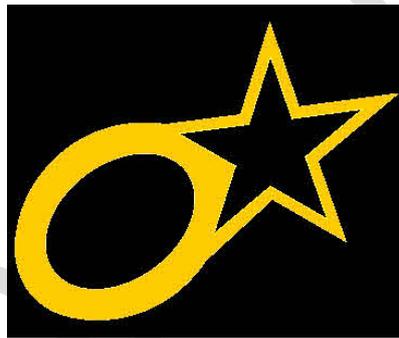


O-448-18

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3243588
BY ORO STAR SPORTS LIMITED TO REGISTER THE FOLLOWING TRADE
MARK:**

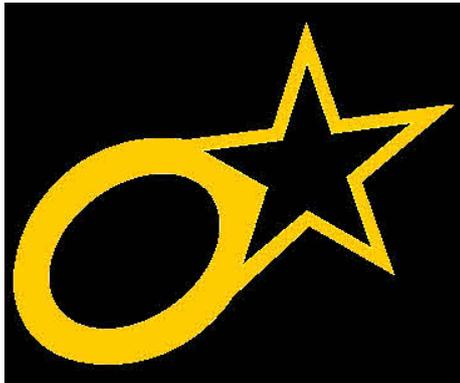


IN CLASS 25

**AND IN THE MATTER OF OPPOSITION THERETO UNDER NO. 410544
BY ALPINESTARS RESEARCH SRL**

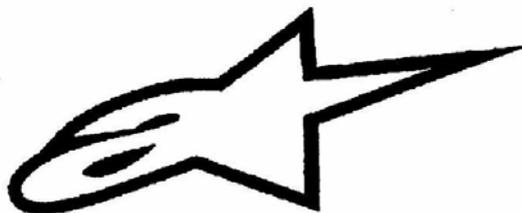
Background and pleadings

1) Oro Star Sports Limited (“the applicant”) applied to register its mark in the UK on 13 July 2017. The application was accepted and published in the Trade Marks Journal on 18 August 2017. The relevant details are shown below:



Class 25: *Leather Garments and Sports wear.*

2) Alpinestars Research Srl (“the opponent”) opposes the marks on the basis of section 5(2)(b), section 5(3) and section 5(4)(a) of the Trade Marks Act 1994 (“the Act”). The section 5(2)(b) and section 5(3) ground are based upon the following earlier European Union Trade Mark (“EUTM”) no. EU006126023 in the name of the applicant:



Filing date: 23 July 2007

Date of entry in register: 18 June 2008

It is registered in respect of goods in various classes but the opponent relies only on the following goods:

Class 9: *chest protectors, back pads, protective corsages, knee guards, knee pads and protective suits for motorcyclists.*

Class 25: *Clothing, headgear; anoraks, trousers, shirts, knitwear, jersey, flannel waistcoats, jumpers, sweaters, skirts, sports footwear, shoes, boots, boots for motorcyclists, casual footwear for motorcyclist and motorists, slippers, blouses, waterproof clothing, overcoats, topcoats, socks, hosiery, stockings, hats, suits, salopettes, coveralls, dungarees, gloves, scarves, berets.*

3) The opponent claims that the mark offends under section 5(2)(b) because there exists a likelihood of confusion between the respective marks as a result of their similarity and because the respective goods are “self evidently identical”.

4) The opponent claims that the mark offends under section 5(3) because of “the substantial reputation” it’s EUTM enjoys, “it is inevitable that consumers when seeing the [applicant’s mark] will think it is a brand extension of the opponent’s [EUTM] or is authorised by the opponent in some way”. It claims that:

- the applicant would benefit from an unfair advantage by “free riding on the coat tails” of the opponent’s EUTM in order to generate interest in the applicant’s mark, and;
- use of the applicant’s mark will lead to detriment in the form of blurring or dilution of the distinctiveness of the opponent’s EUTM

5) In addition, it is claimed that the applicant’s mark also offends under section 5(4)(a) because its use would result in the passing off of the opponent’s goodwill identified by a sign identical to its earlier EUTM. It claims first use in the UK from 1 December 1993 in respect of the following goods:

Chest protectors, back pads, protective corsages, knee guards, knee pads and protective suits for motorcyclists; motorcycling leathers; motorcycling jackets and trousers; protective boots; motorcycling boots; motorcycling gloves; gloves; clothing, footwear, headgear.

