

O/0940/25

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. UK00003812266
BY FUSIONRIDE TECHNOLOGY (SHANGHAI) CO., LTD.
TO REGISTER:**

FUSIONRIDE

AS A TRADE MARK IN CLASSES 9, 12, 35, 37, 39, 42 & 45

AND

**IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 438597 BY
MILESTONE S.R.L.**

BACKGROUND AND PLEADINGS

1. On 22 July 2022, Fusionride Technology (Shanghai) 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 for opposition purposes on 14 October 2022 and registration is sought for the following goods and services:

Class 9: Data processing apparatus; interactive touch screen terminals; downloadable emoticons for mobile phones; traffic-light apparatus [signalling devices]; navigational instruments; navigation apparatus for vehicles [on-board computers]; security surveillance robots; regulating apparatus, electric; remote control apparatus; electric apparatus for commutation.

Class 12: Electric vehicles; automobile chassis; reversing alarms for vehicles; automobile bodies; self-driving cars; driverless cars [autonomous cars]; robotic cars; civilian drones; remote control vehicles, other than toys; space vehicles.

Class 35: Advertising; providing commercial information and advice for consumers in the choice of products and services; commercial administration of the licensing of the goods and services of others; marketing; updating and maintenance of data in computer databases; updating and maintenance of information in registries; systemization of information into computer databases; online retail services for downloadable and pre-recorded music and movies; financial auditing; sponsorship search.

Class 37: Machinery installation, maintenance and repair; installation, maintenance and repair of computer hardware; vehicle service

stations [refuelling and maintenance]; vehicle maintenance; vehicle greasing; vehicle breakdown repair services; vehicle cleaning; vehicle washing; vehicle battery charging; anti-rust treatment for vehicles.

Class 39: Rental of navigational systems; vehicle rental; transporting furniture; car transport; bus transport; vehicle breakdown towing services; car rental; car sharing services; physical storage of electronically stored data or documents; launching of satellites for others.

Class 42: Technological research; Industrial design; Graphic arts design; Packaging design; Computer programming; Computer software design; Updating of computer software; Consultancy in the design and development of computer hardware; Creating and maintaining websites for others; Hosting web sites.

Class 45: Physical security consultancy; monitoring of burglar and security alarms; tracking of stolen property; inspection of factories for safety purposes; online social networking services; leasing of internet domain names; opening of security locks; licensing of computer software [legal services]; licensing [legal services] in the framework of software publishing; legal research.

2. On 13 January 2023, the applicant's mark was opposed by MILESTONE S.r.l ("the opponent"). The opposition is based upon sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("the Act"). The section 5(2)(b) and 5(3) grounds are reliant upon the following mark:



UK registration no. 913598149

Filing date 22 December 2014; registration date 22 July 2017

Relying on some goods only, namely:

Class 9: Optical discs; Disks, magnetic; Opto-magnetic discs; Magnetic tapes; Encoded magnetic cards; ROM cartridges; ROM cassettes; ROM Cards; memory cartridges; Memory boards; Cd roms; Consumer videogames, programs for consumer videogames; Controllers and joysticks for video games for consumers; Other parts and fittings for video games for consumers; Programs for handheld games with a liquid crystal display; DVD-ROMs and other devices for storing programs for handheld games with a liquid crystal display; Computers; DVD-ROMs and other devices for storing computer programs; IT (computer) programs; Other electronic machines; Apparatuses and their parts; Automatic machines for games; Sports training simulators; Simulators for learning to drive.

Class 28: Parts and equipment for portable games with liquid crystal displays; Games machines and devices; All the aforesaid excluding snowboard and snowboard accessories, namely snowboard bindings and snowboard.

("the opponent's mark").

3. The opponent's mark is a comparable mark based on an earlier EUTM. On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between

the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with existing EUTMs. These comparable marks enjoy the same filing and registration dates as their European counterparts.

4. The section 5(2)(b) ground is aimed only at those goods and services that are underlined above. In respect of this ground, the opponent claims that the marks at issue are similar and that the goods and services at issue are identical and/or similar. As such, the opponent claims that there exists a likelihood of confusion on the part of the public, which includes the likelihood of association.
5. Under the section 5(3) ground, the opponent targets all of the applicant's goods and services. It maintains its claim that the marks at issue are similar and that the opponent's mark enjoys a reputation for all of the goods relied upon. As such, the opponent claims that use of the applicant's mark, without due case, would take unfair advantage of, or be detrimental to the distinctive character and/or repute of the opponent's mark.
6. Lastly, under the section 5(4)(a) ground, the opponent relies on six earlier unregistered rights. These are as follows:



(i) (since 27 March 2015);



(ii) (since 27 March 2015);

(iii) RIDE (since 27 March 2015);

(iv) RIDE2 (since 7 October 2016);

(v) RIDE3 (since 30 November 2018); and

(vi) RIDE4 (since 8 October 2020).

7. It is claimed that all of the above signs have been used in the UK since the dates listed above and in respect of the following goods and services:

“Computer programs; computer software; computer hardware; computer games; computer games software; computer games hardware; computer games software supplied from the Internet or recorded on discs, cartridges, tapes, CD-RO Ms; interactive software; virtual goods namely, virtual vehicles, virtual motorcycles, parts and fittings for such goods, clothing, footwear, headwear, protective clothing, footwear, headwear, motorcycle helmets; sports training simulators; simulators for learning to drive; racing simulators; providing online software; providing online computer game software.”

8. The opponent claims that as a consequence of its use of the above signs, it enjoys extensive goodwill in its business. It is claimed that use of the applicant’s mark (which is claimed to be similar to the opponent’s signs), will result in a misrepresentation between them. The opponent’s position is that this misrepresentation would lead to damage being caused to the opponent.

9. The applicant filed a counterstatement wherein it denied the claims against it in detail.

10. The applicant is represented by Marcin Ociepka and the opponent is represented by Maguire Boss. Only the opponent filed evidence in chief and, alongside this, it also elected to file written submissions (which included an annex labelled ‘Annex A’). No hearing was requested and neither party filed written submissions in lieu of the same. This decision is taken after careful consideration of the papers.

11. 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

12. The opponent's evidence in chief came in the form of the witness statements of Natalie Colombo and Sylvie Tate, both of which are dated 31 May 2024. I will deal with these statements in turn.
13. Ms Colombo is the current Sales Administrator of the opponent, a position she has held since 1 April 2024. Prior to this, Ms Colombo was employed as the Office Manager of the opponent since 2017. Ms Colombo's evidence is accompanied by 31 exhibits, being NC1 to NC31, and was adduced in order to demonstrate the evidence of a reputation and an enhanced degree of distinctive character in the opponent's earlier mark. Further, it purports to show that the earlier signs relied upon enjoy a protectable level of goodwill.
14. Turning to Ms Tate's evidence, I note that she is a Chartered Trade Mark Attorney at the opponent's representative firm. Her evidence is accompanied by three exhibits, being ST1 to ST3. It was adduced to demonstrate the similarity of the goods/services at issue and to introduce dictionary and internet extracts relating to the word 'FUSION' into these proceedings.
15. I do not intend to summarise the opponent's evidence in full here (or its submissions, for that matter). However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

PRELIMINARY ISSUE

16. It is noted that in its counterstatement, the applicant sought to raise an argument that the term 'RISE' is commonly used for trade marks covering goods in class 9. In support of this point, the applicant mentioned that there are 572 trade marks (registered for goods in class 9) on the UK trade marks register which include the word 'RIDE' in different combinations. The counterstatement sets out that the applicant would file evidence to substantiate this point but I note that it did not do so.

