

O-448-12

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 2516213
BY
NPOWER LIMITED
TO REGISTER THE TRADE MARK

SPI

IN CLASSES 01, 04, 07, 09, 16, 35, 36, 37, 39, 40, 41 AND 42

AND

OPPOSITION THERETO UNDER NO.99792
BY
SPIE SA

Trade Marks Act 1994
In the matter of application no. 2516213
by Npower Limited
to register the trade mark

SPI

in classes 01, 04, 07, 09, 16, 35, 36, 37, 39, 40, 41 and 42
and the opposition thereto
under no. 99792
by SPIE SA

BACKGROUND

1. On 13 May 2009, Npower Limited (the applicant) applied to register the above trade mark in classes 01, 04, 07, 09, 16, 35, 36, 37, 39, 40, 41 and 42 of the Nice classification system¹.
2. Following publication of the application on 21 August 2009, SPIE SA (the opponent) filed a notice of opposition against the application. The application was subsequently amended in respect of the specification of goods and services; the applicant now seeks registration in respect of:

Class 01:

Chemicals for use in industry, agriculture, horticulture or in forestry; ash, hydrated calcium sulphate; electricity; gas.

Class 04:

Industrial oils and greases; lubricants; fuels; gas, gaseous fuels, oils; fossil fuels; electricity; electrical energy.

Class 07:

Wind turbines; micro-hydro electric power systems; pipe installation apparatus; pumps and compressors; machines for use in the generation, transmission, distribution, supply and conservation of energy; fuel economisers; washing machines, tumble driers, dishwashers, vacuum cleaners, can openers; food processors, mixers, blenders and liquidizers; electric knives and knife sharpeners; irons; electric can openers; parts and fittings for the aforesaid goods.

Class 09:

Publications in electronic form supplied on-line from databases or from facilities provided on the internet (including web sites); electronic publications, electronic magazines; all aforementioned goods relating to the supply of energy, energy efficiency, maintenance, installation and repair of electrical appliances, heating installations, boilers, plumbing and pipework; security and fire alarms; fire and smoke detectors; fire blankets and fire extinguishers; carbon monoxide detectors; apparatus and instruments for conducting, switching, transforming, accumulating, regulating, monitoring or controlling electricity; solar panels for electricity generation; fuel meters; fuel measuring and dispensing equipment; electronic devices for heating, cooling and ventilating systems; lighting controls and ballasts; external power supplies; devices for monitoring and conserving energy use; devices for tracking energy use; solar panels for electricity generation; solar photovoltaics; repair of electrical appliances, heating installations, boilers, plumbing and pipework; electronic, computer, video and on-line games; mouse mats; electrically heated hair curlers, electric irons, extension leads and power cords; telephones and answering

¹ *International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).*

machines; cellular telephones and accessories; television and video apparatus; trouser presses; parts and fittings for the aforesaid goods and accessories; television and video apparatus; trouser presses; parts and fittings for the aforesaid goods.

Class 16:

Printed matter, printed publications, magazines, newsletters; guides; printed programmes, educational and teaching materials; catalogues; promotional material; all relating to the supply of energy, energy efficiency, maintenance, installation and repair of electrical appliances, heating installations, boilers, plumbing and pipework; tickets; stationery; diaries, calendars, note books, address books, writing implements; pens, pencils; certificates relating to carbon credits.

Class 35:

Business project management; business advisory services; organisation, operation and supervision of incentive and loyalty schemes; advertising, marketing and promotional services; provision of advertising, marketing and promotional services on-line from computer databases or the internet (including web sites); business and commercial information services; provision of product information; computerised information storage and dissemination and retrieval services; on-line data processing services, compilation, storage, analysis and retrieval of information and data; arranging, conducting and production of exhibitions, trade shows and trade events; relocation services; all the aforesaid services relating to the supply of energy, energy efficiency, maintenance installation and repair of electrical appliances, heating installations, boilers, plumbing and pipework; retail and wholesale services connected with the sale of household electrical goods; wholesaling and retailing of carbon credits; organising and conducting volunteer programmes and community service projects; organisation, operation and supervision of an incentive scheme for the purpose of reducing levels of carbon dioxide or other greenhouse gases; advisory, information and consultancy services relating thereto.

Class 36:

Financial and insurance services; advisory services relating to credit; arranging of credit; consumer credit services; credit agency services; credit assessment services; credit bureaux services; credit counseling services; credit insurance services; credit management services; credit recovery services; credit reference services; debt collection services; bailiff services; collection of debts; debt factoring; debt management services; organisation of debt collection, all aforesaid services relating to the supply of energy, energy efficiency maintenance, installation and repair of electrical appliances, heating installations, boilers, plumbing and pipework; financial services relating to the use of energy efficient gas and electric services and appliances; awarding of grants in relation to the use of energy efficient gas and electric services and appliances; sports sponsorship; charitable fund raising; brokerage of carbon credits; issuing of tokens of value in relation to incentive schemes for the purpose of reducing levels of carbon dioxide and/or other greenhouse gases in the atmosphere; charitable fundraising and fundraising for community and environmental projects; advisory, information and consultancy services relating to all the aforesaid services.

Class 37:

Insulation of buildings; household maintenance, repair, installation and support services; plumbing services; electrical wiring services; installation, maintenance and repair of windows and conservatories; installation, maintenance and repair of air flow and air conditioning apparatus; maintenance, servicing and repair of gas and electricity generating plants; installation, maintenance, repair and servicing of gas and electric appliances, pipe works and transmission lines; installation, maintenance, repair and servicing of apparatus and instruments using gas or electricity; installation, maintenance, servicing and repair of fire, smoke and security alarms and detectors; installation, maintenance, repair and servicing of central heating systems; consultancy; information and advisory services relating to all the aforesaid services.

Class 39:

Storage, distribution and supply of power and water; gas and electricity storage, supply and distribution services; transport and delivery of goods by road, rail and air; storage, distribution, transportation and delivery of gas and gaseous fuels; transmission and/or distribution and/or supply of gas, electricity and other energy sources; distribution and supply of water; sewage collection, removal and storage; waste collection, removal and storage; travel agency and holiday travel booking services; household and commercial removal services; furniture removal; hire of removal apparatus; packing of goods for removal; van hire; storage of goods; consultancy; information and advisory services relating to all the aforesaid services.