6) The applicant filed a counterstatement denying the claims made. Despite the opponent's earlier EUTM being potentially subject to proof of use because it completed its registration procedures more than five years before the applicant's marks were published¹, the applicant has not requested that the opponent provides proof of use. As a consequence of this, the opponent may rely upon all the goods that are listed in its EUTM.

7) The opponent filed evidence. The applicant chose not to file evidence or written submissions. Neither side requested to be heard and the opponent filed written submissions that I will keep in mind but I will not summarise them here.

8) The opponent was represented by Gill Jennings & Every LLP and the applicant was unrepresented.

Opponent's evidence

9) This takes the form of a witness statement by Caterina Buccimazza, manager of the opponent's "Agreement Administration" department. Ms Buccimazza states that the opponent is the holding company of Alpinestars S.p.A. and has full control over it. It is also stated that Alpinestars S.p.A. is licensed by the opponent to use all of its intellectual property, including the earlier EUTM.

10) Ms Buccimazza explains that she provides the statement in support of the opponent's claim that it has a reputation in its EUTM and a goodwill in its business conducted under the same mark in the UK. I have read all of this evidence, the main points of which can be summarised as follows:

- the opponent was founded in Italy in 1963 and achieved "great success with many legendary motorsport world champions". It has maintained its strongest presence in MotoGP, Formula 1, and NASCAR events worldwide. It is claimed that the opponent is now has a "strong reputation as a global leader

¹ Section 6A of the Act

in technical apparel, protection and footwear for motorcycling, auto racing, action sports and lifestyle clothing”;

- the opponent’s EUTM is one of a number of its trade marks, with others including ALPINESTARS, A-STARs, ASTARS as well as what Ms Buccimazza describes as its “A star” device alone or in combination, for example, with the word “stars”;
- Its earlier EUTM has been used in the UK since 1998 and in a slightly different form between 1993 and 1998;

Confidential turnover figures in the UK are provided for the years 1998 to 2017². From 2002, these figures have been consistently between [REDACTED]

- [REDACTED] a year;
- The EUTM has been used on all the relied upon goods and undated photographs of examples of such use are provided³ showing the mark appearing on, or in conjunction with, various items including motorcycling clothing and footwear, chest protectors, back pads, protective corsages, knee guards, knee pads as well as ordinary boots and casual clothing such as hoodies, t-shirts and caps;
- Photocopied examples of selected pages from the opponent’s catalogues covering the period 1998 to 2016 (plus one from 1992) illustrate the opponent’s mark appearing upon various items of motorsport clothing, gloves and footwear⁴. The cover, contents page and a page showing hoodies bearing the opponent’s mark are shown from a document entitled “2012 ACTION SPORT CLOTHING”. T-shirts are shown elsewhere in the same exhibit;
- The same exhibit also illustrates a pair of shoes adapted for use in skating and also a pair of trainer style shoes described as “crew gear” and “designed to withstand the rigors of quick action pit stops and late night shopping duties...” (1998 catalogue). There is also a “2012 Action Sport Clothing Collection” catalogue showing the mark appearing on various hoodies;