17. The applicant's claim is noted; however, it is not supported by any evidence of fact so any claim that the distinctiveness of the opponent's mark has been weakened by the common use of 'RISE' is of no assistance. Even if the applicant had filed evidence that these marks were present on the trade marks register, it would still be of no assistance here. I say this because it is established case law that, without any evidence as to how the marks are used in the marketplace, the mere presence of trade marks that contain the same element as the mark at issue is not sufficient to establish that the distinctive character of that element has been weakened due to its frequent use.¹ Therefore, given that no evidence in respect of the presence of these marks in the marketplace has been provided, any claim that the distinctive character of the word 'RIDE' in the opponent's mark has been weakened is of no assistance. I will, therefore, say no more about it.

DECISION

Section 5(2)(b): legislation and case law

18. Section 5(2)(b) of the Act reads as follows:

¹ See paragraph 73 of *Zero Industry Srl v OHIM*, Case T-400/06

“(2) A trade mark shall not be registered if because-

(a) ...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood or association with the earlier trade mark.”

19. Section 5A of the Act states as follows:

“Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

20. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“(6)(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark or international trade mark (UK) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

21. The opponent’s mark qualifies as an earlier trade mark under the above provisions. The mark completed its registration process exactly five years before the filing date of the applicant’s mark. Section 6A of the Act sets out that

the relevant period for the use provisions is the five years ending with the date of application for registration which, in this case, is 22 July 2022. As such, the five year period for which use would be required in this case would have been 23 July 2017 to 22 July 2022 meaning that the opponent's mark, which was registered on 22 July 2017, completed its registration process before the relevant period began. Therefore, it was open for the applicant to request the opponent to provide proof of use for the same. However, it did not do so meaning that the opponent's mark is not subject to the use provisions and the opponent may, therefore, proceed to rely on all the goods highlighted in its notice of opposition.

22. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) ("OHIM")*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

23. The applicant's goods and services subject to the present ground are those that are underlined at paragraph 1 above. The opponent's goods are set out at paragraph 2 above.

24. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

"Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary".

25. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;

- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

26. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

27. I have submissions from the opponent in respect of the goods and services comparison. In addition, while the applicant did not file submissions, its counterstatement did include comment on the goods and services comparison. I do not intend to discuss these in full but there are a number of points I wish to address at this stage of my decision.

28. At paragraph 14 of its counterstatement, the applicant claims low or no similarity between the goods in question. In the very next paragraph (being paragraph 15), it claims low similarity between the goods in question. The comments then go on to argue points of difference regarding various classes of goods.² Clearly, there is

² See paragraph 17 of the counterstatement, for example, which states that the ‘different classes of goods [are] also significantly different from each other’.

some form of concession of a low degree of similarity between some goods. However, given that there are specific arguments as to the differences between the goods (again, no reference to services), I am of the view that the concession cannot be taken to apply to all of the goods (or services) at issue. Instead, having considered the content of the comments, it is my view that they can only reasonably be said to apply to the class 9 goods. As such, I will proceed on the basis that the applicant's goods in class 9 are similar to at least a low degree with the opponent's goods.

29. As for the opponent's submissions, I note that it has referred to results of searches conducted via the EUIPO Similarity Database (which was filed in evidence at ST1) in order to point to various overlaps between the goods and services at issue. On this point, the opponent sets out that it understands that the results of the search tool are not binding but it does argue that they are 'highly persuasive'. While this evidence is noted, the opponent is correct in that it is not binding on me and even though I have given this evidence due consideration, the comparisons I must make is to be based on the case law cited above and not previous findings of the EUIPO. Therefore, I disagree that the results of the search are 'highly persuasive'.

30. In addition, the opponent provided a detailed annex setting out where it considered the overlaps in the goods and services lie.³ I do not intend to discuss the opponent's comments in detail but, at this stage, consider it necessary to point out that the majority of the arguments put forward are broad and unsupported. Again, I will not address each argument but, for example, I note that in claiming similarity between the applicant's class 35 services of "online retail services for downloadable and pre-recorded music and movies", the opponent lists a range of goods it claims this term is similar to. Some of these are videogame goods in class 9 on the basis that:

³ See Annex A

“These goods typical[ly] go hand in hand with other forms of audio/visual entertainment such as music and film. The respective goods/services would have the same use, users, purpose and channels of trade. The goods/services are highly similar.”

31. Firstly, the applicant’s term is a service for retail so I am unclear as to how the purpose or use would be the same as the opponent’s video games goods. Secondly, there is no evidence to suggest why video games go hand in hand with any other form of audio/visual entertainment. I appreciate that both may be forms of entertainment but simply suggesting they ‘go hand in hand’ requires more than this simple assertion. I say this because such a finding would offer far too broad a level of protection for any goods or service relating to entertainment simply on the basis that it could be said that because they go *hand in hand*, they are similar. I raise this as merely an example of the approach the opponent has taken and note that it is an argument that is consistent across all of the different classes of goods.

32. I mention this here as I wish to set out that I have no intention to discussing each and every example where such unsupported arguments have been put forward . To do so would result in an overly complicated and unnecessarily extensive goods and services comparison. For the avoidance of doubt, I have considered the submissions in full but will only mention them where I deem it appropriate to do so.

Class 9

Data processing apparatus; interactive touch screen terminals; traffic-light apparatus [signalling devices]; navigational instruments; navigation apparatus for vehicles [on-board computers]; security surveillance robots; regulating apparatus, electric; remote control apparatus; electric apparatus for commutation.

33. The opponent’s mark is registered for the broad term “apparatuses and their parts”. This is a very broad term that can cover apparatus for any purpose. Despite the

reference to 'instruments' and 'terminals', I consider that the above terms of the applicant can all be said to be different types of apparatus. I, therefore, find that they all fall within the opponent's broad term. These goods are, therefore, identical under the principle outlined in *Meric*.

Downloadable emoticons for mobile phones.

34. While the opponent's specification does not include a term that corresponds precisely with the above goods of the applicant, it does include the term "consumer videogames, programs for consumer videogames". As far as I understand it, video games can be played on mobile phones and may include customisable emoticons (such as customisable images that the user may set up as a profile picture for their gaming account or to use mid-game to allow their character/avatar to express emotion to other players, for example). While this fact does not automatically mean that the goods are similar,⁴ I am of the view that the applicant's term is likely the result of various lines of code, which can be said to be the same for the opponent's term. As such, I find that there is some degree of overlap in nature between these goods. Further, while their purposes are not the same (one is a game, one is an emoticon), I consider that the goods are likely to be provided by the same undertakings. On this point, the aforementioned uses of emoticons in games are likely to be provided by the same undertakings that make those games and may be sold as microtransactions within the game itself. Lastly, I consider that the user of these goods will overlap as someone playing video games on a mobile phone is also likely to use emoticons. Taking all of this into account, I find that the goods are similar to a medium degree.

⁴ See paragraph 61 of *Les Éditions Albert René v OHIM*, Case T-336/03

Class 12

Electric vehicles; self-driving cars; driverless cars [autonomous cars]; robotic cars; space vehicles.

35. The opponent argues that the vehicle goods of the applicant are similar to “controllers and joysticks for video games for consumers” on the basis that controls and joysticks are used in vehicles instead of steering wheels. While this argument is noted, I have no evidence to suggest that this is a practice that is common in the trade and without such, I am not willing to conclude that it is. In short, I do not consider that there exists any overlap in nature, method of use, purpose or trade channels. Further, if one was to take a step back and actually consider the terms at issue, it is clear to me that a finding of similarity between these goods would be non-sensical.⁵ As a result, I find that the opponent’s goods are dissimilar to the above goods.

