

O/321/21

TRADE MARKS ACT 1994

IN THE MATTER OF THE UK DESIGNATION OF INTERNATIONAL
REGISTRATION NO. 1468069

BY HUAWEI TECHNOLOGIES CO., LTD

FOR PROTECTION OF THE FOLLOWING TRADE MARK

IN CLASS 9:

HONOR FlyPods

AND

IN THE MATTER OF THE OPPOSITION THERETO

UNDER NO. 417662 BY

APPLE INC.

BACKGROUND AND PLEADINGS

1. Huawei Technologies Co., Ltd (“the holder”) designated the International Registration (“IR”) shown on the front cover of this decision for protection in the United Kingdom on 29 March 2019. The designation was accepted and published on 7 June 2019 in respect of the following goods:

Class 9

Cameras [photography]; computer programs, recorded; computer software applications, downloadable; optical lenses; computer software platforms, recorded or downloadable; wearable computers; telecommunication apparatus in the form of jewellery; selfie sticks for use with smartphones; wearable video display monitors; selfie lenses; USB cables; USB cables for mobile phones; downloadable applications for use with mobile devices; touch screens; television apparatus; plugs, sockets and other contacts [electric connections]; video screens; headphones; headsets; smartphones; smartglasses; smartwatches; wearable activity trackers; cases for smartphones; covers for smartphones; protective films adapted for smartphones; digital photo frames; microphones; computer hardware; computer memory devices; transponders; loudspeakers; cabinets for loudspeakers; network communication equipment; modems; batteries, electric; chargers for electric batteries; mobile power (rechargeable battery); tablet computers; sleeves for laptops; laptop computers; notebook computers; bags adapted for laptops; virtual reality headsets; automobile data recorder; set-top boxes; portable media players; sound transmitting apparatus; camcorders.

2. The designation was opposed by Apple Inc. (“the opponent”). The opposition is based on sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”) and concerns all the goods in respect of which designation was made.

3. Under sections 5(2)(b) and 5(3) of the Act, the opponent is relying upon the following marks:

a) UKTM No. 3306685, registered on 21 February 2020, for **POD** in Class 9;

- b) UKTM 3237887, registered on 1 September 2017, with a priority date of 17 May 2017,¹ for **HomePod** in Class 9;
- c) UKTM No. 3051213, registered on 2 January 2015, for **IPOD** in Class 9;
- d) EUTM No. 14586838,² registered on 16 February 2016, with a priority date of 23 March 2015,³ for **AIRPODS** in Classes 9, 38 and 41; and
- e) EUTM No. 11472008, registered on 3 October 2013, with a priority date of 11 July 2012,⁴ for **EARPODS** in Classes 9, 28, 35, 38 and 41.

4. In the case of earlier marks (a) to (d), the opponent is relying on all the goods and services for which the marks stand registered. Full specifications may be found in the Annex to this decision. In the case of earlier mark (e), the opponent is relying on the goods listed in paragraph 17 of this decision.

5. Under section 5(2)(b), it claims that, as the contested mark is highly similar to its family of POD marks, which enjoy a high degree of inherent and acquired distinctive character, and the contested goods are identical or highly similar to the earlier goods and services, there is a likelihood of confusion on the part of the public in the UK who will believe that the contested mark belongs to its own family of POD marks.

6. Under section 5(3), the opponent claims that its family of marks has a high level of reputation in the UK, including “an extraordinary level of fame and consumer recognition which the marks have acquired in the United Kingdom and worldwide” for “cutting edge goods and services of extremely high quality”. It asserts that it is inevitable that the public will make a mental link between the marks and so use of the contested mark would take unfair advantage of the high level of reputation and distinctive character of the POD family of marks. In addition, use of the contested mark would also cause detriment to the distinctive character and reputation of the marks.

¹ Priority is claimed from Liechtenstein Trade Mark No. 2017-402.

² Although the UK has left the EU and the transition period has now expired, EUTMs and International Marks which have designated the EU for protection are still relevant in these proceedings given the impact of the transitional provisions of The Trade Marks (Amendment etc.) (EU Exit) Regulations 2019, SI 2019 No. 269, Schedule 5. Further information is provided in Tribunal Practice Notice 2/2020.

³ Priority claimed from Jamaica Trade Mark No. 66798.

⁴ Priority claimed from Jamaica Trade Mark No. 60741.

7. The opponent also claims that the family of POD marks is well known within the meaning of Article 6bis of the Paris Convention and that use of the contested mark without due cause is liable to take advantage of, or cause detriment to, the distinctive character and repute of the POD family of marks. Consequently, registration should be refused pursuant to section 5(3) of the Act.

8. Under section 5(4)(a) of the Act, the opponent claims that the use of the family of POD marks confers on the opponent the right to prohibit the use of the contested mark under the laws of passing off. It is relying on all the signs shown in paragraph 2 and all the goods and services relied on under the other grounds.

9. The holder filed a defence and counterstatement denying the claims made and putting the opponent to strict proof of “each and every allegation made in the Notice of Opposition”. In particular, it put the opponent to proof of use of the EARPODS mark.

10. Neither side requested a hearing, so I have taken this decision following a careful consideration of the papers. In these proceedings, the opponent is represented by D Young & Co LLP and the holder by Forresters IP LLP.

EVIDENCE AND SUBMISSIONS

11. The opponent’s evidence in chief comes from Thomas R La Perle, Senior Director in the Legal Department of Apple Inc. His evidence goes to the use and reputation of the POD marks. It is dated 22 May 2020.

12. The holder’s evidence comes from Leona Marie Walker, a Chartered Trade Mark Attorney employed by Forresters IP LLP, the holder’s representative. Her evidence is dated 19 October 2020 and shows use of what she describes as the holder’s “family of HONOR marks” and provides dictionary definitions. Alongside this evidence, the holder made written submissions which, *inter alia*, critique the opponent’s evidence-in-chief.

13. The opponent's evidence in reply comes from Mr La Perle and is dated 16 December 2020. It seeks to show proof of use of the EARPODS mark, in response to the criticisms raised by the holder.

14. The opponent filed written submissions in lieu of a hearing on 5 February 2021.

15. I have read all the evidence and submissions but shall not summarise it here. Instead, I will refer to it where appropriate during the course of my decision.

DECISION

16. Although the UK has left the EU, section 6(3)(a) of the European (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

Proof of Use

17. The holder has required the opponent to provide proof of use of the EARPODS mark for all the goods on which it seeks to rely. These are as follows:

Class 9

Computer peripheral devices; sound recording and reproducing apparatus; earphones, headphones; audio speakers; audio components and accessories.

18. Section 6A of the Act is as follows:

“(1) This section applies where

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section ‘the relevant period’ means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period 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) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes –

(a) use of a trade mark includes use in a form (the ‘variant form’) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), 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.

(5) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Union.

(5A) In relation to an international trade mark (EC) the reference in subsection (1)(c) to the completion of the registration procedure is to be construed as a reference to the publication by the European Union Intellectual Property Office of the matters referred to in Article 190(2) of the European Union Trade Mark Regulation.

(6) 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.”

19. Section 100 of the Act is as follows:

“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 of it.

20. The relevant period during which genuine use must be shown is the five years ending with the date of application for the contested mark, which was 29 March 2019. The relevant period is 30 March 2014 to 29 March 2019. As the EARPODS mark is an EUTM, the territory in which use must be shown is the EU: see *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, paragraph 36.

21. The case law on genuine use was summarised by Arnold J (as he then was) in *Walton International Limited v Verweij Fashion BV* [2018] EWHC 1608 (Ch):

“114. *The law with respect to genuine use.* The CJEU has considered what amounts to ‘genuine use’ of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundersvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816] [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

- (1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].
- (2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].
- (3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally

and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76];

Leno at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].

Form of the mark

22. The mark is registered as “EARPODS”, but the word is used by the opponent and third parties as “EarPods”, as shown in this extract from the opponent’s UK website, captured by the Wayback Machine, and dated 27 October 2016.⁵



⁵ Exhibit TLP-1 to second witness statement of Mr La Perle, page 3.

23. The EARPODS mark is a plain word mark. The General Court (“GC”) held in *La Superquimica v European Union Intellectual Property Office (EUIPO)*, Case T-24/17, that the protection of a word mark relates to the word mentioned in the application and not any particular stylistic or figurative aspects that the mark might have.⁶ I therefore consider the use of the mark as shown above to be use of the mark as registered. Throughout this decision, when I refer to the mark(s) I shall use them in the form in which they have been registered; where I refer to the product(s), I shall use the words in the way in which they appear in the evidence.

Use of the mark

24. Whether the use shown is sufficient to constitute genuine use will depend on whether there has been real commercial exploitation of the mark, in the course of trade, sufficient to create or maintain a market for the goods at issue in the EU during the relevant five-year period. In making my assessment, I am required to consider all relevant factors, including:

- the scale and frequency of the use shown;
- the nature of the use shown;
- the goods for which use has been shown;
- the nature of those goods and the market(s) for them; and
- the geographical extent of the use shown.

25. I must also bear in mind the following principles when examining the evidence before me. First, the case law does not specify particular types of documentation that must be adduced in evidence: see *PLYMOUTH LIFE CENTRE*, BL O/236/13, paragraph 22. Secondly, I am required to consider the evidential picture as a whole: see *New Yorker SHK Jeans GmbH & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-415/09, paragraph 53. Thirdly, I may make reasonable inferences and deductions from this evidence: see *SIMPLEX Trade Mark*, BL O/329/20, paragraph 36. Fourthly, I should not resort to the burden of proof unless, having striven to do so, I find it impossible to make a decision on the

⁶ Paragraph 39.

weight of the evidence: see *Cooke v Watermist* [2014] EWHC 125 (Pats), paragraphs 35-37. Fifthly, I am entitled “to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive”: see *PLYMOUTH LIFE CENTRE*, paragraph 22.

