

BLO/454/22

TRADE MARKS ACT 1994

**IN THE MATTER OF UK DESIGNATION OF
INTERNATIONAL REGISTRATION
NO. WO0000001430529
BY LYNRED
FOR A DEVICE MARK IN CLASS 9**

**AND IN THE MATTER OF OPPOSITION NO. 415978
BY NVIDIA CORPORATION**

**AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON
FROM THE DECISION OF MR ARRAN COOPER
DATED 30 NOVEMBER 2021**

DECISION

1. This is an appeal from a decision of Mr Arran Cooper, on behalf of the Registrar, BL O/871/21, rejecting the opposition of NVIDIA Corporation (“the Opponent”) to the registration of an International Mark designating the UK filed by Lynred (“the Holder”). The Opponent appeals.

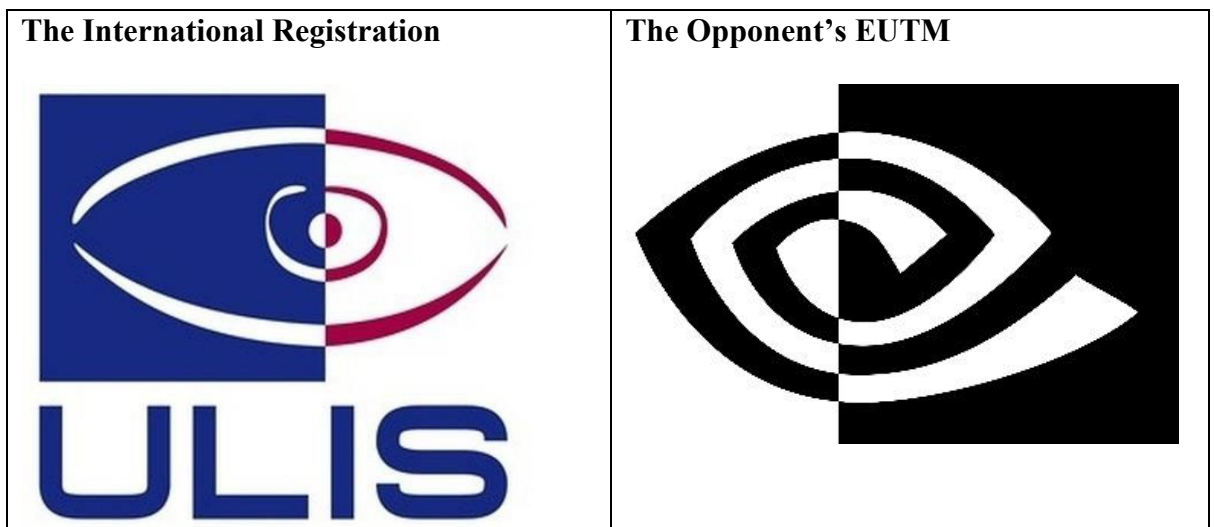
Background

2. The International Mark was registered on 30 July 2018, and UK designation was sought on the same day for the following specification of goods in Class 9:

Scientific, optical, optoelectronic, measuring, signaling apparatus and instruments; security surveillance and monitoring apparatus; devices for safety, security, protection and signaling; measuring, detection and monitoring instruments, indicators and controllers; apparatus and instruments for the detection and analysis of human activity not for medical use; sensors; detectors; photosensors; optical detectors and sensors; infrared detectors and sensors; thermal detectors and

sensors; heat detectors and sensors; smart sensors and detectors, i.e., which include integrated software and electronic functions; thermostats; infrared imaging retinas not for medical use; software; software for monitoring the environment, access and security of buildings; components, namely, semiconductor or optoelectronic components; electronic apparatus, devices and parts, namely, electronic components, electronic integrated circuits, microprocessors, electronic cards built into optical and optoelectronic apparatus.