² Ms Buccimazza’s witness statement, para 19

³ Exhibit CB-4 to Ms Buccimazza’s witness statement

⁴ Exhibit CB-5

- The opponent's mark has been used on all of its goods since 1998 on hangtags, labels, stickers, swing tickets, cartons, clothes hangers and packaging material, an undated selection of which are shown in respect of, what appears to be various motorbike jackets⁵;
- A non-exhaustive lists is provided of over 230 stores spread over England, Scotland, Wales and Northern Ireland⁶ that have made available the opponent's goods bearing its mark. It is noted from the names of many of these stores that they are specialist motorcycle stores;
- By the end of 2016, the opponent's "products had a 20% share of the market"⁷ (but it is not stated what this "market" was);
- The opponent's goods have been promoted in various ways that include advertising in motorsport papers and magazines, examples of which are provided with a date range between November 1997 to December 2015⁸. All of these illustrate the opponent's mark appearing upon motorcycle clothing, motorcycle boots, motorcycle gloves, as well as t-shirts, or in conjunction with such goods, many shown being worn by motorsport celebrities;
- Confidential figures spent on advertising goods bearing the opponent's mark in the UK are provided from 2005 to 2017 and are, from 2009, consistently more than [REDACTED] a year;
- The opponent's goods have also been promoted in the media and press in the UK and numerous examples are provided⁹ including national press such as Daily Mirror and the Daily Mail where news reports about celebrities are accompanied by their photographs wearing clothing bearing the opponent's mark;
- The opponent conducts online advertising and promotion via its own website www.alpinestars.com. The number of visits and unique individuals visitors to the website from the UK are provided for the period 2014 to 2017¹⁰. These figures are also covered by a confidentiality order. The number of unique

⁵ Exhibit CB-6

⁶ Exhibit CB-7

⁷ Ms Buccimazza's witness statement, para 22

⁸ Exhibit CB-8

⁹ Exhibit CB-9

¹⁰ Ms Buccimazza's witness statement, paragraph 27

visitors ranges from [REDACTED] to nearly [REDACTED] a year and visits from [REDACTED] to nearly [REDACTED] a year;

- The opponent's goods have featured on the television programmes *Top Gear* and *The Grand Tour* with the presenters wearing the opponent's motorsport clothes¹¹

11) This concludes my summary of the opponent's evidence.

DECISION

Section 5(3)

12) I find it convenient to begin by considering the grounds based upon section 5(3) of the Act.

13) Section 5(3) states:

“(3) A trade mark which-

- (a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

14) The relevant case law can be found in the following judgments of the Court of Justice of the European Union (“the CJEU”): Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Addidas-Salomon*, [2004] ETMR 10 and C-487/07, *L’Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

¹¹ Exhibit CB-12

- a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors, paragraph 24*.
- (b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors, paragraph 26*.
- (c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman, paragraph 29* and *Intel, paragraph 63*.
- (d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*
- (e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.
- (f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77*.

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

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure*).

Reputation

15) In *General Motors*, Case C-375/97, the CJEU held that:

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

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

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

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

16) For the purposes of proceedings in the UK, it is the reputation in the UK that is relevant because my finding must be based upon the expectations of the UK consumer. In this respect, the opponent has provided evidence in support of its claim that it has the requisite reputation. It is unchallenged by the applicant. The evidence illustrates that the opponent's mark has been used in the UK since 1998 mainly in respect of motorsport clothing including *protective suits for motorcyclists* and footwear including motorcycle boots. The evidence also illustrates use in respect of protectors for various parts of the body, such as knees, chest and back for use in motorsport. The opponent states that it has a 20% market share in the UK and it has shown a consistent and reasonably substantial level of turnover in the UK. Whilst it did not state what market this share was of, it is self-evident from the evidence that it is the motorsport clothing market. Further, the opponent's goods have been made available through several hundred, mainly specialist motorbike outlets throughout the UK. The opponent's mark appears on the goods themselves as well as tags, labels, stickers, swing tickets, cartons, clothes hangers and packaging material. This use

has been accompanied by reasonably high profile promotion in specialist magazines and goods bearing the mark have appeared in photographs in national press.