Class 40:

Power generation; production of energy; energy generation; water treatment; sewage treatment, waste treatment; recycling of chemicals; processing and refinement of fuel materials; conversion of by products from cooling towers into a domestic heating supply; consultancy; information and advisory services relating to all the aforesaid services.

Class 41:

Publication of books, pamphlets and publicity texts; organisation of conferences, exhibitions, seminars; arranging and conducting courses, conferences, exhibitions, events and seminars; all the aforesaid services relating to the supply of energy, energy efficiency, maintenance, installation and repair of electrical appliances, heating installations, boilers, plumbing and pipework; Education, personnel training and development services relating to the gas and electricity industry; organisation and conducting of entertainment events; provision of facilities for entertainment events; entertainment information; consultancy; arranging and conducting competitions; leisure events and awards; information and advisory services relating to all the aforesaid services.

Class 42:

Advisory, information and consultancy services relating to energy management and efficiency; organisation of energy efficiency projects; energy efficiency management and consultancy; auditing energy consumption of buildings; energy conservation management; preparation of reports on energy consumption of buildings; auditing of energy consumption and of efficiency of operation of appliances and safety checking of appliances and pipework; testing of gas and electricity generating plants, gas and electric appliances, pipework, transmission lines and apparatus and instruments utilising gas and electricity; prospecting and exploiting natural, fossil and nuclear fuel resources; testing of gas and electric appliances; social security and government benefit advisory services; provision of information, advice and consultancy in relation to carbon offsetting; development and implementation of processes which are intended to reduce levels of greenhouse gases in the atmosphere; research and consultancy, all relating to the aforesaid services; information and advisory services relating to all the aforesaid services.

3. The grounds of opposition were brought under sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 (the Act). On 29 November 2011 the opponent's representative informed the Trade Marks Registry that the opponent would not be filing evidence. Consequently, the 5(4)(a) ground has been struck out of these proceedings.

4. The opposition is directed against the applicant's goods and services in classes 7, 9, 16, 36, 37, 40, 41 and 42.

5. The opponent relies on the following earlier mark:

Mark details and relevant dates	Goods and services
<p>CTM: 5239348</p> <p>MARK:</p>  <p>Filing date: 3 August 2006</p> <p>Registration date: 18 July 2007</p>	<p>Class 06: Metal building materials; transportable buildings of metal; reinforcing materials, door and window frames of metal; reinforcing materials of metal for pipes; metal nuts; clips of metal for cables and pipes; swimming pool basins of metal; rings and collars of metal; building materials of metal; shuttering and reinforcing materials, of metal, for concrete; grommet thimbles; cable joints and cables of metal, non-electric; railway switches; loading pallets of metal, railway sleepers and switches of metal, valves of metal for pipes; ducts of metal for ventilating and air conditioning installations; partitions and fences of metal; metal tubes and pipes; scaffoldings of metal; staircases of metal; brackets of metal; wire of common metal; gutters of metal; posts and stakes of metal; wall linings and panels of metal; skating rinks (structures of metal); ceilings and floors of metal; joists and girders of metal, platforms, prefabricated, of metal; blinds and shutters of metal; site buildings of metal; metal materials for railway tracks.</p> <p>Class 07: Machines for construction and public works; rough grinding mills; concrete mixers; concrete mixers; elevators (lifts) and elevating apparatus; tarring machines; cranes and other lifting and hoisting apparatus; pneumatic hammers; power hammers; rail laying machines; road rollers; earth moving machines; winches.</p> <p>Class 09: Checking (supervision), life-saving and signalling apparatus and instruments; electronic control apparatus and instruments for railway and motorway networks, bridges and tunnels; alarms and fire protection systems; protective helmets; power lines and cables; video and remote surveillance systems; electric installations for the remote control of industrial or other operations; ducts (electricity), electrical connections and relays; control panels (electricity); conductors, electric and electricity conduits; wires, electric, telephone wires; magnetic wires;</p>

	<p>optical fibres; aerials; masts for wireless telephony; apparatus for the remote control of signals; electric monitoring apparatus; railway traffic safety appliances; apparatus for recording, transmission or reproduction of data, sound or images; intercommunication apparatus; telephone apparatus; telecommunications apparatus and instruments; data processing apparatus, computers and computer peripherals; recorded computer programs; magnetic data carriers.</p>
	<p>Class 11: Apparatus and installations for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, air conditioning and liquid or gas distribution; sanitary installations.</p>
	<p>Class 12: Land vehicles; ladle cars, fork lift trucks; rolling stock for railways, railway couplings, wagons; tramcars; cable transport apparatus and installations.</p>
	<p>Class 17: Plastic basic products; packing, insulating and stopping materials, waterproof or insulating packing; flexible pipes, not of metal; synthetic fibres not for textile use; semi-finished products of synthetic resins.</p>
	<p>Class 19: Building materials (non-metallic), non-metallic rigid pipes for building; non-metallic transportable buildings; site buildings, not of metal; swimming pool basins, not of metal; pipes and tubes, not of metal, for the conveyance of fluids or gas.</p>
	<p>Class 36: Insurance; financial affairs; project finance; real estate management, real estate appraisals.</p>
	<p>Class 37: Construction (building and public works); repair; installation services; building construction and installation supervision; installation and maintenance of all kinds of electrical and electromechanical equipment for industrial or collective use; installation and maintenance of telecommunications and information networks; installation and maintenance of equipment and systems for energy transport and distribution; installation and maintenance of automatic systems; installation and maintenance of all</p>

