

O-389-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2497685
BY SPLATT PRINT LTD TO REGISTER THE TRADE MARK**



IN CLASSES 9, 16 AND 35

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 98660
BY LENOVO (BEIJING) LTD**

TRADE MARKS ACT 1994

**IN THE MATTER OF Application No. 2497685
By Splatt Print Ltd to register the trade mark**



and

**IN THE MATTER OF Opposition thereto under No. 98660
by Lenovo (Beijing) Ltd**

BACKGROUND

1. On 1st September 2008 Splatt Print Ltd of 6/7 Glebe Road, London E8 4BD (hereafter “Splatt”) applied to the register the above mark in Classes 9, 16 and 35.
2. The application was published on 28th November 2008 and on 28th January 2009, Lenovo (Beijing) Ltd of No 6 Chuangye Road, Shangdi Information Industry Base, Haidian District, 100085 Beijing China (hereafter “Lenovo”) lodged an opposition against the goods specified.
3. The opponent based its opposition on section 5(2)(b) and 5(3) of The Trade Marks Act 1994 (hereafter the “Act”), citing an earlier Madrid International mark designating the Community, 946438, the details of which are as follows:

Mark; date of international registration and date of protection in the EU	Goods relied upon in the opposition
<p data-bbox="331 465 783 584">IdeaPad</p> <p data-bbox="320 658 616 696">20th September 2007</p>	<p data-bbox="834 472 975 501">Class 09:</p> <p data-bbox="834 521 1310 763">Computers; computer peripherals; laptop computers; notebook computers; computer hard disks; drives (for computers); computer software; batteries (for notebook computers); computer monitors; flash disk.</p> <p data-bbox="834 786 975 815">Class 16:</p> <p data-bbox="834 835 1310 1048">Printed matters; periodicals; newspapers; books; printed publications; specification; pamphlets; handbooks (manuals); teaching materials (except apparatus); teaching wall map.</p>

4. Under section 5(2)(b), Lenovo say Splatt’s mark reproduces their mark IDEAPAD, phonetically and conceptually. Other, purely descriptive elements such as “my” and “big” are ineffective in distracting from the strong similarities in the marks. Furthermore, the comparison should be made essentially between the word elements only as Lenovo’s mark is a word mark only, capable of being “transposed in any font or device”. Given the similarity or identity of goods, there is an overall likelihood of confusion. Under section 5(3), Lenovo say use of the mark applied for would dilute, tarnish and weaken their mark and may also divert sales. In particular they say that in conducting a search of the internet thousands of hits were retrieved, all being related to Lenovo’s products. If the applicant’s product was being advertised on the internet it would certainly dilute the reputation of Lenovo’s mark and diminish its “earned presence” on the market.
5. Splatt filed a counterstatement denying the grounds of opposition. They say when you search the words “IDEA PAD” on the internet using GOOGLE™, you get “swamped” with references to Lenovo’s product and only 12 pages back do you get any reference to “MY BIG IDEA PAD” and, “we are certainly not receiving thousands of hits from confused customers”. They say “MY BIG IDEA PAD” is more of a guide to users on how to formulate ideas in a structured plan, both on a website and on a physical paper pad, and “we

cannot see how this will be confused with a notebook computer, as they are different concepts”.

6. The subject matter of the opposition is Classes 9 and 16 only which, subsequent to the filing of a Form TM21 in April 2009 limiting the specification, and further clarification requested by me, now reads as follows:

Class 09:

Computer software; software downloadable from the Internet; downloadable electronic publications; but not including computers; computer peripherals; laptop computers; notebook computers; computer hard disks; drives for (for computers); batteries (for notebook computers); computer monitors; flash disk.

