

O-232-03

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 81071
BY TELEFONAKTIEBOLAGET L M ERICSSON
FOR A DECLARATION OF INVALIDITY IN RESPECT OF
TRADE MARK No. 2262661B
IN THE NAME OF AUTONOMY CORPORATION PLC**

TRADE MARKS ACT 1994

**IN THE MATTER OF Application No. 81071
by Telefonaktiebolaget L M Ericsson for a declaration of
Invalidity in respect of Trade Mark No. 2262661B
in the name of Autonomy Corporation Plc**

BACKGROUND

1. Trade Mark No. 2262661B is for the mark Autonomy AXE and is registered in Classes 9, 38 and 42 for the following goods and services:

Class: 09

Computer software and computer programs; computer systems, terminals and peripherals; data processing apparatus; CD Roms, software and programs for searching, retrieving and profiling information via computer systems, computer networks and the Internet; software and programs for providing on-line access to the Internet and for running web-site searches on-line or for concept matching, agent creations, agent restraining and for conducting text searches; software and programs for searching, retrieving, profiling, managing, sorting, selecting and/or storing information available via the Internet or other networks and systems; software and programs capable of adapting their behaviour according to a user's instructions or responses; software and programs that enable on-line publishers and corporations to create, analyse and extract information from the Internet and to automatically maintain and navigate customised portal sites; software and programs with added intelligence involving text; software and programs which deliver to users information via desktop computers, mobile telephones, personal digital apparatus and other handheld digital devices; software and programs which analyse and extract ideas and profiles in text from the Internet thus enabling them to profile users based on documents which are produced or read and then to deliver information which matches this profile; software and programs which provide information from the Internet which enables users to be automatically alerted to the existence of other people whose interests coincide with their own and to be given their e-mail and telephone details; computer software and programs capable of adapting their behaviour according to a user's instructions or responses by personalising and profiling end-users the retrieval, profiling, management, and delivery of data in knowledge management, new media, and e-commerce software applications; computer software and programs for the delivery or exchange of business information to desktop computers, mobile telephones, personal digital apparatus and other handheld digital devices; computer software and programs utilising a processing engine capable of working with an arbitrary structure to provide information.

Class: 38

Providing on-line access to the Internet; providing search engines.

Class: 42

Consultancy, design, analysis, development and implementation services relating to software and programs; leasing access time to computer data bases; maintenance and updating of software, computer software packages and computer programs; rental and/or licensing of software and programs; services relating to running web-site searches on-line; leasing or providing access to software and programs for use by third parties; retrieval and profiling of information via networks and the Internet; leasing or providing access to software and programs for the searching, retrieval and profiling of information via computer systems, computer networks and the Internet; services relating to providing software and programs for searching, retrieving, profiling, managing, sorting, selecting and/or storing information available via the Internet or other networks and systems; services relating to providing software and programs that enable on-line publishers and corporations to create, analyse and extract information from the Internet and to automatically maintain and navigate customised portal sites; services relating to providing software and programs with added intelligence involving text; services relating to providing software and programs which deliver to users information via desktop computers, mobile telephones, personal digital apparatus and other handheld digital devices; services relating to providing software and programs which analyse and extract ideas and profiles in text from the Internet thus enabling it to profile users based on documents which are produced or read and then to deliver information which matches this profile; provision of information from the Internet which enables users to be automatically alerted to the existence of other people whose interests coincide with their own and to be given their e-mail and telephone details; providing design, development, customisation, implementation and maintenance services in respect of knowledge management, new media and e-commerce software applications and programs that provide information via the global computer information network; computer services for concept matching, agent creations, agent retraining and for conducting text searching; computer services, including design, development, customisation, implementation and maintenance services relating to providing on-line navigation of the global computer network and for running web-site searches on-line

2. The mark stands registered from a filing date of 28 February 2001.
3. On 12 November 2002 Telefonaktiebolaget L M Ericsson applied for invalidation of the trade mark under Section 47(2)(a) of the Act because there is an earlier right in relation to which the conditions set out in Section 5(2)(b) of the Act obtain, because the mark is similar to the following earlier registered trade mark owned by the applicant and is to be registered for goods and services identical with or similar to those for which the earlier trade mark is protected and there exists a likelihood of confusion on the part of the public:

Number	Mark	Registration Effective	Goods and Services
2190161	AXE	25 February 1999	<p>Class 09: Apparatus for recording, transmission or reproduction of sound and images; apparatus and instruments for checking (supervision); magnetic and optical data carriers; data processing equipment and computers, computer programmes, peripheral equipment; optical apparatus and instruments; apparatus and instruments for monitoring of telecommunication networks and data communication networks; installation apparatus and instruments for data communication networks and telecommunication networks; instructional and teaching material, manuals and brochures, all provided from a computer network or registered on data carriers.</p> <p>Class 37: Installation, maintenance and repair of data communications and telecommunications.</p> <p>Class 38: Telecommunication services.</p> <p>Class 41: Education within the data communication area and telecommunication area; providing of training; conferences; seminars.</p> <p>Class 42: Consultancy services within the data communication area and telecommunication area; computer programming; leasing of data processing equipment.</p>

4. The registered proprietor, through its agent Barlin Associates, filed a counterstatement denying the grounds of opposition. While the registered proprietor admitted that the respective marks contained identical goods and services in their specifications, it was submitted that the marks themselves, in totality, were not similar.

5. The registered proprietor filed evidence and both sides asked for an award of costs in their favour. The parties were content for a decision to be taken without recourse to a hearing and both parties forwarded written submissions for the Hearing Officer's attention.

Registered Proprietor's Evidence

6. This consists of a witness statement by Rose-Marie Embleton-Smith dated 10 April 2003. Ms Embleton-Smith is an Enquiry Agent and received instructions from Barlin Associates, the registered proprietor's professional advisors in these proceedings, to conduct enquiries to ascertain the use, if any, of the trade mark AXE by the opponent in the UK.

7. Ms Embleton-Smith explains that on the basis of these instructions she conducted an entire website search using the term AXE and located 3,001 references thereto. She states that this search provided information with regard to the use of the trade mark AXE by Telefonaktibolaget L M Ericsson and she summarises the information that was obtained as a result of her enquiries as follows:

“Canada	:	“Ericsson signs IP and AXE agreement with Canadian BridgePoint”
Egypt	:	“Ericsson signs strategic AXE contract with Egypt”
Iran	:	“Ericsson makes AXE breakthrough in Iran”
Belgium	:	“Ericsson's AXE enters the Belgian telecom market” Ericsson has taken an important step into the Belgian market. The first AXE contract with the national telecommunications carrier, Belgacom, has been signed and this means one of the few remaining non-AXE markets in Europe has been entered”
Syria	:	“Ericsson signs USD 120Million AXE contract in Syria”
Sweden	:	“Ericsson signs AXE contract with Telia”
Brazil	:	“Ericsson signs ENGINE contract in Brazil” Ericsson's ENGINE Bridgehead Solution will upgrade Sercomtel's entire network to a next generation network. One AXD301 will be added to the main AXE exchange and the other three exchanges will be connected to another AXD301 (Media Gateway).

The Ericsson AXE switching system is described as “The most widely deployed switching system in the world, is a system for digital exchange nodes in large public telecommunications networks. It serves as a platform for every type of public telephone application, in local, transit, international and combined networks.”

8. Ms Embleton-Smith goes on to declare that in a press release dated the 10th October 2000 Telefonaktibolaget L M Ericsson and Compaq Computer Corporation announced the formation of a strategic partnership to “Jointly develop and build advanced switching computers for Ericsson's AXE-based next generation wireless and wireline networks. These switches, which are the powerful computers at the heart of telephone networks, will incorporate Compaq's high performance AlphaServer and Tru64 UNIX technology”. It was stated in the release dated the 20th March 2001 that “Ericsson announced the 3G cdma2000tm Mobile Switching Center (MSC). Built on Ericsson's latest global AXE platform, the MSC will provide superior capacity and scalability in an exceptionally small package”.

9. Ms Embleton-Smith attaches information obtained from the Internet which relates to Ericsson's enterprise products and at Exhibit RMES 2 is a copy letter from Mr Nick Adams of Ericsson Ltd.