	<p>transport systems and infrastructures (railway, urban, motorway, port or airport); construction, installation and maintenance of energy production plants; installation and maintenance of air conditioning systems; construction, restoration and maintenance of buildings for all purposes; construction, restoration and maintenance of infrastructure, civil engineering works and pipelines; underground, marine and inland waterway construction work; construction of special foundations; maintenance of real estate; rental of construction machinery and equipment; consultancy and advice in relation to construction (building - public works).</p>
	<p>Class 38: Telecommunication and information in the field of telecommunication; electronic mail; communication by computer terminals; computer-aided transmission of messages and images; transmission by satellite, cable and optical fibre; communications and telephone services, cellular telephone communication; cable television broadcasting; leasing access time to a computer database.</p>
	<p>Class 41: Providing of training and tuition in the fields of construction and electrical and electronic engineering; providing sports facilities; organising and arranging of congresses, conferences and seminars.</p>
	<p>Class 42: Architecture; surveying; engineering drawing; construction drafting; consultancy and advice in the field of electrical and electromechanical engineering; design and engineering services in the field of construction, transport and electrical and electromechanical engineering; technical project studies and design, in particular in the fields of construction, transport and electrical and electromechanical engineering; design and updating of computer software; rental of computer software; consultancy and advice relating to relating to computing (systems and networks); leasing access time to a computer for the manipulation and processing of data.</p>
	<p>Class 45: Warden or surveillance services.</p>

6. In its statement of grounds the opponent states:

“4. The mark applied for, SPI, is similar to the mark on which this opposition is based, SPIE & Device. The mark applied for covers goods and services in Classes 7, 9, 16, 36, 37, 40, 41 and 42 which are identical or similar to those covered by the Opponent’s CTM registration No. 5239348. As such, a likelihood of confusion exists between the respective marks.”

7. On 26 May 2011, the applicant filed a counter statement in which it denies the grounds of opposition. It states:

“7.c. The Applicant denies that the goods and services remaining in the application are identical with or similar to the goods for which the Opponent’s mark is protected. The Applicant denies that there is any likelihood of confusion arising on the part of the public, or any likelihood of confusion of association with the Opponent’s trade mark and denies the application should be refused under Section 5(2)(b) of the Act.”

8. On 11 June 2012, I wrote to the opponent requesting them to specify which of the goods and services in the application they considered to be similar or identical to their own and to provide reasons to support the claims. On receipt of the submissions the applicant was given 28 days in which to respond. The parties’ respective submissions were received on 9 July 2012 and 14 August 2012.

9. The opponent's mark is an earlier mark not subject to proof of use because at the date of publication of the application, it had not been registered for five years.²

10. Neither party filed evidence, though the applicant filed written submissions during the period allowed for filing evidence. Both parties filed submissions at my request in respect of the goods and services. Neither party filed submissions in lieu of attendance at a hearing or requested to be heard. I will refer to all of the submissions as necessary below.

DECISION

11. Section 5(2)(b) of the Trade Marks Act 1994, states:

“(2) 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.”

12. In his decision in *La Chemise Lacoste SA v Baker Street Clothing Ltd* - BL O/330/10 (approved by Arnold J in *Och-Ziff Management Europe Ltd v Och Capital LLP* [2011] FSR 11), the Appointed Person, Mr Geoffrey Hobbs QC, expressed the test under this section (by reference to the CJEU cases mentioned) on the basis indicated below:

² See section 6A of the Act (added by virtue of the Trade Marks (Proof of Use, etc.) Regulations 2004: SI 2004/946) which came into force on 5th May 2004.

The CJEU cases

Sabel BV v Puma AG [1998] RPC 199; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77; *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723; *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-6/01; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04; *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P.

The principles

“(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, 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, 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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 great 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;

(k) if the association between the marks causes the public to 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

13. In comparing the goods and services, I bear in mind the following guidance provided by the General Court (GC) in *Gérard Meric v OHIM*, Case T-133/05:

“29. ...goods can be considered identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

14. In comparing the respective specifications, all relevant factors should be considered, as per *Canon* in which the CJEU stated, at paragraph 23 of its 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 intended purpose and their method of use and whether they are in competition with each other or are complementary.”

15. Other factors which may be considered include the criteria identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281 (hereafter *Treat*) for assessing similarity between goods and services:

(a) the respective *uses of* the respective goods or services;

(b) the respective *users of* the respective goods or services;

(c) the *physical nature* of the goods or acts of service;

(d) the respective *trade channels* through which the goods or services reach the market;

(e) in the case of self-serve consumer items, where in practice they are found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) the extent to which the respective goods or services are competitive, taking into account how goods/services are classified in trade.

16. I also bear in mind the decision in *El Corte Inglés v OHIM* Case T-420/03, in which the court commented:

“96...goods or services which are complementary are those where 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 the production of those goods or provision of those services lies with the same undertaking (Case T-169/03 *Sergio Rossi v OHIM-Sissi Rossi* [2005] ECR II-685)”

17. I also take note of the case of *Les Éditions Albert René V Office for Harmonisation in the Internal Market (Trade Marks & Designs)* (OHIM) T-336/03, where it was held:

“The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature, intended purpose and the customers for those goods may be completely different.”

18. When considering the parties services I am mindful of the decision in *Avnet Incorporated v Isoact Ltd* [1998] FSR 16, in which Jacob J stated:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meaning attributable to the rather general phrase.”

19. In their respective submissions, the parties accept that the following goods and services in the application are similar or identical to those in the opponent’s specification:

Class 7

Wind turbines; micro-hydro electric power systems; machines for use in the generation, transmission, distribution, supply and conservation of energy.

Class 9

security and fire alarms; fire and smoke detectors; fire blankets and fire extinguishers; apparatus and instruments for conducting, switching, transforming, accumulating, regulating, monitoring or controlling electricity; electronic devices for heating, cooling and ventilating systems; lighting controls and ballasts; external power supplies; repair of electrical appliances, heating installations, boilers, plumbing and pipework; television and video apparatus.*

Class 36

Financial and insurance services; advisory services relating to credit; arranging of credit; consumer credit services; credit agency services; credit assessment services; credit bureaux services; credit counselling services; credit insurance services; credit management services; credit recovery services; credit reference services; debt collection services; bailiff services; collection of debts; debt factoring; debt management services; organisation of debt collection, all aforesaid services relating to the supply of energy, energy efficiency and pipework; financial services relating to the use of energy efficient gas and electric services and appliances; awarding of grants in relation to the use of energy efficient gas and electric services and appliances; sports sponsorship; charitable fund raising; brokerage of carbon credits; issuing of tokens of value in relation to incentive schemes for the purpose of reducing levels of carbon dioxide and/or other greenhouse gases in the atmosphere; charitable fundraising and fundraising for community and environmental projects; advisory, information and consultancy services relating to all the aforesaid services.