Automobile chassis; automobile bodies;

36. The opponent argues that as a racing game can be played in an arcade setting, it may be playable via a physical construct such as a physical car or bike chassis. It, therefore, argues that the above goods share a degree of similarity with its “consumer videogames, programs for consumers videogames” in class 9 and “games machines and devices” in class 28. While I accept that some arcade games are controlled in replica vehicle periphery devices, this is in no way the same as an actual automobile chassis or body of an automobile. While they may be shaped similarly, the materials used differ. Further, they have different methods of use and purposes. Additionally, there is nothing before me to suggest that it is common in the trade for manufacturers of actual vehicle chassis to also produce and sell peripheral constructions for arcade machines. The goods are not complementary

⁵ On this point, see the comments of Mr Iain Purvis KC, sitting as a deputy High Court judge, at paragraph 24 in the case of *Unicorn Studio Inc v Veronese* [2024] EWHC 1098 (Ch)

and neither are they in competition. As a result, I find that these goods are dissimilar.

Reversing alarms for vehicles.

37. The opponent has suggested that the goods are identical or highly similar with “computers”, “IT (computer) programs”, “other electronic machines” and “apparatus and their parts”. It has given no reason for this suggestion and, in the absence of such, I am of the view that these goods are plainly dissimilar. In short, there is no reason to find that there exists any overlap in nature, method of use, purpose or trade channels. Lastly, the above goods are in class 12 whereas the relied upon goods by the opponent are in class 9, a fact which, in my view, points further away from any similarity between these goods.

Civilian drones; remote control vehicles, other than toys.

38. The opponent claims that the above goods have a clear crossover with “games machines and devices” and, therefore, contends that they are similar. While a remote control vehicle and drones can be used as toys or playthings, this is not what the above terms cover. I say this because, as goods in class 12, they are likely to be reserved for the transport of goods via land or air and the specification expressly excludes toys. The goods at issue are not ‘games devices’ and while they may have similar constructions (insofar as a ‘games device’ covers a remote control toy car or a toy drone), their natures, method of use, purpose and trade channels all differ. Further, the goods are not complementary or in competition with one another. Taking all of this into account, I find that these goods are dissimilar.

Class 35

Updating and maintenance of data in computer databases; updating and maintenance of information in registries; systemization of information into computer databases.

39. The opponent's argument in respect of these goods is that its own goods relate to computers so there must be overlaps between the above services and the opponent's goods. While I accept that the opponent's goods relate to computers, the majority of them cover computer game related goods. Even where the goods are more general (such as "computers" at large), there does not appear to be any obvious connection to databases or registries. Further, the fact that the contested services are provided using a computer, does not make them similar to the opponent's computers as they are business to business services provided with a view of assisting businesses with managing databases and registries. In short, I consider that such an argument is very broad and, if applicable, it could be said that any goods or services related to computers were similar to one another simply because they operate on computers. Such a finding would offer far too broad a scope of protection for any such goods or services and without anything by way of evidence demonstrating sufficient overlaps in the relevant factors between these goods and services, I am unwilling to find them similar. As a result, I find that these goods and services are dissimilar.

Online retail services for downloadable and pre-recorded music and movies.

40. The opponent's argument in respect of these services is that its own goods, such as CD ROMS, for example, are used to view movies or listen to music. As such, the opponent claims that the respective uses, users and purposes are the same and these goods and services are highly similar. While I appreciate that goods and services for the retail of those (or similar) goods may give rise to a finding of

similarity,⁶ I see no merit in the points raised by the opponent. Firstly, I will say that the above service does not, in my view, cover the sale of CDs with music on them but is for downloadable files such as MP3s (for music) and MP4s (for movies), for example. Secondly, I accept that music may be listened to on a CD (though I am not aware that movies are commonly viewed on CDs) but I do not see how this means that the retail of downloadable and pre-recorded music and movies overlaps with CD ROMS. In short, I am unsure as to how the simple fact that CDs may play music would give rise to a degree of similarity between these goods and services. Plainly, they differ in nature, method of use and purpose. Further, I have nothing to suggest that the retailer of downloadable and pre-recorded music and movies is the actual producer and provider of CD ROMS as a good in class 9. As far as I understand it, CD ROMS, as goods, are produced by different companies than those that retail in pre-recorded music and movies. I accept that the user of the applicant's services may also buy CDs. However, this alone is not sufficient to give rise to a finding that these goods and services are similar to any degree. Taking all of this into account, I find that these goods and services are dissimilar.

Class 37

Machinery installation, maintenance and repair; installation, maintenance and repair of computer hardware.

41. The opponent suggests that the above goods are similar to a range of its class 9 video game/computing related goods on the basis that they coincide in user, users, producers/providers, distribution channels and are complementary. In comparing the above to the opponent's "computers", I will first say that there is not any overlap in use as, clearly these goods and services do not overlap in purpose. In addition, I am of the view that the nature and method of use for these goods and services are plainly different. That being said, I agree that the user and trade channels

⁶ *Oakley, Inc v OHIM*, Case T-116/06

overlap. This is on the basis that those who seek computers are also likely to seek the installation, maintenance and repair of the same. Further, I accept that it is common in the trade for such services to be provided by the producer of the computers themselves. Lastly, the goods and services are not competitive in nature but I accept that there is a degree of complementarity between them on the basis that the opponent's computers are important to the installation, maintenance and repair of the same. Taking all of this into account, I find that these goods and services are similar to a medium degree.

Class 42

Technological research; Industrial design; Graphic arts design; Packaging design; Computer programming; Computer software design; Updating of computer software; Consultancy in the design and development of computer hardware; Creating and maintaining websites for others; Hosting web sites.

42. Even if the above services of the opponent could be said to relate to video games or computers, this does not mean that they are similar (as suggested by the opponent). For example, the nature, method of use and purpose of such goods and services are plainly different. Turning to trade channels, I appreciate that the provider of the opponent's class 9 goods may also update, design and programme their own software or computing goods. However, it is not likely that such undertakings would offer such services to third-parties to the point that there could be said to be an overlap in trade channels. On this point, I note that there is no evidence filed that suggests otherwise. Lastly, I am of the view that the user of the opponent's computing or gaming goods will be the end consumer who will play the games or use the computers. On the contrary, the user of the applicant's services will be those involved in the creation of computer software or computers, for

example.⁷ As such, the user of the goods and services will not overlap either. Taking all of this into account, I find that these goods and services are dissimilar.

Class 45

Online social networking services.

43. The above service is for the provision of a service to allow users to connect with other users via a social media platform much like Facebook or LinkedIn. The opponent claims that the above service is similar to its own "IT (computer) programs" on the basis that it encompasses social media computer programs. While this is noted, I am of the view that such an argument could potentially give rise to an argument that any and all services that can be provided or covered by computer programs would be similar to the same. For example, legal services can be provided via computer software or can rely on computer software for their provision to end consumers. However, this does not render legal services similar to computer programs and to suggest otherwise would, again, provide far too broad a scope of protection. As a result, and without anything further from the opponent, I am not willing to find that these goods are similar to any degree. They are, therefore, dissimilar.

Conclusion in respect of the goods and services comparison.

44. As there can be no likelihood of confusion under section 5(2)(b) of the Act where the goods and services are dissimilar, my above findings mean that the present ground may only proceed in respect of those goods that are identical or similar. This means that the present ground may only proceed against the following goods only:

⁷ On this point, I appreciate that some consumers who play games may seek the creating of a website on their behalf. However, I am of the view that, in such circumstances, an overlap in user is, by itself, insufficient to give rise to a finding that the good and services are similar.

Class 9: Data processing apparatus; interactive touch screen terminals; traffic-light apparatus [signalling devices]; navigational instruments; navigation apparatus for vehicles [on-board computers]; security surveillance robots; regulating apparatus, electric; remote control apparatus; electric apparatus for commutation; downloadable emoticons for mobile phones.

Class 37: Machinery installation, maintenance and repair; installation, maintenance and repair of computer hardware.