Class 16:

Writing pads; leaflets

7. As the opponent has made a point about the clarification of the specification sought by me, I should record the precise nature of the clarification and its impact. Form TM21 filed by the applicant sought to put distance between the parties' respective specifications by adding the words, “but not including”, and then listing all the goods contained in Lenovo's specification. This had the effect of rendering the specification in Class 9 something of a linguistic oddity, as follows:

Class 09:

Computer software; software downloadable from the Internet; downloadable electronic publications; but not including computers; computer peripherals; laptop computers; notebook computers; computer hard disks; drives for (for computers); computer software; batteries (for notebook computers); computer monitors; flash disk.

8. As I pointed out to the applicant, it is not possible, at one and the same time, to both include “computer software”, and then exclude it as one of the list of items following the words, “but not including”. I was unconcerned with the other terms following the words “but not including”, as they had not simultaneously been included in the specification; their exclusion simply served as reinforcement to the effect that for the avoidance of any doubt the scope of the specification did not include such terms. The same however, could not be said for “computer software” and for that reason I sought clarification. The applicant confirmed that “computer software” was to be included in the specification and I have proceeded on that basis. The clarification did not require any amendment to the submissions on the part of the opponent, but at the same time I accept the opponent's criticism, that proper clarification ought to have been sought by the registry at the time of offering the amendment. I consider the action I took subsequently, (to obtain clarification from the applicant as to its intentions concerning “computer

software) to be an action available to me by way of the correction of a procedural irregularity in accordance with rule 74 of the Trade Marks Rules 2008.

9. Evidence has been filed by Lenovo which, insofar as it is factually relevant, I shall summarise below. Submissions have also been filed by Lenovo which will also be taken into account. Neither party has asked to be heard and instead, both are content that the matter be decided on the papers. Both parties seek an award of costs.

Opponent's evidence.

10. This takes the form of a witness statement, dated 29th January 2010, from Mr Yuanqing Yang, the President and CEO of Lenovo. He explains that he joined Legend (Beijing) Ltd in 1989, the company having formed in 1984 and has been listed on the Hong Kong Stock Exchange since 1994. The company has 24000 employees worldwide. In 2003 it announced the birth of the "Lenovo" brand to prepare for expansion from China into overseas markets. Since 2003 it has continuously traded under the Lenovo name and been referred to under that new name. The company develops, manufactures and markets computing products and related services. In 2004 it acquired IBM's personal computing division making it the then third largest personal computer company in the world. In the UK the market share held by Lenovo is 3.3%, ranking it number 8 in this country behind companies such as Acer, Hewlett Packard, Dell and Toshiba. In 2005 it made its entry into the European market, at first in the UK, France, Germany, Italy, Ireland and Spain. Sales figures are provided at exhibit YY2 for the years 2005 – 2008 which show 1,385,185 units sold in the UK, making it third overall behind Germany and France for the same period.
11. The company's products are advertised extensively and detailed advertising spend is provided at exhibit YY3. These figures are not aggregated but include "O & M" and "end user advertising", as well as "channel" and "TV advertising". These and other terms are not fully explained. In 2005-2006, the following advertising spend is identified for the UK: O&M End User Advertising (May- June) – €264, 932; O&M Lenovo Announcement Ad FT European Edition/El Pais - €125,948; O&M Channel (May-June) €41, 733; O&M TV advertising (June) €1, 057,544; Howitt (Insert May) UK – €74, 585; O&M UK End User advertising (July – Dec/September booster) €1, 118,801; O&M End User advertising – Q1- €2,319,638; O&M UK Channel advertising – July/March €146,457; Howitt (Insert June) €44,176; Howitt (Insert July) €74, 792; SR Comms- X41 Tablet DM UK – €4,443; Howitt (Inserts for September, October, November) – €81,110, €37,569, €51, 853 respectively; Image Colour EOY Channel Goodies (mousepads) UK €6,724; Colin Clapp EOY Channel Goodies (letter & env) €10,162. Total advertising spend across Europe for 2005-6 is put at €32,012,480. Figures are also given for the year

2006-2007 and the total for that year is €26,458,518 with O&M advertising (end user and channel advertising for the UK being €1,993,539. Finally there are figures for 2007-2008 with a total spend of €15,266,548 and O&M (web and channel advertising for the UK being €500,285. Despite the absence of full explanations of the terms used in this exhibit, it can be concluded that Lenovo uses mixed media advertising extensively, across the EU including the UK, and its advertising spend is by no means small scale.

