

**O/0935/24**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF UK REGISTRATION NUMBER UK00910658342**

**IN THE NAME OF XIAOMI INC.**

**IN RESPECT OF THE FOLLOWING TRADE MARK**

**MIUI**

**IN CLASSES 9, 37, 38 AND 42**

**AND**

**AN APPLICATION FOR REVOCATION THEREOF**

**UNDER NUMBER CA000505068**

**VAILLANT GMBH**

## **Background and pleadings**

1. Trade mark number UK00910658342 stands registered in the UK for the mark shown on the front page of this decision (“***the Contested Mark***”) in the name of Xiaomi Inc. (“***the Proprietor***”). The Proprietor’s registration is a comparable mark (EU).<sup>1</sup> It was filed on 20 February 2012 and completed its registration process on 20 July 2012. At this date, the mark was registered for the following goods and services:

Class 9            Fixed and mobile telephones; Magnetic media readers; Hi-fi systems; Radios, televisions; Computers, Apparatus for recording, Duplicating and, Broadcasting of sound, Images or data; Magnetic media; Navigation and positioning equipment, namely, electronic and computer instruments for determining precise geographic locations of aircraft, marine vessels, land vehicles, human beings; Electronic and computer instruments for surveying, mapping, marine tracking and navigation, aviation navigation and tracking, land vehicles tracking and navigation, and human being tracking and navigation; Global positioning sensors, software, receivers, transmitters; Global positioning systems hardware and software; Wireless communications global positioning systems software and hardware; Parts and fittings for all the aforesaid goods, included in class 9.

Class 37            Maintenance and repair services: Fixed and mobile telephones sets; Magnetic media readers; Stereo hi-fi systems; Television and radio sets; Computers, apparatus for the recording, reproduction and transmission of sound, images and data; Magnetic media; For navigation and positioning equipment, namely electronic and computer instruments for determining precise geographic locations of aircraft, marine vessels, land vehicles, human beings; Electronic and computer instruments for surveying, mapping, marine tracking

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<sup>1</sup> Following the end of the transition period of the UK’s withdrawal from the EU, all EU trade marks (“EUTM”) registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A ‘comparable trade mark (EU)’ retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

and navigation, aviation navigation and tracking, land vehicles tracking and navigation, and human being tracking and navigation; Global positioning sensors, receivers, transmitters; Computer hardware for global positioning systems; Computer hardware for global positioning systems for wireless communication; Parts and components for the afore- mentioned goods.

Class 38      Communication services including positioning, navigation, location, network correction and network communication services.

Class 42      Hardware and software design and development services; Computer software maintenance services.

2. On 30 June 2022, Vaillant GmbH (“***the Applicant***”) sought revocation of the mark, in its entirety, for non-use under sections 46(1)(a) and 46(1)(b) of the Trade Marks Act 1994 (“***the Act***”).<sup>2</sup> The period in respect of which non-use is claimed under section 46(1)(a) is **21 July 2012 to 20 July 2017** (“***the first relevant period***”), with an effective date of revocation of **21 July 2017**. The period in respect of which non-use is claimed under section 46(1)(b) is **30 June 2017 to 29 June 2022** (“***the second relevant period***”), with an effective date of revocation of **30 June 2022**. As the Contested Mark is a comparable mark, pursuant to paragraph 8 of Part 1, Schedule 2A of the Act, use within the EU is relevant for any part of the relevant period which falls prior to IP Completion Day (i.e., 31 December 2020).
3. On 12 September 2022 the Proprietor filed a defence and counterstatement, on Form TM8(N), denying the claims made by the Proprietor, requesting the cancellation application to be dismissed and a costs award to be made in its favour.
4. The Applicant is represented by Cleveland Scott York. The Proprietor is represented by Abion UK Limited.

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<sup>2</sup> The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK’s withdrawal from the EU.

## **Evidence and submissions**

5. During the evidence rounds, only the Proprietor filed evidence in the form of the witness statement of Matthew Bedford dated 7 June 2024, and its corresponding exhibits (labelled MB1 – MB44). Matthew Bedford has since September 2018 been a Senior Associate at the Proprietor’s legal representatives.<sup>3</sup> Therefore, Mr Bedford is duly authorised to provide evidence (and make submissions) on behalf of the Proprietor.
6. A hearing was initially requested, but subsequently vacated and the Proprietor filed written submissions in lieu. The evidence and submissions will not be summarised here, but I have taken them all into account in reaching my decision and will refer to them below where necessary.

## **Decision**

### **Statutory provisions**

7. The relevant provisions of section 46 of the Act are as follows:

“(1) The registration of a trade mark may be revoked on any of the following grounds –

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) [...]

(d) [...]

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<sup>3</sup> At Lane IP Limited, until its acquisition by Abion.

(2) For the purpose of subsection (1) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as in referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) [...]

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existing at an earlier date, that date.”