26. The opponent has filed a large volume of evidence in these proceedings. Much of it shows global use, with sales figures differentiated by product group at only a very high level. I set out below what I have gleaned from this evidence:

- The opponent’s EarPods are white, in-ear headphones which were designed to be more comfortable for the user than previous models. They were launched in 2012 along with the iPhone 5, iPod Touch (5th generation) and the iPod Nano (7th generation).⁷
- Between 2014 and 2019, a set of EarPods was included with each of the iPhone and iPod devices sold worldwide, including in the EU and UK.⁸
- From 2012 to 2018, over 1.32 billion iPhone branded products were sold worldwide generating revenue of over \$870 billion.⁹
- EarPods were also sold as stand-alone items through the Apple website and stores and third-party retailers such as (in the UK) John Lewis, Very and Argos. Screenshots within the relevant period date from 25 October 2014 to 16 November 2018. There is also a screenshot from Apple’s UK-facing website dated 10 September 2019. The price of the goods ranged from £24.00 to £29.99.¹⁰
- Apple achieved over \$10 billion of sales of Apple accessories worldwide in the financial year ending 26 September 2015, with over \$11 billion in 2016, over \$12.5 billion in 2017, over \$17 billion in 2018 and over \$24 billion in 2019. These figures relate to EarPods, other products bearing POD marks, Apple TV, the Apple Watch, other Apple-branded products, Beats-branded products, and

⁷ First witness statement of Mr La Perle, paragraph 13.

⁸ Second witness statement of Mr La Perle, paragraph 11.

⁹ First witness statement of Mr La Perle, paragraph 47.

¹⁰ Exhibits TLP-1 and TLP-2 to the second witness statement of Mr La Perle.

third-party accessories.¹¹ However, Mr La Perle asserts that it is “reasonable to ascribe a significant proportion of these sales to the POD devices”.¹²

- The Europe segment of Apple’s business accounts for between 22% and 24% of Apple’s total net sales.¹³ In this context, “Europe” covers the Middle East, Africa and India, as well as European countries (not all of which are in the EU).¹⁴

27. The opponent is asking me to make a series of inferences on the proportion of the “Europe” sales figures that can be ascribed to the EU and on the share of the sales figures generated by sales of products bearing the EARPODS mark. I have nothing to guide me on the size of the market for the opponent’s products in a country such as India, which, it is common knowledge, has a very large population, albeit one with significant disparities in wealth. Put simply, I would need to decide a reasonable percentage for EU sales but there are too many gaps for such a decision to be anything more than a hunch.

28. Even if I were able to make such a decision, there are shortcomings in the sales figures for accessories, which include several different brands and a wide range of products, as well as covering the worldwide market. There is insufficient evidence to suggest what proportion of sales in each geographic segment come from accessories, and the share of those sales that is due to goods bearing the EARPODS mark.

29. It should not have been difficult for the opponent to provide evidence on sales of goods bearing the EARPODS mark in the EU. This is information that one would expect a business to have to hand. I find that the opponent has not demonstrated genuine use of the EARPODS mark. It may, however, rely on the other four marks under sections 5(2)(b) and 5(3) of the Act.

Section 5(2)(b)

30. Section 5(2)(b) of the Act is as follows:

¹¹ First witness statement of Mr La Perle, paragraph 48.

¹² *Ibid*, paragraph 49.

¹³ *Ibid*, paragraph 50.

¹⁴ Exhibit TLP-22 to the first witness statement of Mr La Perle, page 3.

“A trade mark shall not be registered if because –

...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

31. In considering the opposition under this section, I am guided by the following principles, gleaned from the decisions of the CJEU in *SABEL BV v Puma AG* (Case C-251/95), *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* (Case C-39/97), *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v OHIM* (Case C-3/03), *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* (Case C-120/04), *Shaker di L. Laudato & C. Sas v OHIM* (Case C-334/05 P) and *Bimbo SA v OHIM* (Case C-519/12 P):

a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;

b) the matter must be judged through the eyes of the average consumer of the goods or services in question. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their mind, and whose attention varies according to the category of goods or services in question;

c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

- d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks and vice versa;
- h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and
- k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

32. It is settled case-law that I must make my comparison of the goods and services on the basis of all relevant factors. These may include the nature of the goods and

services, their purpose, their users and method of use, the trade channels through which they reach the market, and whether they are in competition with each other or are complementary: see *Canon*, paragraph 23, and *British Sugar Plc v James Robertson & Sons Limited (TREAT Trade Mark)* [1996] RPC 281 at [296]. Goods and services are complementary when

“... 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.”¹⁵

33. The holder initially submits that there is no need to compare the goods and services, as the marks are dissimilar, and that the section 5(2)(b) ground should fail for that reason. I shall come to the marks later, but the holder submits that, even if I were to find that they are similar, the similarity would be insufficient to cause the public to be confused.

34. The opponent submits that the contested goods are identical to the goods and services covered by the earlier marks and provides what it describes as “a non-exhaustive comparison” in paragraph 51 of its written submissions. This consists of a table showing the applicant’s specification and a selection of goods taken from Class 9 of the opponent’s specifications. These earlier marks are taken together as a family. I will consider the claim to own a family of marks later in my decision. For now, I will compare the marks separately.

Comparison with the POD mark

35. The following contested goods all appear in the specification for the opponent’s POD mark or are self-evidently identical to the opponent’s goods:

¹⁵ *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82.

Cameras [photography]; headphones; microphones; computer hardware; computer memory devices; modems; chargers for electric batteries; tablet computers; sound transmitting apparatus; camcorders.

36. Goods may also be considered as identical when the earlier goods are included in a more general category found in the later specification, or vice versa: see *Gérard Meric v OHIM*, Case T-133/05, paragraph 29. The table below shows where the goods are identical under this principle:

Contested goods	Opponent's goods
Computer programs, recorded	<i>Included in</i> Computer programs
Computer software applications, downloadable; computer software platforms, recorded or downloadable; downloadable applications for use with mobile devices	<i>Included in</i> Computer software
Optical lenses; smartglasses	<i>Included in</i> Optical apparatus and instruments
Wearable computers; smartwatches; tablet computers; laptop computers; notebook computers	<i>Included in</i> Computers
Telecom apparatus in the form of jewellery; transponders	<i>Included in</i> Telecommunications apparatus and instruments
Selfie sticks for use with smartphones; Selfie lenses; protective films adapted for smartphones	<i>Included in</i> Parts and accessories for mobile telephones
Wearable video display monitors;	<i>Included in</i> Displays
USB cables; USB cables for mobile phones	<i>Included in</i> Cables
Downloadable applications for use with mobile devices	<i>Included in</i> Mobile telephone software

Contested goods	Opponent's goods
Touchscreens; video screens; headsets; wearable activity trackers; digital photo frames; virtual reality headsets; automobile data recorder; portable media players.	Included in Apparatus for recording, transmission and/or reproduction of sound or images or other data
Television apparatus; set-top boxes	Included in Apparatus ... for transmitting and/or receiving ... sound and/or images
Plugs, sockets and other contacts [electric connections]; mobile power (rechargeable battery)	Included in Apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity
Smartphones	Included in Mobile telephones
Cases for smartphones	Included in Mobile telephone cases
Covers for smartphones	Included in Mobile telephone covers
Network communication equipment	Included in Telecommunications equipment, apparatus and instruments
Batteries, electric	Included in Batteries
Sleeves for laptops; bags adapted for laptops	Included in Covers, bags and cases adapted or shaped to contain all of the aforesaid goods, made of leather, imitations of leather, cloth or textile materials. ("The aforesaid goods" includes computers.)

37. The remaining goods in the holder's specification are *Loudspeakers* and *cabinets for loudspeakers*. The first two in this list are specifically excluded from the opponent's specification.

38. *Loudspeakers* are used to enable everyone within a room to hear sound reproduced through an audio-visual system. They will share users and trade channels

with the opponent's *Apparatus for recording, transmission and/or reproduction of sound or images or other data*. They are complementary to some of the goods that would be included in this broader category (such as compact disc players), in that the use of the loudspeakers depends on use of audio-visual media players and in my view the average consumer would expect them to be the responsibility of the same undertaking. I find that there is a high degree of similarity between the goods.

39. *Loudspeaker cabinets* are the containers in which the components of a loudspeaker are placed. They are likely to be used by loudspeaker manufacturers rather than the individual who purchases the finished goods for use with the opponent's audio-visual equipment. The trade channels will be different, as will the physical nature of the goods. I find them to be dissimilar.

Comparison with the IPOD mark

40. The following contested goods all appear in the specification for the opponent's IPOD mark or are self-evidently identical to the opponent's goods:

Cameras [photography]; computer programs, recorded; computer software applications, downloadable; television apparatus; plugs, sockets and other contacts [electric connections]; video screens; headphones; digital photo frames; microphones; computer hardware; computer memory devices; transponders; loudspeakers; cabinets for loudspeakers; modems; batteries, electric; chargers for electric batteries; tablet computers; sleeves for laptops; laptop computers; notebook computers; bags adapted for laptops; portable media players; sound transmitting apparatus; camcorders.

41. I find that the goods in the table below are identical in line with the *Meric* principle.

Contested goods	Opponent's goods
Optical lenses	Included in Optical ... apparatus and instruments

Contested goods	Opponent's goods
Computer software platforms, recorded or downloadable; downloadable applications for use with mobile devices	Included in Computer software
Wearable computers; smartwatches;	Included in Computers
Telecommunication apparatus in the form of jewellery	Included in Telecommunication apparatus and instruments
Selfie sticks for use with smartphones; selfie lenses; protective films adapted for smartphones	Included in Parts and accessories for mobile telephones
Wearable video display monitors	Included in Video monitors
USB cables; USB cables for mobile phones	Included in Cables, electric
Touch screens	Included in Electronic apparatus with interactive functions for use with all of the aforesaid goods. (“The aforesaid goods” includes computers.)
Headsets	Included in Apparatus for recording, transmission or reproduction of sound or images
Smartphones	Included in Mobile telephones
Wearable activity trackers	Includes Pedometers
Cases for smartphones; covers for smartphones	Included in Stands, covers, cases, bags and holsters adapted or shaped to contain all of the aforesaid goods. (“The aforesaid goods” includes mobile phones.)
Network communication equipment	Included in Telecommunication apparatus and instruments
Mobile power (rechargeable battery)	Included in Apparatus and instruments for conducting, switching, transforming,

Contested goods	Opponent's goods
	accumulating, regulating or controlling electricity
Virtual reality headsets	Included in Electronic apparatus with multimedia functions for use with all of the aforesaid goods (“The aforesaid goods” includes video and computer games.)
Automobile data recorder	Includes mileage recorders for vehicles; kilometer recorders for vehicles.
Set-top boxes	Includes television set-top boxes

44. Of the remaining goods, *Smartglasses* would fall within the broader term *Eyewear* which is specifically excluded from the coverage of the opponent's mark. They are spectacles that contain additional features such as earphones, microphones and cameras, and allow for wireless connection to other devices such as smartphones. The opponent's specification includes *Wireless communication devices for voice, data or image transmission, excluding Smartglasses as Eyewear*. The purposes of the goods overlap, as does their physical nature and users. I have no information on the trade channels. There is likely to be a degree of competition as a user may choose glasses over a headset or earphones. I find the goods to be highly similar.