Class 37

Household maintenance, repair, installation and support services; electrical wiring services; installation, maintenance and repair of windows and conservatories; installation, maintenance, repair and servicing of gas and electric appliances, pipe works and transmission lines; installation, maintenance, repair and servicing of apparatus and instruments using gas or electricity; installation, maintenance, servicing and repair of fire,

smoke and security alarms and detectors; installation, maintenance, repair and servicing of central heating systems; consultancy; information and advisory services relating to all the aforesaid services; installation, maintenance and repair of air flow and air conditioning apparatus; maintenance, servicing and repair of gas and electricity generating plants

Class 41

Organisation of conferences, exhibitions, seminars; arranging and conducting courses, conferences, exhibitions, events and seminars; all the aforesaid services relating to the supply of energy, energy efficiency, maintenance, installation and repair of electrical appliances, heating installations, boilers, plumbing and pipework; Education, personnel training and development services relating to the gas and electricity industry; organisation and conducting of entertainment events; provision of facilities for entertainment events; consultancy; arranging and conducting competitions, sporting events and competitions, leisure events and awards; information and advisory services.

Class 42

Advisory, information and consultancy services relating to energy management and efficiency; research and consultancy; information and advisory services relating to all the aforesaid services.

* The terms underlined in class 9 are not „goods’ as are included within the class 9 specification, (though the wording forms part of the limitation within that class). Consequently, they will not form part of my consideration.

20. The remaining goods and services to be compared (identified by the parties in their respective submissions) are as follows:

Opponent’s goods and services	Applicant’s goods and services
Class 7 Machines for construction and public works	Class 7 Pipe installation apparatus Pumps and compressors
Class 11 Apparatus and installations for heating	Class 9 Fuel meters; fuel measuring and dispensing equipment
Class 41 Providing of training and tuition in the fields of construction and electrical and electronic engineering AND Consultancy and advice in the field of electrical and electromechanical engineering	Class 9 Publications in electronic form supplied on-line from databases or from facilities provided on the internet (including web sites); electronic publications, electronic magazines; all aforementioned goods relating to the supply of energy, energy efficiency, maintenance, installation and repair of electrical appliances, heating installations, boilers, plumbing and pipework
Class 9 Life saving apparatus and instruments	Class 9 carbon monoxide detectors

Class 9 Control panels (electricity)	Class 9 solar panels for electricity generation
Class 9 Conductors, electric and electricity conduits	Class 9 solar photovoltaics
Class 9 Recorded computer programs; magnetic data carriers	Class 9 electronic, computer, video and on-line games
Class 41 Providing of training and tuition in the fields of construction and electrical and electronic engineering AND Consultancy and advice in the field of electrical and electromechanical engineering	Class 16 Printed matter, printed publications, magazines, newsletters; guides; printed programmes, educational and teaching materials; catalogues; promotional material; all relating to the supply of energy, energy efficiency, maintenance, installation and repair of electrical appliances, heating installations, boilers, plumbing and pipework;
Class 37 Installation services; construction, restoration and maintenance of buildings for all purposes	Class 37 Insulation of buildings
Class 37 Repair; installation services; restoration and maintenance of buildings for all purposes	Class 37 Plumbing services
Class 37 Construction, installation and maintenance of energy production plants	Class 40 Power generation; production of energy; energy generation.
Class 37 Construction, restoration and maintenance of infrastructure, civil engineering works and pipe lines; underground, marine and inland waterway construction work	Class 40 Water treatment, sewage treatment; waste treatment.
Class 42 Consultancy, and advice in the field of electrical and electromechanical engineering; design and engineering services in the field of construction, transport and electrical and electromechanical engineering	Class 42 Organisation of energy efficiency projects; energy efficiency management and consultancy; auditing energy consumption of buildings; energy conservation management; preparation of reports on energy consumption of buildings

<p>Class 37 Construction, restoration and maintenance of infrastructure, civil engineering works and pipe lines; underground, marine and inland waterway construction work AND Class 11 Apparatus and installations for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, air conditioning and liquid or gas distribution</p>	<p>Class 42 Auditing of energy consumption and of efficiency of operation of appliances and safety checking of appliances and pipework; testing of gas and electricity generating plants, gas and electric appliances, pipework, transmission lines and apparatus and instruments utilising gas and electricity</p>
<p>Class 9 Apparatus for the remote control of signals; electric monitoring apparatus; control panels (electricity) AND Class 11 Apparatus and installations for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, air conditioning and liquid or gas distribution</p>	<p>Class 42 Testing of gas and electric appliances</p>

21. There is no opposition to the remaining goods and services.

The applicant's goods in class 7

22. In its submissions dated 14 August 2012 the applicant refers to the opponent's goods in this class and states:

"The term 'public works' is not understood or explained by the opponent."

23. While it is true to say that the opponent has not provided an explanation of the term in its submissions, this does not prevent me from considering the similarity of goods. The applicant's goods are „pipe installation apparatus'. Since „pipe installation apparatus' are used in construction they fall within the broader term „machines for construction' and these goods are identical in accordance with *Meric*. The opponent also relies on „machines for construction and public works' against the applicant's „pumps and compressors' in class 7. Pumps and compressors are machines which are used in many applications which can include for use in the construction industry. Pumps can be used for clearing water from sites, moving cement and so on. Consequently, in accordance with *Meric*, these goods are also identical.