8. Section 100 of the Act is also relevant, which reads:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

9. Given that the Proprietor’s mark is a comparable mark, paragraph 8 of part 1, schedule 2A of the Act is also relevant, which states:

“8.— Non-use as defence in infringement proceedings and revocation of registration of a comparable trade mark (EU)

(1) Sections 11A and 46 apply in relation to a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the period of five years referred to in sections 11A(3)(a) and 46(1)(a) or (b) (the "five-year period") has expired before [IP completion day]—

(a) the references in sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in sections 11A and 46 to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before [IP completion day]—

(a) the references in sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark, are to be treated as references to the corresponding EUTM ; and

(b) the references in sections 11A and 46 to the United Kingdom include the European Union”.

### **Relevant case law**

10. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 *P Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft 'Feldmarschall Radetsky'*[2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial

justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].

107. The trade mark proprietor bears the burden of proving genuine use of its trade mark: see section 100 of the 1994 Act and *Ferrari* at [73]-[83]. The General Court of the European Union has repeatedly held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned: see e.g. Case T-78/19 *Lidl Stiftung & Co KG v European Union Intellectual Property Office* [EU:C:2020:166] at [25]. It has also repeatedly held that the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the proprietor to produce additional evidence to dispel any doubts as to the genuineness of its use: see e.g. *Lidl* at [33]. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander QC (as he then was) as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use. [...] However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

11. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL 0/404/13, Mr Geoffrey Hobbs QC (as he then was) as the Appointed Person stated that:

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.’

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

12. What I take from this case law is that there is no requirement to produce any specific form of evidence, but that I must consider what the evidence as a whole shows me and whether on this basis I can reasonably be satisfied on the balance of probabilities that there has been genuine use of the mark in respect of the goods and services for which it is registered.

13. In *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, the Court of Justice of the European Union (“CJEU”) noted that:

“36. It should, however, be observed that [...] the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.

[...]

48. To determine whether the condition of genuine use in the Community is satisfied, I consider that the national court must examine all forms of use of the mark within the internal market. In that context, the geographical definition of the relevant market is the entire territory of the 27 Member States. The borders between Member States and the respective sizes of their territories are not pertinent to this inquiry. What matters is the commercial presence of that mark, and consequently that of the goods or services covered by the mark, in the internal market.

[...]

55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine

or not. A *de minimis* rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77).”

14. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited* [2016] EWHC 52, Arnold J (as he then was) reviewed the case law since *Leno* and concluded as follows:

“228. Since the decision of the Court of Justice in *Leno* there have been a number of decisions of OHIM Boards of Appeal, the General Court and national courts with respect to the question of the geographical extent of the use required for genuine use in the Community. It does not seem to me that a clear picture has yet emerged as to how the broad principles laid down in *Leno* are to be applied. It is sufficient for present purposes to refer by way of illustration to two cases which I am aware have attracted comment.

229. In Case T-278/13 *Now Wireless Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* the General Court upheld at [47] the finding of the Board of Appeal that there had been genuine use of the contested mark in relation to the services in issue in London and the Thames Valley. On that basis, the General Court dismissed the applicant’s challenge to the Board of Appeal’s conclusion that there had been genuine use of the mark in the Community. At first blush, this appears to be a decision to the effect that use in rather less than the whole of one Member State is sufficient to constitute genuine use in the Community. On closer examination, however, it appears that the applicant’s argument is not that use within London and the Thames Valley was not sufficient to constitute genuine use in the Community, but rather that the Board of Appeal was wrong to find that the mark had been used in those areas, and that it should have found that the mark had only been used in parts of London: see [42] and [54]-[58]. This stance may have been due to the fact that the applicant was based in Guildford, and thus a finding which still left open the possibility of conversion of the Community trade mark to a national trade mark may not have sufficed for its purposes.

230. In *The Sofa Workshop Ltd v Sofaworks Ltd* [2015] EWHC 1773 (IPEC), [2015] ETMR 37 at [25] His Honour Judge Hacon interpreted *Leno* as establishing that ‘genuine use in the Community will in general require use in more than one Member State’ but ‘an exception to that general requirement arises where the market for the relevant goods or services is restricted to the territory of a single Member State’. On this basis, he went on to hold at [33]-[40] that extensive use of the trade mark in the UK, and one sale in Denmark, was not sufficient to amount to genuine use in the Community. As I understand it, this decision is presently under appeal and it would therefore be inappropriate for me to comment on the merits of the decision. All I will say is that, while I find the thrust of Judge Hacon’s analysis of *Leno* persuasive, I would not myself express the applicable principles in terms of a general rule and an exception to that general rule. Rather, I would prefer to say that the assessment is a multi-factorial one which includes the geographical extent of the use.”