17) Taking all of the above into account, I conclude that the opponent's mark is known to a significant part of the relevant public, being motor sport participants and motorcyclists. It is not obvious to me that clothing for other motor sports would be used by anyone other than participants in that sport. Therefore, I find that the earlier mark has a reputation in respect of the following of the opponent's goods:

Class 9: *chest protectors, back pads, protective corsages, knee guards, knee pads and protective suits for motorcyclists.*

Class 25: *Clothing, headgear, all adapted for use in motorsport ; boots for motorcyclists, casual footwear for motorcyclists and motorists.*

18) I acknowledge that the opponent's evidence also illustrated use in respect of T-shirts, hoodies and casual boots and trainers, however, when viewing the evidence as a whole it is clear that the overriding focus of the opponent is on clothing and the like for motorsports. I find that it has not been demonstrated that the reputation of its mark extends to T-shirts, hoodies or casual boots.

Link

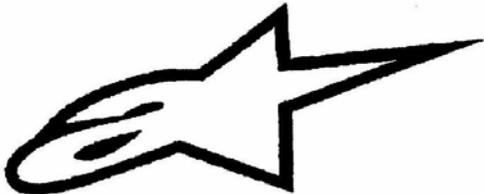
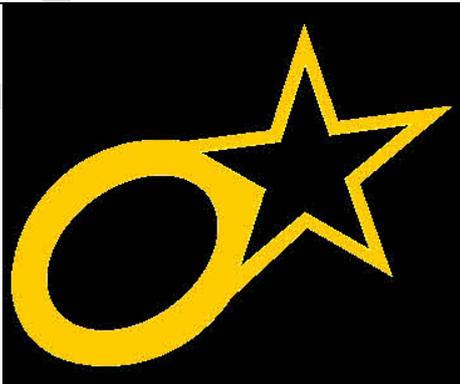
19) In *Intra-Press SAS v OHIM*, Joined cases C-581/13P & C-582/13P, the Court of Justice of the European Union stated (at paragraph 72 of its judgment) that:

"The Court has consistently held that the degree of similarity required under Article 8(1)(b) of Regulation No 40/94, on the one hand, and Article 8(5) of that regulation, on the other, is different. Whereas the implementation of the protection provided for under Article 8(1)(b) of Regulation No 40/94 is conditional upon a finding of a degree of similarity between the marks at issue so that there exists a likelihood of confusion between them on the part of the relevant section of the public, the existence of such a likelihood is not

necessary for the protection conferred by Article 8(5) of that regulation. Accordingly, the types of injury referred to in Article 8(5) of Regulation No 40/94 may be the consequence of a lesser degree of similarity between the earlier and the later marks, provided that it is sufficient for the relevant section of the public to make a connection between those marks, that is to say, to establish a link between them (see judgment in *Ferrero v OHMI*, C-552/09 P, EU:C:2011:177, paragraph 53 and the case-law cited).”

20) Therefore, the level of similarity required for the public to make a link between the marks for the purposes of 5(3) may be less than the level of similarity required to create a likelihood of confusion.

21) The respective marks are as follows:

Opponent's mark	Applicant's mark
	

22) The applicant's submissions consist of just one sentence in its counterstatement where it asserts that “there is no resemblance between the companies [sic] trademarks”. I do not agree. There is a good deal of visual similarity between the marks because they both consist of what may be perceived as a lowercase curved letter coalesced with a star device at the right/top right of the letter. However, there are also differences with the opponent's mark including a lowercase letter “a” whereas the applicant's mark includes a disc that may be perceived as a letter “o”. There are also differences in the star device with the star in the opponent's mark having only three arms, whereas the star in the applicant's mark is more fully formed

with five arms. As the opponent has submitted, the colour present in the applicant's mark is of no consequence when comparing the marks.