Comparison with the HomePod and AIRPODS marks

45. I have found that all the contested goods are identical to goods covered by either the POD mark or the IPOD mark. *Television apparatus, headphones, microphones and computer hardware* are also included in the specifications of the HomePod and AIRPODS marks. In addition, the HomePod mark also covers the contested *Smartglasses, smartwatches and set top boxes*.

46. I find that the goods in the tables below are identical in line with the *Meric* principle.

Contested goods	Opponent's goods (HomePod)
Wearable computers; wearable video display monitors; wearable activity trackers; virtual reality headsets	Included in Wearable electronic devices.
Smartphones	Included in Mobile telephones.
Loudspeakers	Included in Audio speakers.
Tablet computers; laptop computers; notebook computers	Included in Computer hardware.
Portable media players	Included in Mobile electronic devices.
Sound transmitting apparatus	Includes Radio transmitters

Contested goods	Opponent's goods (AIRPODS)
Computer programs, recorded; computer software applications, downloadable; computer software platforms, recorded or downloadable; downloadable applications for use with mobile devices	Included in Computer software
Optical lenses	Included in Optical apparatus and instruments
Wearable computers; tablet computers; laptop computers; notebook computers	Included in Computer hardware
Telecommunication apparatus in the form of jewellery; smartphones	Included in Telecommunications apparatus and instruments
USB cables for mobile phones	Included in Electrical and electronic connectors, couplers, wires, cables, chargers, docks, docking stations, interfaces, and adapters for use with all of the aforesaid goods. ("The aforesaid goods" includes Telecommunications apparatus and instruments).
Loudspeakers	Included in Audio speakers.

Contested goods	Opponent's goods (AIRPODS)
Network communication equipment	Included in Electronic communication equipment and instruments

47. I draw my comparison to a close here. If I need to return to it later in my decision, I shall do so.

Average consumer and the purchasing process

48. In *Hearst Holdings Inc & Anor v A.V.E.L.A. Inc & Ors* [2014] EWHC 439 (Ch), Birss J (as he then was) described the average consumer in these terms:

“The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”¹⁶

49. The opponent submits that the average consumer is either a member of the general public or a business customer with specific professional knowledge or expertise, and that, given that the general public is more prone to confusion, the marks should be considered from their perspective.

50. The holder submits that the goods are directed at the general public or professionals working in the Information Technology sector, and that they are relatively expensive and purchased infrequently. As a consequence, the average consumer will pay “particular attention” during the purchasing process.¹⁷ I agree that some of the goods will be expensive and purchased infrequently, but this is not the case for all of

¹⁶ Paragraph 60.

¹⁷ Holder’s written submissions, paragraph 54.

them. For example, *Cases for smartphones* will be relatively cheap and thus be a less considered purchase than the *Smartphone* itself.

51. I agree that the majority of the goods will be purchased by the general public or by professionals. The prices vary, as will the frequency with which the goods are acquired. The average consumer will pay at least a medium degree of attention, although where the goods are more costly, for example computer hardware, the degree of attention will be higher. The consumer will buy the goods from a physical shop, online or catalogues. The process will therefore largely be a visual one, although I do not discount the oral element, given the potential for assistance from sales staff or word-of-mouth recommendations.

52. Where the goods are directed towards professionals or business, the average consumer will be paying a greater degree of attention as the quality of the goods will have an impact on the quality of the products they themselves are making or the services they are delivering. In my view, *Loudspeaker cabinets, transponders, network communication equipment and optical lenses* are more likely to be bought by businesses than individuals. The consumer will obtain them from websites, catalogues and other printed material, and physical stores. The visual element of the mark will therefore be significant, although, as goods may be ordered by the phone or following consultation with sales staff, the aural element cannot be ignored.

Comparison of marks

53. It is clear from *SABEL* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo* that:

“... it is necessary to ascertain in each individual case, the overall impression made on the target public by the sign for which the registration is sought, by means of, inter alia, an analysis of the components of a sign

and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”¹⁸

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

55. The respective marks are shown below:

Earlier mark	Contested mark
POD	HONOR FlyPods
HomePod	
IPOD	
AIRPODS	

Overall impression of the marks

56. The contested mark consists of two words: “HONOR” and “FlyPods”. The opponent submits that “HONOR” denotes the house brand and so would largely be ignored for the purposes of comparing the marks. It also asserts that “FLY” would not serve as an indicator of origin, as it is likely to be understood as an adjective meaning “good” or “cool”. Consequently, “POD” is, in the opponent’s submission, the dominant and distinctive element of the contested mark. The holder submits that the mark must be considered as a whole, but that “HONOR” is the dominant element, as

“it is commonly acknowledged that the use of all capital letters in typing is used to indicate shouting. ... Accordingly, when a mark consists of one word

¹⁸ Paragraph 34.

in all capital letters and one word not in capital letters, the relevant consumer will perceive the word in capitals as a 'louder' word than the word not in capitals. This means that for the sign 'HONOR FlyPods', the 'louder' and therefore dominant component of the mark will be the word in capital letters, namely HONOR."¹⁹

57. In my view, the words "HONOR" and "FlyPods" have independent distinctive roles in the contested mark. They do not hang together as a unit. "HONOR" will be seen as the US spelling of the word "HONOUR" and so has a laudatory aspect. "FlyPods" is an invented word coined from "FLY" and "PODS" and will make a slightly larger contribution to the overall impression of the mark.

58. The opponent's POD mark consists of the single word "POD" in capital letters and a standard font. The overall impression of the mark lies in the word itself.

59. The opponent's HomePod mark consists of the two words "HOME" and "POD" joined together. Again, they appear in a standard font, but this time in title case with capitals for the beginnings of the words. The overall impression of the mark lies in the juxtaposition of the two words.

60. The opponent's IPOD mark is a single word. This will be seen as either an invented word or the word "POD" prefixed with the letter "I". The overall impression of the mark lies in the word as a whole.

61. The opponent's AIRPODS mark will, in my view, be seen by the average consumer as a juxtaposition of the words "AIR" and "PODS". This is where the overall impression of the mark lies.

Visual comparison

62. The opponent submits that the contested mark is similar to its earlier marks as the later mark contains the element "POD" from its earlier family of POD marks. It drew

¹⁹ Holder's written submissions, paragraph 28.

my attention to case law of the GC which held that where a later sign consists exclusively of the earlier mark to which another word has been added, the marks are similar: se *FairWild Foundation v OHIM*, Case T-247/11, paragraph 31, and *Sport Eybl & Anor v OHIM*, Case T-179/11, paragraph 26.²⁰ The holder submits that the contested mark is visually “totally different” to the earlier marks.²¹ It notes that the beginnings are different and submits that it is established case law that consumers pay most attention to the beginning of a mark.

63. The contested mark is noticeably longer than any of the earlier marks and comprises two words, while the opponent’s marks are all single words. The earlier POD mark does appear completely within the contested mark and the capitalisation of the letter “P” in that mark means that the average consumer is likely to notice this fact. That it is at the end of the contested mark, rather than the beginning, does not, in my view, detract from any similarity, as it is not a universal rule that the consumer pays most attention to the start of a mark: see, for example, *Bristol Global Co Ltd v EUIPO*, Case T-194/14. I find that the contested mark has a medium degree of visual similarity to the opponent’s POD mark.

64. The opponent’s HomePod mark has the same first two letters as the contested mark, although it is considerably shorter at 7 letters compared to the 12 of HONOR FlyPods. In both marks, the P is capitalised, meaning that the consumer will identify the word “POD” or “PODS”. In my view, the marks are visually similar to a low degree.

65. The AIRPODS mark also contains 7 letters and it is my view that the average consumer will identify it as being made up of two words joined together. I find that the contested mark is visually similar to the AIRPODS mark to a low degree.

66. The IPOD mark contains 4 letters and so is even shorter than the contested mark than the HomePod and AIRPODS marks. It was my view that some consumers would think that this was an invented word, while others would see it as “I” plus “POD”. For neither group of consumers would the visual similarity be any more than low.

²⁰ The first of these cases, which is the one cited in the opponent's submissions, is available only in French or German. The second of these cases, which is available in English, is cited in the first.

²¹ Holder’s written submissions, paragraph 20.

Aural similarity

67. The opponent's marks will be pronounced as "POD", "HOH-M POD", "EYE-POD" and "AIR-PODS", with either one or two syllables.

68. When the contested mark is spoken, some consumers will say it in full, as follows: "ON-OR FLY-PODS". There may also be some consumers who see "HONOR" as a house brand and would be more likely only to say "FLY-PODS". For this first group of consumers, the contested mark is aurally similar to a medium degree to the "POD" mark, to a low to medium degree to the IPOD earlier mark, and to a low degree to the HomePod and AIRPODS marks. For the second group of consumers, the contested mark is aurally similar to a medium to high degree to the IPOD earlier mark, similar to at least a medium degree to the POD mark, and similar to a low to medium degree to the HomePod and AIRPODS marks.

Conceptual similarity

69. The opponent submits that the consumer would understand the "POD" element of the contested mark to refer to a new product or service in connection with the goods offered under its family of "POD" marks. As it considers the remaining elements of the contested mark to be non-distinctive, it submits that the conceptual similarity is high.

70. The holder submits that the word "HONOR" means "high respect; great esteem",²² and that "FLY" can be either a noun denoting an insect or a verb that describes the action of flying. Drawing from a definition on the website dictionary.com,²³ the holder submits that "pod" is descriptive of a characteristic of both parties' goods, "namely that they are in the form of a streamlined enclosure, housing or container of some kind".²⁴ On this basis, "pod" should, in the view of the holder, be considered to have a very low distinctive character and the marks to be conceptually dissimilar.