### **Assessment of the sufficiency of use**

15. The evidence clearly shows that the Proprietor is one of the world’s largest smartphone manufacturers. It has widely marketed its ‘Xiaomi’ smartphones, occupying a significant share in such market globally (including several EU countries and the UK). Mr Bedford’s witness statement outlines the background of ‘Xiaomi’ (the Proprietor), describing it as one of the world’s leading companies in consumer electronics and software, ranking in 2020 as the third-largest smartphone manufacturer globally.<sup>4</sup> The Proprietor’s website (‘www.mi.com’) receives millions of visits globally, including significant traffic from EU countries such as Spain, France, Germany, Poland, and the UK.<sup>5</sup> ‘Xiaomi’ is also among the top smartphone shippers in Europe,<sup>6</sup> particularly in Spain, France, and Italy,<sup>7</sup> and sells its products through physical stores across the EU<sup>8</sup> and online retailers like Amazon, Carrefour, and Vodafone.<sup>9</sup> In the UK, ‘Xiaomi’ markets its smartphones

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<sup>4</sup> Exhibit MB1, Exhibit MB2, Exhibit MB20, Exhibit MB22, Exhibit MB23, Exhibit MB25. For evidence concerning the UK see Exhibit MB30 and Exhibit MB31.

<sup>5</sup> Exhibit MB3 and Exhibit MB4.

<sup>6</sup> Exhibit MB24 and Exhibit MB21.

<sup>7</sup> Exhibit MB41, Exhibit MB42 and Exhibit MB43.

<sup>8</sup> Exhibit MB5.

<sup>9</sup> Exhibit MB6.

via a physical store in the Westfield London outlet,<sup>10</sup> and through online retailers such as Argos, John Lewis, and Currys PC World,<sup>11</sup> as well as the 'Xiaomi' UK official website ('www.mi.com/uk').<sup>12</sup> Mr Bedford confirms that the "Mi smartphones" advertised on the official website use the 'MIUI' software, although none of the extracts reference the Contested Mark. Evidence also shows Xiaomi's global revenues in the thousands of millions during the relevant period;<sup>13</sup> Mr Bedford states that a significant portion of such revenues is attributable to the UK and EU. Advertising efforts include social media platforms (i.e., YouTube, Instagram, Twitter, and Facebook)<sup>14</sup> and third-party online articles in the UK.<sup>15</sup> All this evidence references to 'Xiaomi' smartphones, with no mention of the Contested Mark.

16. Turning to the evidence concerning the use of 'MIUI'. Mr Bedford's witness statement describes the 'MIUI' software, clarifying that it is the operating system (OS) pre-installed on all Xiaomi smartphones and tablet devices. Since the MIUI's first release in 2010, this OS has been updated multiple times up to the latest 'MIUI 12' version. The evidence reports that the first iterations of the 'MIUI' user interface resembled in part the iOS operating system, such as the app icons being in a uniform shape, the dialler and in-call interface, the organisation of the 'Settings' app, and the visual appearance of toggles in the user interface (UI).<sup>16</sup>

17. The evidence features a screenshot from a third-party YouTube channel showing one of the Proprietor's smartphones being turned on for the first time. The exhibit shows the phone's screen displaying a prominent stylised number '11' and the wording "MIUI 11" underneath as shown below:<sup>17</sup>

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<sup>10</sup> Exhibit MB26.

<sup>11</sup> Exhibit MB27 and Exhibit MB29.

<sup>12</sup> Exhibit MB28.

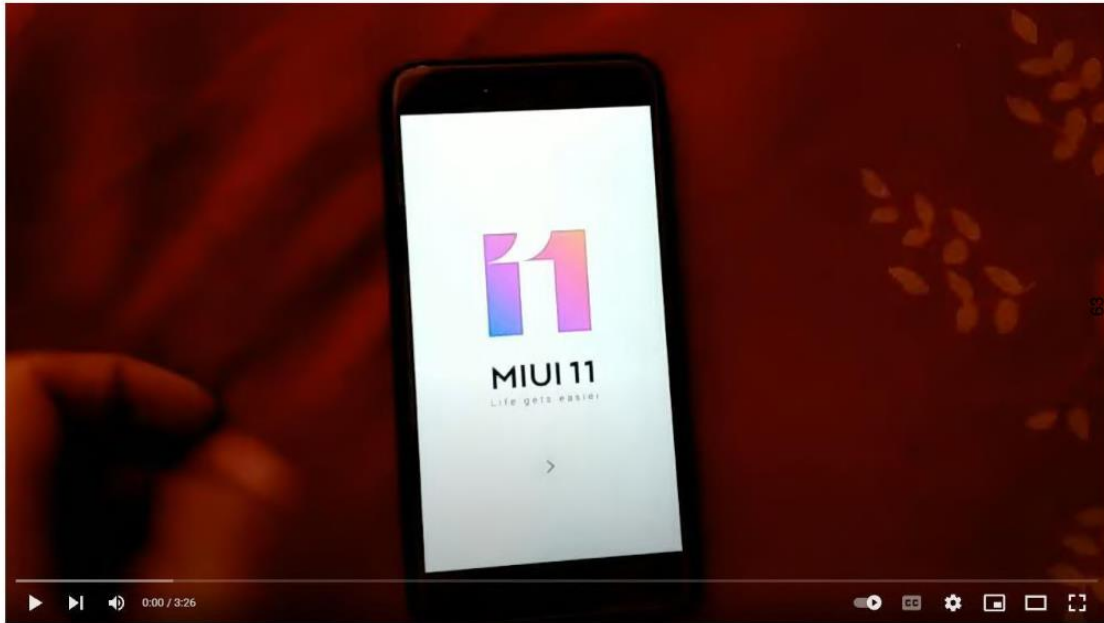
<sup>13</sup> Exhibit MB40 and Exhibit MB44.