The average consumer and the nature of the purchasing act

45. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods and services. I must then decide the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. (as he then was) described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

46. The average consumer base for the goods and services at issue is made up of both members of the general public at large (for remote controls and downloadable

emoticons, for example) and business users (for traffic light apparatus, security robots and navigational instruments, for example). The goods and services will be available via general retailers (be that electronic stores or online app stores, for example) or from the producers directly (for the goods sought by business users or the class 37 services, for example). The goods and services will also be available online via the retailers' and producers' websites. When it comes to members of the general public, I find that the goods and services will be selected primarily visually be that via self-selection from shelves or selection from images/lists on a website. That being said, I do not discount the aural component playing a role, by way of word of mouth recommendations or advice from sales assistants. As for the selection by the business user, I consider that while the visual aspect will still play a very important role, the users are more likely to also discuss the selection with sales assistants. As such, the aural component is, for business users, likely to play an equal role to the visual one.

47. The goods and services at issue will range in cost and frequency. Given the disparate nature of the goods and services at issue, I do not intend to discuss the process for each term. However, for example, I am of the view that remote controls and downloadable emoticons are likely to be relatively cheap goods (or even free, for the latter) that are selected on a frequent basis whereas goods such as security robots are likely to be fairly expensive and selected less frequently. The selection process for the range of goods and services at issue is likely to vary from relatively low (for downloadable emoticons) to relatively high (for security robots). I say this because the former goods are likely to be casual, cheap selections whereas the latter will attract consideration of various factors on the basis that they are technical goods relating to security and are, therefore, likely to be important selections to the user. Lastly, I appreciate that some of the goods and services will sit somewhere in the middle of these two categories and will attract a medium degree of attention.

Comparison of the marks


48. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

49. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“... it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

50. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

51. The respective trade marks are shown below:

The opponent's mark	The applicant's mark
	<p data-bbox="1018 479 1219 510">FUSIONRIDE</p>

52. As was the case with the goods and services comparison above, I have submissions from the opponent as well as comments from the applicant via its counterstatement. I do not intend to reproduce those submissions/comments here but will, where necessary, address them below.

Overall impression

The applicant's mark

53. The applicant's mark is a word only mark that consists of the word 'FUSIONRIDE'. The opponent submits that it is the word 'RIDE' that plays the greater role in the overall impression of the mark, with 'FUSION' being understood as "an occasion where two or more things join or are combined."⁸ In addition, the opponent claims that the word 'FUSION' is a reference to some aspect of fusion or connection between the applicant and the opponent or the respective goods and services. It is claimed that this is typical in the industry because it is widely known that licensing arrangement and partnership frequently exist between game developers and brands. On this point, the opponent refers to collaborations between vehicle brand owners such as Ducati and Kawasaki and further examples as provided in its evidence.⁹

⁸A dictionary definition taken from Cambridge Online dictionary defining the word in this way is provided at ST2

⁹ ST3

54. The above argument is noted but I see no reason why it is of any assistance to these proceedings. I appreciate that 'FUSION' will be understood as referring to a joining or combining of things, however, I am not convinced that this will be viewed as a reference to a collaboration. I say this because, as far as I understand it, consumers do not tend to refer to collaborations as 'fusions' in this sense and I have nothing before me to suggest otherwise. Additionally, I am of the view that any indication of a collaboration would commonly require reference to a second brand. In the present case, the word 'FUSION' is claimed to be the indicator of a collaboration but, even if this were the case, there is no explanation as to what other brand the 'RIDE' brand is collaborating with. So even if 'fusion' could be said to be indicative of a collaboration, it makes no sense to me why consumers would, in the context of the applicant's mark, see this word together with the word 'RIDE' and think it was a reference to a connection between 'RIDE' and a second brand.

55. It is noted that the above argument forms the basis of the opponent's submissions regarding the visual, aural and conceptual comparison of the marks. In light of what I have said above, I do not consider that it carries any weight and I will discuss any specific submissions of the opponent where necessary below.

56. Turning back to the actual impression of the applicant's mark, I accept that the consumer will readily identify this as the conjoining of the words 'FUSION' and 'RIDE'. However, neither word dominates the other and I, therefore, find that the overall impression of the mark resides in these conjoined words.

The opponent's mark

57. The opponent's mark is a figurative mark that consists of the word 'RIDE' presented in a stylised manner (with a partial dissection of the letter 'R'). Above this word is an angled square device element within which sits a stylised letter 'R' which follows the same stylisation as the letter 'R' in the word below it, albeit with two extra angled

lines where the dissection occurs. While the device element will be perceived as the letter 'R', and is presented as the largest element in the mark, it is the word 'RIDE' that will play the greater role in the overall impression of the mark. I say this because consumers tend to focus on the elements of marks that can be read and, further, the consumers will understand that the 'R' in the device element stands for 'RIDE' so will attribute less weight to it. All this being said, I find that the device element will still play a role in the overall impression of the mark, albeit a secondary one.

Visual comparison

58. When discussing the visual comparison of the marks, the opponent submits that the applicant's mark can be presented in the following way:

FUSIONRIDE

59. In considering this point, I refer to the case of *Dreamersclub Ltd v KTS Group Ltd* (BL O/091/19) wherein Mr Philip Johnson, as the Appointed Person, found that use of the below mark constituted use of the word only mark 'DREAMS'.

dreams

60. The basis for this finding was that the stylisation of the word did not alter the distinctive character of the word mark. While it is clear that use of words in different fonts and typefaces can be within the fair and notional use of a word only mark, I do not consider that this is the case with the proposed presentation of the applicant's mark. I say this because reducing the size of 'FUSION' and presenting the word 'RIDE' in a larger, bold font alters the distinctiveness of the applicant's mark so as to shift the overall impression of the mark from the 'FUSIONRIDE'

element as a whole to the word 'RIDE', with 'FUSION' playing a lesser role. As a result, I do not consider that this submission is of any assistance here.

61. Visually, the marks share the word 'RIDE'. That being said, the marks differ in several elements. Firstly, I appreciate that the applicant's mark is a word only mark capable of use in any standard typeface and that this may cover a typeface similar to the one used by the opponent, however, I do not consider that this extends to the way the letter 'R' in the opponent's mark has been dissected. Secondly, the opponent's mark includes a large device element which has no counterpart in the applicant's mark. I acknowledge that this element plays a secondary role in the opponent's mark, however, it still forms a significant point of visual difference due to its placement and size. Lastly, the marks differ in the presence of the word 'FUSION' at the beginning of the applicant's mark. On this point, I remind myself that consumers tend to focus on beginnings of marks¹⁰ meaning that the presence of the word 'FUSION' is a significant point of difference, especially since it makes up six letters when compared to the shared four. Taking all of this into account, I find that the marks are visually similar to between a low and medium degree.

Aural comparison

62. The opponent submits that the word 'FUSION' is non-distinctive and would be attributed lesser weight, resulting in a finding that the marks are aurally highly similar. Given what I have said above regarding the 'FUSION' element, I disagree.

63. While consisting of a device element that includes a letter 'R', I consider that the opponent's mark will simply be pronounced as the one syllable word 'RIDE'. The applicant's mark will be pronounced as the two words 'FUSION RIDE', which consists of three syllables that will be pronounced in the ordinary way. The marks share the pronunciation of the word 'RIDE', which makes up the entirety of the

¹⁰ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

aural element of the opponent's mark and the last syllable of the applicant's. The marks differ in the presence of the first two syllables in the applicant's mark. As above, I remind myself that consumers tend to focus on the beginnings of marks, being where these marks differ. Further, I am of the view that, from an aural perspective, the opponent's mark is a very short mark and while there is no special test for 'short' marks,¹¹ I am of the view that, in the present case, the consumer is more likely to notice the differences between these marks on the basis that they make up two syllables when compared to the one syllable that is shared. Taking all of this into account, I find that the marks are aurally similar to a medium degree.

Conceptual comparison

64. The opponent claims that the marks are conceptually identical or highly similar on the basis that 'fusion' will mean the merging of different elements in the unified whole. As above, it is claimed that this means that the applicant's mark will be understood as a reference to a fusion between the applicant and the opponent. For the same reasons set out when considering the overall impression of the applicant's mark, I do not agree with these submissions and will say no more about them.