3. The Opponent filed the opposition on 11 April 2019, under sub-sections 5(2)(b), 5(3) and 5(4)(a) of the 1994 Act but no evidence of use was filed, such that the opposition proceeded only on the 5(2)(b) grounds. These were based upon the Opponent's earlier EUTM No. 014519912 which is registered for a wide range of goods and services in Classes 9 (including computer hardware and software), 28 and 42 (the full specification is set out in an Annex to the Decision below).
4. Both marks include a device:



5. Neither side filed evidence, and only the Opponent's representative attended the hearing before the Hearing Officer.
6. In his detailed Decision, the Hearing Officer:
 - a. Compared the parties' respective goods in various sub-categories, and concluded that some of the Holder's goods were identical to some of the

Opponent's goods, and others were similar to them. He also found that some of the Holder's goods were dissimilar to the Opponent's goods;

- b. Made findings as to the average consumer and purchasing process; he identified the purchasing act as being primarily visual in relation to all the goods, but noted that aural considerations could not be disregarded;
 - c. Found that the Opponent's Mark had a higher than medium degree of inherent distinctiveness, this was due to its stylistic elements rather than to the fact that it would be seen (by some) as an eye;
 - d. Found the marks to be visually similar to a low degree, aurally dissimilar, and conceptually similar to a higher than medium degree; and
 - e. Concluded that there was no likelihood of confusion, either direct or indirect and so rejected the opposition.
7. The Grounds of Appeal in essence raised two points. First, the Opponent said that the Hearing Officer erred in his analysis of the likelihood of confusion, mainly because of his views about the similarity of the marks. Secondly, it submitted that he erred in finding certain of the Holder's goods to be dissimilar to the Opponent's goods - he should have found them all to be similar goods.
8. Neither side wished to attend a hearing of the appeal. The Opponent provided submissions in writing in lieu of attendance. The Holder did not wish to make representations to me. I have therefore dealt with this matter on the papers.

Standard of the appeal

9. This appeal is by way of review of the Hearing Officer's decision. Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference in this sort of appeal. Before that is warranted, it would be necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer was wrong. The relevant principles were set out in *TT Education Ltd v Pie Corbett Consultancy* [2017] RPC 17

by Daniel Alexander QC sitting as the Appointed Person at [14]-[52], and his conclusions were approved by Arnold J in *Apple Inc v Arcadia Trading Limited* [2017] EWHC 440 (Ch), [2017] FSR 40. Mr Alexander QC said in particular that:

“... In the case of a multifactorial assessment or evaluation, the Appointed Person should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions. In particular, where an Appointed Person has doubts as to whether the Registrar was right, he or she should consider with particular care whether the decision really was wrong or whether it is just not one which the appellate court would have made in a situation where reasonable people may differ as to the outcome of such a multifactorial evaluation (*REEF*, *BUD*, *Fine & Country* and others).”

10. Subsequently, the Supreme Court in *Actavis Group PTC v. ICOS Corporation* [2019] UKSC 1671, [2019] RPC 9 dealt with the role of the appellate court at [78] to [81]. Lord Hodge said:

“78. ... Where inferences from findings of primary fact involve an evaluation of numerous factors, the appropriateness of an intervention by an appellate court will depend on variables including the nature of the evaluation, the standing and experience of the fact-finding judge or tribunal, and the extent to which the judge or tribunal had to assess oral evidence: *South Cone Inc v Bessant*, *In re Reef Trade Mark* [2002] EWCA Civ 763; [2003] RPC 5, paras 25-28 per Robert Walker LJ.

...

80. What is a question of principle in this context? An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. What is the nature of such an evaluative error? In this case we are not concerned with any challenge to the trial judge’s conclusions of primary fact but with the correctness of the judge’s evaluation of the facts which he has found, in which he weighs a number of different factors against each other. This evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge’s conclusion is outside the bounds within which reasonable disagreement is possible. ...

