

O/0481/26

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. UK00003909111
BY DONGGUAN YOUPUTE TECHNOLOGY CO. LTD. TO REGISTER:**

HK GAMING

AS A TRADE MARK IN CLASS 9

AND

**IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 442161 BY
THE STRYZE GROUP ACQUISITION I GMBH**

BACKGROUND AND PLEADINGS

1. On 8 May 2023, Dongguan Youpute Technology Co. Ltd. (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK (“the applicant’s mark”). The applicant’s mark was published on 19 May 2023 and registration is sought for the following goods:

Class 9: Computer mouse; Mouse [computer peripheral]; Computer mouse pads; Computer keyboards; Computer keyboard keycaps; Computer keyboard controllers; Computer keypads; Software; Computer software; Computer software packages; Application software.

2. On 26 July 2023, the applicant’s mark was opposed by The Stryze Group Acquisition I GmbH (“the opponent”). The opposition is based on sections 5(4)(a) and 3(6) of the Trade Marks Act 1994 (“the Act”).
3. Under its 5(4)(a) ground, the opponent relies on the unregistered sign “HK GAMING” that it claims to have used throughout the UK since 27 April 2020 in respect of the following goods:

“Keyboards; Keyboard amplifiers; Keyboard terminals; Wireless keyboards; Multifunction keyboards; Computer keyboards; Keyboards for tablets; Multifunction computer keyboards; Keyboards for smartphones; Covers for computer keyboards; Keyboards for mobile phones; computer keyboard keys; computer keyboard key pads; Computer keyboard keycaps; Computer keyboard controllers; Computer keypads; Software; Computer software; Computer software packages; Application software; telephone sets with screen and keyboard; Mouse pads; Computer mouse; Pads (Mouse -); Mouse mats; Mousepads; Computer mouses; Computer mousepads; Computer mouse pads; Mouse [computer peripheral]; Mouses for computers; Mouse pads [computer peripheral]; Wrist rests for computer mouse users; Mats for use with a computer mouse; switches; computer switches; computer optical switches;

computer mechanical switches; computer apparatus and instruments; computer peripheral devices; parts and fittings for all of the aforesaid goods.”

4. The opponent claims that its use of the above goods has given rise to a protectable level of goodwill. Further, given the identity between the sign and the mark together with the identity of the goods at issue, the opponent claims that it is highly likely that there would exist a misrepresentation on the part of the consumer in that they would be deceived into thinking that the applicant and the opponent were economically linked. Consequently, the opponent argues that this would divert trade away from the opponent, thereby causing it damage.
5. Under the 3(6) ground, the opponent claims that the applicant has acted in bad faith because it knew, or ought to have known, that the opponent was using both identical and highly similar branding and livery for identical or similar goods after acquiring the brand on 28 December 2021. It is claimed that the applicant sought to register its mark dishonestly in an effort to prevent the opponent, as a competitor, from using its rights in the UK. In addition, the opponent claims that the applicant’s attempts to invalidate the opponent’s marks in other proceedings falls short of the standard of acceptable commercial behaviour.
6. The applicant filed a counterstatement wherein it denied the claims against it.
7. Both parties filed evidence in chief during these proceedings, with the opponent’s evidence being accompanied by written submissions. In addition, I note that the opponent also filed evidence in reply which, again, was accompanied by written submissions. A hearing took place before me on 16 March 2026, by video conference. The opponent was represented by Dr Dominic Murphy of Shoosmiths LLP, who have represented the opponent throughout these proceedings. The applicant was represented by Liu Chen, who is an employee of the applicant and has been listed as its appointed representative in these proceedings since 3 August 2023.

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

EVIDENCE

9. The opponent's evidence in chief came in the form of the witness statement of Carlos Pons dated 22 July 2024. Mr Pons is IP Counsel of Razor Group GmbH which is confirmed as being the owner of the opponent. Mr Pons's evidence was filed to prove that the opponent enjoys goodwill in its sign and that the application was made in bad faith. It is accompanied by 13 exhibits, one of which (exhibit 13) is subject to a confidentiality order.

10. The applicant's evidence came in the form of the witness statement of Chen Meili dated 13 September 2024. Chen Meili is the sales manager of the applicant, a position they have held since 2001. Chen Meili's evidence was adduced in defence of the applicant's position and is accompanied by 13 exhibits, being C1 to C4 and CML1 to CML9.

11. In reply, the opponent filed the witness statement of Dr Dominic Murphy dated 14 November 2024. As set out above, Dr Murphy is the opponent's representative and is, therefore, duly authorised to file evidence on its behalf. Dr Murphy's evidence introduces a number of screenshots of various websites into the proceedings and is accompanied by three exhibits, being DM1 to DM3.