65. The concept of the opponent's mark lies in the word 'RIDE'. I say this because the device element will simply be viewed as standing for the word that sits below it. 'RIDE' is an ordinary dictionary word that has multiple meanings, with the two primary ones being to sit on or in and control the movements of something (be that an animal or a car) or to be carried along in a vehicle.

66. Turning to the applicant's mark, I have set out above that this will be viewed as the conjoining of the words 'FUSION' and 'RIDE'. 'RIDE' will be attributed the same meaning as above. As for 'FUSION', I find that, primarily, this word will be

¹¹ See paragraph 44 of BOSCO, BL O/301/20

understood as a reference to the union of different things. For example, it can be seen as a reference to nuclear fusion but can also be understood as a reference to a style of cooking that ‘fuses’ the cuisines of different countries or the combination of different styles of music.¹² There is nothing that informs which type of fusion is being referred to in the applicant’s mark so the meaning of ‘FUSION’ is likely to be understood in different ways by different consumers. When viewed as a whole, the mark has no unitary meaning (on the basis that the *fusing of a ride* makes no obvious sense). It will, instead, be viewed as a conjoining of two ordinary, but unconnected, words. As such, the concept of the mark will lie in the concept associated with these individual words.

67. When comparing the marks from a conceptual stand point, the word ‘RIDE’ will, plainly, be a point of conceptual identity between the marks. However, the word ‘FUSION’ will not be ignored and will, itself, be a point of conceptual difference between the marks that goes some way to offset any identity associated with the common use of the word ‘RIDE’. Overall, I find that the marks are conceptually similar to a medium degree.

Distinctive character of the opponent’s mark

68. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-

¹² While I have disregarded the opponent’s submissions, I note that these meanings are consistent with the meanings put forward by the opponent.

108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

69. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of marks can be enhanced through use, and I note that the opponent has filed evidence of the use of its mark and has argued that its mark enjoys an enhanced degree of distinctive character. I will, therefore, consider whether this evidence is sufficient to give rise to a finding that the distinctiveness of the opponent’s mark has been enhanced through use. Before doing so, however, I will consider the inherent position.

70. As above, the opponent’s mark is a figurative mark that consists of the word ‘RIDE’ presented in a stylised manner, above which sits a figurative device element. While the word ‘RIDE’ is not descriptive of or allusive for the goods at issue, it is an ordinary dictionary word and its use from a trade mark perspective is not particularly remarkable. As for the device element, I do not consider that this will be ignored, however, it is simply the presentation of the first letter of the sole word

in the mark so its use is not particularly remarkable either. Taking all of this into account, I am of the view that the opponent's mark enjoys a medium degree of inherent distinctive character.

71. I turn now to consider the position in respect of the opponent's claim that its mark enjoys an enhanced degree of distinctive character. In considering this point, I remind myself that the present assessment is based on the perception of the UK consumer. Therefore, my summary of the evidence will focus on the opponent's use in the UK only. Another point I consider it necessary to raise at this point is that the opponent has filed separate evidence both in relation to the use of its mark and the use of the six signs relied upon under its section 5(4)(a) ground. I have given due consideration to this evidence and wish to point out that while the section 5(4)(a) specific evidence is noted, it is not applicable to the present ground. On this point, I appreciate that the signs relied upon under section 5(4)(a) are similar to the mark relied upon here to the point that it could be argued use of the unregistered sign 'RIDE4', for example, also constitutes use of the opponent's earlier mark. However, the reason that such evidence is of no assistance here is that, under the section 5(4)(a) ground, the opponent relies on additional goods and services beyond those which are relevant here (a range of clothing and protective clothing goods, for example). Therefore, it is reasonable to infer that the turnover provided in respect of the section 5(4)(a) ground includes evidence that is not relevant here and given that the evidence in respect of that ground is not broken down in any way (outside of a separate turnover for physical and virtual goods), it is not possible for me to determine how much of the section 5(4)(a) evidence is potentially attributable to the present ground. As such, I am unable to consider any of the section 5(4)(a) specific evidence during the assessment of the present ground (or the section 5(3) ground, for that matter).

72. In respect of the relevant evidence, I note that the opponent confirms that it is an Italian game developer which is claimed to be well known for its racing games, especially motorcycle racing games. The 'RIDE' computer game was first launched

in 2015, with a sequel to the game being released every one or two years. It is confirmed that the game boasts a large number and variety of motorcycles for the user to select from. The evidence claims that the opponent has used its mark in relation to a range of different class 9 and 28 goods.¹³ These goods include the computer program goods but also storage media, seemingly those goods on which the video games are stored. Additionally, the opponent claims to sell parts and equipment for games machines.

73. In respect of UK use, the opponent's evidence sets out that between 2017 and 2022 it accrued the following levels of turnover:

Year	Sales (€)
2017	33,292
2018	27,415
2019	16,997
2020	23,650
2021	12,818
2022	5,500
Total	129,672

74. In respect of the above, I note that the relevant date for the present proceedings is 22 July 2022 meaning that some of the figures from 2022 are likely to have fallen after this. Even though this is something I will bear in mind in making my assessment of the use before, I note that the figures for 2022 are not significant meaning that any impact this point is likely to have on the overall figures is limited.

75. The turnover is not broken down in any way. I note that sample invoices have been provided showing the sale of video games on various platforms.¹⁴ However, these are sales to customers in the EU so are not particularly helpful to the present

¹³ See paragraphs 6 and 7 of Ms Colombo's statement

¹⁴ NC2

ground. That being said, the remainder of the evidence regarding an enhanced degree of distinctive character appears to focus solely on the opponent's video games. As such, I consider it reasonable to proceed as if the entirety of the above turnover relates to the sale of video games, be that as a downloadable product or a physical product.¹⁵ I note that images of the packaging the goods are sold in is provided in the evidence and I can confirm that they show the opponent's mark.¹⁶

76. The opponent confirms that its goods are sold via a range of retailers and partners in the UK, including Amazon, the PlayStation Store, Game, Tesco and Sainsburys, amongst others. Printouts confirming the offering of the opponent's goods by some of these retailers are provided in evidence.¹⁷ In addition to this, I note that images are provided further in the evidence showing the 'RIDE' game on shelves in Tesco and Sainsburys.¹⁸

77. In terms of marketing, the opponent sets out that it spent €7,300 on advertising and promoting its game in the UK between 2017 and 2018. This is confirmed as covering expenditure on adverts, social media campaigns, competitions, sponsorships and attendance at trade shows/expos. Examples of such efforts have been provided in evidence. While I do not intend to discuss these in full, I note that they show the opponent's social media accounts,¹⁹ print advertisements for UK publications such as 'Games TM', 'Xbox One Magazine', 'MCV', 'Play with BC',²⁰ collaborations with trade magazines such as MCN (being Motorcycle News),²¹ online and television advertising (including advertising on BT Sport and various motorcycle magazine's online websites)²² and evidence regarding attendance at trade shows such as the MCN London Motorcycle Show.²³ This evidence is mostly

¹⁵ This is the confirmed sales method of the opponent, as per paragraph 14 of Ms Colombo's statement.

¹⁶ NC4

¹⁷ NC6

¹⁸ NC12

¹⁹ NC7

²⁰ NC8 and NC13

²¹ NC9

²² NC10

²³ See NC7 to NC11.

undated but I note that it covers advertising for the 'RIDE' video game and not any of its sequels such as RIDE2 or RIDE3, for example. Given that this game was released in 2015, with the sequels being released every one or two years, I consider it reasonable to infer that these adverts in respect of the first game were from prior to the relevant date.

