

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION Nos 2149402, 2149403, 2149404, 2149405,  
2149406, 2149407, 2149408, 2149409, 2149415, 2149418, 2149420, 2149421,  
2149424, 2149425, 2149426, 2149428**

**BY MINISTRY OF SOUND RECORDINGS LIMITED TO REGISTER MARKS  
IN CLASS 9**

**AND**

**IN THE MATTER OF OPPOSITION THERETO UNDER Nos 48426, 48427, 48428,  
48429, 48430, 48431, 48432, 48433, 48434, 48435, 49656, 48436, 48437, 48438, 48439,  
48408**

**BY VIRGIN RECORDS LIMITED**

## **TRADE MARKS ACT 1994**

**IN THE MATTER OF** Application Nos 2149402, 2149403, 2149404, 2149405, 2149406, 2149407, 2149408, 2149409, 2149415, 2149418, 2149420, 2149421, 2149424, 2149425, 2149426, 2149428

by Ministry of Sound Recordings Limited to register a mark in Class 9

and

**IN THE MATTER OF** Opposition thereto under Nos 48426, 48427, 48428, 48429, 48430, 48431, 48432, 48433, 48434, 48435, 49656, 48436, 48437, 48438, 48439, 48408 by Virgin Records Limited

## **BACKGROUND**

1. In October 1997, Ministry of Sound Recordings Limited of London applied to register the following trade marks in Class 9:

<b>Application No.</b>	<b>Trade Mark</b>
2149402	SMOOTH NATION
2149403	RAP NATION
2149404	PARTY NATION
2149405	SUMMER NATION
2149406	DANCE NATION
2149407	LOVE NATION
2149408	DISCO NATION
2149409	SWING NATION
2149415	TRANCE NATION
2149418	HIP HOP NATION
2149420	INDIE NATION
2149421	POP NATION
2149424	DUB NATION
2149425	MELLO NATION
2149426	CLUB NATION
2149428	LATINO NATION

2. Following examination the applications were accepted and published for the following specification of goods:

“Records, tapes, cassettes, compact discs, CD Roms, recording discs, laser discs, sound and video recordings, film, computer software and computer games”.

except for: No. 2149420, INDIE NATION, where the specification is:

" records, cassettes, compact discs, recording discs, laser discs, sound and video recordings, film.

3. Virgin Records Limited of London filed notices of opposition against all the applications. The grounds of opposition pursued before me in each case were, in summary:

- (a) under section 3(1)(a) of the Act, in that the trade mark for which registration is sought are not capable of distinguishing the goods of the applicant from the goods of any other trader;
- (b) under section 3(1)(b) of the Act, in that the trade marks are devoid of any distinctive character;
- (c) under section 3(1)(c) of the Act, in that the trade marks consists exclusively of signs or indications which may serve in trade to designate the kind, quality or other characteristics of the goods;
- (d) under section 3(1)(d) of the Act, in that the trade mark consists exclusively of words which have become customary in the current language and/or bona fide and established practices of the trade.

4. The applicants filed a counterstatement in which all of the grounds of opposition are denied.

5. Both parties filed evidence in these proceedings and both sides ask for an award of costs. The matter came to be heard on 19 November 2001. The applicants were represented by Mr James Mellor, of Counsel instructed by Dechert; the opponents were represented by Mr Richard Arnold of Her Majesty's Counsel instructed by Mathisen & Macara.

#### **OPPONENTS' EVIDENCE**

6. In respect of all the proceedings the opponents filed statutory declarations by Will Meekin. Mr Meekin explains that he is the Head of Legal and Business Affairs at Virgin Records Limited. Mr Meekin has worked in the music industry as a solicitor since September 1993 and joined Virgin Records Limited in January 1996. In each declaration he explains that he is informed by Aaron Ross, the A&R assistant in his company's Dance Music Department, that the first word in each trade mark is generic in nature, as is the word NATION. It is commonly used by the music industry, usually in the titles of releases.