12. I will refer to points from the evidence or submissions where necessary.

PRELIMINARY ISSUE

13. I wish to briefly deal with the nature of the applicant's evidence in these proceedings. Chen Meili's witness statement is 94 pages in length and I do not consider it appropriate to discuss it in fine detail here. On this point, I note that, at the hearing, Mr Chen did not specifically seek to discuss the wide range of issues raised in the applicant's evidence. I am of the view that given the extent of this evidence, if there was something the applicant wished to specifically direct me to in support of its defence, it was for the applicant to highlight precisely what that was. That being said, I will discuss a number of points raised at this stage of my decision so as to assist in demonstrating the nature of the applicant's evidence. These points are as follows:

- a. It is noted that the witness statement of Chen Meili includes 19 requests for evidence covering various points. Each request is accompanied by a passage discussing the claimed inferences that the applicant believes can be made from the lack of such evidence. One request, for example, is for the provision of evidence regarding to OEM (original equipment manufacturer) production agreements relating to the HK GAMING mark from April 2020 onwards. Firstly, it is not for the applicant to dictate what evidence is of assistance to the opponent in proving its case. Secondly, OEM agreements are not documents that are ordinarily required in claims under section 5(4)(a) of the Act. In short, if an opponent can prove that it engaged in trading activities in the UK at a sufficient volume and so long as said sales create an association between the business and the sign, then goodwill *may* be found. The existence of OEM agreements has no impact on this.
- b. At paragraph 93 of Chen Meili's witness statement, they state that there is a strong indication that Exhibit 12 of Mr Pons's statement may be forged or include transactions from other entities. This is a very serious allegation and the only attempt to substantiate it relates to the fact that online records show that a company called EU Gaming, Ltd. was never sold to the opponent. In making this argument, Chen Meili has included a printout from Companies

House which does not show that the company was sold.¹ This is noted but I see no reason why EU Gaming, Ltd. has any relevance here and I fail to see what the applicant is alleging. In any event, and as I will come to discuss below, there is an agreement covering the assignment of the HK GAMING business from EU GAMING, LTD. and HK Gaming, Ltd. to the opponent. This agreement covers the sale of assets and not the sale of EU Gaming, Ltd. itself. As a result, the argument that EU Gaming was not sold is irrelevant and entirely misconceived. As there is no additional basis for this allegation of forgery, I consider it to be entirely unfounded.

- c. At paragraph 224 of Chen Meili's statement, they made an allegation that the opponent has attempted to reverse engineer the applicant's products and claims that the opponent's silence on the issue (and its unwillingness to provide evidence) indicates that the opponent may have engaged in unethical behaviour. Frankly, this allegation is absurd and entirely baseless as it is accompanied by no supporting evidence.

- d. There are several allegations that the opponent sells counterfeit goods of the real 'HK Gaming' brand. In support of this claim, the applicant has provided a number of Amazon reviews from the opponent's store.² Within the reviews, there are a small number of allegations that the goods are fake. While noted, some of the reviews stem from the store run by a different company (albeit a seemingly connected one, being Stryze Group Americas I LLC). As such, some of the reviews cannot even be attributed to the opponent itself. In any event, the primary problem with these allegations is that the reviews are from 2024 and, therefore, after the relevant date for these proceedings. They are, therefore, of no assistance here.

- e. Included within the applicant's evidence is a 'declaration' from one of the applicant's manufacturing partners, being Huizhou Qinda Electronic

¹ CML102

² CML105

Technology Co., Ltd.³ The document is claimed to speak to the unethical actions of the opponent. While noted, it is not dated and neither is it confirmed precisely who gave the declaration. As such, it is entirely hearsay evidence and without any further information surrounding the document, I am not willing to attribute it any evidential weight.

14. As above, there were many more points raised of a similar unsupportable nature. While I have not mentioned them all, I can confirm that I have given them due consideration and will only seek to discuss any relevant points where I deem it necessary to do so.

DECISION

Section 5(4)(a)

15. Section 5(4)(a) of the Act reads as follows:

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

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

(aa)

(b)

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

³ CML109

16. Subsection (4A) of Section 5 states:

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

17. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “*a substantial number*” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

18. Halsbury’s Laws of England Vol. 97A (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

“Establishing a likelihood of deception generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation¹ among a relevant class of persons; and

- (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

- (a) the nature and extent of the reputation relied upon,
- (b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;
- (c) the similarity of the mark, name etc used by the defendant to that of the claimant;
- (d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

Relevant Date

19. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander Q.C., as the Appointed Person, endorsed the registrar's assessment of the relevant date for the purposes of section 5(4)(a) of the Act, as follows:

“43. In *SWORDERS TM* O-212-06 Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’ ”

20. The applicant's mark does not have a priority date. While no express mention of this line of defence has been made, there is evidence provided that can be taken as an attempt to demonstrate earlier use of the applicant's mark. Such use, if satisfactory, could constitute the beginning of the behaviour complained about and would, therefore, impact upon the relevant date in these proceedings. I will discuss this evidence below.