81. Thus, in the absence of a legal error by the trial judge, which might be asking the wrong question, failing to take account of relevant matters, or taking into account irrelevant matters, the Court of Appeal would be justified in differing from a trial judge's assessment of obviousness if the appellate court were to reach the view that the judge's conclusion was outside the bounds within which reasonable disagreement is possible. It must be satisfied that the trial judge was wrong ...”

11. I note the additional guidance from Mr Iain Purvis QC sitting as the Appointed Person in *Rochester* BL O/049/17 at [33]:

“... the reluctance of the Appointed Person to interfere with a decision of a Hearing Officer on likelihood of confusion is quite high for at least the following reasons:

(i) The decision involves the consideration of a large number of factors, whose relative weight is not laid down by law but is a matter of judgment for the tribunal on the particular facts of each case

(ii) The legal test ‘likely to cause confusion amongst the average consumer’ is inherently imprecise, not least because the average consumer is not a real person.

(iii) The Hearing Officer is an experienced and well-trained tribunal, who deals with far more cases on a day-to-day basis than the Appellate tribunal.

(iv) The legal test involves a prediction as to how the public might react to the presence of two trade marks in ordinary use in trade. Any wise person who has practised in this field will have come to recognize that it is often very difficult to make such a prediction with confidence. ... Any sensible Appellate tribunal will therefore apply a healthy degree of self-doubt to its own opinion on the result of the legal test in any particular case.”

12. Lastly, in *Yellow Bulldog Ltd v A P & Co Ltd* [2020] EWHC 3558 (Ch) in summarising the relevant principles, Morgan J also referred to what was said by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] ETMR 26 at [114]-[115], and the Court of Appeal's judgment in *Re Sprintroom Ltd* [2019] BCC 1031 at [76]:

"... on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment

of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion". "

13. I have kept these principles in mind on this appeal.

Likelihood of confusion

14. It is convenient to take the point about the likelihood of confusion first.

Analysis of the Opponent's mark

15. The Grounds of Appeal set out a complaint about the Hearing Officer's analysis of the Opponent's mark. He had said:

"35 ... the opponent gave detailed submissions as to the impression of the opponent's mark. I will not reproduce these here but I note that the main point of these submissions was that the device element, being the only element in the mark, will be seen as an eye.

36 Having considered the submissions and the mark as a whole, I am of the view that the majority of average consumers will see it as a spiral. However, I accept that a significant proportion of average consumers may view the opponent's mark as a graphical representation of an eye. Regardless of whether it is seen as an eye or not, I do not consider the opponent's mark to be particularly remarkable from a trade mark perspective. This is on the basis that average consumers are used to seeing trade marks consisting solely of shapes or stylised representations of recognisable objects (in the case it is seen as an eye). Having said that, I do appreciate that the make-up of the mark, with its spiral and inverted colour scheme, will leave an unusual imprint in the eyes of average consumers. Overall, I consider that the mark enjoys a higher than medium degree of inherent distinctiveness. For the avoidance of doubt, in the event that the mark is seen as an eye, the elevated level of distinctiveness is attributable to the marks stylistic elements and not the fact that the mark consists of an eye.

37 As above, the opponent has argued that its mark will be seen as an eye and it is upon this basis that it aimed its arguments in favour of a likelihood of confusion. While I have found that the majority of average consumers would see it as a spiral, I have found that a significant proportion of average consumers would see it as an eye. As this represents the opponent's best case, I will focus the remainder of this decision on the proportion of consumers that will see an eye. ..."

16. At paragraph 3 of the Grounds, the Opponent submitted that "the Hearing Officer's comment at Paragraph 36 that the "majority of average consumers" will see the

Appellant's mark "as a spiral" constitutes an error of fact which had a material impact on the Decision." This point was not fleshed out in the Opponent's written submissions, and as in my view that finding was plainly open to the Hearing Officer, I reject that complaint.