<sup>14</sup> Exhibit MB34, Exhibit MB36, Exhibit MB37.

<sup>15</sup> Exhibit MB35.

<sup>16</sup> Exhibit MB7.

<sup>17</sup> Exhibit MB8.



Miui 11 Full Setup Redmi 4, 5A, Y1, Max 2 || Miui 11 All Setup Features || Miui 11 Global Setup

Techy Shiva  
27.7k subscribers

Subscribe

13K

Share

Download

Clip

Save

18. Mr Bedford states that every user of the Proprietor’s smartphones will be aware of the ‘MIUI’ technology and that the product (i.e., the mobile phone) operates on the ‘MIUI’ software. The evidence is undated, and it indicates “YouTube IE” suggesting that the YouTube channel targets consumers in Ireland.

19. A review for one of the Proprietor’s products (i.e., the Xiaomi tablet ‘Mi Pad 2’) shows that the reviewer refers to the Contested Mark to identify the Proprietor’s technology.<sup>18</sup> The reviewer states that “*the Android model runs 5.1 Lollipop and Xiaomi’s own MIUI 7.0 user interface*”. The article also lists ‘MIUI 7.0’ among the specifics on the Xiaomi Mi Pad 2. In the article the ‘MIUI 7.0’ is identified as a user interface and no further functionalities of this user interface are specified.<sup>19</sup>

20. Exhibit MB10 shows some third-party online articles detailing the user interface features introduced by various versions of the ‘MIUI’ software. Multiple articles focus on ‘MIUI 12’, highlighting enhancements such as smoother animations, modern visual elements, a more cohesive design, a notification control centre, redesigned privacy settings, floating windows, dynamic wallpapers, on-screen navigation gestures, an app drawer for organising apps, and battery-saving

<sup>18</sup> Exhibit MB9.

<sup>19</sup> Exhibit MB9, page 68.

management tools.<sup>20</sup> Additional evidence further details some of the ‘MIUI 12’ functionalities such as, for example, the new interface of the weather app, new intuitive visuals, and the introduction of the dark mode.<sup>21</sup>

21. Another article discusses the ‘MIUI 7’ software, describing how it alters the user interface of Xiaomi phones, for example, the app arrangement on the home screen, lock screen notifications, the design of the ‘recent panels’ section and of the dialler app.<sup>22</sup> Additionally, one article traces the evolution of the ‘MIUI’ operating system, outlining features introduced across different versions, particularly those related to phone management, interface design, and functionality.<sup>23</sup>

22. Evidence also shows that in 2019, around 309 billion active users were using the ‘MIUI’ operating system, increasing to a total of around 343 billion active users in 2020.<sup>24</sup> The evidence shows the global number of ‘MIUI’ active users, not broken down by country. Mr Bedford states that most of the users are located outside of China, but he does not elaborate further on this point.

23. The Proprietor promoted ‘MIUI’ through its YouTube channel. The evidence features stills of videos showing the launch of the ‘MIUI 10’ and ‘MIUI 11’ software.<sup>25</sup> The evidence mostly does not clarify the types of features being advertised. Only one part of the evidence refers to the ‘MIUI’ caller display. While the videos attracted substantial views and comments, the evidence appears to be global. Mr Bedford notes that the “MIUI 12 Global Launch Event Recap” video targets the EU market, particularly Italy and Spain. Further promotion of the Contested Mark occurred via a dedicated ‘MIUI’ YouTube channel, where video stills show some of the ‘MIUI’ software functionalities such as, for example, how to hide apps, gestures controls, and the phone interface.<sup>26</sup> The Proprietor also operates a community forum website (‘www.c.mi.com’) that includes a dedicated ‘MIUI’ section with over 51,000 individual threads, providing users with updates and product-related discussions.<sup>27</sup>

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<sup>20</sup> Exhibit MB10 pages 71, 80-82 and 84.

<sup>21</sup> Exhibit MB14.

<sup>22</sup> Exhibit MB10, pages 87 – 96.

<sup>23</sup> Exhibit MB10, page 97 and 98.

<sup>24</sup> Exhibit MB11 and Exhibit MB12.

<sup>25</sup> Exhibit MB15 and Exhibit MB16.

<sup>26</sup> Exhibits MB17 and MB18.

<sup>27</sup> Exhibit MB19.