21. The applicant has introduced sales data covering 2016 to 2023. The figures are broken down to cover wholesale and retail revenue. The figures are as follows:

Year	Units sold (wholesale)	Total wholesale revenue (USD)	Total estimate retail revenue (GBP)
2016	1,000	21,870	33,300 – 44,400

2017	500	8,725	15,400 – 19,250
2018	4,800	93,984	135,000 – 172,500
2019	8,900	180,937	234,000 – 390,000
2020	18,210	1,140,480	562,110 – 702,325
2021	17,720	314,320	394,200 – 578,160
2022	6,180	112,738	175,745 – 229,670
2023	4,840	88,620	125,020 – 138,700

22. In the applicant's narrative evidence, it is explained that the actual UK retail revenue stemming from the above sits between 25 and 35% of the figure provided. This gives me difficulty in determining the precise nature of any sales in the UK. In addition, the evidence does not confirm what goods are actually covered by the sales data. As such, it can reasonably be argued that the data relates to goods that are not necessarily at issue here. In addition to these issues, the supporting documentation in respect of the applicant's activities is vague and imprecise. I say this for the following reasons:

- a. There is just one invoice provided that is dated 10 March 2022 which covers the sale of optical and mechanical switches for keyboards to the opponent, albeit in the USA.⁴ So while this invoice is not even directed at the UK, it also makes no reference to the HK GAMING brand whatsoever. Further, the goods shipped appear to be parts for keyboards that could reasonably be said to be incorporated into end goods by the opponent itself which are then sold under the HK GAMING brand to the end consumer.
- b. There are six transaction documents provided.⁵ Three of these are to a US company so they are not relevant here. One is in the opponent's name and is dated 16 March 2022 and the last two are seemingly in German and include no reference to the opponent, or any other company for that matter. The one document that is in the opponent's name, while showing a transaction amount, contains no other information whatsoever. As such, I have no reason to find

⁴ C2

⁵ C4

that this transaction covers anything other than the type of sales that I have discussed in the previous point, being the sale of parts of goods to be later incorporated into HK GAMING products.

23. The lack of precision in these documents means that I am unable to determine their relevance. While I appreciate a manufacturer may generate goodwill, I consider it entirely plausible in the present circumstances to suggest that the products covered by the sales data are parts that are sold at their source by the applicant to third parties who incorporate them into final products and affix those products with their own respective brandings. Of course, I have no evidence to suggest that this is the case but, in the present case, it is for the applicant to support any such argument by demonstrating how its wholesale goods reach the end user in the UK. Without anything further, I am entitled to proceed on the basis of the aforementioned understanding.

24. Another point raised was one at the hearing wherein Mr Chen was discussing the availability of the applicant's HK Gaming website from September 2018 onwards. In giving his submissions, he made reference to an exhibit showing the applicant's websites but this is merely a printout from a website called 'dynadot' which lists a number of domain names and their registration dates.⁶ The 2018 website is 'hkgaming.com' and, at the hearing, Mr Chen agreed that this website had global reach and was not specific to the UK. He did not push the point any further, so I am not clear on the relevance of the evidence, but I raise it here in case it was provided as some sort of attempt to prove earlier use in the UK. In short, this evidence is simply a printout confirming the existence of a '.com' website from 2018 onwards. It shows nothing of its outward use, let alone how it can be said to be targeted at the UK market. The fact that a website may be registered is not sufficient to show any outward use capable of being the start of the behaviour complained about.

⁶ CML101

25. Bearing in mind what I have said above, I am not convinced that the applicant has sufficiently proven that it has made any sales or any offers for the sale of goods to the UK consumer prior to the filing date of its mark. This means that the relevant date for the section 5(4)(a) assessment is the filing date of the applicant's mark, being 8 May 2023.

Goodwill

26. Goodwill was described in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL), in the following terms:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.”

27. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), Pumfrey J. stated:

“27. There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX)* (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

28. However, in *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) Floyd J. (as he then was) stated that:

“[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

29. In *Hart v Relentless Records* [2002] EWHC 1984 (Ch), Jacob J. (as he then was) stated that:

“62. In my view the law of passing off does not protect a goodwill of trivial extent. Before trade mark registration was introduced in 1875 there was a right of property created merely by putting a mark into use for a short while. It was an unregistered trade mark right. But the action for its infringement is now barred by s.2(2) of the Trade Marks Act 1994. The provision goes back to the very first registration Act of 1875, s.1. Prior to then you had a property right on which you could sue, once you had put the mark into use. Even then a little time was needed, see per Upjohn L.J. in BALI Trade Mark [1969] R.P.C. 472. The whole point of that case turned on the difference between what was needed to establish a common law trade mark and passing off claim. If a trivial goodwill is

enough for the latter, then the difference between the two is vanishingly small. That cannot be the case. It is also noteworthy that before the relevant date of registration of the BALI mark (1938) the BALI mark had been used “but had not acquired any significant reputation” (the trial judge's finding). Again that shows one is looking for more than a minimal reputation.”

30. From reviewing the applicant's position in respect of the present ground, I note that it has raised two primary issues with the opponent's claim. The first issue stems from the fact that the opponent relies on a sign that it claims to have purchased in 2021. In respect of this point, the applicant claims that the goodwill the opponent seeks to rely upon was not duly assigned to it. The second issue is that there is no connection between the sign relied upon and the opponent, meaning that any goodwill accrued from use of the 'HK GAMING' sign does not vest in the opponent. On this point, the applicant argues that the Amazon printout for the HK GAMING store, for example, make no reference to the opponent. Before proceeding to discuss the opponent's evidence of use, I will address the point regarding the assignment of goodwill first. If I am satisfied that there was a valid assignment, I will then consider the evidence more generally. In doing so, I will consider the argument as to whether any goodwill (insofar as it exists) actually vests in the opponent.