The applicant's goods in class 9

24. The opponent relies on „apparatus and installations for heating' in class 11 to oppose the applicant's „fuel meters; fuel measuring and dispensing equipment' in class 9. The opponent's goods may be used by an individual or a professional, while the applicant's goods are more likely to be used by a professional. A member of the general public may use a fuel meter, for example the fuel gauge in a car, but is unlikely to be the average consumer of the meters themselves. The opponent's goods have the sole purpose of

providing heating, whereas the applicant's goods are for measuring and/or dispensing fuel. A fuel meter or dispensing device may be part of an apparatus for heating but this does not mean that they are necessarily similar goods. The goods are not complementary in the sense that one is indispensable for the use of the other, nor can they be used interchangeably. In accordance with *Les Éditions Albert René*, taking into account the nature, purpose and users of these goods, the goods are not similar.

25. The applicant's 'publications in electronic form' are 'supplied on-line from databases or from facilities provided on the internet' and are limited to publications relating to the supply of energy, energy efficiency, maintenance, installation and repair of electrical appliances, heating installations, boilers, plumbing and pipework. They will be used by anyone seeking such information whether they are a professional or a member of the general public. The opponent considers these goods to be similar to its own services in class 41 for the provision of training and tuition in the fields of construction and electrical and electronic engineering. The user of such a service will be a student wishing to learn construction and electrical and electronic engineering or a qualified person in that field wishing to keep his knowledge up to date. There is a degree of overlap in the purpose of the parties' goods to the extent that both provide information and may be provided online. There is some overlap between the trade channels as a training service may be provided online in the same way that the applicant's goods are. However, a training service is likely to be offered by a person or organization with the appropriate licenses and qualifications whereas the type of electronic publications in the applicant's specification will be widely available from a range of publishing houses, marketing departments etc. Electronic publications of the type listed in the applicant's specification may be used as part of a training service, but this does not mean that they are complementary and they are not in competition. There is a degree of similarity between these goods and services for the reasons identified above, though it is at a low level.

26. The opponent also seeks to rely on 'consultancy and advice in the field of electrical and electromechanical engineering' against the applicant's electronic publications discussed in the previous paragraph. Users of consultancy services in this field are likely to be professionals, whereas the applicant's electronic publications may be used by the public at large, which may include professionals. The purpose of a consultancy service is to provide expert advice in a particular field, in this case electrical and electromechanical engineering. The purpose of the applicant's electronic publications is to provide information relating to supply of energy, energy efficiency, maintenance, installation and repair of electrical appliances, heating installations, boilers, plumbing and pipework. The trade channels are different. A consultancy service is likely to be bespoke whereas the publications provided by the applicant are for general consumption. The goods and services are not complementary, nor are they in competition. There is no similarity between these goods and services.

27. The opponent states that its 'life saving apparatus and instruments' are similar to the applicant's 'carbon monoxide detectors' on the basis that they both save lives. Life saving apparatus and instruments are used by someone, usually a medical professional or someone with medical training, in order to save the life of another. They are moveable goods in the sense that they need to be able to be taken to the person whose life is at risk. A carbon monoxide detector is used by a member of the general public in their home or by businesses. It is used to detect an excess of carbon monoxide in the atmosphere and is normally fixed to a wall, adjacent to heating or other apparatus which may produce excess carbon monoxide. It is a warning device, which may save lives as a result, but its principal purpose is to provide an alert allowing time to correct the problem or escape the situation.

The trade channels for these goods are different; they are not complementary and are certainly not in competition. The users, nature and purpose are entirely different. These are dissimilar goods.

28. The opponent also submits that its 'control panels (electricity)' are similar to the applicant's 'solar panels for electricity generation'. Solar panels will be used by a member of the general public or a professional to generate electricity. They are large panels which by their nature, must be placed prominently to 'collect and convert' light. As a general rule this is achieved by placing them on a roof, or on a frame in an open space. Control panels may be used by a member of the general public or a professional, though it is less likely that a member of the general public will look to purchase such goods directly but they will normally be fitted by a professional as part of an installation along with other apparatus which may include a control panel, such as a solar panel installation. However, in accordance with the decision in *Les Éditions Albert René*, this does not necessitate a finding of similarity. Control panels are used to regulate the throughput of electricity and are often hidden or locked away. Solar panels are specialist goods which must be purchased from specialist suppliers. The term control panels cover many uses and in some forms are readily available from DIY stores. The goods are not complementary in the sense that one can be used in place of the other, nor are they in competition. Taking all of these factors into account, these goods are dissimilar.

29. Also in class 9, the opponent submits that the applicant's 'solar photovoltaics' are similar to its own 'conductors, electric and electricity conduits'. Solar photovoltaics are the cells which make up solar panels and convert light to electricity. They will be used by anyone who uses solar panels, i.e. a member of the general public or, more likely, a professional. Conductors conduct existing electricity and allow it to move from one place to another while conduits protect its transit. Again these goods may be used by a member of the general public or a professional. They may be large industrial goods or smaller goods for use in the home. Solar photovoltaics are highly specialised goods with a limited number of suppliers. Conductors and conduits are far more readily available from a number of suppliers online or from stores. It is clearly not possible to use one of these goods in place of the other and they are not in competition. These goods are dissimilar.

30. The final comparison necessary in class 9 is the opponent's goods 'recorded computer programs; magnetic data carriers' against the applicant's 'electronic, computer, video and on-line games'. The users of both types of goods would be members of the general public. In the case of the opponent's recorded computer programs, these may include complex programs for specialist use so the users may also be professionals and businesses. Recorded computer programs will generally be available on a type of storage device, i.e. magnetic data carrier. However, I do not discount the fact that increasingly, computer programs are available to download online, avoiding the need for hard storage. Computer, video and online games are clearly intended to entertain. They are made available on storage devices and directly online. There is some cross over in terms of trade channels for these goods as the computer programs and games on hard storage devices, as well as the magnetic data carriers themselves, may be available from the same high street and online stores. However, they will be displayed in different areas of those stores. Turning to online programs and games, these are unlikely to be available via the same websites. Gaming websites tend to be provided for 'gamers' to play online and do not offer any additional computer programs. Specialist and bespoke computer programs will have their own particular niche outlets. These goods are not complementary, nor are they in competition. Taking all of these factors into account, I find there to be a moderate degree of similarity between recorded computer programs and electronic, computer, video and

online games and a low level of similarity between magnetic data carriers and electronic, computer, video and online games, as they are one step removed from the games themselves.