17. The Opponent's complaint at paragraphs 4-9 of the Grounds was that the Hearing Officer's analysis of the distinctive character of its Mark was influenced by his belief that the device does not resemble an eye, which, it said, led to inconsistencies in his reasoning. The Opponent complained in particular that the Hearing Officer had erred in finding that there was only a low degree of visual similarity between the marks.
18. In its written submissions, the Opponent suggested that the Hearing Officer had ignored the fact that the Mark was a depiction of an eye, but that submission is hard to accept in light of the approach which the Hearing Officer set out at paragraph 37, and which appears to me to have been carefully followed in the Hearing Officer's comparison of the parties' marks at paragraphs 38-47. In those paragraphs he expressly refers at various points to the Opponent's Mark (and indeed, the Holder's mark) as depicting an eye. Indeed, there is nothing that the Opponent has pointed to in the Decision which leads me to think that the Hearing Officer failed to analyse the marks and the similarities between them on the basis that the Opponent's mark is an eye device, which is what he said he was doing. On the contrary, the analysis in paragraphs 38-47 seems clearly to assume that it is an eye device.
19. There are doubtless innumerable marks which include a device of an eye, and as the Hearing Officer explained in paragraph 45, that point alone is insufficient to guarantee visual similarity. He referred to the decision of Mr Purvis QC sitting as the Appointed Person in BL O/010/16 *Royal Academy of Arts v Errea Sport*, where Mr Purvis said:

"... I do not have any difficulty with the notion (which Mr Stobbs appeared to be contending was illogical) that two representations of the same thing may have no visual similarity. In the world of art, the visual representation of a horse in Picasso's *Guernica* has little or nothing in common with the visual representation of a horse in one of George Stubbs' portraits. I do not think it unreasonable to say that they have no visual similarity, whilst having some limited conceptual similarity (they are both paintings of horses)."

20. As a result, for a finding of a high degree of similarity, more would be needed than simply to decide that the marks both include eye devices. Indeed, the Opponent's submission was that the *stylisation* of the eye devices is also similar, as both marks have the same combination of elements (depiction of an eye, the contrast between the left and right sides of the depiction, and the box around the device). It submitted that the Hearing Officer erred because he ignored the fact that both marks use a contrasting and inverted colour scheme.
21. It does not seem to me that the Hearing Officer did ignore the points about stylisation or colour. He did consider stylisation, and said at paragraph 45 that he found the eyes were stylistically very different. It seems to me that whether or not the marks are stylistically similar is a point on which reasonable people might differ, but certainly the Opponent has not identified an appealable error on the point.
22. Moreover, the Opponent's point about the assessment of visual similarity seems to me to ignore two additional factors which the Hearing Officer took into account in his assessment of visual similarity, neither of which was challenged on the appeal. First, the Opponent ignores the impact of the word ULIS in the IR, which the Hearing Officer found at paragraph 43 makes a roughly equal contribution to the overall impression of the IR. Therefore he was right to take this into account in paragraph 45. Secondly, in paragraph 45 the Hearing Officer took account of the "contrived colour splits" in the IR, which he did not think were reflected in the earlier Mark. Hence, even if the Hearing Officer had considered that the marks shared some stylisation, it seems to me that he would not have found the degree of visual similar to be high, as the Opponent claimed.
23. The Opponent argued that finding only a low degree of visual similarity was inconsistent with the finding at paragraph 47 that the marks were conceptually similar to a higher than medium degree, because both depicted eyes. I disagree. They are different tests. There is no identifiable flaw in this reasoning.
24. In paragraph 10 of the Grounds of Appeal, the Opponent complained of the Hearing Officer's assessment of the likelihood of confusion, saying that he had failed "to correctly a) incorporate and balance the various competing relevant factors and b) apply the relevant case law, particularly in respect of the 'independent distinctive role'

principle.” At paragraph 11, the Opponent added that the Hearing Officer had not given sufficient weight to the high degree of conceptual similarity between the marks, the identity of some of the goods, the fact that consumers will largely only be paying a medium degree of attention and the point that the consumer will select the goods at issue primarily via visual means.