Assignment of goodwill

31. The opponent's evidence sets out that The Stryze Group Acquisition GmbH was founded in 2020 and, in December 2021, it acquired (through a subsidiary, being the opponent) the assets in and around the brand 'HK GAMING'. Mr Pons claims that this purchase included the figurative UK trade mark (under registration number 918230778) and the non-registered word mark 'HK GAMING'. In support of this, the opponent has provided an asset purchase agreement (“APA”) dated 28 December 2021.⁷ The APA covers the sale of assets by HK Gaming, Ltd. and EU Gaming, Ltd., to the opponent. [REDACTED]

⁷ Exhibit 13

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. It is this business that is the subject of the APA.

32. At the hearing, Mr Chen argued that the APA assigned only the '778 mark, which is a figurative mark that includes the Hong Kong flag. Having considered the APA, this is clearly not the case. While it does assign the mark in question, it also includes the following passage in regard to the intellectual property rights conveyed:⁸

“ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. ”

33. While the trade marks covered by the APA [REDACTED]
[REDACTED], I fail to see how the excerpt above cannot be said to cover use of the words 'HK GAMING' without any further embellishment (being the sign relied upon in these proceedings). For example, [REDACTED]
[REDACTED]. As such, I am satisfied that the APA covered the assignment of the sign relied upon. In addition, the above excerpt also, clearly, expressly covers the goodwill connected with the use of 'HK GAMING'.

34. At the hearing, Mr Chen set out that the opponent still had not proven that the applicant was aware of the APA. This submission was made during the discussion surrounding the assignment of goodwill so I will address it here. It was not clear the intent of this comment as Mr Chen did not expand on the point. Whilst I agree that there is nothing sufficiently solid proving that the applicant must have been

⁸ See page 2 of the APA at Exhibit 13

aware of the agreement simply because it was listed as a supplier of the products, this does not have any impact on the matter of the assignment of goodwill. This is on the basis that there is no requirement that the applicant be aware of the assignment in order for it to be valid.

35. Lastly, I wish to briefly address that, at the hearing, Mr Chen stated that the applicant had no way of knowing whether the APA was authentic or not. While he did not go so far as to allege it was a false document (and expressly stated that he was not saying that), I fail to see what other point he could possibly be getting at. In short, the APA is exhibited to a witness statement that was accompanied by a sworn statement of truth and, outside of the brief and unsupported comments of Mr Chen at the hearing, I have no reason to doubt its accuracy.

36. Given what I have said above, I am content to find that the goodwill of the HK GAMING brand was duly assigned to the opponent via the APA. I will now proceed to consider whether there exists a protectable level of goodwill.

Evidence of use

37. Goodwill results from trading activities in the UK. The opponent's evidence includes a screenshot from its store as viewed on Amazon.co.uk.⁹ The screenshot is undated but does show use of 'HK Gaming'. Following this, the opponent has provided a wide range of user reviews from customers in the UK regarding sales of 'HK Gaming GK61 Mechanical Gam...' (presumably a gaming keyboard based on the image of the product).¹⁰ There are around 90 pages worth of reviews and I see no reason to discuss them in any detail save to say that they cover the years 2020 to 2023.

⁹ Exhibit 2

¹⁰ Exhibit 3

38. A range of other screenshots are provided from both third party websites and the opponent's own website but these are mostly undated.¹¹ The screenshots that are dated include the following:

- a. an article from RTINGS.com comparing the HK Gaming Mira-M gaming mouse with another brand of gaming mouse.¹² This article includes two dates, being 25 November 2022 and 29 May 2023 and I cannot see any reason for the discrepancy in these dates but, in any event, there is nothing before me suggesting whether this website is aimed at the UK consumer or not and I have nothing to indicate that it is a well-known site across the UK consumer base.
- b. A screenshot dated 14 August 2022 that shows a review by the website 'keyboardsexpert.com' wherein the HK GAMING brand is discussed. As was the case with the article discussed at point a. above, there is nothing to suggest the reach of this review in the UK.

39. In respect of sales, the opponent has provided the following figures regarding the UK-only sales of HK GAMING products since 2019:

Year	Units sold	Gross Revenue (GBP)
2019	20	466
2020	6,511	272,259
2021	16,868	811,912
2022	7,854	355,258
2023	2,434	99,056
Total	33,687	1,538,951

40. In respect of the above, it is noted that the applicant argued that the opponent did not buy the Amazon store until December 2021 so the figures from before that should not count. As above, I am satisfied that the HK GAMING brand was duly assigned along with the goodwill meaning that the sales from between 2019 and

¹¹ Exhibits 4, 5, 7, 8 and 9

¹² Exhibit 6

2021 (prior to December) are still capable of being relied upon by the opponent despite being sales by a predecessor in title.