7. Mr Meekin explains that it is not unusual for the word NATION to be combined with the name of a type of music, for example, DISCO NATION and HOUSE NATION - both DISCO and HOUSE being types of dance music.

8. In support of these contentions, Mr Meekin refers to exhibits in each case which consist of extracts from the magazine Music Week, together with examples of records released to the public taken from a Music Master CD-Rom entitled Retail Entertainment Data (RED) and which seek to demonstrate that the first word in each trade mark is generic. Mr Meekin

explains that RED is a directory of record releases and is updated every two months. Also shown in the exhibits is use of the word NATION in the title of releases taken from RED.

## **APPLICANTS' EVIDENCE**

9. This consists principally of statutory declarations dated 14 May 1999 by Hector Dewar. Mr Dewar explains that he is a Director of Ministry of Sound Recordings Limited having held this position since January 1997. He adds that he is familiar with the trade marks used in the music industry including trade marks used as the titles of records and compilation albums and the names of recording artists.

10. The following points emerge from Mr Dewar's declaration:

- in March 1996 his company released a compilation album entitled DANCE NATION. Exhibit HD1 consists of copies of packaging showing use of the trade mark DANCE NATION;
- sales revenue from products sold under the trade mark since first use have been as follows:

<b>YEAR</b>	<b>SALES REVENUE (£)</b>
1996	1,500,000
1997	3,353,560
1998	1,514,646

- the company has extensively advertised products under the trade mark DANCE NATION throughout the United Kingdom since March 1996. Advertising expenditure has been as follows:

<b>YEAR</b>	<b>ADVERTISING EXPENDITURE (£)</b>
1996	124,694
1997	569,105
1998	344,140

- advertisements to promote sales of products under the trade mark have been placed in the following magazines: Mix Mag, DJ, Company, The Face, Musik, Update, Sugar, Minx, Ministry, Sky, More, Time Out, Smash Hits and Loaded (although copies of such advertisements are not provided);
- there has been a full broadcast campaign to advertise products sold under the trade mark, with coverage and competitions on all main TV and radio stations including BBC1, BBC2, Radio 1, Capital Radio, Channel 4, ITV, Channel 5, Sky and MTV. The trade mark has also been featured on the television programme Top of the Pops;

- exhibit HD2 consists of examples of mailings sent to members of the Ministry of Sound database (undated) which exceeds 250,000 people, together with posters and materials used for in store retail promotions;
- products branded with the trade mark have been sold extensively throughout the United Kingdom. Exhibit HD3 is a list of those towns throughout the United Kingdom where the products have been sold;
- having read the statutory declaration made by Mr Will Meekin and in particular exhibits WM1 and WM2, Mr Dewar explains that, to the best of his knowledge and belief, all references to the trade mark DANCE NATION in those exhibits are references to products sold by his company under the trade mark or to products sold by Telstar Limited in 1995. Mr Dewar explains that Telstar Limited subsequently assigned all of their rights in the trade mark DANCE NATION to his company. Further, to the best of Mr Dewar's knowledge and belief, all references to the trade mark CLUB NATION referred to in those exhibits are references to use by Virgin Records Limited or by Beechwood Music Limited who have used the trade mark CLUB NATION under licence from his company. No further information is provided about this licence.
- that Mr Dewar believes that due to the extensive use of the trade mark DANCE NATION by his company and the reputation that has therefore been developed through such use, any use of a trade mark containing the word NATION on compilation albums and in particular compilation albums featuring dance music in the United Kingdom, would inevitably lead to confusion with his company's products and trade marks.

11. In a statutory declaration dated 16 September 1999, in respect of the proceedings relating to the application for the trade mark DANCE NATION, Mr Dewar provides exhibits showing examples of products bearing the trade mark DANCE NATION, a video cassette, which includes examples of television advertisements used to promote products sold under the trade mark, and the originals of mailings sent to members of the database operated by his company, as well as posters and materials used for in-store promotions.