²² Holder's written submissions, paragraph 39.

²³ Exhibit LMW4.

²⁴ Holder's written submissions, paragraph 42.

71. I agree with the holder on the meanings that the average consumer will find in the words “HONOR” and “FLY”. Although I accept that it is possible that some consumers will understand “FLY” as an adjective meaning “good” or “cool”, I consider that it is more likely that the average consumer will think of air travel. It may also call to mind the insect. “POD” may have several meanings and the following are all included in the *Oxford Dictionary of English*: “an elongated seed vessel of a leguminous plant such as the pea”, “a small herd or school of marine animals, especially whales”, and “a detachable or self-contained unit on an aircraft, spacecraft, vehicle, or vessel, having a particular function”.

72. Whatever meaning the average consumer ascribes to “POD” in the contested mark, they are likely also to give the POD mark. In the IPOD mark, the initial letter may mean the first person singular, or be taken as a reference to “Internet” or “Interactive”. Other consumers will believe that “IPOD” is an invented word. In the HomePod mark, “Home” will have its usual meaning of the place where one lives. Finally, in the AIRPODS mark, “AIR” would mean the atmosphere that surrounds us, or bring to mind qualities of lightness and freedom.

73. In my view, there is a medium degree of conceptual similarity between the contested mark and the POD mark, and a slightly lower than medium degree of conceptual similarity between the contested mark and the AIRPODS and HomePod marks. The conceptual similarity between the contested mark and the IPOD mark will also be at a slightly lower than medium level for those consumers who see the opponent’s mark as “I” plus “POD”; for those who see it as an invented word, there is no conceptual comparison to make.

Distinctiveness of the earlier marks

74. In *Lloyd Schuhfabrik Meyer*, the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a

particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Alternberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered, the market share held by the mark, how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark, the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking, and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

75. Registered trade marks possess varying degrees of inherent distinctive character from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

76. The POD mark may have a suggestive quality for some of the goods covered by it, for example covers and cases for mobile telephones. However, for the majority of the goods, I find it to be neither descriptive nor allusive, and so it has an average level of inherent distinctive character. For covers and cases, the level is slightly lower.

77. The addition of the letter I and the words HOME and AIR to the POD mark increases the inherent distinctiveness of those marks to a slightly higher than average level, although not the highest. However, for those consumers who see “IPOD” as an invented word, that mark will have a high level of inherent distinctive character.

78. The opponent claims that the distinctiveness of the POD marks has been enhanced through use. It submits that:

“63. For a number of years, the Opponent has marketed and sold products and provided services under the Earlier Family of POD Marks throughout the United Kingdom, through its retail stores, online stores, and direct sales force, as well as through third-party cellular network carriers, wholesalers, retailers, and value-added resellers. Paragraph 52 of the Witness Statement confirms that there are hundreds of Apple retail store locations in the United Kingdom.

64. As explained more fully in paragraphs 10 to 44 of the Witness Statement, the Earlier Family of POD Marks have become among one of the most famous and widely recognized marks in the world. It is an integral part of Apple’s corporate business and is of enormous value to the company.”

79. Earlier in my decision, I set out the shortcomings I found in the evidence adduced to show proof of use of the EARPODS mark. These are replicated at the broader level. What I can say is as follows:

- Apple launched a portable music player, the iPod, in October 2001. New models were produced every following year until 2010, and then in 2012, 2015 and 2019.²⁵
- The mark was used on the back of the device and I have reproduced an example below:²⁶

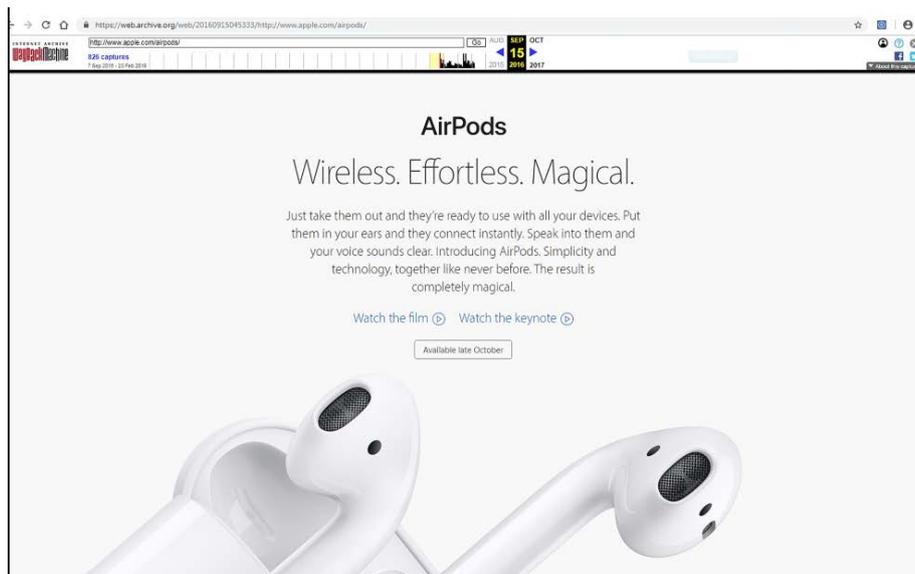


6th Generation- 2015

²⁵ First witness statement of Thomas La Perle, paragraphs 10-11.

²⁶ *Ibid*, paragraph 13.

- By 2007, 100 million iPod devices had been sold worldwide.²⁷
- Articles in newspapers such as *The Daily Telegraph*, *The Guardian* and *The Metro* describe the iPod as “iconic” and “the first cultural icon of the 21st century”, and report on nostalgic interest in older models.²⁸
- AirPods were the third POD device to be introduced (after the iPod and EarPods) in 2016. They are wireless earbuds designed to be used with iPhones, iPods, iPads and other such devices.²⁹



- The HomePod wireless smart speaker and home assistant was launched on 5 June 2017 and first became available on 9 February 2018.³⁰



²⁷ Exhibit TLP-4 to the first witness statement of Mr La Perle, page 7.

²⁸ Exhibit TLP-4, pages 26 and 32, and Exhibit TLP-6, page 28.

²⁹ First witness statement of Thomas La Perle, paragraphs 33-35. The image is taken from Exhibit TLP-14, page 4.

³⁰ *Ibid.*, paragraphs 39 and 41.

- According to Mr La Perle’s first witness statement, POD devices have been advertised on television, in major publications, on the Apple website and on advertising hoardings in the EU and the UK.³¹ No examples of advertising have been provided and neither have the names of any publications.
- Apple’s global advertising costs were \$1.8bn in 2015, and these are the most recent figures given. Costs had risen steadily over the previous 15 years from \$209m in 2000, reaching \$1bn in 2012.³²
- Exhibit TLP-25 provides website analytics produced by www.alexa.com for the Apple websites from November 2017 to November 2018. It shows that 4.0% of visitors came from the UK, 3.0% from Germany, 2.3% from Italy, 2.7% from France and 2.0% from Spain, adding up to 14%. Alexa also ranked the Apple website at number 49 in the list of most visited websites in the UK and in the top 78 for France, Germany, Italy, the Netherlands, Spain and Sweden.

80. As can be seen from the images reproduced above, the IPOD and AIRPODS marks are used as iPod and AirPods. As with the EARPODS mark earlier in my decision, I do not consider that this difference affects the distinctive character of the marks. The average consumer will identify the two words that make up the AIRPODS mark and I consider that some consumers would see the IPOD mark as comprising “I” and “POD”.

81. I accept that use of the IPOD mark has been long-standing and geographically widespread. The product has received coverage in a wide range of general and IT-focused print and online media, as shown in Exhibits TLP-4 and TLP-6 to Mr La Perle’s first witness statement. Despite the lack of country-level or product-level detail in the evidence, there is enough for me to find that the distinctiveness of the IPOD mark has been enhanced to a very high level through use for portable media players. The evidence filed leads me to find that this was a product that had a significant impact on the public. For the remaining goods covered by the IPOD mark, the distinctiveness of the mark remains at the inherent level of slightly higher than average, or high, depending on how the consumer understands this mark.

³¹ *Ibid*, paragraph 55.

³² Exhibit TLP-21.

82. Use of the HomePod and AIRPODS marks is more recent and the evidence is insufficient for me to find that these marks have an enhanced level of distinctiveness. The distinctiveness of those marks is slightly higher than average.

83. There is no evidence that POD is used on its own and so I find that the distinctiveness of that mark has not been enhanced beyond its inherent level of average.

Conclusions on likelihood of confusion

84. There is no scientific formula to apply in determining whether there is a likelihood of confusion. It is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle, i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or vice versa. It is necessary for me to take account of the distinctive character of the opponent's marks, the average consumer and the nature of the purchasing process for the contested goods. In doing so, I must be aware that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them they have in their mind.

85. There are two types of confusion: direct and indirect. In *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, Mr Iain Purvis QC, sitting as the Appointed Person, explained that:

“Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognised that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but analysed in formal terms, is something along the following lines: ‘The later

mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”³³

86. Mr La Perle states that consumers have already shown themselves to be confused between the marks.³⁴ Exhibit TLP-26 contains examples. The first two are in German and Latvian. As these have not been translated, I am unable to take them into account: see *POLLINI*, BL O/146/02, and the Tribunal Work Manual, paragraph 4.8.4.2. The remaining items are as follows:

- An article dated 31 October 2018 entitled “Honor made a colorful pair of AirPods clones”,³⁵
- An article from AllTechNews dated 20 March 2019 entitled “AirPods in the Android world”,³⁶
- An undated blogpost entitled “Honor announces FlyPods | Honor Airpods Review | Honor Flypods price”,³⁷
- Five tweets, one of which comes from before the relevant date, which mention “Honor airpods” or “Huawei airpods”.

87. These articles and posts are hardly conclusive. The first does not appear to confuse the marks at all, while I am not able to make much sense of the passage quoted by Mr La Perle from the second article, and which I have reproduced below:

A double tap on the right ear will turn on or off the playback, on the left – it will start the voice assistant. You can not switch tracks, as well as configure commands. Perhaps this will appear in the future, as is the charge display on Huawei and Honor AirPods smartphones on the iPhone. At least the screenshots of the flagships promise this.

The heading of the third article does appear to contain a mistake, as do the tweets. It is not clear, though, where these users are based, or where the articles come from. I

³³ Paragraph 16.