10. Ms Embleton-Smith concluded by stating that her enquiries have revealed that Ericsson only uses the word AXE in relation to telephone exchanges such as those used by BT.

Applicant for Invalidation's Submissions

11. As mentioned earlier in this decision both the applicant for invalidation and the registered proprietor forwarded written submissions for the Hearing Officer's attention.

12. In summary, Haseltine Lake (the applicant's professional representatives in these proceedings) submit the following:

- (i) The word AXE is prominent within the registered proprietor's mark and the additional word Autonomy would simply indicate the addition of a trading name or housemark.
- (ii) As envisaged in the BULOVA ACCUTRON case, it is common for consumers to refer to and recognise trade marks without the housemark.
- (iii) The fact that the trade marks cover identical goods is not in dispute and to assist, the applicant has prepared a table in which each term in the registered proprietors trade mark and the corresponding term in the earlier registration which is considered identical or similar is detailed. A copy of this table is at Appendix One to this decision.
- (iv) That all goods in Classes 9 and 38 of the opposed application are identical to the goods and services in Classes 9 and 38 for which the earlier mark is protected.
- (v) The majority of the Class 42 services contained in the respective marks are identical and if they are not identical they are similar and the goods and services are often sold through the same channels of trade to the same end users.
- (vi) The applicant's mark is inherently very distinctive and deserves a wide penumbra of protection.
- (vii) Regarding costs, an exemplary award should be made to the applicant in respect of the evidence filed by the registered proprietor as the evidence was entirely superfluous.

Registered Proprietor's submissions

13. In summary, the submissions made by Barlin Associates (the Registered Proprietor's professional representatives in these proceedings) are as follows:

- (i) As the applicant has not filed evidence of the earlier right to which it lays claim the application for invalidity should be denied as there is no formal evidence to support the claim for an earlier right.
- (ii) If necessary the registered proprietor will exclude the goods and services of the applicant as identified by the evidence e.g. by adding to the specification of the registered proprietor “none of the aforesaid goods being for the monitoring of telecommunication networks and data communication networks”.
- (iii) The applicant has not in its statement of Grounds particularised those goods and services in the mark applied for which it considers to be identical and similar to those goods and services set out in its earlier registration.
- (iv) Regarding Class 9, the registered proprietor offers to delete the goods “computer software and computer programmes” per se, together with the specification qualification made earlier.
- (v) The respective marks are different as it includes the word Autonomy in which the registered proprietor has acquired a considerable reputation and the goods and services of each party are highly specialised.
- (vi) The registered proprietor’s evidence shows that the applicant’s trade mark is used exclusively in relation to telephone exchanges.
- (vii) There are other trade marks registered in the relevant classes which contain the word AXE e.g. GOLDEN AXE, THE DUEL, AXESS, AXE BRASIL.

14. This completes my summary of the evidence filed in this case and the written submissions of the parties. I now turn to the decision.

Decision

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

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

- (a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or
- (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 of association with the earlier trade mark.”

16. An earlier right is defined in Section 6, the relevant parts of which state:

“6.-(1) In this Act an "earlier trade mark" means -

- (a) a registered trade mark, international trade mark (UK) or Community trade mark 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,”

17. Section 72 of the Act is also relevant and it reads:

“72. In all legal proceedings relating to a registered trade mark (including proceedings for rectification of the register) the registration of a person as proprietor of a trade mark shall be prima facie evidence of the validity of the original registration and of any subsequent assignment or other transmission of it.”

18. Firstly, I note that the registered proprietor has criticised the applicant’s statement of grounds for not particularising those goods and services which it considers identical or similar to those set out in the earlier registration. However, I would point out that the applicant clearly identifies the earlier right on which it relies and claims identity of goods and services. Similarity of goods and services is only claimed to the extent that the goods and services are not deemed identical.

19. I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel BV v Puma AG* [1998] R.P.C 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] R.P.C 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG* [2000] E.T.M.R. 723.

It is clear from these cases that:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*, page 224;
- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v. Puma AG*, page 224, 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* page 84, paragraph 27;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v. Puma AG*, page 224;
- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG*, page 224;

- (e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, page 132, paragraph 17;
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG*, page 224;
- (g) account should be taken 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 was registered; *Lloyd*, paragraph 29;
- (h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG*, page 224;
- (i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, page 333, paragraph 29.