#### **OPPONENTS' EVIDENCE IN REPLY**

12. This consists of statutory declarations by Frances Mary Harding and Andrew Harrison. Ms Harding explains that she is employed as a Trade Mark Assistant by Mathisen & Macara who are the opponents' professional representatives in these proceedings.

13. Ms Harding explains that she searched the Internet for a definition of the word NATION as used by the Music Industry and she exhibits a printout from the 'Pop Will Eat Itself' website dated 4 May 2000 showing their definition of the word NATION as "*a people or race distinguished by community of descent, language, history or political institutions. Or tastes in music*".

14. Ms Harding also searched the website 'of Boxman', an on-line retailer of sound and visual recordings for sound recordings including the word NATION in their title and she exhibits a printout of titles of releases containing the word NATION, taken from the website of Boxman. This is dated 8 May 2000, but the print out shows dates of release of titles which precede this date by some margin.

15. In his statutory declarations Mr Harrison explains that he is an experienced Journalist and Editor of consumer magazines. He explains that between 1992 and 1995 he edited Select (1995 circulation: 112,000), specializing in independent rock and dance music; from 1995 to 1996, he was music Editor at Details Magazine in New York; from 1996 to 1999, he wrote for The Face, Spin, Rolling Stone and Q magazines. Since 1999, he has been locum Editor before being appointed to his present position in March 2000 as publisher of Select and Mixmag, the world's recognised authority on dance music (circulation 95,000).

16. Mr Harrison explains the he is aware of the use of the word NATION by the music industry. Mr Harrison explains that the word has had, he says, a wide and popular currency in the music industry since the 1987 Top Ten Hit HOUSE NATION by Housemaster Boyz and the Rude Boy of House. Rapper Afrika Bambaataa has used the term ZULU NATION since at least 1983. Dance radio station Kiss FM has run a strand called HOUSE NATION since 1995 and released CDs of HOUSE NATION as have React Records (1994). Britains biggest club, Cream in Liverpool has used a venue called NATION. There is also a club/bar in New York called NATION.

17. Mr Harrison explains that, based on his knowledge of the music industry, he believes that the word NATION is in wide use because it denotes community, friendliness and inclusiveness to all participants in dance music and clubbing. The theme of 'one nation' is, he explains, central to the modern clubbing experience and is assumed to belong to all. In effect it simply refers to a large number of clubbers and so has no specific individual meaning.

18. In addition, in the proceedings covering the application for the trade mark CLUB NATION the applicants filed the following:

A statutory declaration dated 18 February 2000 by Laurie Crow and a further statutory declaration dated 3 February 1999 by Laurie Crow attached as exhibit LC1

- in exhibit LC1 Ms Crow explains that she has been in her current position as Director of Commercial Services for the Operations Division of Sony Music Entertainment (UK) Ltd since 1991 and previously was in the position of Purchasing Controller. She has been involved in the music industry for 13 years.

A statutory declaration dated 18 February 2000 by Mike Chadwick together with a statutory declaration dated 25 February 1999 also by Mike Chadwick and attached as exhibit MC1

- in exhibit MC1 Mr Chadwick explains that he is the Managing Director of Vital Distribution and has been in his current position since 1993. He was previously in the position of MD at Revolver Distribution Ltd. He has been involved in

the music industry for 22 years.

A statutory declaration dated 25 February 1999 by Martin Mills

- Mr Mills is the Chairman of Beggars Banquet Group Ltd and has been running his group of companies for 21 years.

A statutory declaration dated 25 February 1999 by Seven Webster

- Mr Webster is the Managing Director of 7PM Management and has been in his current position since 1990. He has been involved in the music industry for 9 years.

A statutory declaration dated 25 February 1999 by Dave Trafford

- Mr Trafford is the Managing Director of 3MV and has been in his current position since April 1993. He was previously in the position of Sales Director and has been involved in the music industry for 18 years.