The applicant's goods in class 16

31. The applicant's goods in this class are „printed matter, printed publications, magazines, newsletters; guides; printed programmes, educational and teaching materials; catalogues; promotional material; all relating to the supply of energy, energy efficiency, maintenance, installation and repair of electrical appliances, heating installations, boilers, plumbing and pipework'. The opponent is relying on the same services as were relied on against the electronic versions of these goods. With the exception of „educational and teaching materials', my analysis is the same as that provided above at paragraph 24, since the goods in class 16 are simply the printed version of the goods in class 9. These goods and services are similar to a low degree.

32. Educational and teaching materials will be used by an educator to teach another or by a student who wishes to learn about the supply of energy, energy efficiency, maintenance, installation and repair of electrical appliances, heating installations, boilers, plumbing and pipework. The user of the opponent's training services will be a student wishing to learn about construction and/or electrical and electronic engineering. A training service may be provided online or face to face while the applicant's materials will be provided in printed form. The users may be the same, the purpose may also overlap. The nature of the goods and services are different. The goods and services are not complementary, nor are they in competition. Taking all of these factors into account, there is some degree of similarity but it is at a fairly low level.

33. The opponent also relies on „consultancy and advice in the field of electrical and electromechanical engineering' against the applicant's printed matter in class 16. As discussed above, the consultancy services provide expert opinion in two specialist fields and are likely to be used by professionals. The applicant's goods may be used by professionals but will generally be used by members of the general public for information. The trade channels will be completely different as consultancy services are specialist services while printed matter is available easily, from many different sources. Some of it may be purchased or it may be provided free upon a request for information or included with a new product. The goods and services are not fungible and are not in competition. These goods and services are dissimilar.

The applicant's services in class 37

34. The applicant's services are „insulation of buildings'. The opponent's services, in the same class, are „installation services; construction, restoration and maintenance of buildings for all purposes'. Insulation of buildings is part of the process of construction and in older buildings, part of the restoration and/or maintenance of the building. As such these services are identical according to the principles laid down in *Meric*.

35. „Plumbing services' in the applicant's specification would be included in the broader term „repair, installation services; restoration and maintenance of buildings for all purposes' in class 37 of the opponent's specification. Consequently, these services are identical.

The applicant's services in class 40

36. The applicant's services are „power generation; production of energy; energy generation.’ These are services which create energy and may be used by the general public or by businesses. They may be the product of a power plant or a small domestic electricity generator. The opponent's services are „construction, installation and maintenance of energy production plants’. These are highly specialist services which will not be used by the general public but by professionals wishing to have a power plant constructed, installed or maintained. The natures of these services differ as the opponent's services build, fit and maintain a power plant while the applicant's services are concerned with the creation of energy. This may be via a power plant but it may not. The trade channels for these goods are different, they are not complementary as one is not necessary for the use of the other and they are not in competition. These services are dissimilar.

37. The applicant's remaining services in class 40 are „water treatment, sewage treatment; waste treatment’. The opponent's services which, in its view, are similar are „construction, restoration and maintenance of infrastructure, civil engineering works and pipe lines; underground, marine and inland waterway construction work.’ The applicant's services may be used by a member of the general public or businesses and will be used for the processing of water, sewage and waste. The opponent's services will be used by professionals to build, restore and maintain infrastructures, and waterways and may include the construction of plant intended to treat water, sewage or waste but the nature of the services is completely different: the applicant's services treat water, waste and sewage, whilst the opponent's services are for construction, restoration and maintenance. While these services include the building, restoration and upkeep of waterways they are not in any way related to the treatment of water, sewage or waste. The trade channels will be entirely different. The provision of water, sewage and waste treatment will not be obtained from the same source as construction services for civil engineering and waterways. The services are not complementary nor are they in competition. These are dissimilar services.

The applicant's services in class 42

38. The opponent relies on „consultancy, and advice in the field of electrical and electromechanical engineering; design and engineering services in the field of construction, transport and electrical and electromechanical engineering’ against the applicant's „organisation of energy efficiency projects; energy efficiency management and consultancy; auditing energy consumption of buildings; energy conservation management; preparation of reports on energy consumption of buildings’. Both parties' services are fairly specialist in nature and are likely to be used primarily by professionals and businesses. However, in the case of the applicant's services, energy efficiency audits now form part of the process of buying, selling and renting property and therefore such services may be used by a member of the general public. Both parties' services provide consultancy but in separate fields, the opponent's relating to electrical and electromechanical engineering while the applicant's relate to energy efficiency. These services are not accessed through the same trade channels and are not complementary or in competition. Consequently, these services are dissimilar. The opponent also relies on design and engineering services in relation to construction, transport and electrical and electromechanical engineering. Design and engineering services are not accessed through the same trade channels as the applicant's organisation, auditing and energy conservation services. They self

evidently have a different purpose and are not complementary or in competition. The services are dissimilar.

39. The opponent relies on „construction, restoration and maintenance of infrastructure, civil engineering works and pipe lines; underground, marine and inland waterway construction work’ in class 37, against the applicant’s „auditing of energy consumption and of efficiency of operation of appliances and safety checking of appliances and pipework; testing of gas and electricity generating plants, gas and electric appliances, pipework, transmission lines and apparatus and instruments utilising gas and electricity’. The opponent’s services will be used by professionals and specialists for building, restoring and maintaining structures, pipelines and waterways. The applicant’s services will be used by members of the general public when having gas and electric appliances and apparatus serviced and also by businesses and professionals, especially in the case of, inter alia, power plants and civil engineering works. The services are used to test, check and audit equipment relating to energy production. The trade channels are clearly different. Construction, restoration and maintenance of the type described in the opponent’s specification are specialist services provided under detailed contracts. The services in the application may be provided to a householder through a gas or electricity provider or by a local fitter but may also be provided by large companies e.g. in the testing of power plants. The services are not complementary, nor are they in competition.