78. While all of the above evidence is noted and points, clearly, to efforts of the opponent seeking to promote its game (albeit limited due to the overall spend of €7,300 over two years, as stated), I have very little to suggest any level of readership or viewership for the majority of the publications referred to.²⁴ On this point, the publications shown are not, as far as I am aware, popular UK-wide publications and I have nothing before me to suggest otherwise. As such, it is not possible for me to accurately determine the level of exposure that the 'RIDE' game may have achieved throughout the UK prior to the relevant date.

79. There is brief evidence regarding trade reviews via online publications such as Bike Social (being a .co.uk website) and Godisageek.com.²⁵ While noted, the first review is not an actual review of the game but a preview of the game prior to its release. Further, there are only two articles and while one of which is from a UK-based website, the other is not so it is not possible to determine its reach across the UK consumer base. While on the topic of reviews, I note that the opponent has also provided a range of customers reviews.²⁶ The first set of reviews (being 20 in total) are from the Steam website (being an online game portal) whereas the second set of reviews come via global ratings (which are international in nature) and verified purchaser reviews from UK customers (of which there are twelve) on Amazon. The review evidence is noted but it covers just 32 reviews of the product and 20 of those are not confirmed as being from customers in the UK. As for the global

²⁴ On this point, I do appreciate that the MCN London Motorcycle Show is shown as being attended by almost 100,000 people over three days but aside from a limited number of posters for the 'RIDE' game at one booth, there is nothing to suggest the actual level of exposure of the 'RIDE' brand at this event.

²⁵ NC14

²⁶ NC15

ratings, the international nature of such ratings means that it is not possible to determine how much of said reviews stem from UK customers. As a result, I find that this evidence is of very little assistance.

80. Lastly in respect of use of the opponent's mark, it has provided a printout taken from a google search for results posted before 21 July 2022.²⁷ The search is shown as being for 'ride game'. While noted, this is not particularly compelling evidence that points to an enhancing of the distinctive character of the mark. I say this because it is a specific search for 'ride' in the context of a game meaning that the search was geared towards revealing a game named 'ride'. I fail to see what other results could have possibly come up given the nature of the search so I see no reason to find that this evidence indicates any knowledge of the game across the UK consumer base.

81. Taking all of the evidence into account, I am of the view that while the opponent has plainly used its mark in the UK, the level of use shown is not sufficient to warrant a finding that the UK consumer would identify the mark with the goods and services of a single undertaking. I say this because the level of use before me is just at too low a level, especially when considered in the context of the market within which the opponent operates, being the video game market. On this point, I note that I have no evidence to suggest the size of the market but, even so, I consider that it is likely to be a significant market and a turnover of approximately €130,000 over 6 years is, put simply, very low. As for the marketing evidence, I appreciate that the opponent has demonstrated that it promoted its mark in the UK, however, its marketing spend for 2017 and 2018 was still very low. In respect of this point, I remind myself that the evidence does not indicate how the marketing efforts led to a sufficient level of exposure across the relevant public in the UK. This is because while examples of advertising have been provided, little is given to indicate the viewership of the same. As a result, I find that the inherent position

²⁷ NC16

applies, namely that the opponent's mark enjoys a medium degree of inherent distinctive character.

Likelihood of confusion

82. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

83. In respect of the goods and services at issue, I have found them to be identical or similar to a medium degree. The average consumer base is formed of both members of the general public and business users. The former will select the goods via primarily visual means, although I do not discount an aural component, whereas the latter will select the goods both visual and aurally. I have concluded that the average consumer will pay a degree of attention that ranges between a relatively low and a relatively high. In respect of the similarity of the marks, I have found the marks to be visually similar to between a low and medium degree and aurally and conceptually similar to a medium degree. Lastly, I have found the opponent's mark to possess a medium degree of inherent distinctive character.

84. In its submissions in respect of confusion, the opponent refers to a separate decision of this Tribunal in which a Hearing Officer found indirect confusion between the marks 'Q' and 'Q CRYPTO' (being that under decision O/0231/23). The first point to make here is that I am not bound by the decision of another Hearing Officer. In any event, having considered that case, it is not on all fours with the case before me. I say this because the finding of confusion in that case was reached on the basis that 'CRYPTO' was descriptive and because 'Q' played a greater role in both marks. This is not the case here as while 'RIDE' may be the stronger element in the opponent's mark, 'FUSION' plays an equal role to 'RIDE' in the applicant's mark. Lastly, I note that the point of difference in that case came at the end of the applied for mark whereas in the present case, the point of difference sits at the beginning of the applicant's mark which, as I have set out above, is where consumers tend to focus. As a result, I see no reason why the outcome in the referred to case has any bearing on the decision I must make here.

85. Taking all of the above factors into account and even bearing in mind the principle of imperfect recollection, I do not consider that the marks at issue will be misremembered or inaccurately recalled for one another. While the shared use of the word 'RIDE' will be noticed, the differences would not be overlooked. In short, the presence of the word 'FUSION' in the applicant's mark and the device element in the opponent's mark will not be overlooked. Further, I am of the view that when seeking to remember the applicant's mark, consumers will pin their recollection of the applicant's mark on the entirety of its verbal element, being 'FUSIONRIDE' and not solely the shared element of 'RIDE'. Consequently, I do not consider that there exists a likelihood of direct confusion between the marks, even on identical goods or in instances where the consumer pays a lower degree of attention.

86. I will now proceed to consider indirect confusion. In doing so, I remind myself of the case of *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, wherein Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: ‘The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark’.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

- (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (‘26 RED TESCO’ would no doubt be such a case).
- (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as ‘LITE’, ‘EXPRESS’, ‘WORLDWIDE’, ‘MINI’ etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)".

87. While the above examples in *L.A. Sugar* are noted, they are not intended to be treated as an exhaustive list of the only instances wherein indirect confusion occurs.

88. Further, I note the case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, wherein Arnold LJ referred to the comments of James Mellor Q.C. (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at paragraph 16 that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

89. In respect of indirect confusion, the opponent claims that category (b) of *L.A. Sugar* (cited above) is particularly relevant to its case. The opponent claims that the differences between the marks are simply non-distinctive additions of a kind that one would expect to see in a sub-brand or brand extension. In seeking to support its position, the opponent relies on a range of online printouts that make reference to various computer games that include the word 'FUSION' in their title.²⁸ I do not intend to reproduce all of these here but note that they include games such as *Metroid Fusion*, *Trials Fusion* and *Dragonball Fusions*, *Beyblade Metal Fusion* and *Serious Sam Fusion*. The problem I have with this evidence is that there is nothing before me to suggest the existence of games in these series of titles that do not include the word 'Fusion'. This is an issue because in order for me to be satisfied that consumers would see 'Fusion' as a sub-brand or brand extension, I am of the

²⁸ ST3

view that evidence is required to demonstrate that use of this word would actually be seen in this way (i.e. as a sub-brand in the title of a video game which could include its use as part of the title for a sequel game, for example) and that consumers are used to seeing it as such. Another point worth mentioning is the fact that the majority of this evidence refers to games where 'Fusion' is placed at the end of the title and as a separate word. This is not the case here as 'FUSION' is not only placed at the beginning of the mark but it is actually conjoined with the word 'RIDE'. On this point, I acknowledge that there are two titles shown where 'Fusion' is presented first in respect of the games 'Fusion Nexus' and 'Fusion Shift'. Again, there is nothing before me regarding games with the title 'Nexus' or 'SHIFT' to the point that the addition of Fusion would be seen as indicative of a sub-brand or brand extension. For these reasons, I do not consider that the evidence filed is particularly compelling in pointing to the fact that 'FUSION' at the beginning of the applicant's mark would be seen as non-distinctive.