41. The opponent's evidence also includes a range of invoices stemming from Amazon sales.¹³ There are around 134 pages worth of invoices and, therefore, it is not possible for me to assess them in detail here. While the invoices cover just the early days of July 2022, they are introduced as 'sample invoices' so I do not see any issue in the limited scope of these invoices because they were adduced to support the turnover figures provided above.
42. The invoices cover a roughly equal split of the sales of keyboards and keycap sets for keyboards. The overwhelming majority of the invoices are to addresses in the UK, including locations such as London, Manchester, Swansea, Torquay, Newcastle and Edinburgh, amongst others. However, there are a small handful of invoices to customers in the USA, Ireland, Germany and Qatar. Each invoice confirms the seller as the opponent.
43. In addition to the invoices, the opponent has provided a spreadsheet covering 139 pages of information, seemingly tracking each sale made by the opponent, albeit not limited to sale of the HK GAMING brand.¹⁴ The information in the spreadsheets is only identifiable upon zooming in closely and, for illustrative purposes, I note that the spreadsheets appear before me in the following format:

¹³ Exhibit 11

¹⁴ Exhibit 12

A large, dense spreadsheet with many columns and rows, representing individual sales data. The spreadsheet is filled with text and numbers, and is presented in a very small font size, making the individual cells difficult to read. It appears to be a multi-column table with various data points.

44. I remind myself that during the course of these proceedings, the Tribunal commented upon this evidence in its correspondence dated 19 July 2024 which stated:

“[T]he Tribunal briefly notes that one of the exhibits filed (being Exhibit 12) consists of 139 pages of spreadsheets for individual sales via Amazon.co.uk. The information in the spreadsheet is heavily condensed and is only legible upon zooming in on the soft copy of the same. In short, the Tribunal considers this an inappropriate way in which to file evidence, particularly given that it is already in excess. Rather than direct the removal of Exhibit 12 or make a determination that it will be given no consideration whatsoever, the Tribunal instead confirms that its admission into these proceedings is on the basis that it will be given a very broad consideration by the Hearing Officer that will ultimately be responsible for this matter.”

45. Clearly, the example of the evidence I have provided above is an unacceptable format of evidence and given what was said in the Tribunal’s letter dated 19 July 2024, I consider that it is an appropriate approach for me to give this evidence very little weight. That being said, this does not detract from the turnover and invoices evidence provided.

46. Even though I have confirmed that I will give the spreadsheet very little weight, there is a point in the applicant's evidence that I wish to discuss briefly. The applicant alleges that a number of the goods in the spreadsheet are mis flagged as being HK GAMING products when they are, in fact, labelled HKKB. A list of goods and their location within the spreadsheet is provided in support of this claim.¹⁵ However, having looked at the spreadsheet myself, and on the pages identified by the applicant, I cannot see any reference to the brand HKKB. Even if there were, I have already noted that this spreadsheet is not limited to just HK GAMING products and, in any event, this point does not distract from the actual HK GAMING specific turnover and sales data provided by Mr Pons.

47. Lastly, the opponent's evidence does briefly mention its advertising costs, which it claims are substantial. While noted, there is nothing sufficiently solid before me to assist me in determining what 'substantial' means in the context of the opponent's business. As such, I do not consider this statement carries any probative value.

Association between the sign and the opponent

48. As I have set out above, the applicant made an argument that despite the use, there is no connection between the HK GAMING brand and the opponent. While the Amazon store or the opponent's website (which is undated) do not make any reference to the opponent itself, the invoices clearly state that they are sold by the opponent. In short, I see no reason why the consumer would not connect the use by the opponent to the HK GAMING brand. I, therefore, find that the applicant's argument in respect of this point is misguided and so long as there is a protectable goodwill, I am satisfied that there is a sufficient connection between the sign and the opponent.

¹⁵ CML103

Assessment of the evidence

49. Taking all of the evidence into account, it covers the sale of around 33,000 products for a turnover of around £1.5 million over a five-year period. That being said, I suspect that the actual figure as at the relevant date is likely to be less than this because the figures provided are based on the entirety of 2023 and, in the present case, the relevant date is 8 May 2023. This means that a significant proportion of the 2023 figures will have undoubtedly come after that date. While I have no way to accurately determine how this impacts upon the overall turnover and sales figures, I note that the 2023 figures cover the sale of 2,434 goods for a total of £99,056 so a reduction, even of the entirety of the 2023 figures, will not greatly impact the overall position.

50. Another issue I am required to consider in respect of the evidence before me is that the turnover provided is not broken down in any way. I am, therefore, not able to determine the spread of the turnover across the goods on which the opponent relies. That being said, I do not see that this is a particular problem for the opponent on the basis that, while no breakdown is provided, all of the invoices cover keyboards and keycaps for keyboards. As above, there is a roughly equal split across these two categories of goods. Therefore, I consider that I am entitled to proceed on the basis that the entirety of the turnover equally applies to such goods. I appreciate that there is evidence relating to computer mice, however, this evidence is either undated or not focused on the UK market. As such, I have nothing to assist me in determining whether the opponent sold such goods (or any others, for that matter) in the UK prior to the relevant date.

51. I appreciate that the turnover figures are not significant. However, under the present ground, I remind myself that even small businesses which have more than a trivial goodwill can protect signs which are distinctive of that business under the law of passing off even though its goodwill and reputation may be small.¹⁶ Another point relevant to the level of use is that while the use may not have necessarily

¹⁶ See, for example, *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590

generated a high level of turnover, the evidence shows that the level of sales were at a relatively high volume with around 30,000 products sold. In addition, I note that the use before me may not be particularly longstanding but it does cover a number of years so cannot be said to be short term use. Lastly, the Amazon reviews are extensive and cover a wide range of positive reviews, further hinting towards the existence of goodwill.¹⁷

52. Taking all of the above into account, I am satisfied that there exists a protectable level of goodwill vested in the opponent, but only insofar as it relates to “keyboards” and “computer keyboard keycaps”. Further, I am satisfied that the sign relied upon is distinctive of and/or associated with that goodwill. Lastly, as to the strength of the protectable level of goodwill, I consider that it is only moderate.