12. Turning specifically to the mark IDEAPAD, Mr Yang says it has gained a substantial reputation associated with his company's products. Exhibit YY5 comprises the results of a an internet GOOGLE™ search conducted on 3rd February 2010 for the term "idea pad". The search shows the first 100 hits of 189,000. They show Lenovo's product, the IDEAPAD notebook or laptop, being the subject of the first nineteen hits. Hit number 20 is "Develop and Plan Your Big Ideas with My Big Idea Pad" at the site "mybigideapad.com". Thereafter, with the exception of hits 52, 56 and 86, which all refer to Splatt's product and company, all remaining hits are exclusively those of Lenovo.
13. Exhibit YY6 shows use of the IDEAPAD mark on products, on the laptop casing and screen as well as in web based advertising. There are two undated photographs of laptops and three copies of web pages advertising laptops comprising this exhibit. The dates on the web pages cannot be ascertained but the copyright inscription is dated 2009. My Yang says the mark is used in relation mostly to computers, but also accessories, such as batteries and peripherals as well as downloadable publications and drivers, and also printed material and manuals. My Yang says his consumers are direct users of ICT equipment or in house buyers of computing goods. The IDEAPAD range is aimed at the general consumer rather than more IT dependent professionals. He says companies like his manufacture and sell, not only the hardware and software comprising a computer or notebook/laptop, but also peripherals and linked products such as screens, servers, batteries, cables, connectors, bags, possibly printers, scanners, fax machines, toners and cartridges. Exhibit YY7 shows the company's website (prints taken in January 2010), displaying some of those other items, notably cables, connectors, batteries and carry cases.
14. The launch of Lenovo's IDEAPAD computers was announced worldwide on 3rd January 2008 and this launch received ample press reviews in many countries. A number of these reviews are listed in a further GOOGLE™ internet search, limited in time to 1st January 2008 – 15th September 2008. It is intended to show by this exhibit that Lenovo's product IDEAPAD had been established in the UK prior to the date of filing Splatt's application. IDEAPAD computers and related products were first sold in the UK in August 2008, initially via Lenovo's wholly owned subsidiary Lenovo Technology UK Ltd and its official website and later, through established distributors, including nationwide retail outlets such as PC WORLD, DABS and AMAZON. In 2009

66,000 units were shipped to UK end users. IDEAPAD products are extensively advertised throughout the UK. Exhibit YY10 comprises a collection of press articles from 2008, and these concern the launch of the IDEAPAD Netbook, according to the articles to compete mainly with the ASUS EEE PC. A netbook is a relatively low cost, mobile laptop, usually having a smaller screen than normal laptop and designed especially for web surfing and e-mail applications. The models launched by Lenovo were the S9 and S10. The press articles are, in the main, dated August 2008 and several (eg in VNU and THE REGISTER refer to the products being available in the UK in October 2008. CNet CRAVE refers to early October). As well as the more technical magazines, articles and reviews appear in more mainstream publications such as THE DAILY TELEGRAPH and FINANCIAL TIMES. My Yang says his company concentrates essentially on PR, in store or co-marketing activities, rather than direct advertising. Various promotional offers and competitions can be seen at www.pcformat.co.uk/competition. Co-marketing with retailers such as TESCO in their TESCO DIRECT CATALOGUE (7 million circulation) are also in evidence in this exhibit. The whole estimated advertising investment for IDEAPADS is put at \$70,000. IDEAPAD computers won Computer of the Year Awards at the T3 Awards in October 2009. Other awards are also referred to. The remainder of Mr Yang's evidence is essentially submission, and with which I shall deal in due course.