90. I also note that this same evidence also includes mention of the word 'fusion' in the context of collaborations. I have discussed this when considering the overall impression of the applicant's mark but raise it again here as I note that the evidence makes reference to a crossover between the game Fortnite and the LEGO toy brand, the descriptive surrounding which mentions a 'creative fusion' between them. While this is noted, the word 'fusion' is not used in a trade mark context (i.e. 'Fortnite fusion LEGO' or 'LEGO fusion Fortnite') and as was the case above, I am not convinced that the reference to this word here is such that the word 'FUSION' in the applicant's mark would be seen as indicative of a collaboration between the 'RIDE' brand and another brand (which is absent). As a result, I do not consider that reference to 'fusions' between brands is something that assists the opponent's argument and in reaching this conclusion, I also rely on the comments I have made at paragraph 54 above.

91. Given what I have said throughout this decision, I see no reason why 'FUSION' in the applicant's mark would be seen as indicative of a sub-brand or brand-extension

to the point that consumers would believe that both marks originate from the same or economically linked undertakings. In short, 'FUSION' has no descriptive or allusive qualities to the point that consumers would see it as indicating a type of product that would be seen as indicative of a brand extension. Further, I see no reason why any other instance of indirect confusion would occur, regardless of the level of attention paid or the identity between some of the goods at issue. I say this because the share element, being 'RIDE' is not so strikingly distinctive to the point that consumers would believe that only one undertaking would use it. Further, the differences between the marks are not simply changes to shared elements that are logical or consistent with a sub-brand or brand extension. While I appreciate that the examples of indirect confusion given in L.A. Sugar are not exhaustive, I have no further submission from the opponent as to any other instance where indirect confusion would occur. Having said that, I do consider it necessary to cover off the fact that even though the words 'FUSION' and 'RIDE' do not form a meaningful phrase, the addition of 'FUSION' as a distinctive word before 'RIDE' will result in the consumer seeing 'RIDE' as part of a different mark, rather than indicating the opponent's mark 'RIDE'. Therefore, I do not consider that consumers will view 'RIDE' as having distinctive significance independent to the whole of the mark so it cannot be said that consumers will view the applicant's mark as consisting of two or more signs to the point that the *Medion*²⁹ principle applies.

92. Taking all of the above into account but also bearing in mind the case law referenced at paragraph 88 above, I find that there exists no likelihood of indirect confusion. For the avoidance of doubt, this finding applies regarding of the degree of attention paid by the consumer and in instances where the marks are viewed on identical goods.

93. I will now proceed to consider the remaining grounds of opposition.

²⁹ See *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, the correct approach to which was set out by Arnold J (as he then was) at paragraphs 18 to 21 of *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch).

Section 5(3)

94. Section 5(3) of the Act states:

“5(3) A trade mark which –

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

95. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Adidas-Salomon*, Case C-487/07, *L’Oreal v Bellure*, Case C-323/09, *Marks and Spencer v Interflora*, Case C383/12P, *Environmental Manufacturing LLP v OHIM*. The law appears to be as follows:

(a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Salomon*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; Intel, paragraph 42.

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; Intel, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; Intel, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; Intel, paragraphs 76 and 77 and Environmental Manufacturing, paragraph 34.

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

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

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

96. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that the marks are similar. Secondly, the opponent must show that its marks have achieved a level of knowledge/reputation amongst a significant part of the public throughout the relevant territory. Thirdly, it must be established that the level of reputation and the similarities between the parties' marks will cause the public to make a link between them, in the sense of the earlier mark being brought to mind by the applicant's mark. Finally, assuming the first three conditions have been met, section 5(3) requires that one or more of the types of damage will occur. It is unnecessary for the purposes of section 5(3) that the goods and services be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

Reputation

97. In respect of the evidence filed, I remind myself that I have summarised the UK specific evidence when considering an enhanced degree of distinctive character at paragraphs 72 to 80 above. Under the present ground, use in the EU is relevant

prior to 31 December 2020, being IP Completion Day. Therefore, the evidence summarised above, while relevant here, does not represent the entirety of the evidence that is relevant to the present ground. I will, therefore, summarise the EU use insofar as I consider it necessary to do so.

98. In respect of the opponent's use in the EU, I note that between 2017 and 2020, it generated a total sales of €500,091.31. Given that the UK was part of the EU during this time, I consider it reasonable to assume that this turnover encompasses the UK specific turnover for 2017 to 2020, which covers total sales of €101,354.

99. In addition to the turnover figures, I note that the opponent has filed evidence of promotional attempts across various countries in the EU including advertisements in publications, collaborations with EU-based trade magazines, online and television advertising examples and attendance at trade shows and expos.³⁰ This evidence is noted but the same issues I have explained with the UK-based evidence at paragraph 78 above is relevant here as while this evidence points to efforts to promote the opponent's game, there is nothing to suggest any level of readership or viewership for the majority of the publications referred to or the attendance levels at the trade shows/expos. As a result, I am unable to accurately determine the level of exposure that the 'RIDE' game may have achieved throughout the EU prior to the relevant date.

100. I appreciate that, taken as a whole, the evidence shows various attempts to create or preserve a market share for video game goods under the opponent's mark. In addition, the turnover provided, while low in the context of the relevant market, is demonstrative of genuine efforts by the opponent to use its mark across the relevant territory prior to the relevant date. That being said, the assessment for the existence of a reputation is far more onerous than the assessment for genuine use and, instead, requires that the marks relied upon are known by a significant

³⁰ See NC7 to NC12

part of the relevant public in the relevant territory. In short, I accept that the opponent sold video games in both the EU and the UK prior to IP Completion Day and the relevant date, respectively. However, the evidence is at too low a level in terms of turnover and lacks detailed information regarding any actual spread of awareness of the marks by the relevant public across the relevant territory prior to the relevant date.

101. In light of the above, I find that the opponent's section 5(3) ground of opposition fails in its entirety. I will now proceed to consider the final ground of opposition, being section 5(4)(a).

Section 5(4)(a)

102. Section 5(4)(a) states:

“(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.”

103. 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.”

104. 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).”

105. 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 reputation 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

106. 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.’ ”

107. The applicant’s mark does not have a priority date, and neither is there any evidence of any earlier use that is capable of being the start of the behaviour complained about. As a result, the relevant date for the 5(4)(a) assessment falls on the filing date of the application at issue, being 22 July 2022.

Goodwill

108. The first hurdle for the opponent is that it needs to show that, at the relevant date, it had the necessary goodwill in its business and that its signs were distinctive

of and/or associated with that goodwill. On this point, I remind myself that the opponent relies on the following unregistered signs which it claims to have used in the UK from the dates listed alongside the signs:



- a.  (since 27 March 2015);
- b.  (since 27 March 2015);
- c. RIDE (since 27 March 2015);
- d. RIDE2 (since 7 October 2016);
- e. RIDE3 (since 30 November 2018); and
- f. RIDE4 (since 8 October 2020).

109. For ease of reference, I will refer to the above signs simply as 'Sign 1' through 'Sign 6', with Sign 1 being that shown at point a above, Sign 2 being that shown at point b, and so on.

110. The opponent claims to have used each sign in respect of the following goods and services:

"Computer programs; computer software; computer hardware; computer games; computer games software; computer games hardware; computer games software supplied from the Internet or on recorded on discs, cartridges, tapes, CD-ROMs; interactive software; virtual goods namely, virtual vehicles, virtual motorcycles, parts and fittings for such goods, clothing, footwear, headwear, protective clothing, footwear, headwear, motorcycle helmets; sports training simulators; simulators for learning to drive; racing simulators; providing online software; providing online computer game software."

111. 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.”

112. 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 of 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.”

113. 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.”

114. 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.”

115. Goodwill arises as a result of trading activities. In respect of the signs relied upon, I note that the opponent has provided evidence specific to the signs relied upon. I will discuss this further below but also note that as Sign 1 is identical to the mark relied upon under the above grounds, the evidence summarised at paragraphs 72 to 80 above is also relevant to the use of Sign 1, Sign 2 and Sign 3, the latter two on the basis that they cover use of the first ‘RIDE’ game (which was the focus of the section 5(2)(b) ground). On this point, I will say that the issue of goodwill is based on UK customers so the EU use (summarised at paragraphs 98 and 99 above) is not relevant here.