24. The evidence also shows that the Proprietor has received industrial design awards for its smartphones including the 'Red Dot 2019' award for the 'MIUI Natural Dynamic Sound System'.<sup>28</sup> Although the Proprietor did not explain further the features of the 'MIUI Natural Dynamic Sound System', the system appears to introduce new sound effects for ringtones, notifications and alarms allowing users to personalise their audio notification settings.<sup>29</sup> The evidence also includes screenshots from social media accounts on Facebook, Twitter, and Instagram, all dedicated exclusively to the 'MIUI' software. While these posts reference the wallpapers introduced with the 'MIUI 12' release, they offer limited insight into the broader functionalities of the software.<sup>30</sup>

25. Based on the evidence presented, the Proprietor is a significant player in the smartphone market, and it has widely marketed its 'Xiaomi' smartphones. The evidence also suggests that, during the relevant period, the Proprietor has used the Contested Mark to identify and promote the operating system (OS) of its smartphones. The 'MIUI' OS appears to focus primarily on enhancing the user interface (i.e., how the phones look) and improving functionality, allowing users to interact with their devices in a more intuitive and user-friendly way. Having reached this conclusion about the evidence of actual use, I shall, later in this decision, consider whether or to what extent the evidence establishes genuine use of the registered goods and/or services and what may constitute a fair specification.

### **Form of the mark**

26. For the sake of completeness, I must consider if I find the use of the mark as shown in the evidence to be use of the Contested Mark as registered. As outlined in *Lactalis McLelland Limited v Arla Foods AMBA*, Case O/265/22,<sup>31</sup> the use of the mark in a different form may also constitute use of the mark as registered.

27. The test under section 46(2) of the Act (i.e. whether the form in which the mark has been used differs in elements which do not alter the distinctive character of the

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<sup>28</sup> Exhibit MB32.

<sup>29</sup> Exhibit MB33, page 232.

<sup>30</sup> Exhibit MB38.

<sup>31</sup> At [13] - [15]. See also *Hyphen GmbH v EUIPO*, Case T-146/15, at [28] - [32].

mark) was summarised as follows by Phillip Johnson, sitting as the Appointed Person, in *Lactalis*:

“13. [...] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences) (see for instance, T-598/18 *Grupo Textil Brownie v EU\*IPO*, EU:T:2020:22, [63 and 64]).

14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.

15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hyphen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative elements are usually less likely to change the distinctive character than those related to the word elements.

16. [...] Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).”

28. I note that whilst the Contested Mark is registered as the letter combination ‘MIUI’, the evidence always features the Contested Mark used along with a number (e.g., ‘MIUI 7.0’ or ‘MIUI 11’) indicating the version of the ‘MIUI’ operating system. For example, exhibit MB10 (page 98) provides a list of different versions of the ‘MIUI’ software identified by various numbers:



EDITOR'S PICK

## Xiaomi: 5 things you didn't know about the Apple of the East

Another noteworthy feature popularized by the brand (and [Huawei](#)) is the ability to download themes from a dedicated store. This is a feature stock Android still technically lacks, as you can download icon/font packs but there isn't an entire theme store.

The early years of MIUI also introduced a few more solid features, such as a built-in [data saver](#) (MIUI 7), one-handed mode for big phones ([MIUI 6](#)), and a permission manager (MIUI 5/6). The last few years have also seen plenty of improvements.

### MIUI 8

The arrival of [MIUI 8](#) arguably heralded the biggest change for Xiaomi's platform yet. Prominent features include scrolling screenshot support, a quick ball navigation setting for accessibility, and the second space feature to create a second profile on the phone.

We also saw the dual apps feature (allowing users to run two messaging accounts on one phone), a power-saving mode, an overhauled gallery app, a more vibrant visual design, and new fonts.

### MIUI 9

We saw this update first hit phones in late 2017, delivering swipe gestures for navigation. These aped Apple's iPhone X, as you swipe up from the bottom to go home and swipe laterally to go back.

Other than these gestures, [MIUI 9](#) also brought "dynamic resource allocation" for better system performance, a smart assistant, and an improved notification shade.

### MIUI 10

The most recent version is [MIUI 10](#), which launched a few months ago. Some of the more prominent features include a [redesigned recents menu](#) and portrait mode for [phones with single cameras](#).

### MIUI 11

We haven't seen any solid news on the next iteration of MIUI, expected to be called MIUI 11. Nevertheless, we'd expect Xiaomi to push it out to phones in 2019.

The Chinese brand also has a habit of pushing out MIUI updates without actually updating the Android version. So a jump to the next Android update isn't guaranteed if your phone supports MIUI 11.

## MIUI tips and tricks

Xiaomi's Android skin is pretty easy to understand, but it certainly holds more its fair share of secrets. We show you how to master the platform — check out our guides below.

- [How to take a screenshot on a Xiaomi phone](#)
- [A guide to MIUI themes: Here's how to spice up your Xiaomi phone](#)
- [A beginner's guide to the Xiaomi camera app: Here's what those settings and modes do](#)

If you have any MIUI questions, comments, or recommendations, sound off in the comments! You can also check out our guide to the best Xiaomi phones over [here](#).