DECISION

15. The opposition is founded upon Section 5(2) (b) and Section 5(3) of the Act. Dealing firstly with section 5(2)(b), this reads:

“(2) A trade mark shall not be registered if because –

(a).....

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

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

16. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6.-(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK), Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in

question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

17. With an international registration date and date of protection in the EU of 20th September 2007, it is clear that under Section 6(1) of the Act, Lenovo's mark is an earlier trade mark. Further, as it completed its registration procedure less than five years before the publication of the contested mark (28th November 2008), it is not subject to the proof of use requirements set out in section 6A of the Act.

18. In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the European Court of Justice ("CJEU") in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,

(b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG*, who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*,

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*,

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma AG*,

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

(h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(i) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(j) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

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

Comparison of goods and services

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

‘In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, their end users and their method of use and whether they are in competition with each other or are complementary.’

20. Other factors have been identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281, such as the nature of the users and the channels of trade.
21. For the benefit of Splatt, who are not as far as I am aware represented in these proceedings, and bearing in mind their specific comments in the counterstatement, I should explain that the issue for me is a *notional* comparison between the respective specifications. That is to say that the submission that the respective parties are actually and in fact selling diverse products, which would never in real life be confused is essentially irrelevant. What matters is what the respective specifications say and cover in their specifications.
22. It is important to recognise that even though there is little evidence on similarity, I nevertheless have the statements of case and am able to draw upon commonly known facts. Mr Geoffrey Hobbs QC sitting as the Appointed Person said in *Raleigh International trade mark* [2001] R.P.C. 11 at para 20, that such evidence will be required if the goods or services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered. But where there is self-evident similarity, and especially in relation to everyday items, evidence may not be necessary. He also stated that the tribunal may, in an appropriate case, consider the question of similarity from the viewpoint of the notional member of the relevant purchasing public.
23. I should also mention a further case in terms of the application of legal principles, and that is the European Court of First Instance (“CFI”) in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) (“Meric”)* Case T-133/05, where, at para 29, it is stated:

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359,

paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

24. With my introductory comments out of the way, I turn to the goods to be compared, which are as follows:

Lenovo’s goods	Splatt’s goods
<p>Class 09: Computers; computer peripherals; laptop computers; notebook computers; computer hard disks; drives (for computers); computer software; batteries (for notebook computers); computer monitors; flash disk.</p> <p>Class 16: Printed matters; periodicals; newspapers; books; printed publications; specification; pamphlets; handbooks (manuals); teaching materials (except apparatus); teaching wall map.</p>	<p>Class 09: Computer software; software downloadable from the Internet; downloadable electronic publications; but not including computers; computer peripherals; laptop computers; notebook computers; computer hard disks; drives for (for computers); batteries (for notebook computers); computer monitors; flash disk.</p> <p>Class 16: Writing pads; leaflets</p>

Class 9

25. Lenovo has computer software in their Class 9 specification. Plainly that is identical to “computer software” in Splatt’s specification and Lenovo’s term “computer software” would also encompass “computer software downloadable from the internet”. As far as “downloadable electronic publications” are concerned, these are not ‘software’ as such but may need software to access. Having said that, Lenovo has a broad specification in Class 16 reflecting ‘print based’ publications and it is common for such print based publications, including newspapers, books, specifications and manuals, to be published both in print and electronic versions. In essence they are the same publication; that is to say, that a manual of a computer say,

whether published in print or electronically, will, of necessity comprise the same information, from the same source and about the same machine . On that basis, I find that “downloadable electronic publications” in Splatt’s Class 9 specification are highly similar to “printed publications” in Lenovo’s Class 16 specification.

26. As will be clear from my analysis above, the limitation commencing “but not including.....” in Splatt’s Class 9 specification is of no effect at all. Splatt may have expected the limitation to render its remaining terms that much more distant to those of Lenovo but this is plainly not the effect at all and this is because the items listed after the words “but not including” are seemingly entirely unrelated to those terms preceding the words.