116. A breakdown of how the opponent’s UK turnover can be attributed to each of the signs relied upon between 2017 and the relevant date is provided. On this point, I note that this turnover is expressly confirmed as relating to the sale of physical products covering the goods relied upon. This turnover is as follows:³¹

Years	Sign 1, 3	Sign 2, 4 (Ride2)	Sign 5 (Ride3)	Sign 6 (Ride4)	Total
2017		209,553.44			209,553.44
2018	14,272.50	68,257.00	378,656.18		461,186.18
2019		18,225	105,518.49		122,743.49
2020			4,973.54	597,921.17	600,894.71
2021				20,064.67	20,064.67
Up to 22 July 2022				12,377.61	12,377.61
Total	14,272.50	296,035.94	486,148.21	630,363.45	1,426,820.10

³¹ In respect of this table, I note that there appears to be some inconsistency in that Sign 2 is for the figurative ‘Ride’ sign, indicating the first game, not ‘Ride2’ as set out here.

117. In respect of the above totals, I note that it is not confirmed what currency the figures are presented in. Given that all other figures provided in evidence are in euros, I consider it reasonable to proceed on the basis that this is the case for the above also.

118. In addition, the opponent has provided sales of digital products under all of the RIDE signs sold from 2017 to the relevant date. These are as follows:

Year	Euros
2017	420,181
2018	479,878
2019	450,249
2020	760,260
2021	774,727
2022	378,195
Total	3,263,490

119. A range of sample invoices are provided that show the sales of the various 'RIDE' titles to customers across the UK.³²

120. In respect of advertising, the opponent confirms that between 2017 and 2022, it spent nearly €200,000 advertising and promoting the goods and services relied upon under the present ground. Supporting evidence in support of this spend is provided and I note that this include advertising through the opponent's own website,³³ on social media platforms,³⁴ via print advertisements,³⁵ online and television advertising,³⁶ sponsorship,³⁷ competitions³⁸ and trade shows/expos.³⁹ In

³² NC17

³³ NC3 and NC18

³⁴ NC7 and NC21

³⁵ NC22

³⁶ NC23

³⁷ NC24

³⁸ NC25

³⁹ NC11 and NC26

addition, I note that the opponent relies on trade and customer reviews in respect of its games.⁴⁰ I do not intend to discuss this evidence in detail as, while it does include additional examples to those discussed under the section 5(2)(b) and 5(3) ground above, it is very much in line with the evidence I have discussed at paragraphs 77 and 79 above. Having considered this evidence, much like that discussed above, there is nothing to suggest the actual reach of these advertising attempts. For example, I consider the highpoint of the social media evidence to be a tweet provided from an account called 'PQube Games' that show that an advert for RIDE3 which reached 224,156 people and obtained 61,697 engagements. While noted, there is no evidence to explain what this actually means in terms of its exposure to UK end consumers. Further, the international nature of social media means that it is possible a proportion of these people or 'engaged' users may have been from outside of the UK. Additionally, I note that the trade show referred to in the evidence mentions an attendance level of almost 100,000 people but, as I have set out under the cover of footnote 24 above, it is not clear how many of these were exposed to the opponent's brand in the UK.

121. On the face of it, the overall figures appear to reflect a significant level of sales. However, this turnover covers the use of six different signs (which, themselves, cover four different titles) over five and a half years. The high point of this evidence is that the opponent's sixth sign (being 'RIDE4') accrued a turnover over €630,363 between 2020 and the relevant date. While the turnover evidence is noted, no breakdown has been provided in how it can be broken down to cover the goods and services relied upon (being those listed at paragraph 110 above). This is an issue for the opponent as the goods and services for which goodwill is claimed cover a disparate range of categories (including video games, clothing and protective clothing). On this point, I have no way to accurately determine how much of the turnover can relate to each of the category of goods relied upon. Additionally, the markets at issue under this ground are significant markets that cover the video

⁴⁰ NC28 and NC29

game/simulator market, the clothing market and the protective clothing market.⁴¹ As such, even if it was possible to attribute the turnover to the different goods and services relied upon, these are large markets meaning that the turnover provided is likely to be considered very low in respect of the same, especially in light of the fact that, as above, the turnover covers 6 different signs (being four different games) and spreads over five and a half years.

122. All of the above being said, I remind myself that (1) assessments of goodwill are to be made with an appropriate level of generality⁴² and (2) a small business which has 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.⁴³ Applying these points to the present case, I am of the view that the evidence is sufficient to give rise to a finding that the opponent's business enjoys a protectable level of goodwill and that this goodwill vests in the signs relied upon. In terms of the level of this goodwill, I appreciate that the use before me is far from trivial, however, it is not large. In the context of the markets at issue, I am only content to conclude that the goodwill that vests in the opponent's business is low. Lastly, while no breakdown of the goods/services has been provided, I will proceed on the basis that this goodwill is associated with all of the goods and services relied upon.

Misrepresentation and damage

123. 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

⁴¹ I have no evidence in respect of the markets at issue but consider it reasonable to infer that they are all large markets.

⁴² See paragraph 59 of *BUNNYJUICE* (O/0064/24)

⁴³ See *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590 for example.

“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.”

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.”

124. In considering the issue of misrepresentation, I bear in mind the case of *Comic Enterprises* (cited above), wherein Kitchin L.J. set out that it seemed doubtful whether the difference between the legal tests of misrepresentation under section 5(4)(a) and confusion under section 5(2)(b) would (all other factors being equal) produce different outcomes.⁴⁴ This is because they are both normative tests

⁴⁴ Although this was an infringement case, the principles are equally applicable to section 5(2) of the Act: *Soulcycle Inc v Matalan Ltd* [2017] EWHC 496 (Ch).

intended to exclude the particularly careless or careful, rather than quantitative assessments.

125. In the present case, I note that five of the signs relied upon by the opponent are not the same as the mark relied upon under the section 5(2)(b) ground. Further, some of the goods and services for which a goodwill exists are different from those that were at issue above. That being said, it is my view that the same finding reached when considering confusion in respect of the section 5(2)(b) ground is applicable here. I say this because while most of the signs relied upon are different to the mark subject to the confusion assessment above, they are all dominated by the word 'RIDE'. As this was the dominant element of the mark subject to the section 5(2)(b) assessments, I see no reason why the same findings reached under that ground cannot be applied here. In addition, I note that I found no confusion in circumstances where the goods at issue were identical and while I have not conducted a goods and services comparison here, I do not consider it necessary as a finding that the parties operate in the same fields of activity for some of the goods and services at issue here would not result in a favourable outcome for the opponent.

126. Taking all of the above into account, applying the principle set out in *Comic Enterprise* and relying on the same reasons set out at paragraphs 85 to 92 above, I find that there is no misrepresentation in the present case. Without a misrepresentation there can be no damage suffered. As a result, I find that the opponent's section 5(4)(a) ground fails.

CONCLUSION

127. The opposition fails in its entirety and the applicant's mark may, subject to any successful appeal of my decision, proceed to registration for all goods and services applied for.

COSTS

128. The applicant has succeeded and is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016 (on the basis that the proceedings commenced prior to 1 February 2023). While the applicant did not file its own evidence, it was required to consider the evidence of the opponent. As such, I consider it appropriate to make an award of costs in order to reflect this.

129. In the circumstances, I award the applicant the sum of £1,200 as a contribution towards its costs. The sum is calculated as follows:

Considering the notice of opposition and preparing the counterstatement:	£400
Considering the opponent's evidence:	£800
Total:	£1,200

130. I hereby order MILESTONE S.r.l. to pay Fusionride Technology (Shanghai) Co., Ltd. the sum of £1,200. 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 6th day of October 2025

A COOPER
For the Registrar