Misrepresentation

53. In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt L.J. stated that:

“There is no dispute as to what the correct legal principle is. As stated by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] R.P.C. 341 at page 407 the question on the issue of deception or confusion is

“is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents' [product]”

The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148. The necessity for a substantial number is brought out also in *Saville Perfumery Ltd. v. June Perfect Ltd.* (1941) 58 R.P.C. 147 at page 175; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101.”

¹⁷ While the Amazon storefront makes no reference to the opponent, the invoices from Amazon sales clearly list the opponent as the seller. As such, I do not doubt that the connection to the opponent will be made.

54. And later in the same judgment:

“.... for my part, I think that references, in this context, to “more than *de minimis*” and “above a trivial level” are best avoided notwithstanding this court's reference to the former in *University of London v. American University of London* (unreported 12 November 1993). It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion.”

55. In light of the case law above, it is not necessary for the opponent to show that there has been actual misrepresentation to the relevant public. Therefore, a notional assessment of the same may apply.

56. I have found that the opponent enjoys a protectable level of goodwill for the sign ‘HK GAMING’ in respect of “keyboards” and “computer keyboard keycaps”. The applicant’s mark is ‘HK GAMING’. The mark and the sign are, plainly, identical. The applicant’s mark’s specification covers a range of peripheral goods for computers such as mice and keyboards as well as computer software. Where the goods at issue cover keyboards they are plainly identical. Even where the applicant’s specification covers other computer peripheral devices, the fields of activity are clearly the same as both parties operate in the field of computer peripheral devices. As for the software goods in the applicant’s mark, the fields of business may not be identical but they are sufficiently close in that both sets of goods sit within the broader computing field.

57. Taking the above into account, I find that the present case represents a paradigm example of misrepresentation, even bearing in mind the fact that the opponent’s goodwill does not sit at a particularly strong level. In short, the mark and sign are identical and the goods are either identical or are those that sit within the same or similar fields of activity as the opponent. Overall, I find that use of the applicant’s

mark for the goods applied for at the relevant date would have constituted a misrepresentation to a substantial number of consumers.

Damage

58. Having found the existence of goodwill and misrepresentation, I consider that damage through diversion of sales is easily foreseeable. The opposition based upon section 5(4)(a) is, therefore, successful.

59. I will now proceed to consider the section 3(6) ground of the opposition.

Section 3(6)

60. Section 3(6) of the Act states:

“(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

61. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, Lord Kitchin summarised the general principles applicable to bad faith at [240] as follows:

“(i) [...]

(ii) The date for assessing whether an application to register [a] trade mark was made in bad faith is the date the application for registration was made (*Lindt*, para 35).

(iii) Bad faith in this context is an autonomous concept of EU law which must be given a uniform interpretation [...], and must be interpreted in the context of Directive 89/104 in the same manner as in the context of Regulation 40/94 ([*Malaysia Dairy Industries Pte Ltd v Ankenævnet for Patenter og Varemaerker* (C-320/12) EU:C:2013:435 (“*Malaysia Dairy*”), para 29; [*Sky plc v SkyKick UK Ltd* (C-371/18) EU:C:2020:45 (“*Sky CJEU*”), para 73).

(iv) While, in accordance with its usual meaning in everyday language, the concept of bad faith presupposes the presence of a dishonest state of mind or intention, the concept must also be understood in the context of trade mark law, which involves the use of marks in the course of trade. Further, it must have regard to the objectives of the [...] law of trade marks, namely the establishment and functioning of [...] a system of undistorted competition in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable consumers, without any possibility of confusion, to distinguish those goods or services from those which have a different origin (*Lindt*, para 45; [*Koton Mağazacılık Tekstil Sanayi ve Ticaret AS v European Union Intellectual Property Office (EUIPO)* (C-104/18) EU:C:2019:724 (“*Koton*”)], para 45).

(v) Consequently, the objection will be made out where the proprietor made the application for registration, not with the aim of engaging fairly in competition but either (a) with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties; or (b) with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, and in particular the essential function of indicating origin (*Koton*, para 46; *Sky CJEU*, para 75).

(vi) The intention of the applicant is a subjective matter, but it must be capable of being established objectively by the competent administrative or judicial authorities having regard to the objective circumstances of the case (*[Hasbro Inc v EUIPO, Kreativni Dogaaji d.o.o. (intervening)* (Case T-663/19) EU:T:2021:211 (“*Hasbro*”)], paras 39 and 40; *Koton*, para 47).

(vii) The burden of proving that an application for a registered mark was made in bad faith lies on the party making the allegation. But where the circumstances of the case may lead to a rebuttal of the presumption of good faith, it is for the proprietor of the mark to explain and provide a plausible explanation of the

objectives and commercial logic pursued by the application for registration (*Hasbro*, paras 42 and 43).

(viii) Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all of the factors relevant to the particular case (*Lindt*, para 37).