³⁴ First witness statement of Thomas La Perle, paragraph 62.

³⁵ Page 4.

³⁶ Pages 5-7.

³⁷ Page 8.

do note that the prices quoted in the articles are in Chinese and Russian currencies. This evidence therefore carries little weight in my decision-making.

88. Earlier in my decision, I found that the contested goods to be identical to goods covered by either the POD or the IPOD mark, and the contested mark to be similar to the POD mark to a medium degree and visually and conceptually similar to the IPOD mark to a low degree and aurally similar to a medium to high degree to the IPOD mark. I found that the POD mark had an average level of inherent distinctiveness and that the IPOD mark was highly distinctive for portable media players, as its inherent distinctiveness had been enhanced through use. The IPOD mark would also be highly distinctive for those consumers who believed it to be an invented word.

89. As the contested mark is a composite mark, I also take account of the case law following the CJEU's judgment in *Medion*. In *Whyte and Mackay Ltd v Origin Wine UK Ltd & Anor* [2015] EWHC 1271 (Ch), Arnold J (as he then was) considered the impact of the CJEU's judgment in *Bimbo* on the earlier judgment. He said:

“18. The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19. The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks – visually, aurally and conceptually – as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20. The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meaning of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21. The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

90. In my view, the “HONOR” and “FlyPods” parts of the contested mark have distinctive significance independently of the whole, but I note that this does not necessarily mean that there is a likelihood of confusion.

91. I take the marks as wholes and bear in mind the independent distinctive roles of the different words that appear in the contested mark. In my view, there are sufficient differences between the marks for the contested mark not to be mistaken for any of the earlier marks. I find that direct confusion is not likely, and so turn to consider whether there is indirect confusion.

92. The opponent submits that the likelihood of confusion is increased because it owns a family of “POD” marks, and that the average consumer will believe that the contested mark is another member of that family. In *IG Communications Ltd v OHIM*, Case T-301/09, the GC explained that:

“With regard to the likelihood of confusion linked to the existence of a family of CITI trade marks, two conditions have been laid down by case law which must be fulfilled in order to prove that a likelihood exists. First, the proprietor of the purported family of trade marks must furnish proof of use of all the

marks belonging to the family or, at the very least, of a number of marks capable of constituting a family and, secondly, the mark applied for must not only be similar to the marks belonging to the family but also display characteristics capable of associating it with the family (*BAINBRIDGE* [2008] ETMR 13 at [126] and [127]).”³⁸

93. The opponent relied on five marks containing the word “POD” or “PODS”, and it will be recalled that I was unable to find that the evidence showed genuine use of the EARPODS mark. For the same reasons, proof of use has not been shown for the AIRPODS, HomePod or POD marks, although I can accept that the evidence shows use of the IPOD mark. This means that the opponent is unable to rely on the existence of a family of POD marks.

94. To my mind, “FLY” is not a logical brand extension to “Pods”, so I consider that the average consumer will not assume that the goods come from the same or economically connected undertakings. It is my view that, given the enhanced distinctiveness of the “IPOD” mark, the opponent’s marks will be brought to mind, but this is mere association, not confusion: see *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, paragraph 81.

95. The section 5(2)(b) ground fails.

Section 5(3)

96. Section 5(3) of the Act is as follows:

“A trade mark which –

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

[...]

³⁸ Paragraph 86.

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 European Union trade mark or international trade mark (EU) in the European Union) 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.”

97. The conditions of section 5(3) are cumulative:

- a) the opponent must show that the earlier mark has a reputation;
- b) the level of reputation and the similarities between the marks must be such as to cause the public to make a link between the marks; and
- c) one or more of three types of damage (unfair advantage, detriment to distinctive character or repute) will occur.

98. It is not necessary for the goods to be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

Reputation

99. In *General Motors Corp v Yplon SA*, Case C-375/97, the CJEU held that:

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

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

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

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

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it."

100. Although reputation and enhanced distinctiveness are different things, the factors that are relevant are the same. I found that the evidence was insufficient in the case of the POD, HomePod and AIRPODS marks to show enhanced distinctiveness and would make the same assessment for reputation. There is no information on sales figures or market share, or how much has been invested in promoting these marks within the EU. I do accept that the IPOD mark had a strong reputation in the EU for portable media players at the relevant date, which is the date of application for the contested mark. On the basis of the evidence, I find that a significant part of the relevant public, which would be the general public, would be aware of the IPOD mark for those goods.

Link

101. In assessing whether the public will make the required mental link between the marks, I must take account of all relevant factors. The following were identified by the CJEU in *Intel Corporation Inc v CPM United Kingdom Ltd*, Case C-252/07:

- The degree of similarity between the conflicting marks;

- The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public;
- The strength of the mark's reputation;
- The degree of the earlier mark's distinctive character, whether inherent or acquired through use; and
- Whether there is a likelihood of confusion.

102. Under section 5(2)(b), I found that the contested mark was visually similar to the IPOD mark to a low degree, aurally similar to a medium to high degree, and (where a comparison could be made) conceptually similar to a slightly lower than medium degree.

103. The contested goods are all electronic audio-visual or communications devices, accessories for use with such devices, or computer software. The opponent has supplied evidence of the converging technologies in this field, with functions being shared between media players, smartphones, computers and cameras. Consequently, I consider that there is a medium to high degree of similarity between the contested goods and those for which the opponent has a reputation.

104. I considered that the opponent has a strong reputation. It is known for the high quality of its design and for being an innovator. An article from *The Guardian* dated 18 March 2011 says:

“Apple has changed the way we think about technology and design, the way we shop, the way we consume media and the way we interact with each other. Via the iPod Touch, iPhone and iPad it has opened up doors for other methods of technology to come into our lives. None of that would have happened without the iPod.”³⁹

³⁹ Exhibit TLP-4 to the first witness statement of Thomas La Perle, page 28.

105. Another article, this time from *The Daily Telegraph* dated 19 September 2010, states:

“When Apple launched the first-generation iPod in October 2011, few imagined the impact it would have on the way we consume music. The very first iPod was a revelation – the sleek white styling, intuitive user interface and ability to store up to 1,000 songs were like a breath of fresh air.”⁴⁰

106. In 2016, an article on www.theverge.com said:

“And while the classic iPod design was finally retired two years ago, and the remaining members of the iPod line are less important to Apple’s strategy today than they were years ago, it’s still an integral part of history, both for the company and the larger tech industry.”⁴¹

107. I found that the IPOD mark had a very high level of distinctive character for portable media players.

108. I found that there was no likelihood of confusion under section 5(2)(b). The marks were, in my view, insufficiently similar. I did, however, find that the opponent’s mark would be brought to the mind of the average consumer. The level of similarity required for the public to make a link between the marks for the purposes of section 5(3) may be less than the level of similarity required to create a likelihood of confusion: see *Intra-Press SAS v OHIM*, Joined cases C-581/13 P and C-582/13 P, paragraph 72.

109. I find that a link is made out.

Damage

110. There are three possible forms of damage and the opponent has pleaded that any or all of them may occur. I shall consider unfair advantage first.

⁴⁰ Exhibit TLP-6 to the first witness statement of Thomas La Perle, page 27.

⁴¹ Exhibit TLP-6 to the first witness statement of Thomas La Perle, page 4.

111. Unfair advantage means that consumers are more likely to buy the goods of the contested mark than they would otherwise have been if they had not been reminded of the earlier marks. In *L'Oréal SA & Ors v Bellure & Ors*, Case C-487/07, the CJEU said:

“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 of the distinctive character or the repute of that mark where that party seeks by that use to ride on the coat-tails of the mark with a reputation 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.”⁴²

112. Earlier in the same case, the CJEU also said:

“As regards the concept of ‘taking unfair advantage of the distinctive character or the repute of the trade mark’, also referred to as ‘parasitism’ or ‘free-riding’, that concept relates not to the detriment caused to the mark but to the advantage taken by the third party as a result of the use of the identical or similar sign. It covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation.”⁴³

113. Any advantage has to be unfair for the ground to be made out. In *Argos Limited v Argos Systems Inc* [2018] EWCA Civ 2211, Floyd LJ (with whom Lord Kitchen and Sir Colin Rimer agreed) stated:

“That brings me to the central question of whether ASI's use of the sign ARGOS in relation to the service of provision of advertising space took

⁴² Paragraph 50.

⁴³ Paragraph 41.

unfair advantage of the trade mark. I reject Mr Mellor's contention that, in a case such as the present, unfairness is established by the fact of economic advantage and no more. So to hold would be to empty the word 'unfair' of any meaning. Like the Court of Appeal in *Whirlpool* I do not consider the effect of the CJEU's judgment in *L'Oréal* to go that far."⁴⁴

114. In *Argos*, the Court of Appeal held that a change in the economic behaviour of the customers for the goods offered under the later mark was required in order to establish unfair advantage. This may be interred where the later trade mark would gain a commercial advantage from the transfer of the image of the earlier trade mark to the later mark: see *Claridges Hotel Limited v Claridge Candles Limited & Anor* [2019] EWHC 2003 (IPEC).

115. In my view, the holder would gain an unfair commercial advantage from the transfer of the image of the earlier mark and its reputation for innovative and well-designed products. I find that unfair advantage is made out.

116. The opponent also submits that use of the holder's mark would erode or dilute the distinctiveness of its earlier marks. For this head of damage to be made out, the opponent must provide evidence that there will be a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered: see *Environmental Manufacturing LLP v OHIM*, Case C-383/12 P, paragraphs 34-43. It is not necessary to adduce evidence of actual detriment, as the serious or risk detriment may be inferred, through the use of logical deductions, which must not be the result of "mere suppositions". In my view, the evidence adduced by the opponent falls short of what would be required for me to be able to infer a change in consumers' economic behaviour.

117. I turn now to detriment to reputation. The opponent submits that customers would expect holder's goods to be of the same standard of quality, innovation and design as its own goods and services, and may be deceived. The opponent's submissions are

⁴⁴ Paragraph 108.

essentially hypothetical arguments and so insufficient for me to find detriment to repute: see *Unite The Union v The Unite Group Plc*, BL O/291/13.