Class 16.

27. As Lenovo has “printed matters”, “printed publications” and “pamphlets”, these terms will encompass “leaflets” in Splatt’s specification. It is more questionable that “writing pads” will be covered by these broad terms, as my understanding would be that a “writing pad” would be an unsullied item of stationery which has not been written on at the point of sale. “Writing pads” could however be covered by “teaching materials”, or alternatively, they would be similar to Lenovo’s broader terms as mentioned above. That is to say that “writing pads” are made of the same physical material as printed matter and will often be sold in general stationers such as WH SMITH, alongside the pre-printed material covered in Lenovo’s specification. I conclude then that “leaflets” are identical “pamphlets” and “writing pads” are highly similar to “teaching materials” and/or “printed publications”.

Comparison of marks

28. The respective marks are as below:

Splatt’s mark	Lenovo’s mark
	<p data-bbox="815 1518 1257 1637">IdeaPad</p>

29. The case law makes it clear that I must undertake a full comparison of both marks in their totalities, taking account of all differences and similarities. The comparison needs to take account of the visual, aural and conceptual similarities and differences between the marks.
30. In terms of visual appearance, Splatt's mark presents as a composite mark with a number of different elements, including colour as a feature. The words are normal dictionary words which would be read as a grammatically correct sequence "MY BIG IDEA PAD", although they are not presented in linear format. Although the 'my' and 'pad' words are not in the same style script (and in the case of 'pad' in a different colour) and are smaller in size, and as such may be regarded as subsidiary to "BIG IDEA", they are nonetheless not negligible in the whole and would be recognised as contributing to the total verbal context. As I have said the words are also not presented in linear conjunction, the word 'my' is on its side next to "BIG", and the other words 'stacked'. The words appear inside a yellow lightbulb, which graphically emphasises and illustrates the 'idea' concept. In this regard I accept the submissions of Lenovo's attorneys to the effect that a lightbulb is often used as graphic depiction and expression of an 'idea' or 'inventive moment'; "to have a lightbulb moment". The lightbulb is supported by a simple yellow human figure with arms raised and behind this human figure is a row of similar figures in black with arms by their sides. The background is green. Lenovo's mark comprise two words conjoined "Idea" and "Pad", in linear conjunction. The 'I' of Idea and the 'P' of Pad are in capitals, whilst the other letters are lower case. The use of capitals reinforces the fact that two words have been brought together, rather than the mark comprising a single word. There are no other elements in Lenovo's mark. Bringing the similarities and dissimilarities between the respective marks together, I find that, visually, the marks are similar to a moderate degree.
31. Aurally, Lenovo's mark will be pronounced, "EYE DEAR PAD". Splatt's will be pronounced "MY BIG EYE DEAR PAD"; plainly any non verbal element cannot be enunciated. To the extent that, visually, Splatt's mark may be argued to place emphasis upon the words and notion "BIG IDEA", as distinct from the words "my" and "pad", then this 'emphasis' will be lost in aural usage. Furthermore, whereas Lenovo's mark presents visually as a single, conjoined word, no such characteristic will be evident in aural usage. Consequently I find that, bringing the similarities and dissimilarities together, the marks are aurally similar to a high degree.
32. Conceptually, there is no evidence before me to suggest there is any such thing as an "idea pad". It is therefore an inventive concept but which plainly derives from two known dictionary words "idea" and "pad". In the realm of computing, the concept invoked is of some kind of electronic device or "pad", upon, or by which, the user can give free rein to his or her expressions or ideas. The words "idea" and "pad" are also present in that order in Splatt's

mark, but I need to consider whether there is anything in the visual presentation especially, that may subtly change or vary the semantic concept away from an “idea pad”.