19. The following points emerge from the above declarations:

- all the declarants are familiar with the trade marks used in the music industry, including trade marks used as the title of records, the titles of compilation albums and the names of recording artists;
- all the declarants are aware of the use of the trade mark DANCE NATION by Ministry of Sound Recordings Limited and believe that they have developed an extensive and valuable reputation in that trade mark through use in the United Kingdom. All believe that if the trade mark DANCE NATION was used in the music industry on or in relation to recordings, albums or similar products, it would be associated with the applicants;
- the word NATION is not, they say, commonly used in the music industry, with or without other words. Further, they are unaware of any use in the music industry of the trade marks Smooth Nation, Rap Nation, Party Nation, Summer Nation, Love Nation, Disco Nation, Swing Nation, Trance Nation, Hip Hop Nation, Pop Nation, Dub Nation, Mello Nation or Latino Nation;
- all the declarants are aware that Virgin Records Limited commenced use of the trade mark CLUB NATION in August 1998;
- the declarants all explain that in view of the extensive and valuable reputation developed by the applicants in the trade mark DANCE NATION, if any of the trade marks the subject of the applications were seen on or in relation to compilation albums, they would be associated with the applicants. Further, if it was not for the fact that it is known by all that Virgin have used the trade mark CLUB NATION, it would be assumed that any compilation album using that

title was an album of the applicants.

## DECISION

20. The first objection is based upon Section 3(1)(a) of the Act which states:

"3.-(1) The following shall not be registered -

(a) signs which do not satisfy the requirements of section 1(1),"

Section 1(1) states:

"1.-(1) In this Act a "trade mark" means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.

A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.

21. Mr Arnold for the opponents submitted that it was clear from the evidence that the applicants intended to use the terms sought to be registered as the titles of compilation albums and not as trade marks (badges of origin). In that connection he drew my attention to SCIENCE AND HEALTH TM [1968] RPC 402 a case decided by the Secretary of State's Tribunal under the Trade Marks Act 1938, which held that the title of a book does not normally function as a trade mark because it (like the title of an album) denotes content rather than trade origin. I was also referred to BACH AND BACHFLOWER REMEDIES TM [2000] RPC 513. In this case, the signs put forward for registration describe the genre or style of music, together with the people who share that taste.

22. I will deal with what facts I believe emerge from the evidence later in this decision. But in terms of the ground of objection based upon Section 3(1)(a), I believe that the test under this sub-section establishes a low threshold. In the case of AD 2000 trade mark [1997] RPC 168, the Appointed Person, Geoffrey Hobbs QC stated that:

"... the requirements of Section 1(1) are satisfied even in cases where a sign represented graphically is only "capable" to the limited extent of being "not incapable" of distinguishing goods or services of one undertaking from those of other undertakings. Such signs are not excluded from registration by Section 3(1)(a). Section 3(1)(a) has the more limited effect envisaged by article 3(1)(a) of the Directive of preventing the registration of "signs which cannot constitute a trade mark" at the time when they are put forward for registration."

23. Furthermore, according to the Opinion of Advocate General Ruiz-Jarabo Colomer in the Court of Justice of the European Community in Case C-299/99 Philips Electronics NV v Remington Consumer Products Ltd [2001] RPC 38 page 754 paragraph 43 and 44, there is not a category of marks which are *incapable* of acquiring a distinctive character, that would not otherwise be excluded by Section 3(1)(b) and (c) of the Act. In my view the basis for the



Section 3(1)(a) objection in respect of the trade marks at issue here is not made out. Having regard to the authorities, I do not believe that they are so hopeless that they fail under Section 3(1)(a) of the Act and I dismiss this ground accordingly.

24. The other objections are based upon Section 3(1)(b), 3(1)(c) and 3(1)(d) respectively and which state:

"3.-(1) The following shall not be registered -

- (a) .....
- (b) trade marks which are devoid of any distinctive character,
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,
- (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade:

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it."

25. It was common ground that the first element in each of the trade marks in suit was descriptive of a style or genre of music. Mr Mellor in his skeleton argument said "The first word in each mark is generic ....." I take this admission without comment. The questions to be answered are therefore (a) is the word NATION one which was in common use at the date of application to describe a group of people with shared tastes in music? and (b) if the word NATION is descriptive is the whole sign sought to be registered in each case one which must be refused registration?