118. The holder submits that it has due cause to use the mark as:

“... [it] is the owner of a large number of ‘HONOR’ formative UK and EU trade marks to the extent that the Applicant has a ‘family’ or HONOR marks. The mark HONOR FlyPods is simply an extension of their family of HONOR marks.”⁴⁵

119. The existence of a large number of trade marks containing the word “HONOR” does not, however, have any bearing on whether the holder has due cause to use a mark including the word “FlyPods”. The holder has made no submissions going directly to that point, and so I dismiss this argument.

120. The section 5(3) ground succeeds.

Article 6bis of the Paris Convention

121. The opponent claims that its family of POD marks are well-known within the meaning of Article 6bis of the Paris Convention and section 56 of the Act.

122. Section 56(1) of the Act is as follows:

“References in this Act to a trade mark which is entitled to protection under the Paris Convention ... as a well-known trade mark are to a mark which is well-known in the United Kingdom as being the mark of a person who –

(a) is a national of a Convention country, or

(b) is domiciled in, or has a real and effective industrial or commercial establishment in a Convention country,

⁴⁵ Holder’s written submissions, paragraph 71.

whether or not that person carried on business, or has any goodwill, in the United Kingdom.”

123. Section 6 of the Act states that such well-known marks are earlier marks for the purposes of section 5(2)(b) and 5(3). The opponent would therefore have to show that the marks were well-known to the UK public, but would not be required to prove use. This would not have assisted the opponent any further. The opposition has succeeded under section 5(3), and under section 5(2)(b) would still have required the opponent to have proved use of a sufficient number of marks to run a successful family of marks claim.

Section 5(4)(a)

124. Section 5(4)(a) of the Act states that:

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

(a) by virtue of any rule or law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection 4(A) is met

...”

125. Subsection 4(A) is as follows:

“The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

126. In *Reckitt & Colman Products Limited v Borden Inc. & Ors* [1990] RPC 341, HL, Lord Oliver of Aylmerton described the ‘classical trinity’ that must be proved in order to reach a finding of passing off:

“First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying ‘get-up’ (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff’s goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the plaintiff. Thirdly, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant’s misrepresentation that the source of the defendant’s goods or services is the same as the source of those offered by the plaintiff.”⁴⁶

127. The opponent is relying on the signs **POD, HomePod, IPOD, AIRPODS** and **EARPODS** which it claims to have been used for all the goods and services on which it sought to rely under the previous grounds. Sections 5(2)(b) and 5(4)(a) deal with different areas of law. In the light of the Court of Appeal’s decision in *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, it seems doubtful whether the difference between the legal test for confusion under trade mark law and that for deception under the law of passing off will (all other factors being equal) produce different outcomes. The opposition failed under section 5(2)(b) and the opponent is, in my view, in no better a position under section 5(4)(a).

CONCLUSION

128. The opposition has succeeded and the designation will be refused.

⁴⁶ Page 406.

COSTS

129. The opponent has been successful and is entitled to a contribution towards its costs in line with the scale set out in Tribunal Practice Notice (TPN) 2/2016. In the circumstances, I award the opponent the sum of £2300 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Preparing a statement and considering the other side's statement: £400

Preparing evidence and considering the other side's evidence: £1250

Preparation of written submissions in lieu of a hearing: £450

Official fee: £200

TOTAL: £2300

130. I therefore order Huawei Technologies Co., Ltd to pay Apple Inc the sum of £2300, which should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 29th day of April 2021

**Clare Boucher
For the Registrar,
Comptroller-General**

Annex: Specifications of the Earlier Marks

UKTM No. 3306685

POD

Class 9

Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission and/or reproduction of sound or images or other data; apparatus, instruments and materials for transmitting and/or receiving and/or recording sound and/or images; calculating machines, data processing equipment; computers, tablet computers, computer terminals, computer peripheral devices; computer hardware; computer networks; facsimile machines, answering machines, telephone-based information retrieval software and hardware; adapters, adapter cards, connectors and drivers; random access memory, read only memory; solid state memory apparatus; computer gaming machines; microprocessors, memory boards, monitors, displays, keyboards, cables, modems, printers, videophones, disk drives; central processing units; computer memory devices; solid state data storage devices; cordless telephones; electronic communication equipment and instruments; telecommunications apparatus and instruments; telecommunications equipment, apparatus and instruments; computer and electronic games; computer software and computer hardware apparatus with multimedia and interactive functions; circuit boards; integrated circuits; magnetic, optical, and electronic data storage devices; apparatus for data storage; hard drives; miniature hard disk drive storage units; headphones; stereo headphones; in-ear headphones; electronic phonographs; record players, high fidelity stereo apparatus, tape recorders and reproducing apparatus; microphones; digital audio and video players with multimedia and interactive functions; accessories, parts, fittings, and testing apparatus for all the aforementioned goods; radio receivers, amplifiers, sound recording and reproducing apparatus; digital audio and video devices; audio cassette recorders and players, digital audio tape recorders and players; radios; audio, video and digital mixers; radio transmitters; car audio apparatus; global positioning systems; navigation apparatus for vehicles (on board computers); cameras; video cameras; telephones; parts and accessories for mobile telephones; portable digital electronic devices for data processing, information processing, storing and displaying data, transmitting and receiving data, transmission of data between computers, and software related thereto; handheld digital electronic devices for data processing, information processing, storing and displaying data, transmitting and receiving data, transmission of data between computers and software related thereto; digital music and/or video players; MP3 and other digital format audio players; hand held computers, personal digital assistants, electronic organizers, electronic notepads; handheld and mobile digital electronic devices for the sending and receiving of telephone calls, faxes, electronic mail, video, instant messaging, music, audiovisual and other multimedia works, and other digital data; global positioning system (GPS) devices,

telephones; handheld and mobile digital electronic devices for the sending and receiving telephone calls, faxes, electronic mail, and other digital media; computer software; computer programs; prerecorded computer programs for personal information management, database management software, character recognition software, telephony management software, electronic mail and messaging software, paging software, mobile telephone software; database synchronization software, computer programs for accessing, browsing and searching online databases, computer software for use in connection with online music subscription service, software that enables users to play and program music and entertainment-related audio, video, text and multi-media content, software featuring musical sound recordings, entertainment-related audio, video, text and multi-media content, computer software and firmware for operating system programs, data synchronization programs, and application development tool programs for personal and handheld computers; computer software for authoring, downloading, transmitting, receiving, editing, extracting, encoding, decoding, displaying, storing and organizing text, graphics, images and electronic publications; computer hardware and software for providing integrated telephone communication with computerised global information networks; electronic handheld devices for the wireless receipt, storage and/or transmission of data and messages, and electronic devices that enable the user to keep track of or manage personal information; software for the redirection of messages, computer software for the synchronization of data between a remote station or device and a fixed or remote station or device; sound effect apparatus and instruments (computer software); electronic tone generators (computer software); computer desktop utility software; screen saver software; software for detecting, eradicating and preventing computer viruses; software for data encryption; software for analysing and recovering data; software for computer system backup, data processing, data storage, file management and database management; software for telecommunication and communication via local or global communications networks, including the Internet, intranets, extranets, television, mobile communication, cellular and satellite networks; software for creating and delivering electronic greeting cards, messages and electronic mail; software for web design, creation, publishing and hosting; software for access to communications networks including the Internet; computer equipment for use with all of the aforesaid goods; magnetic data carriers; blank computer storage media; magnetic, optical, and electronic data storage materials; chips, discs and tapes bearing or for recording computer programs and software; CD-ROMs; batteries; rechargeable batteries; chargers; chargers for electric batteries; none of the above goods being digital signal processing hardware and software used for audio signal manipulation for real or virtual musical instruments; recording discs, automatic vending machines and mechanisms for coin-operated apparatus; cash registers; fire-extinguishing apparatus; downloadable audio and video recordings featuring music, comedy, drama, action, adventure and/or animation; downloadable electronic publications in the nature of books, plays, pamphlets, brochures, newsletters, journals, magazines, and periodicals on a wide range of topics of general interest; fonts, typefaces, type designs and symbols in the form of recorded data; user manuals in electronically readable, machine readable or computer readable form for use with, and sold as a unit with, all the aforementioned goods; pre-recorded vinyl records, audio tapes, audio-video tapes, audio video cassettes, audio video discs; audio tapes for sale with booklets; sound, video and data recordings; digital versatile discs; mouse pads; bags and cases

adapted or shaped to contain cameras and/or video cameras; mobile telephone covers; mobile telephone cases; mobile telephone cases made of leather or imitations of leather; mobile telephone covers made of cloth or textile materials; bags and cases adapted or shaped to contain digital music and/or video players, hand held computers, personal digital assistants, electronic organizers and electronic notepads; holders, straps, armbands, lanyards and clips for portable and handheld digital electronic devices for recording, organizing, transmitting, manipulating, and reviewing text, data, audio, image and video files; Internet e-mail, and/or other data to one or more electronic handheld devices from a data store on or associated with a personal computer or a server; instructional material relating to the foregoing; computer disk holders; electronic apparatus with multimedia functions for use with all of the aforesaid goods (not being digital signal processing hardware and software used for audio signal manipulation for real or virtual musical instruments); electronic apparatus with interactive functions for use with all of the aforesaid goods (not being digital signal processing hardware and software used for audio signal manipulation for real or virtual musical instruments); accessories, parts, fittings, and testing apparatus for all of the aforesaid goods (not being digital signal processing hardware and software used for audio signal manipulation for real or virtual musical instruments); covers, bags and cases adapted or shaped to contain all of the aforesaid goods, made of leather, imitations of leather, cloth, or textile materials; none of the aforesaid goods being loudspeakers or accessories, parts and fittings for loudspeakers.

UKTM 3237887

HomePod

Class 9

Computer hardware; microphones; sound recording and reproducing apparatus; digital audio and video players and recorders; audio speakers; audio amplifiers and receivers; voice recording and voice recognition apparatus; radios; radio transmitters and receivers; computer hardware for playing, organizing, downloading, transmitting, manipulating and reviewing audio files and media files; electronic devices capable of providing access to the Internet and for the sending, receiving, and storing of digital data; voice-controlled smart audio speakers with virtual personal assistant capabilities; electronic agendas; personal digital assistant; remote controls; remote controls for controlling computers; mobile telephones; mobile electronic devices; mobile electronic devices, smartwatches, smartglasses, earphones, headphones, audio and video players and recorders, televisions, set top boxes, speakers, amplifiers, home theatre systems, and entertainment systems; electronic voice command and recognition apparatus for controlling the operations of consumer electronics devices and residential systems; electronic voice command and recognition and remote control apparatus and devices for controlling and monitoring consumer electronics devices, lighting, appliances, thermostats, heating and

air conditioning systems, alarm and home security and surveillance systems, smoke and carbon monoxide detectors, door and window locks and latches, and home automation systems; remote controls; accessories for smart audio speakers.