33. It may be said at this point that the bolder and more dominant presentation of the words “BIG IDEA” (as distinct from the words “my” and “pad”) vary the concept from a mere ‘idea pad’ to a ‘*big idea* pad’; the ‘big’ element, not referring to physical size, but instead to the well known notion of someone having a ‘big idea’, that is to say, a major brainwave, epiphany or insight. This interpretation is amplified perhaps by the stacked format of the words as distinct from being in linear conjunction. However, even if that were to be the case, the underlying concept of having a ‘pad’ upon which to give free rein to such an ‘idea’, be it big or otherwise, is still preserved. Alternatively, the “big” in “Big Idea Pad” could relate simply to physical size, ie a *big* idea pad. Given the overall presentation however, I think this less likely.
34. As I have said with respect to the lightbulb element , I accept Lenovo’s attorney’s evidence that such as device graphically illustrates the concept of an ‘idea’; indeed there is evidence at Exhibit YY11 showing that Lenovo themselves also use the device of a lightbulb to signify the same thing. So, the lightbulb and human figures do not add to or vary, but rather emphasise the semantic concept of an “idea pad”.
35. Submissions by Lenovo’s attorneys also draw my attention to several cases (Case T -348/02, *Quick Restaurants v OHIM*, *Roset SA v Textil Roset* before OHIM and decision B 1150 855 *PORTALUX v PORTALUXE INTERNACIONAL* plus device) to circumstances where “typically words would be considered as dominant elements in composite marks”. I have to be cautious not to elevate such cases necessarily to the status of expressions of legal proposition, immutable in all cases. That said, in this particular case, where Splatt’s device elements do not detract from, vary or present their own independent element, but rather support the verbal element, it can only be concluded that the words do indeed ‘speak loudest’. On that basis, I find that conceptually the marks are reasonably highly similar. I say, “reasonably highly similar” on the basis that Splatt’s mark introduces the notion of possession, as in ‘my’, which is not present in Lenovo’s mark and I also take account of the presentation of fonts, styles and linear conjunction of the words together with the device elements, which in conjunction, could result in some consumers seeing Splatt’s mark as evoking a ‘pad’ for recording or experimenting with ‘big ideas’, as opposed to a ‘*big idea* pad’. Other consumers may however see the mark as simply a ‘big idea pad’. Both interpretations must however be taken into account in my analysis.
36. Overall, I conclude that the respective marks share a high level of similarity.

The average consumer and nature of purchase

37. As matters must be judged through the eyes of the average consumer (*Sabel BV v. Puma AG*, para 23), it is important that I assess who the average consumer is for the goods at issue, and whether there is anything about the nature of transactions under the respective marks that may lead me to conclude that the average consumer is other than someone “deemed to be reasonably well informed and reasonably circumspect and observant” (see authority (b) in para 16 above).
38. The average consumer for the goods covered by Lenovo’s specification will in the main be the general public. Granted, there will be specialist IT purchasers and practitioners also but the evidence is that Lenovo’s products are ‘everyday’ items such as netbooks and laptops. The average consumer for the Splatt’s goods will likewise, in the main comprise the general public.
39. Although I’ve said the products involved are “everyday”, I need to qualify that by saying one doesn’t buy a laptop every day, as one would buy food. The items are high value items which would engage the consumer in considerable care and attention beyond the normal reasonable circumspection. The same would be true even of less valuable items such as the software as this necessarily involves strict compatibility questions. I will factor these observations into my overall assessment.

Use and distinctive character of the earlier trade mark

40. Before I bring my findings together in an overall assessment, I have to consider whether the opponent’s mark has a particularly distinctive character, either arising from the inherent characteristics of the trade mark or because of the use made of it. In terms of its inherent distinctiveness, I consider Lenovo’s mark to be imbued with a moderate level of distinctiveness. That is to say that it does not comprise an invented word, which would be at the highest level of distinctiveness, but rather two known, dictionary words brought together. They both have some ‘reference’ or resonance in relation to the goods and are not therefore completely random and unassociated with those goods in any way. On that basis I believe the earlier mark has a moderately high level of distinctiveness.
41. On the question whether that inherent level of distinctiveness has been enhanced through use, this is not an easy question to answer. It’s not easy to answer essentially because of timing. Splatt’s application was filed on 15th September 2008, this was ostensibly before sales of Lenovo’s products under the name ‘IDEAPAD’ were made in the UK. Launch of the products in the UK appears to have been October 2008 with much of the pre-launch press and