25. In its written submissions, the Opponent’s first reason for criticising the assessment of the likelihood of direct confusion was that the Hearing Officer had attributed too low a level of visual similarity to the marks and ignored their similarities of style. As I have rejected those points, they do not help the Opponent on the likelihood of direct confusion and paragraph 51 of the decision stands. Otherwise, the Opponent submitted that the Hearing Officer had given too little weight to the factors listed in paragraph 11 of the Grounds of Appeal, but as each of them was mentioned by him in paragraph 49 as relevant points, I cannot accept that submission.
26. That leaves the issue of the likelihood of indirect confusion, which the Hearing Officer dealt with first in paragraph 52. I have not identified any criticism in the Grounds of Appeal of the analysis in that paragraph. The Opponent’s written submissions did deal with it, but the point (even if the Opponent had been able to run it, which I doubt) was once again based upon its contentions as to the impact of the stylisation of the marks. As I have rejected those arguments, this line of appeal would also fail.
27. Lastly, the Grounds of Appeal complained of a misapplication of the case law relating to the ‘independent distinctive role’ saying that whilst the Hearing Officer paid lip service to the need “to carry out a global assessment taking into account all relevant factors” he had nevertheless ignored “the highly salient factor that the purchasing process will primarily be visual” as well as the stylisation factors already discussed, reiterating the Opponent’s contention that the Hearing Officer’s comment at paragraph 54 of the Decision that “that the marks consist of significantly different graphically depictions of eyes” was bizarre in view of the highly similar negative/contrasting stylisation of the marks.
28. Whilst the point is said to show an error of law, or the application of the law, in my judgment these submissions turn again upon the contention rejected by the Hearing

Officer, and which I have declined to overturn, that the stylisation of the two marks is close enough to raise the visual similarity to a high level.

29. In all the circumstances, therefore, I do not consider that the Hearing Officer's Decision is undermined by the alleged errors identified in paragraphs 3-14 of the Grounds of Appeal.

Similarity of goods

30. Paragraph 2 of the Grounds of Appeal did not make clear what, exactly, was said to have been incorrect in the Hearing Officer's analysis of the similarity of the goods. The point related only to the goods listed in paragraph 30 of the Decision which he found to be dissimilar to the Opponent's goods. The single paragraph in the Grounds dealing with this point said,

“Such a viewpoint not only represents an unduly restrictive reading of the relevant case law but is also logically inconsistent with the Hearing Officer's various comments regarding an overlap of highly relevant factors such as nature.”

Had the Holder wished to participate in the appeal, it is hard to see how it could have known what error was being alleged, to enable it to respond effectively to such a generalised complaint. A statement of case should enable the opposing party to know the case it has to meet. This part of the Grounds of Appeal failed to do that.

31. The points made in the Opponent's written submissions were more specific and related only to “components, namely, semiconductor or optoelectronic components.” The main point made was that those goods should have been found to be similar (at least) to computer hardware, in the light of the Hearing Officer's findings at paragraph 29.
32. In the light of my findings as to the merits of the appeal against the Hearing Officer's findings on the likelihood of confusion, which applied to identical and similar goods to the Opponent's specification, it seems to me that expanding the range of similar goods to be considered for a likelihood of confusion by reversing paragraph 30 of the Decision in part would make no difference to the overall result.

33. For that reason, as well as in light of the inadequacy of the Grounds of Appeal, I decline to deal with the merits of the point raised in paragraph 2 of the Grounds.
34. I therefore reject the appeal and uphold the Decision of the Hearing Officer permitting the mark to proceed to grant.
35. The Holder has taken no part in the appeal and it is not clear to me whether it has incurred any costs. However, it may apply to me in writing by 5 pm on 13 June 2022 for its costs of the appeal (if any), setting out brief details of any costs which have been incurred by it.

Amanda Michaels

The Appointed Person

26 May 2022

Written submissions were provided by **Lane IP Limited** on behalf of the Appellant.