UKTM No. 3051213

IPOD

Class 9

Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment, computers; computer software; fire-extinguishing apparatus; abacuses; accumulators, electric; acid hydrometers; acidimeters for batteries; acoustic conduits; acoustic couplers; acoustic [sound] alarms, sound alarms; actinometers; adding machines; aerials, antennas; aerometers; electronic agendas; air analysis apparatus; alarm bells, electric; alarms; alcoholmeters; alidades; altimeters; ammeters; amplifiers; amplifying tubes, amplifying valves; anemometers; animated cartoons; anode batteries, high tension batteries; anodes; answering machines; anti-dazzle shades, anti-interference devices [electricity]; anti-theft warning apparatus; anticathodes; apertometers [optics]; armatures [electricity]; asbestos gloves for protection against accidents; asbestos clothing for protection against fire; asbestos screens for firemen; apparatus and instruments for astronomy; audiovisual teaching apparatus; automated teller machines [ATM]; azimuth instruments; bags adapted for laptops; balances [steelyards], lever scales [steelyards], steelyards [lever scales]; balancing apparatus; bar code readers; barometers; batteries, electric, for vehicles, accumulators, electric, for vehicles; batteries for lighting; batteries, electric; battery jars, accumulator jars; battery boxes, accumulator boxes; battery chargers; beacons, luminous; bells [warning devices]; betatrons; binoculars; blueprint apparatus; boiler control instruments; branch boxes [electricity]; breathing apparatus, except for artificial respiration; breathing apparatus for underwater swimming; bullet-proof waistcoats, bullet-proof vests, bullet-proof waistcoats; buzzers; cabinets for loudspeakers; cables, electric; calculating machines; calculating disks; calibrating rings; calipers; camcorders; cameras [photography]; capillary tubes; carpenters' rules; carriers for dark plates [photography]; cases especially made for photographic apparatus and instruments; cases fitted with dissecting instruments [microscopy]; cash registers; cassette players; cathodes; cathodic anti-corrosion apparatus; cell phone straps; cell switches [electricity], reducers [electricity]; centering apparatus for photographic transparencies; chargers for electric batteries; chemistry apparatus and instruments; chips [integrated circuits]; choking coils [impedance]; chromatography apparatus for laboratory use; chronographs [time recording apparatus]; cinematographic film, exposed; cinematographic cameras; circuit breakers; circuit

closers; cleaning apparatus for phonograph records, cleaning apparatus for sound recording discs; clothing for protection against accidents, irradiation and fire; clothing for protection against fire; clothing especially made for laboratories; coaxial cables; coils, electric; mechanisms for coin-operated apparatus; coin-operated mechanisms for television sets; collectors, electric; electric apparatus for commutation; commutators; compact discs [audio-video]; compact discs [read-only memory]; compact disc players; comparators; directional compasses; compasses [measuring instruments]; computer game software; computer operating programs, recorded; computer software, recorded; computer programs, recorded; computer programs [downloadable software]; computer keyboards; computer peripheral devices; computer memory devices; computers; condensers [capacitors], capacitors; conductors, electric; connections for electric lines; connectors [electricity]; contacts, electric; containers for microscope slides; control panels [electricity]; converters, electric; copper wire, insulated; cosmographic instruments; mechanisms for counter-operated apparatus; counterfeit [false] coin detectors, false coin detectors; counters, meters; couplers [data processing equipment]; couplings, electric, connections, electric; covers for electric outlets; crash test dummies; crucibles [laboratory], cupels [laboratory]; current rectifiers; cyclotrons; darkroom lamps [photography]; darkrooms [photography]; data processing apparatus; decompression chambers; demagnetizing apparatus for magnetic tapes; densimeters; densitometers; detectors; diagnostic apparatus, not for medical purposes; diaphragms [acoustics]; diaphragms [photography]; diaphragms for scientific apparatus; dictating machines; diffraction apparatus [microscopy]; digital photo frames; discharge tubes, electric, other than for lighting, electric discharge tubes, other than for lighting; disk drives for computers; disks, magnetic; distance measuring apparatus; distance recording apparatus, apparatus for recording distance; distillation apparatus for scientific purposes; distribution boards [electricity]; distribution boxes [electricity]; distribution consoles [electricity]; divers' masks; diving suits; DNA chips; dog whistles; dosage dispensers, dosimeters; downloadable music files; downloadable image files; downloadable ring tones for mobile phones; drainers for use in photography, photographic racks; dressmakers' measures; drying racks [photography]; drying apparatus for photographic prints; ducts [electricity]; DVD players; dynamometers; ear plugs for divers; editing appliances for cinematographic films, apparatus for editing cinematographic film; egg timers [sandglasses], hourglasses; egg-candlers; electric door bells; electric loss indicators; electric installations for the remote control of industrial operations; materials for electricity mains [wires, cables]; electricity conduits; electrified rails for mounting spot lights; electrified fences; electro-dynamic apparatus for the remote control of railway points; electro-dynamic apparatus for the remote control of signals; electrolyzers; electromagnetic coils; electronic publications, downloadable; electronic notice boards; electronic pens [visual display units]; electronic pocket translators; electronic tags for goods; encoded identification bracelets, magnetic; encoded magnetic cards; enlarging apparatus [photography]; epidiascopes; ergometers; exposure meters [light meters]; facsimile machines; apparatus for fermentation [laboratory apparatus]; fibre optic cables; film cutting apparatus; films, exposed; filters [photography]; filters for ultraviolet rays, for photography; filters for respiratory masks; fire alarms; fire escapes; fire boats; fire blankets; fire extinguishers, fire extinguishing apparatus; fire engines; fire beaters; fire hose nozzles; fire hose; fire pumps; flash-bulbs [photography]; flashing lights [luminous signals], blinkers [signalling lights]; flashlights [photography]; floppy disks;

fluorescent screens; fog signals, non-explosive; food analysis apparatus; frames for photographic transparencies; apparatus to check franking, apparatus to check stamping mail; frequency meters; furnaces for laboratory use, ovens for laboratory use; furniture especially made for laboratories; fuse wire, wires of metal alloys [fuse wire]; fuses; galena crystals [detectors]; galvanic cells; galvanic batteries; galvanometers; garments for protection against fire; gas testing instruments; gasoline gauges, petrol gauges; gasometers [measuring instruments]; gauges; glass covered with an electrical conductor; glazing apparatus for photographic prints; Global Positioning System [GPS] apparatus; gloves for protection against accidents; gloves for protection against X-rays for industrial purposes; gloves for divers; goggles for sports; grids for batteries; hands free kits for phones; head cleaning tapes [recording]; headphones; heat regulating apparatus; heliographic apparatus; hemline markers; high-frequency apparatus; holders for electric coils; holograms; horns for loudspeakers; hydrometers; hygrometers; identification threads for electric wires; identification sheaths for electric wires; identity cards, magnetic; igniting apparatus, electric, for igniting at a distance, electric apparatus for remote ignition; incubators for bacteria culture; inductors [electricity]; integrated circuit cards [smart cards], smart cards [integrated circuit cards]; integrated circuits; intercommunication apparatus; interfaces for computers; inverters [electricity]; invoicing machines; ionization apparatus not for the treatment of air or water; jigs [measuring instruments]; juke boxes for computers; juke boxes, musical, coin-operated musical automata [juke boxes]; junction sleeves for electric cables; junction boxes [electricity]; kneepads for workers; laboratory trays; laboratory centrifuges; lactodensimeters; lactometers; laptop computers; lasers, not for medical purposes; appliances for measuring the thickness of leather; lens hoods; lenses for astrophotography; letter scales; levelling staffs [surveying instruments], rods [surveying instruments]; levelling instruments; levels [instruments for determining the horizontal]; life jackets; life belts; life buoys; life saving apparatus and equipment; life-saving rafts; light dimmers [regulators], electric, light regulators [dimmers], electric; light-emitting electronic pointers; light-emitting diodes [LED]; lighting ballasts; lightning conductors [rods], lightning conductors, lightning arresters; limiters [electricity]; locks, electric; logs [measuring instruments]; loudspeakers; magic lanterns; magnetic data media; magnetic tapes; magnetic tape units for computers; magnetic encoders; magnetic wires; magnets; decorative magnets; marine compasses; marine depth finders; marking buoys; marking gauges [joinery]; masts for wireless aerials; material testing instruments and machines; mathematical instruments; measures; measuring apparatus; measuring instruments; measuring devices, electric; measuring spoons; mechanical signs; megaphones; mercury levels; metal detectors for industrial or military purposes; meteorological balloons; meteorological instruments; metronomes; micrometer screws for optical instruments; micrometers, micrometer gauges; microphones; microprocessors; microscopes; microtomes; mileage recorders for vehicles, kilometer recorders for vehicles; mirrors for inspecting work; mirrors [optics]; modems; money counting and sorting machines; monitoring apparatus, electric; monitors [computer programs]; monitors [computer hardware]; mouse [data processing equipment]; mouse pads; nautical apparatus and instruments; naval signalling apparatus; navigation apparatus for vehicles [on-board computers]; navigational instruments; needles for record players, styli for record players; neon signs; nets for protection against accidents; nose clips for divers and swimmers; notebook computers; observation instruments; octants; ohmmeters; optical discs;