(ix) The applicant for a trade mark is not required to indicate or to know precisely when the application is filed or examined, the use that will be made of it (*Sky CJEU*, para 76; [*AS v Deutsches Patent-und Markenamt* (C-541/18) EU:C:2019:725], para 22).

(x) Nevertheless, the registration by an applicant of a mark without any intention to use it in relation to the goods and services covered by the registration may constitute bad faith where there is no rationale for the application in the light of the aims referred to in Regulation 40/94 and Directive 89/104 (*Sky CJEU*, para 77).

(xi) Such bad faith may, however, be established only where there are objective, relevant and consistent indicia tending to show that, when the application was filed, the applicant for registration had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark (*Sky CJEU*, para 77).

(xii) It follows that the bad faith of the applicant cannot be presumed on the basis of a mere finding that, at the time of filing the application, the applicant had no economic activity corresponding to the goods and services referred to in the application (*Sky CJEU*, para 78).

(xiii) When the absence of an intention to use the mark in accordance with the essential functions of a trade mark concerns only certain goods or services

referred to in the application for registration, that constitutes making the application in bad faith only in so far as it relates to those goods or services (*Sky CJEU*, para 81).

(xiv) If, at the end of the day, the court concludes that, despite formal observance of the relevant rules and conditions for obtaining registration, the purpose of the rules has not been achieved, and that there was an intention to take advantage of the rules by creating artificially the conditions laid down for obtaining the registration, this may amount to an abuse sufficient to find that the application was made in bad faith (see, for example, *Hasbro*, para 72).

(xv) Directive 89/104 does not preclude a provision of national law under which an applicant for registration must state that the mark is being used in relation to the goods or services in relation to which it is sought to register the mark, or that the applicant has a *bona fide* intention that it should be used, provided that infringement of such an obligation cannot constitute a ground for invalidity. It may, however, constitute evidence for the purposes of establishing possible bad faith on the part of the applicant when the application was filed (*Sky CJEU*, paras 86 and 87).”

62. An allegation of bad faith is a serious one which must be distinctly proved, but in deciding whether it has been proved, the usual civil evidence standard applies (i.e. balance of probability). This means that it is not enough to establish facts which are as consistent with good faith as bad faith: *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch).

63. It is necessary to ascertain what the applicant knew at the relevant date: *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch). Evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date: *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others*, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16).

64. I remind myself that the opponent's position in respect of the present ground is that the applicant acted in bad faith because it knew, or ought to have known, that the opponent was using identical branding and livery for identical or similar goods after acquiring the HK GAMING brand on 28 December 2021. The opponent claims that by seeking to register its mark, the applicant acted dishonestly in an effort to prevent the opponent, as a competitor, from using its rights in the UK. The opponent claims that the applicant's attempts to invalidate the opponent's marks in other proceedings also falls short of the standard of acceptable commercial behaviour.

65. Dealing with the latter point first, I have not been given any real basis as to why the applicant's attempts to invalidate the opponent's marks in other proceedings constitute an act of bad faith. This aspect of the present ground was not furthered at the hearing. Put simply, there are many reasons why one party may seek to invalidate another party's mark so pleading that the applicant has made attempts to invalidate the opponent's other marks constitutes behaviour that falls short of honest commercial practices will, by itself, not suffice.

66. Before proceeding to discuss the bulk of the claim, I wish to discuss a document that was adduced into evidence by the applicant. In seeking to defend its position that it was the rightful owner of the brand, the applicant included what is titled a 'retail authorization letter' in its evidence.¹⁸ The document is one wherein the applicant authorised the opponent, and the company Stryze Group America 1 LLC, to retail HK GAMING products in the USA, Canada, UK and the EU. The presence of this document was the focus of a discussion at the hearing when discussing the bad faith claim. Dr Murphy alleged that this document was never received by the opponent but I note that this is not actually borne out in evidence as Mr Pons did not file evidence in reply to confirm one way or the other. Further, Dr Murphy claims that the document is falsified which, as I pointed out at the hearing, is a serious allegation. Whilst noted, I do not consider it necessary to get into the point of its veracity at this stage because the document, whilst referencing the opponent, is

¹⁸ C3

not actually signed by the opponent. Instead, it appears to be signed by a representative of the applicant only. Therefore, it cannot be said that it duly demonstrates that the opponent was only a supplier of the goods. In addition, the document that is provided in evidence is a certified copy. The copy was certified as original on 12 January 2022 by an accountant named Chong Kin Ho. However, the document itself is not actually dated. As a result, I do not consider that this evidence assists the applicant.

67. Turning back to the opponent's claim, it is noted that it argues that the applicant must have known that it acquired the 'HK GAMING' brand in 2021 because it was named as a supplier in the APA. The name of the supplier listed (Dongguan YPT Technology) is not identical to the name of the applicant but it is very similar and, further, the address listed is the same as the address on file in these proceedings. I was invited at the hearing to conclude that the company identified in the APA was the applicant. While I am willing to accept this is the case, it does not necessarily point to knowledge. At the hearing, Mr Chen argued that the applicant did not have sight of the APA and argued that just because it was listed as a supplier, it did not constitute knowledge. There is nothing before me that categorically proves that the applicant had knowledge of the APA so, in respect of this point, I am inclined to agree with Mr Chen. Even if it were aware, the applicant having knowledge is not enough by itself to warrant a finding of bad faith. On this point, I refer to paragraph 40 of *Lindt*¹⁹ which sets out that:

“the fact that an applicant knows or must know that a third party has long been using [...] an identical or similar sign for an identical or similar product capable of being confused with the sign for which registration is sought is not sufficient, in itself, to permit the conclusion that the applicant was acting in bad faith.”