40. The opponent also relies on „apparatus and installations for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, air conditioning and liquid or gas distribution, in class 11 against „auditing of energy consumption and of efficiency of operation of appliances and safety checking of appliances and pipework; testing of gas and electricity generating plants, gas and electric appliances, pipework, transmission lines and apparatus and instruments utilising gas and electricity’. The users of the opponent’s goods may be members of the general public or businesses who wish to light, heat, generate steam, cook, chill, dry, ventilate or make use of air conditioning. Liquid and gas distribution are likely to be used in a more specialist context. I have already discussed the users and uses of the applicant’s services above and they are considerably different. The trade channels for this type of apparatus will be suppliers of large apparatus for these purposes, as well as websites and stores selling domestic appliances. The applicant’s services will be available by contract either through a service provider or under a specialist agreement between businesses. The goods and services are not complementary nor are they in competition. I find the goods and services to be completely dissimilar.

41. Finally, the opponent is relying on „apparatus for the remote control of signals; electric monitoring apparatus; control panels (electricity)’ in class 9 and „apparatus and installations for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, air conditioning and liquid or gas distribution’ in class 11 against the applicant’s „testing of gas and electric appliances’. I will deal with the opponent’s goods in class 9 first. The user of the opponent’s goods will be a person wishing to control a signal by remote means or monitor or control something. The goods will be used to control or monitor a signal or apparatus and may be in the form of a small device within a larger final product or (as discussed earlier, in the case of control panels) may be a large panel in its own secure room. The users of the applicant’s services may be members of the general public or businesses wishing to have their electric and/or gas appliances tested, or businesses/manufacturers wishing to meet quality control standards and ensure their products are fit for purpose. The services provide testing of gas and electrical appliances which may be carried out by a professional, either on request or to enable appliances to

pass quality control or meet particular required standards. I am mindful of the applicant's comments regarding these services in its submissions dated 14 August in which it states:

"...the provision of a testing service is generally carried out by a third party unrelated to the provider of the goods being tested."

The trade channels for these goods and services are completely different. The goods and services are not complementary, nor are they in competition and I find them to be dissimilar.

42. Turning to the opponent's goods in class 11, the users may be members of the general public or businesses who wish to light, heat, generate steam, cook, chill, dry, ventilate or make use of air conditioning. These goods include a wide range of products from table lamps to large refrigerated units. The trade channels for these goods and the applicant's services differ as the opponent's goods will be available online or from stores, whereas the applicant's services are specialist services available from particular registered providers. The goods and services are not complementary nor are they in competition. Taking into account the nature, purpose and users of these goods and services, these goods and services are dissimilar.

Comparison of the respective marks

43. The marks to be compared are:

Opponent's mark	Applicant's mark
	SPI

44. In making a comparison between the marks, I must consider the respective marks' visual, aural and conceptual similarities with reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components³, but without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details.

Dominant and distinctive components

45. The opponent's mark consists of the four letters SPIE. There is some degree of stylisation to the letters which are presented in upper case. In addition to the letters there is a circular device above the letter 'I' which contains six pale lines presented in fan spacing starting on the right of the circle and enlarging until the sixth line touches both sides of the circle at its base. Neither the letters nor the device are de minimis within the mark as a whole, both being distinctive, though the word is more dominant.

46. The applicant's mark, 'SPI', does not split into separate distinctive and dominant components. It will be viewed as the three letters 'SPI' which is its only constituent part.

³ *Sabel v Puma AG, para.23*

Visual similarities

47. The applicant submits:

“3. The marks are three and four letters long respectively. However, the mark of registration number 5239348 includes a distinctive device element which takes the place of the letter ‘l’. The opposed mark is represented in capital letters whereas the earlier mark is represented in stylised letters which adds a degree of distinctiveness. Furthermore, the earlier mark includes the letter ‘e’. This letter is equally dominant in comparison to the other letters making up the mark and as such there is no reason to suggest that the consumer would not notice this letter as although it is at the end of the mark it would not be overlooked. Accordingly, although the marks have two letters in common, namely SP, the presence of the additional letter ‘e’ in the earlier mark together with the use of the figurative element in place of the letter ‘l’ are sufficient to dispel any visual similarities between the marks and any perceived similarity is, we submit, insufficient to outweigh the clear visual differences between the marks. The presentational aspects of the later trade mark should be taken into account and as such there is only a low level of visual similarity between the two marks.”

The applicant suggests that the parties’ respective marks share the first two letters „SP’ with the third part of the opponent’s earlier mark consisting of „a distinctive device element’ in place of the letter ‘l’.

48. In my view both marks share the three letters „SPI’. The third letter in the earlier mark consists of a letter ‘l’ the same height as the ‘P’ and ‘E’ either side of it. It could be considered to be an enlarged lower case „l’ with the addition of a tittle formed by the device, or an upper case ‘l’, the third in a four letter mark „SPIE’ which has a device element presented above the word. However in either case the third letter is clearly a letter ‘l’. In addition to those three letters the opponent’s mark consists of stylised letters which provide a minor point of difference, as does the additional letter ‘E’ and the circular device element presented above the letter ‘l’.

49. Taking all of these factors into account I find there to be a fairly low degree of visual similarity between the marks.

Aural similarities

50. In respect of any aural similarity the applicant submits:

“4. ...the later (sic) mark is likely to be pronounced either as a two syllable word i.e. S-PIE or as a single word ‘SPY’ whereas the later trade mark will be pronounced as the separate letters S-P-l and accordingly there is no aural similarity between the marks.”