reviews being in August 2008. That said, there is evidence that the term IDEAPAD had been known in the UK as the prospective name for Lenovo's computers from January 2008 when its launch was first announced. For example, in the time limited internet GOOGLE™ search comprising Exhibit YY8, there are hits dated 2nd and 3rd January 2008 on sites www.geek.com and www.reghardware.co.uk, both referring to Lenovo's new laptops or notebooks using the IDEAPAD name. This plainly supports Mr Yang's evidence that the launch was announced worldwide in January 2008. So, even before the products went on sale in the UK, the name was known to the buying public.

42. Whilst I would accept in principle that it would seem possible that, even if actual sales of a product or service had not been made, it would nevertheless be possible to argue that the distinctiveness of a mark had become 'enhanced', in this case I am unwilling to find that enhancement is something I should factor in. This is on the basis that I am unable to say in the circumstances that, apart from the technically curious and specialised computer buyers, that as of 15th September 2008, the *general* buying public will have had sufficient exposure to Lenovo's mark 'IDEAPAD' for it to be said that enhancement had taken place.

Likelihood of confusion

43. The various findings I have arrived at above need now to be factored into an overall assessment of likelihood of confusion. I need to adopt a global approach, which takes into account 'imperfect recollection' on the part of the consumer, as advocated by the ECJ in *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Imperfect recollection is the doctrine whereby a side by side mark comparison does not altogether reflect how marks will be compared in the market place. It is also the case that the authorities, to which I have referred above in para 18 above, recognise two forms of confusion, direct and indirect. By direct confusion, it is meant that the average consumer is likely to mistake one mark for another, assuming imperfect recollection of course. By indirect, it is meant that although the average consumer will not necessarily mistake the respective marks directly, he or she may well nevertheless assume an association, in that goods sold under the mark the subject of the application derive from the same economic undertaking as the goods sold under the earlier mark.
44. I have found the respective marks to share a high level of similarity and the respective goods to be either identical, or at the least highly 'similar'. In particular I have found the respective marks to be conceptually highly similar. I have also found the earlier mark to be possessed of a moderate level of distinctiveness. In all the circumstances I find there is a likelihood of confusion with respect to all the opposed goods. In this case, the nature of confusion may be either direct or indirect as mentioned in para 36 above. In particular, I

would say that indirect confusion may arise on the basis that on seeing Splatt's mark, even if the consumer were to regard the words as conveying the message, "my *big idea* pad" (as opposed to "my *big idea* pad"), it may be assumed that the source of the product were the same as "IDEAPAD", given the closeness of concept, even if the respective marks may not be directly confused.

45. The opposition is therefore successful in its entirety under section 5(2)(b)

46. As Lenovo has been successful under section 5(2)(b), it follows that it will be no better off under section 5(3). However, had I proceeded to consider the case under section 5(3), I would have struggled to find that at the date of filing (15th September 2008), Lenovo had a "reputation" amongst the computer buying public at large, required to invoke that provision (see my discussion in para 33 above). Without such a reputation the provision cannot be invoked.

Costs

47. Lenovo has been totally successful in its opposition and is entitled to a contribution towards its costs. I take account of the fact that that the decision has been reached without a hearing taking place. In the circumstances I award Lenovo the sum of £1300 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

1. Official fee for filing opposition and preparing a statement - £500
2. Filing evidence - £500
3. Filing submissions - £300

Total £1300

48. I order Splatt Print Ltd to pay Lenovo (Beijing) Ltd the sum of £1300. The sum should be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 10 day of November 2010

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