23) Aurally, the opponent submits that neither will be pronounced, but that "at a push" they may be referred to as "a-star" and "o-star" respectively. Whilst I agree that it is not likely that the consumer will attempt to pronounce the marks, however, if it did, it is my view that the star devices will not be pronounced and the marks will be pronounced "a" and "o" respectively. Certainly, there is nothing before me to suggest that device elements contribute to the aural aspects of marks.

24) The opponent submits that the marks are conceptually similar "as both are a 'letter and star' fusion". I agree that this creates an element of conceptual similarity, but I also observe that the fact that the letter represented in each mark is different and where this is noticed, it will create some conceptual difference.

25) Whilst in respect to detriment and/or unfair advantage under section 5(3) of the Act it is not a requirement that there must be identity or similarity between the respective goods, the issue remains relevant to the overall analysis. In the current case, the reputation in the opponent's mark is in respect of various motorsport related goods in Class 9 and Class 25, as recorded in paragraph 17 above. All of the opponent's Class 25 goods are covered by the broad terms *Leather Garments* and *Sports wear* present in the application and they are, therefore identical (see the guidance in *Gerard Meric v. Office for Harmonization in the Internal Market (Trade Mark and Designs)* OHIM, Case T-133/05, paragraph 29).

26) Taking all of the above into account, I find that whilst there are some differences between the marks, the similarities outweigh these differences particularly when imperfect recollection is factored in. It is often the case that consumers do not have the opportunity to compare marks side-by-side and may not recall a mark precisely. Consequently, I find that the relevant section of the public will make a connection between the marks, that is to say, the similarity between the marks when used in respect of the same goods is such as to establish the requisite link between them.

Detriment and unfair advantage

Unfair advantage

27) Firstly, the opponent claims that use of the applicant's mark would take unfair advantage of its earlier mark. It submits that such use would exploit its mark by "free riding" on its "coat tails" and on its reputation, therefore, saving on investment in promoting its mark.

28) There is some debate as to whether the judgment of the CJEU in *L'Oreal v Bellure* means that an advantage gained by the user of a junior mark is only unfair if there is an intention to take advantage of the senior mark, or some other factor is present which makes the advantage unfair. The English Court of Appeal has considered this matter three times. Firstly, in *L'Oreal v Bellure* [2010] RPC 23 when that case returned to the national court for determination. Secondly, in *Whirlpool v Kenwood* [2010] RPC 2: see paragraph 136. Thirdly, in *Specsavers v Asda Stores Limited* [2012] EWCA Civ 24: see paragraph 127. On each occasion the court appears to have interpreted *L'Oreal v Bellure* as meaning that unfair advantage requires something more than an advantage gained without due cause. However, the absence of due cause appears to be closely linked to the existence of unfair advantage. See paragraph 36 of the opinion of Advocate General Kokott in Case C65/12 *Leidseplein Beheer and Vries v Red Bull*.

29) In *Jack Wills Limited v House of Fraser (Stores) Limited* [2014] EWHC 110 (Ch) Arnold J. considered the earlier case law and concluded that:

"80. The arguments in the present case give rise to two questions with regard to taking unfair advantage. The first concerns the relevance of the defendant's intention. It is clear both from the wording of Article 5(2) of the Directive and Article 9(1)(c) of the Regulation and from the case law of the Court of Justice interpreting these provisions that this aspect of the legislation is directed at a particular form of unfair competition. It is also clear from the case law both of The Court of Justice and of the Court of Appeal that the defendant's conduct

is most likely to be regarded as unfair where he intends to benefit from the reputation and goodwill of the trade mark. In my judgment, however, there is nothing in the case law to preclude the court from concluding in an appropriate case that the use of a sign the objective effect of which is to enable the defendant to benefit from the reputation and goodwill of the trade mark amounts to unfair advantage even if it is not proved that the defendant subjectively intended to exploit that reputation and goodwill.”