26. In relation to whether the word NATION is descriptive, Mr Arnold pointed to the evidence of Ms Harding which provides the definition of the word NATION as used by the music industry. This states:

"na'tion, n. A people or race distinguished by community of descent, language, history or political institutions. Or tastes in music...;-)"

27. He also pointed to the evidence of Mr Meekin to which is exhibited a list of record releases all of which contain the word NATION in their titles, some of the examples show the word combined with types of music ie Disco and House.

28. I also note the evidence of Mr Andrew Harrison an experienced journalist within the music industry who says that the word NATION has and has had wide and popular currency in the music industry since 1987.

29. Mr Mellor for his part was dismissive of the evidence. The definition of the word NATION in the context of the music industry was extracted from the internet three years after the relevant date. The lists of record titles was not limited to the situation before the relevant date and it contained as titles some of the applicants' own signs. Those that were within the relevant period included for example 'Till Ireland a Nation' and 'Spirit of the Nation' which did not support the opponents' contention.

30. Taking account of the submissions and the evidence, it seems to me that the word NATION has, and had at the relevant time, established itself within the music industry as a word used to describe something. That something being that set out in the definition of the word NATION above. I reach that view because despite Mr Mellor's submissions to the contrary there is evidence of others using the word NATION in the same manner in which the applicants used it prior to the date of application, and I have the evidence of Mr Harrison which is not challenged by the applicants. Mr Harrison I regard as an expert witness and in considering the question of expert evidence in LOADED (0/455/00), Mr Thorley QC acting as the Appointed Person commented as follows:

"In order to resolve this aspect of the case, I have reminded myself as to the functions of an expert witness and particularly of the observations of Millett L.J. in *The European Limited v The Economist Newspaper Limited* (1998) FSR 283 at 291:

*"The function of an expert witness is to instruct the judge of those matters which he would not otherwise know but which it is material for him to know in order to give an informed decision on the question which he is called to determine. It is legitimate to call evidence from persons skilled in a particular market to explain any special features of that market of which the Judge might otherwise be ignorant and which may be relevant to the likelihood of confusion. It is not legitimate to call such witnesses merely in order to give their opinions whether the two marks are confusingly similar. They are experts in the market, not on confusingly similarity.....in the end the question of confusingly similarity is one for the Judge. He was bound to make up his own mind and not leave the decision to the opinion of the witnesses".*

Mr Thorley goes on to say:

"Whilst that observation was made in relation to evidence as to confusion, it is important in this case on reputation as well in that it directs attention to the necessity to have regard to the expertise of the deponent in question so that the relevant Judge can be informed as to matters within the trade which he would otherwise be ignorant of. Weight can only be attached to an expert's opinion when it is an opinion which

(a) is based upon his experience

- (b) is explained in sufficient detail so that the court can comprehend the reason why the expert holds that opinion and can assess by reference to the explanation the weight that is to be attached to it”.

31. In taking account of Mr Harrison’s evidence I believe I am doing as Chadwick L.J. suggested in BACH AND FLOWER REMEDIES [2000] RPC 513 at line 535 where he said:

"The task for the court is to inform itself, by evidence, of the matters of which a reasonably well informed and reasonably observant and circumspect consumer of the products would know; and then, treating itself as competent to evaluate the effect which those matters would have on the minds of such a person with that knowledge, ask the question."

32. In his evidence Mr Harrison says that in the music industry the word NATION is in wide use to denote, amongst other things ‘inclusiveness’ and that it has had a wide and popular currency since 1987. That in my view represents the likely perception of the average consumer and therefore NATION is a word which when used in association with a generic word like HOUSE, and in relation to the goods at issue (all carriers of music), will denote fans of a style or genre of music.