optical data media; optical character readers; optical fibers, [light conducting filaments], light conducting filaments [optical fibers]; optical lanterns, optical lamps; optical condensers; oscillographs; oxygen transvasing apparatus; ozonisers [ozonators]; parking meters; particle accelerators; pedometers; peepholes [magnifying lenses] for doors; periscopes; personal stereos; Petri dishes; phonograph records, sound recording discs; photocopiers [photographic, electrostatic, thermic]; photometers; phototelegraphy apparatus; photovoltaic cells; apparatus and instruments for physics; pipettes; Pitot tubes; plane tables [surveying instruments]; planimeters; plates for batteries; plotters; plumb lines; plumb bobs; pocket calculators; polarimeters; portable telephones; portable media players; precision balances; precision measuring apparatus; automatic indicators of low pressure in vehicle tires [tyres], automatic indicators of low pressure in vehicle tires, automatic indicators of low pressure in vehicle tyres; pressure measuring apparatus; pressure gauges, manometers; pressure indicators; pressure indicator plugs for valves; printed circuits; printed circuit boards; printers for use with computers; prisms [optics]; probes for scientific purposes; processors [central processing units], central processing units [processors]; projection screens; projection apparatus; protection devices for personal use against accidents; protection devices against X-rays, not for medical purposes; protective helmets; protective helmets for sports; protective masks; protective suits for aviators; protractors [measuring instruments]; punched card machines for offices; push buttons for bells; pyrometers; quantity indicators; radar apparatus; radio pagers; radiological apparatus for industrial purposes; radiology screens for industrial purposes; radios; radiotelegraphy sets; radiotelephony sets; railway traffic safety appliances; range finders, telemeters; readers [data processing equipment]; audio- and video-receivers; record players; apparatus for changing record player needles; reflecting discs for wear, for the prevention of traffic accidents; refractometers; refractors; regulating apparatus, electric; relays, electric; remote control apparatus; resistances, electric; respirators for filtering air; respiratory masks, other than for artificial respiration, respirators, other than for artificial respiration; resuscitation mannequins [teaching apparatus]; retorts; retorts' stands; revolution counters; rheostats; riding helmets; road signs, luminous or mechanical; rods for water diviners; rulers [measuring instruments]; rules [measuring instruments]; saccharometers; safety nets, life nets; safety tarpaulins; safety restraints, other than for vehicle seats and sports equipment; salinometers; satellite navigational apparatus; satellites for scientific purposes; scales; scanners [data processing equipment]; screens [photography]; screens for photoengraving; screw-tapping gauges; semi-conductors; sextants; sheaths for electric cables; shoes for protection against accidents, irradiation and fire; shutter releases [photography]; shutters [photography]; sighting telescopes for firearms; signal bells; signal lanterns; signalling panels, luminous or mechanical; signalling whistles; signalling buoys; signals, luminous or mechanical; signs, luminous; simulators for the steering and control of vehicles; sirens; apparatus for measuring the thickness of skins; sleeves for laptops; slide projectors, transparency projection apparatus; slide calipers; slide-rules; slope indicators, clinometers, gradient indicators, inclinometers; smoke detectors; sockets, plugs and other contacts [electric connections], plugs, sockets and other contacts [electric connections]; socks, electrically heated; solar batteries; solderers' helmets; solenoid valves [electromagnetic switches]; sonars; sound transmitting apparatus; sound recording strips; sound recording carriers; sound recording apparatus; sound reproduction apparatus; sound locating instruments; sounding apparatus and machines;

sounding lines; sounding leads; spark-guards; speaking tubes; spectrograph apparatus; spectrosopes; speed measuring apparatus [photography]; speed checking apparatus for vehicles; speed indicators; speed regulators for record players; spherometers; spirit levels; spools [photography]; sprinkler systems for fire protection; stage lighting regulators; stands for photographic apparatus; starter cables for motors; steering apparatus, automatic, for vehicles; step-up transformers; stereoscopes; stereoscopic apparatus; stills for laboratory experiments; stroboscopes; sulphitometers; surveying instruments; surveying apparatus and instruments; surveying chains; surveyors' levels; switchboards; switchboxes [electricity]; switches, electric; tachometers; tape recorders; taximeters; teaching apparatus; teeth protectors; telegraph wires; telegraphs [apparatus]; telephone apparatus; telephone receivers; telephone transmitters; telephone wires; teleprinters, teletypewriters; teleprompters; telerupters; telescopes; television apparatus; temperature indicators; temperature indicator labels, not for medical purposes; terminals [electricity]; test tubes; testing apparatus not for medical purposes; theft prevention installations, electric; theodolites; thermionic valves, thermionic tubes; thermometers, not for medical purposes; thermostats; thermostats for vehicles; thread counters; ticket dispensers; time switches, automatic; time recording apparatus; time clocks [time recording devices]; tone arms for record players; totalizers; traffic cones; traffic-light apparatus [signalling devices]; transformers [electricity]; transistors [electronic]; transmitters of electronic signals; transmitters [telecommunication]; transmitting sets [telecommunication]; transparencies [photography], slides [photography]; transponders; triodes; tripods for cameras; urinometers; USB flash drives; vacuum tubes [radio]; vacuum gauges; variometers; vehicle radios; vehicle breakdown warning triangles; verniers; video telephones; video cassettes; video game cartridges; video recorders; video screens; videotapes; viewfinders, photographic; viscosimeters; voltage surge protectors; voltage regulators for vehicles; voltmeters; voting machines; wafers for integrated circuits; walkie-talkies; washing trays [photography]; water level indicators; wavemeters; weighbridges; weighing machines; weighing apparatus and instruments; weights; whistle alarms; wind socks for indicating wind direction; wire connectors [electricity]; wires, electric; workmen's protective face-shields; wrist rests for use with computers; X-ray films, exposed; X-ray photographs, other than for medical purposes; X-ray apparatus not for medical purposes; X-ray tubes not for medical purposes; apparatus and installations for the production of X-rays, not for medical purposes; computer hardware; computer gaming machines; memory boards; displays; adapters; adapter cards; drivers; computer networking hardware; apparatus for data storage; hard drives; miniature hard disk drive storage units; blank computer storage media; chips, discs and tapes bearing or for recording computer programs and software; random access memory, read only memory, solid state memory apparatus; facsimile machines; video cameras; MP3 and other digital format audio players; handheld computers, tablet computers, personal digital assistants, electronic organizers, electric notepads; handheld electronic game units adapted for use with an external display screen or monitor; handheld digital electronic devices and software related thereto; handheld and mobile digital electronic devices for the sending and receiving of telephone calls, faxes, electronic mail, and other digital data; handheld mobile digital electronic devices for recording, organizing, transmitting, manipulating, and reviewing text, data, image, audio, and audiovisual files, for the sending and receiving of telephone calls, electronic mail, and other digital data, for use as a digital format audio player, handheld computer, personal digital assistant,

electronic organizer, electronic notepad, camera, and global positioning system (GPS) electronic navigation device; electronic handheld units for the wireless receipt, storage and/or transmission of data and messages, and electronic devices that enable the user to keep track of or manage personal information; electronic communication equipment and instruments; telecommunication apparatus and instruments; telephone-based information retrieval software and hardware; electronic navigational devices, namely, global positioning satellite (GPS) based navigation receivers; telephones, mobile telephones, parts and accessories for mobile telephones; digital voice recorders; wireless communication devices for voice, data or image transmission; earphones; audio speakers; sound recording and reproducing apparatus, electric phonographs, high fidelity stereo apparatus and reproducing apparatus; digital audio and video recorders and players; cassette recorders; video cassette recorders and players; compact disc recorders; digital versatile disc recorders and players, digital versatile tape recorders and players; radio transmitters and receivers; audio, video and digital mixers; televisions; television monitors; video monitors; video viewers, namely , video monitors for mobile phones, handheld computers, and portable and handheld digital electronic devices; television set top boxes; automobile stereo adapters; car audio apparatus; docking stations; devices for hands-free use; power adapters for the aforesaid goods; computer software for business, home, education, and developer use; computer software for creating, authoring, distributing, downloading, transmitting, receiving, playing, editing, extracting, encoding, decoding, displaying, storing and organizing text, graphics, images, audio, video, and multimedia content, and electronic publications; operating system software, data synchronization software, application development software; computer software for personal information management; database management software; database synchronization software; character recognition software; voice recognition software; speech to text conversion software; voice-enabled software applications; telephony management software; electronic mail and messaging software; mobile telephone software; computer software for accessing, browsing and searching online databases; computer software for the redirection of messages, Internet e-mail, and/or other data to one or more electronic handheld devices from a data store on or associated with a personal computer or a server; computer software for the synchronization of data between a remote station or device and a fixed or remote station or device; computer and electronic games; downloadable audio and video files, movies, video games, television programs, pod casts and audio books via the internet and wireless devices featuring music, movies, videos, television, celebrities, sports, news, history, science, politics, comedy, children's entertainment, animation, culture, current events and topics of general interest; fonts, typefaces, type designs and symbols in the form of recorded data; user manuals in electronically readable, machine readable or computer readable form for use with, and sold as a unit with, all the aforementioned goods; electronic apparatus with multimedia functions for use with all of the aforesaid goods; electronic apparatus with interactive functions for use with all of the aforesaid goods; a full line of accessories, parts, fittings, and testing apparatus for all of the aforesaid goods; stands, covers, cases, bags and holsters adapted or shaped to contain all of the aforesaid goods; none of the foregoing being glasses, sunglasses or eyewear.

EUTM No. 14586838

AIRPODS

Class 9

Audio components and accessories; sound recording and reproducing apparatus; digital video recorders and players; remote control apparatus; audio speakers; earphones, headphones, microphones; voice recording and recognition apparatus; radios, radio transmitters, and receivers; handheld digital electronic devices and software related thereto; wireless communication devices for voice, data or image transmission; televisions; television receivers; television monitors; audio receivers; downloadable pre-recorded audio and audiovisual content, information, and commentary; downloadable electronic books, magazines, periodicals, newsletters, newspapers, journals, and other publications; optical apparatus and instruments; electronic communication equipment and instruments; telecommunications apparatus and instruments; apparatus for data storage; computers; computer peripheral devices; computer hardware; computer software; electrical and electronic connectors, couplers, wires, cables, chargers, docks, docking stations, interfaces, and adapters for use with all of the aforesaid goods.

Class 38

Transmission of digital audio, video and multimedia content by telecommunications; electronic transmission of audio and video files via computer and other electronic communications networks; audio and video broadcasting.

Class 41

Entertainment services; providing non-downloadable audio, video and multimedia content; providing information, reviews and personalized recommendations of entertainment content; providing advice and information in the field of entertainment.

EUTM No. 11472008

EARPODS

Relying on the following goods and services:

Class 9

Computer peripheral devices; sound recording and reproducing apparatus; earphones, headphones; audio speakers; audio components and accessories