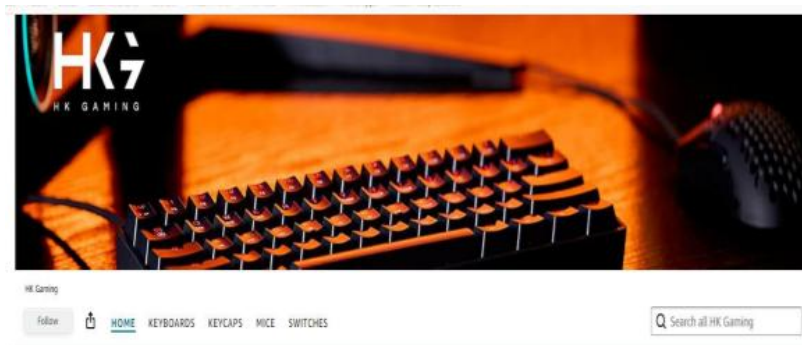
68. As a result of the above, it is not enough to suggest that the applicant was aware of the opponent's business operation and that by filing for its mark, it was acting in bad faith. Therefore, I must be satisfied that the evidence presents something more

¹⁹ *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, Case C-529/07

to show that the applicant was acting in line with the intentions put forward by the opponent, namely that it was seeking to prevent the opponent from using its rights.

69. At the hearing, Dr Murphy took me to evidence showing that the applicant's Amazon storefront appears to be an exact copy of the opponent's Amazon storefront.²⁰ While the storefronts use the same image and while the use of HK GAMING is present in both, it is placed at separate locations within the photograph and the actual stylisation of the marks differ. For illustrative purposes, I have reproduced the images below:

The opponent's storefront:



The applicant's storefront:



70. Clearly, there is a very high degree of similarity to how the parties' storefronts appear. Unfortunately for the opponent, this is not, by itself, sufficient to show that

²⁰ DM3

the applicant was acting in line with the pleaded intention of preventing the opponent from using its rights.

71. Turning to the opponent's claim more generally, it appears to be made up of a range of vague arguments based on mere suppositions and inferences that are simply not borne out in evidence. I will not go over each of the arguments raised but, for example, refer to the one put forward at paragraph 12 of the opponent's skeleton argument, which states as follows:

"12. In these circumstances, the filing of an application for an identical Trade Mark (as the word version of the mark in all caps covers use of the mark in all cases, variants and colours) covering identical goods cannot be characterised as coincidental or bona fide. Thus, we invite the Tribunal to conclude that the filing of the Application was a deliberate attempt to appropriate existing and valid Trade Mark rights known to belong to the Opponent at the time of filing."

72. While this argument (and others like it) is noted, it is a mere supposition that the application at issue cannot have been coincidental or bona fide on the basis that it was for a mark that is identical to the opponent's brand. In short, there is simply no documentary evidence speaking to the intention of the applicant as at the relevant date. Applying for an identical mark for identical or similar goods is not an act of bad faith. If it were, then every successful claim under section 5(1) or 5(2)(a) of the Act would also constitute a bad faith claim.

73. As set out above, an allegation of bad faith is a serious one that must be distinctly proved on the balance of probabilities and, in the present case, the opponent has failed to satisfy this burden. Therefore, without anything sufficiently solid before me that categorically points to the intentions of the applicant, I am not willing to find that the application at issue was filed in bad faith. As a result, the present ground fails.

CONCLUSION

74. The opposition has succeeded in full under the section 5(4)(a) ground. As a result, the applicant's mark is, subject to any successful appeal of my decision, hereby refused registration for all of the goods applied for.

COSTS

75. The opponent has succeeded and is, therefore, entitled to a contribution towards its costs. At the hearing, Dr Murphy requested off-scale costs in respect of these proceedings. The basis for this request was because the applicant made extensive submissions based on irrelevant facts. In response, I confirmed that if I deemed it necessary to grant off-scale costs then I would invite the parties to make submissions on the point.

76. Having considered the position, I appreciate that the applicant's evidence and submissions were convoluted and mostly irrelevant. However, this alone does not warrant an award of costs off the scale. On the contrary, I do not consider that there is anything before me to suggest that the applicant has been unreasonable in its conduct throughout these proceedings. As a result, I hereby refuse the opponent's request and will, instead, make a costs award based upon the scale published in Tribunal Practice Notice 1/2023.

77. In the circumstances, I award the opponent the sum of £2,200 as a contribution towards its costs. The sum is calculated as follows:

Preparing a notice of opposition and considering the counterstatement	£300
Preparing evidence and considering the evidence of the proprietor:	£900
Preparing for and attending a hearing:	£800

Official fees: £200

Total: £2,200

78.I hereby order Dongguan Youpute Technology Co. Ltd. to pay The Stryze Group Acquisition I GmbH the sum of £2,200. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 5th day of June 2026

A COOPER

For the Registrar