30) In the current case, there is no evidence that the applicant is intentionally attempting to take advantage of the earlier mark. In its written submissions, the opponent claims that the director of the applicant is an Italian national and, because of this, it suspects that the director is fully aware of the opponent’s mark. In the absence of evidence to the contrary, I do not consider it creditable that just because the director is an Italian national that it follows he will be aware of the opponent’s mark. Nevertheless, I keep the guidance given by Arnold J in *Jack Wills* in mind and in particular that a decision maker is not precluded from a finding of unfair advantage “even if it is not proved that the defendant subjectively intended to exploit that reputation”.

31) In *Lonsdale Sports Limited v Erol* [2013] EWHC 2956 (Pat), Norris J was considering proceedings involving the following marks:

The logo for Lonsdale, featuring the word "LONSDALE" in a bold, black, serif font with a white outline, arched over a white banner.

v.



31) Norris J rejected a claim that there was a likelihood of confusion, but went on to say:

“34 As I have said above, at a first glance the block of text in the Respondent's Mark looks like something that Lonsdale might be connected with (a first impression soon dispelled in the case of the average consumer). But that first glance is important. Those who look at the wearer of a product bearing the Respondent's Mark might not get more than a glance and might think the wearer was clad in a Lonsdale product. The creation of that illusion might be quite enough for the purchaser of a “look-alike” product: indeed who but such a person would knowingly buy a “pretend” product? Further, it undoubtedly dilutes the true “Lonsdale” brand by putting into circulation products which do not proclaim distinctiveness but rather affinity with a reputable brand.”

32) There are parallels with the current proceedings. The applicant's mark is strongly evocative of the style and content of the opponent's earlier mark. This is to such an extent that when factoring in the other relevant facts such as the identity of the respective goods and that marks are rarely recalled precisely, I find that the applicant's mark is likely to be associated with the opponent and, as a result, it will create an attractive force that may otherwise be absent. Therefore, I find that the applicant will take an unfair advantage of the opponent's reputation as a result of the link between the two created by the concept of a rounded letter coalesced with a star device common to both marks.

Detriment to distinctive character

33) The opponent also claims that use of the applicant's mark will lead to detriment to the distinctive character of the earlier mark because such use will lead to a blurring or dilution of the distinctiveness of the earlier mark by diminishing the ability of the consumer to immediately associate the earlier mark with the opponent's goods leading to a possible reduction in sales.

34) In *Environmental Manufacturing LLP v OHIM*, Case C-383/12P, the CJEU stated that:

“34. According to the Court’s case-law, proof that the use of the later mark is, or would be, detrimental to the distinctive character of the earlier mark requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered, consequent on the use of the later mark, or a serious likelihood that such a change will occur in the future (*Intel Corporation*, paragraphs 77 and 81, and also paragraph 6 of the operative part of the judgment).

35. Admittedly, paragraph 77 of the *Intel Corporation* judgment, which begins with the words ‘[i]t follows that’, immediately follows the assessment of the weakening of the ability to identify and the dispersion of the identity of the earlier mark; it could thus be considered to be merely an explanation of the previous paragraph. However, the same wording, reproduced in paragraph 81 and in the operative part of that judgment, is autonomous. The fact that it appears in the operative part of the judgment makes its importance clear.

36. The wording of the above case-law is explicit. It follows that, without adducing evidence that that condition is met, the detriment or the risk of detriment to the distinctive character of the earlier mark provided for in Article 8(5) of Regulation No 207/2009 cannot be established.

37. The concept of ‘change in the economic behaviour of the average consumer’ lays down an objective condition. That change cannot be deduced solely from subjective elements such as consumers’ perceptions. The mere fact that consumers note the presence of a new sign similar to an earlier sign is not sufficient of itself to establish the existence of a detriment or a risk of detriment to the distinctive character of the earlier mark within the meaning of Article 8(5) of Regulation No 207/2009, in as much as that similarity does not cause any confusion in their minds.