29. In these instances, the Contested Mark 'MIUI' is clearly in use in an acceptable variant. The addition of such numbers is manifestly descriptive of the type, series or version of the 'MIUI' software aimed at indicating a combination of features that

that specific version of the 'MIUI' software possesses. Therefore, the addition of such numbers does not prevent the element 'MIUI' from being viewed independently to indicate the origin of the goods and services. I therefore find this use of the Contested Mark to be an acceptable variant of the mark as registered in line with *Lactalis*.

### **Fair specification**

30. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. (as he then was) as the Appointed Person summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

31. In *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834 the Court of Appeal set out the proper approach to partial revocation, as follows:

“245. First, it is necessary to identify the goods or services in relation to which the mark has been used during the relevant period.

246. Secondly, the goods or services for which the mark is registered must be considered. If the mark is registered for a category of goods or services which is sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, use of the mark in relation to one or more of the subcategories will not constitute use of the mark in relation to all of the other subcategories.

247. Thirdly, it is not possible for a proprietor to use the mark in relation to all possible variations of a product or service. So care must be taken to ensure this exercise does not result in the proprietor being stripped of protection for goods or services which, though not the same as those for which use has been proved,

are not in essence different from them and cannot be distinguished from them other than in an arbitrary way.

248. Fourthly, these issues are to be considered having regard to the perception of the average consumer and the purpose and intended use of the products or services in issue. Ultimately it is the task of the tribunal to arrive at a fair specification of goods or services having regard to the use which has been made of the mark.

249. This approach does strike an appropriate balance. It gives effect to the clear intention of the EU legislature that marks must actually be used or, if not used, be subject to revocation. [...] It is also fair to proprietors for it does not require a proprietor to prove that he has used his mark in relation to all possible variations of the goods or services covered by its registration but only those which are sufficiently distinct to constitute coherent categories or subcategories. I am also satisfied that it gives appropriate protection to the legitimate interest of a proprietor in being able in the future to extend his range of goods or services within the scope of the terms describing the goods or services for which its mark is registered.”

32. Mr Bedford states that the Contested Mark identifies the operating system (OS) that comes pre-installed on the Proprietor’s smartphones and tablet products. The evidence provided indicates that the Contested Mark has been used exclusively in relation to the OS for the Proprietor’s products. Mr Bedford did not provide a full or clear account of the functions of an OS for smartphones. From the evidence provided, the OS seems to consist of the smartphones’ user interface referring to the phone’s appearance (e.g., apps’ shape, wallpapers, floating windows, animations), and its usability (e.g., on-screen navigation gestures, control centre, dark mode/brightness settings, and battery management).

33. The Proprietor argues, in its submissions in lieu, that the evidence shows use of the Contested Mark for “*Apparatus for recording, Duplicating and, Broadcasting of sound, Images or data*” in class 9.<sup>32</sup> This is because the evidence reports that the MIUI’s OS enables all OPPO, Vivo, Xiaomi and Realme phones to connect and

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<sup>32</sup> Mr Bedford’s submissions in lieu dated 2 May 2025 [29.d].

share data between them.<sup>33</sup> As ‘MIUI’ is the OS exclusively for ‘Xiaomi’ phones, it seems to me that such file-sharing functionality does not only relate to the ‘MIUI’ OS as it is available in other phones (i.e., OPPO, Vivo and Realme), and appears to be a common function smartphones have. I find that the evidence fails to establish that this feature derives from the ‘MIUI’ OS. Furthermore, I note that in the Proprietor’s submissions in lieu, such file-sharing functionality is referred to as the ‘Mi Share’ and not ‘MIUI’. Therefore, I find the evidence is insufficient to show use at least in relation to “*Apparatus for recording, Duplicating [...] of sound, Images or data*”.

34. For the sake of completeness, with regard to the goods “*Apparatus for [...] Broadcasting of sound*”, I note the evidence reports that the Proprietor received an award for the ‘MIUI Natural Dynamic Sound System’. The evidence indicates that the ‘MIUI Natural Dynamic Sound System’ mainly equips the Proprietor’s smartphones with new sound effects for ringtones, notifications and alarms. It has not been made clear to me that such functionality falls within the general definition of sound broadcasting. The Proprietor did not further articulate the features of the ‘MIUI Natural Dynamic Sound System’, and I find the evidence neither sufficient nor clear enough to establish genuine use of the Contested Mark in relation to hardware (i.e., apparatus) for the broadcasting of sound.

35. The Proprietor contends, in its submissions in lieu, that the evidence shows that the ‘MIUI’ software has radio capabilities and a Hi-fi functionality since the ‘MIUI’ OS offers a Music App enabling the users to play music on their phones.<sup>34</sup> As mentioned above, the Contested Mark has been used exclusively for the smartphones’ OS. The natural definitions of “*radios*” and “*Hi-fi systems*” in class 9 are hardware comprising sound-reproducing equipment; thus, these goods do not equate to a phone’s user interface. Absent further clarification from the Proprietor, I do not find the evidence shows use of the Contested Mark for these types of goods.

36. The Proprietor also submits that the evidence shows use of the Contested Mark in relation to “*Navigation and positioning equipment, namely, electronic and computer instruments for determining precise geographic locations of aircraft, marine*

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<sup>33</sup> Exhibit MB10, page 75.