51. In my view the opponent's mark has two likely pronunciations. The average consumer will not articulate the device element of the mark but will pronounce the letters, either individually, „S-P-l-E” or will pronounce the mark as an invented word, i.e. 'SPY'. Given that „ie’ is a fairly common combination of letters which are well known to the average consumer, I think it likely that the word will be pronounced „SPY’. The applicant's mark also has two likely pronunciations, either the individual letters, „S-P-l’ or as a word, in

which case it will be pronounced „SPY’. The letters SPI do not create a known word, nor do they contain any common combinations of letters that may suggest a word. The letter combination is such that, in my view, the average consumer will pronounce them as the individual letters S-P-I. Taking all of these factors into account, I find the marks to be aurally similar to a fairly low degree (if SPIE is verbalised as letters) or not at all (if SPIE is verbalised as SPY).

Conceptual similarities

52. In its submissions the applicant states:

“5. We submit that neither mark has any meaning and neither mark is likely to create any conceptual image in the mind of the average consumer, we submit that the marks are conceptually neither similar nor dissident; the conceptual position is, in effect, neutral.”

53. I agree. For a conceptual meaning to be relevant it must be one capable of immediate grasp by the average consumer.⁴ Neither of the marks before me are known words and neither includes any indication that they are acronyms for a particular entity which could be readily understood by the average consumer. Consequently, neither sends a conceptual message and I find the conceptual position to be neutral. However, notwithstanding this finding, there is, in my view, an element of difference in the average consumer’s perception of the marks to the extent that the when faced with the opponent’s mark the average consumer will form a word from the four letters present in the mark, whereas, when faced with the applicant’s mark the average consumer will more likely see just the individual letters S-P-I.

Distinctive character of the earlier mark

54. The inherent distinctive character of a trade mark can be appraised only, first, by reference to the goods and services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods and services for which it has been used as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

55. As no evidence has been filed I need only consider the inherent distinctive character of the mark. I have concluded, in the preceding paragraphs, that SPIE has no meaning and will be considered to be an invented word by the average consumer. That, coupled with the distinctive device presented above the letter ‘I’ to form the title, results in a mark which I consider to have a high degree of inherent distinctive character.

Likelihood of confusion

56. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the

⁴ This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIMi* [2006] e.c.r. –I-643; [2006] E.T.M.R. 29.

consumer relying instead on the imperfect picture of them he has kept in his mind.⁵ I must also keep in mind the average consumer for the goods and services, the nature of the purchasing process and have regard to 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 and services and vice versa.

57. I have found that the marks share a fairly low degree of visual similarity and have found the marks to be aurally similar to a fairly low degree (if SPIE is verbalised as letters) or not at all (if SPIE is verbalised as SPY). I have also found conceptual neutrality. I have identified a high level of inherent distinctive character in the opponent's earlier mark. In respect of the parties' goods and services I have identified those which are not contested, those which the parties have accepted are similar or identical and those which required me to make a finding. (My conclusions on these goods and services are at paragraphs 20-41 of this decision). I have concluded that some are identical according to the principles provided in *Meric*, some are similar and some are entirely dissimilar.

58. There is a general rule, clear from decisions such as joined cases T-183/02 and T-184/02⁶, that the first parts of words catch the attention of consumers. However, it is also clear that each case must be decided on its merits. In this case the fact that the first (or only) three letters of each mark are the same does not mean that the overall impression the marks give the average consumer is one of similarity. This is clear from the judgment of the GC in *Inter-Ikea Systems BV v OHIM*, case T-112/06 (where three out of the four letters were identical, sequentially⁸), in which the GC said:

“54. As regards the visual comparison between the verbal element of the contested mark and the earlier word marks, the applicant claims that the only difference between them is the presence of the letter ‘d’ in the contested mark and the letter ‘k’ in the earlier word marks. However, the Court has already held in Case T-185/02 *Ruiz-Picasso and Others v OHIM – DaimlerChrysler(PICARO)* [2004] ECR II-1739, paragraph 54) that, in the case of word marks which are relatively short, even if two marks differ by no more than a single consonant, it cannot be found that there is a high degree of visual similarity between them.”

59. In my view the fact that the three letters SPI (the totality of the applicant's mark) are contained at the start of the opponent's four letter mark, is not, of itself, sufficient for a finding of confusion. I must also take account of the additional letter ‘E’ which makes quite a difference in such a short mark, and the addition of the distinctive device in the opponent's mark.

60. Given the nature of goods and services on which this opposition is based it is clear that the average consumer will include anyone from a member of the general public, making a low price relatively frequent purchase, such as a memory stick, to a professional seeking to purchase civil engineering services, which self evidently requires a higher level of attention to be paid. It is also clear that some of the goods and services are identical, some are similar and some are entirely different. In the case of goods and services which

⁵ *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

⁶ *El Corte Inglés v OHIM – González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)* [2004] ECR II – 965, paragraph 81

⁷ –
965, paragraph 81

⁸ *The words being compared were IDEA and IKEA*

(MUNDICOR) [2004] ECR II –

are dissimilar, I need not go on to consider the similarity of the marks.⁹ In respect of the remaining goods and services, in my view the differences between the parties' respective marks are such that, even where the goods and services are identical and are frequent, low priced purchases demanding a lower than average level of attention, the marks in their totality are sufficiently different that there is no likelihood of confusion, whether direct (where one mark is mistaken for the other) or indirect (where the average consumer believes the respective goods and services originate from the same or a linked undertaking). Consequently, I need not go on to consider the position in respect of goods and services requiring a more considered purchase or those which are similar rather than identical.

Conclusion

61. The opposition fails.

COSTS

62. The opposition having failed, the applicant is entitled to a contribution towards its costs. I have taken into account that no hearing has taken place and that the applicant filed written submissions during the evidence period and additional submissions in light of the response to my request to the opponent to provide details of the extent of its claim. I have also taken account of the fact that if opponent's pleadings had been better particularised at the outset, this opposition would have been better focused at an earlier stage, especially in light of the subsequent concessions which were made in respect of the goods and services at issue. I make the award on the following basis:

Preparing a statement and considering the other side's statement:	£ 300
Written submissions:	£ 700
Total:	£ 1100

63. I order SPIE SA to pay Npower Limited the sum of £1100. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 14th day of November 2012

**Ms A Skilton
for the Registrar,
The Comptroller General**

⁹ The test is a cumulative one, see *Vedial SA v OHIM C-106/03*