38 The General Court, at paragraph 53 of the judgment under appeal, dismissed the assessment of the condition laid down by the *Intel Corporation* judgment, and, consequently, erred in law.

39. The General Court found, at paragraph 62 of the judgment under appeal, that ‘the fact that competitors use somewhat similar signs for identical or similar goods compromises the immediate connection that the relevant public makes between the signs and the goods at issue, which is likely to undermine the earlier mark’s ability to identify the goods for which it is registered as coming from the proprietor of that mark’.

40. However, in its judgment in *Intel Corporation*, the Court clearly indicated that it was necessary to demand a higher standard of proof in order to find detriment or the risk of detriment to the distinctive character of the earlier mark, within the meaning of Article 8(5) of Regulation No 207/2009.

41. Accepting the criterion put forward by the General Court could, in addition, lead to a situation in which economic operators improperly appropriate certain signs, which could damage competition.

42. Admittedly, Regulation No 207/2009 and the Court’s case-law do not require evidence to be adduced of actual detriment, but also admit the serious risk of such detriment, allowing the use of logical deductions.

43. None the less, such deductions must not be the result of mere suppositions but, as the General Court itself noted at paragraph 52 of the judgment under appeal, in citing an earlier judgment of the General Court, must be founded on ‘an analysis of the probabilities and by taking account of the normal practice in the relevant commercial sector as well as all the other circumstances of the case’.”

35) In *32Red Plc v WHG (International) Limited and others* [2011] EWHC 665 (Ch), Henderson J. held that a change in consumers’ economic behaviour could be

inferred from the inherent probabilities of the situation. He said:

“133. Is there evidence of a change in economic behaviour brought about by the use of the Vegas signs? In the nature of things, direct evidence of such a change is likely to be hard to find in cases of the present type, although Mrs F provides a suggestive example of a customer who was nearly persuaded to change her allegiance as a result of a perceived connection between 32Red and 32Vegas. However, I see no reason why I should not have regard to the inherent probabilities of the situation, and in particular to the contrast between the marketing models of the two casinos. The similarity of their names, and the fact that 32Vegas was always operated as one of a number of linked casinos on the carousel model, lead me to conclude that an average online gambler would have been far readier to switch his allegiance from 32Red to 32Vegas, or to play with 32Vegas in the first place, than he would have been in the absence of such similarity. These are changes in economic behaviour, and I am satisfied on the balance of probabilities that such changes are likely to have occurred to a significant extent.”

36) In the current case, there is no evidence that the relevant public will change the economic behaviour as a result of use of the applicant's mark. This is perhaps not surprising because there is no evidence to illustrate that the applicant has commenced trading. Therefore, for the opponent to be successful under this limb, I must be able to infer that such a change of economic behaviour is likely to occur. It is my view that because of the similarities between the marks that I have already identified and the identity of the respective goods, the relevant person is more likely to switch his allegiance than he would have been if the marks were more distant or the goods not identical. In summary, I infer that a change in economic behaviour is likely to occur.

Section 5(2)(b)

37) In light of my findings in respect of the grounds based upon section 5(3) of the Act, it is not necessary that I decide the grounds based upon section 5(2)(b) or section 5(4)(a).

Summary

38) The opposition is successful and the application is refused in its entirety.

COSTS

39) The opponent has been wholly successful and is entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 4 of 2007. I take into account that only the opponent filed evidence and written submissions and that no hearing was held. With all of this in mind, I award costs as follows:

Preparing statement and considering counterstatement (including fee)	£500
Preparing evidence and considering other side's evidence	£750
Preparing written submissions in lieu of hearing	£400
Total:	£1650

40) I order Oro Star Sports Limited to pay Alpinestars Research srl the sum of £1650 which, in the absence of an appeal, should be paid within 14 days of the expiry of the appeal period.

Dated this 24th day of July 2018

Mark Bryant
For the Registrar
The Comptroller-General

REDACTED