<sup>34</sup> Mr Bedford’s submissions in lieu dated 2 May 2025 [29.b and 29.c]; Exhibit MB10, page 93 and 95.

vessels, land vehicles, human beings”, “Electronic and computer instruments for surveying, mapping, marine tracking and navigation, aviation navigation and tracking, land vehicles tracking and navigation, and human being tracking and navigation”, “Global positioning sensors, software, receivers, transmitters”, “Global positioning systems hardware and software” and “Wireless communications global positioning systems software and hardware” because the ‘MIUI’ OS possesses navigation, location access, and compass functionalities.

37. With regard to “Global positioning sensors, software, receivers, transmitters; Global positioning systems [...] software; Wireless communications global positioning systems software [...]” in class 9, whilst I appreciate that smartphones have built-in GPS technology and that the ‘MIUI’ OS provides the Proprietor’s smartphones with a compass application, I do not find the evidence shows use of the Contested Mark for these types of goods. In particular, the Proprietor, in its submissions in lieu, referred me to a piece of evidence that describes the compass app. I note the review concerns the application’s user interface (UI), and accordingly states that “*the compass behaves slightly different when you place your phone and when you have it in your hand. On a flat surface, you get a UI which tells you the direction. Swiping onto the second pane gives you a spirit level app. When you hold the phone in your hand, the phone utilizes the camera, and lets you know the direction in which the camera is pointing*”. Therefore, it seems to me that the evidence refers to the compass’ user interface (i.e., how it looks) rather than describing GPS features provided by the ‘MIUI’ OS. Absent a clearer account from the Proprietor, I do not find the evidence shows more than the mere use of the Contested Mark for the Proprietor’s OS (i.e., user interface).

38. For the sake of completeness, I note that the Proprietor also submits that the ‘MIUI’ OS enables a ‘location’ feature, and it refers me to a screenshot showing the Proprietor’s phones’ ‘Privacy protection’ section.<sup>35</sup> The Proprietor did not provide further clarification on this point. From the evidence it seems that the screenshot the Proprietor refers to describes the ‘MIUI 12’'s new appearance and functionality of the privacy menu. For example, it is stated that “*you get a newly redesigned Privacy protection menu inside the menu. This screen consists of comprehensive*

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<sup>35</sup> Mr Bedford’s submissions in lieu dated 2 May 2025 [30.b].

*permission and privacy-related options. Firstly, it will show you at glance how many apps are using the location, contacts, call logs, microphone, storage, and other permissions*". Therefore, once more, the evidence exclusively shows use of the Contested Mark for the smartphones' user interface rather than the actual location functionality.

39. The Proprietor states, in its submissions in lieu, that the evidence shows use of 'MIUI' for a telephone functionality.<sup>36</sup> I note the evidence to which the Proprietor refers me actually indicates that *"the Dialler app on MIUI 7 features a white background, with recents and contacts tabs to choose from. The list gets populated once you have recents/contacts"*.<sup>37</sup> This indicates that the 'MIUI 7' OS does not equip the Proprietor's smartphones with a "telephone functionality", which is commonly available in all telephones independently of their OS, but 'MIUI 7' merely modified the appearance (i.e., the interface) of the telephone's dialler in the Proprietor's phones. I believe this functionality falls within the wider definition of user interface function and it does not amount to a specific telephone functionality.

40. The Proprietor also contends that the evidence shows use of the Contested Mark in relation to a 'navigation' functionality.<sup>38</sup> The Proprietor refers me to a piece of evidence reporting on the 'MIUI 12' introducing a user interface functionality (called 'Control Center') that enables the phone's user to easily access many of the phone's functionalities all in one place (e.g., brightness slider, Bluetooth, cellular data, screen rotation, torch).<sup>39</sup> Whilst I appreciate that the evidence shows, among other features, the 'location'/'navigation' logo in the Control Centre, I find that the evidence merely refers to the new user interface function (i.e., the Control Centre) available with the 'MIUI 12'. The location/navigation function remains a general function available in all smartphones and devoid of any direct link with the 'MIUI' software. In any case, even if I were to accept that the location function derived from the 'MIUI' OS, the evidence provided is insufficient to show genuine use of the mark for this feature.

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<sup>36</sup> Mr Bedford's submissions in lieu dated 2 May 2025 [29.a].

<sup>37</sup> Exhibit MB10, page 92.

<sup>38</sup> Mr Bedford's submissions in lieu dated 2 May 2025 [30.a].

<sup>39</sup> Exhibit MB10, page 72.