33. I go on to consider the answer to question (b) ie, does the combination of a generic term with a descriptive term produce something which has any or sufficient distinctive character to enable acceptance of the trade marks at issue? Mr Mellor on the basis of Procter & Gamble (BABY DRY) C383/99, Zapf Creation AG v OHIM (NEWBORN BABY) T140/00, Windsurfing Chiemsee Productions -und Vertriebs GmbH v Boots-und Segel Nubbör Walter Huber (WINDSURFING) C108/97, C109/97, and Wm Wrigley Jr. Company v OHIM (DOUBLEMINT) T-193/99 submitted that taken as a whole each of the signs presented for registration was distinctive and therefore they did. Mr Arnold submitted that all the signs were prima facie descriptive, that they consisted of signs which may serve in trade to designate the genre or style of music contained in the CDs etc to which the signs are to be applied, that the signs consist of signs or indications which have become customary in the trade namely the common place descriptions of forms of genre or styles of music.

34. In my view the most appropriate authority against which to judge these trade marks is BABY DRY. WINDSURFING deals with geographic indications, which is not the case here and the other decision is of the Court of First Instance rather than the Court of Justice. In BABY DRY the Court of Justice said:

"The signs and indications referred to in Article 7(1)(c) of Regulation No 40/94 are thus only those which may serve in normal usage from a consumer’s point of view to designate, either directly or by reference to none of their essential characteristics, goods or services such as those in respect of which registration is sought. Furthermore, a mark composed of signs or indications satisfying that definition should not be refused registration unless it comprises no other signs or indications and, in addition, the purely descriptive signs or indications of which it is composed are not presented or configured in a manner that distinguishes the resultant whole from the usual way of designating the goods or services concerned or their essential characteristics.

As regards trade marks composed of words, such as the mark at issue here, descriptiveness must be determined not only in relation to each word taken separately but also in relation to the whole which they form. Any perceptible difference between the combination of words submitted for registration and the terms used in the common parlance of the relevant class of consumers to designate the goods or services or their essential characteristics is apt to confer distinctive character on the word combination enabling it to be registered as a trade mark.

It is true that Article 7(2) of Regulation No 40/94 states that Article 7(1) is to apply notwithstanding that the grounds of non-registrability obtain in only part of the Community. That provision, which was rightly cited at paragraph 24 of the contested judgment, implies that, if a combination of words is purely descriptive in one of the languages used in trade within the Community, that is sufficient to render it ineligible for registration as a Community trade mark.

In order to assess whether a word combination such as 'BABY-DRY' is capable of distinctiveness, it is therefore necessary to put oneself in the shoes of an English-speaking consumer. From that point of view, and given that the goods concerned in this case are babies' nappies, the determination to be made depends on whether the word combination in question may be viewed as a normal way of referring to the goods or of representing their essential characteristics in common parlance.

As it is, that word combination, whilst it does unquestionably allude to the function which the goods are supposed to fulfil, still does not satisfy the disqualifying criteria set forth in paragraphs 39 to 42 of this judgment. Whilst each of the two words in the combination may form part of expressions used in everyday speech to designate the function of babies' nappies, their syntactically unusual juxtaposition is not a familiar expression in the English language, either for designating babies' nappies or for describing their essential characteristics."

35. In my view, on the basis of the evidence before me, in each of the signs put forward for registration the two elements are generic and descriptive and I see no reason to suppose that the combination, when viewed by the relevant consumers, would be seen as anything other than the normal way of asking for or denoting the music the goods will carry. There is no lexical invention and the terms would be the normal way of referring to the goods, or representing their essential characteristics.

36. That being the case, I believe that each of the grounds of opposition based upon Section 3(1)(b), (c) and (d) are made out in respect of all of the applications. But I must consider further the applications in respect of the signs DANCE NATION and CLUB NATION. This is because the former has been used by the applicants in relation to CDs and cassettes since 1996, and the latter because additional evidence has been filed in those particular proceedings.