41. Turning to the remaining goods in class 9 “*Fixed and mobile telephones; Magnetic media readers; televisions; Magnetic media; Global positioning systems hardware [...]; Wireless communications global positioning [...] hardware*”. These goods all refer to pieces of hardware and as the evidence exclusively showed use for software, I find no evidence of use was provided for such goods. The same reasoning applies to “*Navigation and positioning equipment, namely, electronic and computer instruments for determining precise geographic locations of aircraft, marine vessels, land vehicles, human beings; Electronic and computer instruments for surveying, mapping, marine tracking and navigation, aviation navigation and tracking, land vehicles tracking and navigation, and human being tracking and navigation [...]* *Parts and fittings for all the aforesaid goods, included in class 9*”. I find these goods are navigation and tracking ‘instruments’, therefore they are pieces of hardware that do not fall within the definition of operating system (i.e., software).
42. Turning to “*Computers*”, although I appreciate that computers run on an OS, first the types of operating systems that run on computers have different functionalities from OS designed for smartphones and, second, the term “computers” normally identifies a piece of hardware. Therefore, absent further clarification from the Proprietor, I find this term does not fall within the definition of operating system outlined above and for which evidence of use is provided.
43. Turning to class 37 services, the evidence does not show any use of the Contested Mark in relation to maintenance and/or repair services for the goods listed in class 9. Absent further submissions from the Proprietor on this point, I find the Proprietor failed to show use for this class of services.
44. Turning to class 38, the Proprietor contends, in its submissions in lieu, that as the ‘MIUI’ OS provides the ‘compass’ and ‘radio’ functionalities, this indicates that the evidence also shows use for “*Communication services including positioning, navigation, location, network correction and network communication services*” in class 38. Although I appreciate that compasses in smartphones function using GPS technology, the evidence does not show that the Proprietor offers a wider communication network that enables the MIUI users to access location and navigation services. Therefore, absent further submissions from the Proprietor, I

find the evidence does not show use of the Contested Mark for the services in class 38.

45. With regard to class 42, the Proprietor submitted that the evidence shows the Contested Mark was used in relation to the design and development of the 'MIUI' software and that this software was maintained throughout the years with various updates. Whilst I appreciate the evidence shows the Proprietor developed the 'MIUI' OS and distributed it for its products (i.e., smartphones), the evidence does not show the Proprietor provided software design and development to third parties as a commercial activity. Accordingly, part of the evidence seems to indicate that Beijing Xiaomi Mobile Software Co., Ltd (i.e., the Proprietor) is both the designer and the client of the 'MIUI' OS.<sup>40</sup> Turning to "*Computer software maintenance services*", I find there is no evidence showing the use of the Contested Mark for such services. Absent further submissions from the Proprietor on this point, I find the Proprietor did not provide evidence to show use for these services.

## **Conclusion**

46. From my account of the evidence, it exclusively shows use of the Contested Mark for the Proprietor's OS. The Proprietor fails to explain with any clarity what the operating system does, or which functions and capabilities are within its essential scope. From the evidence it seems that an OS is aimed at enhancing a smartphone's user interface (i.e., how the phones look) and its useability, allowing users to interact with their devices in a more intuitive and user-friendly way. Nonetheless, without precise and robust evidence on such points, I am unable to reliably assess whether, or to what extent, the use of the Contested Mark 'MIUI' in respect of a mobile telephone operating system, may properly be considered to reflect the terms specified within the various classes of goods and services for which the contested mark is registered. I find this to be a critical deficiency in the evidence as a whole. The evidence refers to published articles reviewing the features of the 'MIUI' operating system, but there is no narrative account presented to this tribunal to explain the connection to the relevant specified goods and services. Even if I accept that the core software that constitutes an operating

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<sup>40</sup> Exhibit MB33, page 232.

system may govern matters such as the user interface, management of apps and efficient running of the mobile telephone, it is not obvious to me that an operating system would be naturally described as encompassing any of the registered specified goods and services as further indicated above in this decision. For example, the evidence may indicate that all 'Xiaomi' mobile phones feature a 'MIUI' operating system, and that users may accordingly have encountered the Contested Mark on starting up such phones. However, the operating system is not the mobile telephone, which is one of the goods specified in Class 9. Indeed, as I understand matters, as a member of the purchasing public, another popular operating system is Google's Android, which is software that is used on mobile telephones from various manufacturers. The operating system is not synonymous of the mobile telephone goods.

47. In reaching my decision I am reminded that the trade mark proprietor bears the burden of proving genuine use of its trade mark and that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned. Following from the above considerations, I find that the Proprietor has failed to show use of the Contested Mark for any of the contested registered goods and services.

### **Outcome**

48. The application for revocation on the grounds of non-use therefore succeeds in full. As a result, the trade mark is, subject to any successful appeal, hereby revoked for all the goods and services in classes 9, 37, 38 and 42. The effective date of revocation is 21 July 2017.

### **Costs**

49. As the Applicant for revocation has been successful, it is entitled to a contribution towards its costs. Bearing in mind the relevant scale set out in the Tribunal Practice Notice (TPN) 1/2023 I award costs as follows:

Official fee	£200
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Preparing revocation application and considering the registered proprietor's defence and counterstatement	£250
<b>Total</b>	<b>£450</b>

50. I order Xiaomi Inc. to pay Vaillant GmbH the sum of **£450**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 2<sup>nd</sup> day of October 2025**

*Andrea Rossi*

**For the Registrar**