37. In relation to DANCE NATION, the amount of use for the whole period 1996-1997, amounts to £4.8m worth of CDs and cassettes sold under the sign DANCE NATION. Mr Arnold says (a) that was not use as a trade mark only the title of the CD (the trade mark in

that case being MINISTRY OF SOUND and (b) that the use is not put into any context so that it is impossible to judge how that use can be translated into acquired distinctiveness. In my view he is right on both points. The indication from the packaging used on these CDs exhibited in evidence suggests that the trade mark is 'MINISTRY OF SOUND' and that the term DANCE NATION is the title of the album. Nothing is provided which suggests that the term DANCE NATION performs the function of a second trade mark. Certainly there is no evidence that the relevant public would perceive it as such. On the use, whilst £4.8m seems a lot of money, it may not mean much in relation to record sales as a whole in the United Kingdom or even record sales in the dance sector of that market. I am not able to infer that in this case use equates to acquired distinctiveness, see the comments of Jacob J in British Sugar [1996] RPC 281. Thus, the objections to registration are made out in relation to application No. 2149406, DANCE NATION.

38. In respect of CLUB NATION, there is the additional evidence. The applicant has filed statutory declarations from six trade witnesses who say that (a) the word NATION is not commonly used in the music industry, (b) they are aware of the applicants use of the sign DANCE NATION, (c) if they saw one of the signs, other than CLUB NATION, for which registration is sought used on or in relation to compilation albums they would associate it with the applicant and (d) the same would be true of CLUB NATION were it not for the fact that they are aware that it is used by the Opponents.

39. Mr Arnold submitted that this evidence was of no assistance and should be disregarded for the following reasons. First, the six statutory declarations are identically or almost identically worded. (In the case of Mr Mills a word-processing error led to the omission of paragraph 3 which makes a nonsense of his paragraph 5.) Secondly, each of the statutory declarations is explicitly addressed to the position as at the date they were made, in early 1999, and hence well after the application date. Thirdly, proposition (a) is at odds with the Opponent's evidence. Fourthly, each of the declarants gives evidence as to what he as a member of the trade would think not what the average consumer would think. Not only is the evidence speculative, therefore, it is speculation on the wrong basis. Fifthly, attempting to adduce evidence of a likelihood of confusion from witnesses who are not confused but on the contrary are well-aware that the Opponent's CLUB NATION records are unconnected with the Applicant's DANCE NATION records is peculiarly self-defeating. Sixthly, the supposition that confusion might be caused by the Opponent's use of CLUB NATION is in any event belied (a) by all the third party uses of similar signs and (b) the absence of any evidence that the Opponent's use has led to any confusion in fact.

40. Insofar as the common format is concerned I accept that, notwithstanding the obvious charge that the declarants have been led, the individuals would have had the opportunity to have read the declaration and had their responsibilities brought to their attention in swearing on oath before signing the document. The difficulty I have in accepting this evidence is the lack of particularisation insofar as the relevance of the experience of each witness is concerned and the lack of detail such that the weight to be attached to each declaration could be assessed - see the comments of Simon Thorley QC quoted above. All may be employed in the music industry, but in what capacity? For example, in his evidence, Mr Meekin, on behalf of the opponents, said that he had worked in the music industry for five years, but he felt it necessary to talk to Virgin's Dance Music Department A&R assistant in order to give his evidence. Why should

these declarants not be in the same position? Also, in the face of the evidence elsewhere about the number of other uses of the word NATION- uses which I have no reason to believe were not coined individually and independently - I am lead to conclude that this particular trade evidence is less than compelling. In the circumstances, I do not believe that a separate case can be made out for the registration of the sign CLUB NATION. Thus the objections under Section 3(1)(b), (c) and (d) are made out against application No. 2149426 too.

41. In the circumstances, the oppositions to all these applications for registration succeed and the opponents are entitled to an award of costs. I order the applicants to pay to the opponents the sum of £6000 which takes account of the duplication of evidence and the single hearing in this case. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 5<sup>TH</sup> day of March 2002**

**M KNIGHT  
For the Registrar  
the Comptroller-General**