20. In essence the test under Section 5(2) is whether there are similarities in marks and services and/or goods which would combine to create a likelihood of confusion. In my consideration of whether there are similarities sufficient to show a likelihood of confusion I am guided by the recent judgements of the European Court of Justice mentioned earlier in this decision. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural or conceptual similarity between the marks, evaluating the importance to be attached to those different elements, taking into account the degree of similarity in the services and/or goods, the category of services and/or goods in question and how they are marketed. Furthermore, in making my comparisons I must assume notional fair use of the marks on the full range of goods and services which fall within the respective specifications.

21. The registered proprietor claims that the applicant's use of the AXE trade mark is limited to use in relation to telephone exchanges. This may be so, but for the purposes of the current opposition the applicant's earlier right extends across the full width of its Class 9, 37, 38, 41 and 42 specifications of goods and services.

22. I turn now to the consideration of the respective goods and services covered by the specifications of the mark in suit and the applicant's earlier registration. In this context I bear in mind that the registered proprietor seeks to amend its Class 9 and 42 specifications by the addition of the wording "none of the aforesaid being for the monitoring of telecommunication networks and data communication networks" and also by the deletion in Class 9 of the goods "computer software and computer programmes". I also take into consideration the "table" attached to the applicant's written submissions – a copy of which is attached as Appendix One to this decision.

23. Where respective goods and services are not identical I need to determine similarity of goods and/or services and in this regard I intend to follow the guidelines formulated by Jacob J in *British Sugar Plc v James Robertson & Sons Ltd* [1996] RPC 281 (Pages 296, 297) as set out below:

"The following factors must be relevant in considering whether there is or is not similarity:

- (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 services;
- (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 particular 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."

24. Whilst I acknowledge that in view of the CANON-MGM judgement by the European Court of Justice (3-39/97) the Treat case may no longer be wholly relied upon, the ECJ said the factors identified by the UK government in its submissions (which are listed in TREAT) are still relevant in respect of a comparison of goods and/or services.

25. Firstly, I turn to a comparison of the registered proprietor's Class 9 specification (as amended) with that of the class of specification of the applicant's registration.

26. The registered proprietor's specification is somewhat lengthy and detailed but nevertheless in essence it comprises:

- (i) computer and data processing systems and apparatus which are identical to the applicant's "data processing equipment and computers" and "peripheral equipment";
- (ii) CD ROMS and various dedicated and specialised software and programs which are nevertheless identical to the applicant's "magnetic and optical data carriers" and "computer programmes".

27. Although the registered proprietor's Class 9 specification excludes goods "for the monitoring of telecommunication networks and data communication networks" this does not

assist the registered proprietor as the identical goods contained in the applicant's specification are not limited regarding their scope or application.

28. To sum up, all the Class 9 goods within the registered proprietor's specification (amended or not) are identical to goods contained within the Class 9 specification of the applicant's earlier mark.

29. I go on now to a consideration of the Class 38 specifications. The specification of the mark in suit reads – "Providing on-line access to the Internet; providing search engines". I have no doubt that such services fall within the "telecommunications services" covered by the applicant's specification. They are commonly supplied and maintained by telecommunications providers, often in association with a telephone service. In my view the Class 38 services are identical.

30. Finally, I go on to the Class 42 services and I am in broad agreement with the detailed submissions set out by the applicant and contained in Appendix One to this decision. The registered proprietor's services essentially relate to computer software – consultancy, access, maintenance, updating, leasing, retrieval, managing, extracting information from etc. and also computer services in general e.g. design. These services are at least similar to those of the applicant, in particular computer programming, consultancy and leasing in relation to data communication and data processing, also computer programmes themselves (Class 9) and the installation, maintenance and repair of data communications (Class 37). In general the respective users of the services are likely to be the same, and the services (and goods) concerned are provided in the same discrete area, often by the same service provider. It seems to me that the supplier of computer software, computers and computer programming services is also likely to be in a position to supply services relating to computer software in general. I do not consider the exclusion in relation to the "monitoring of telecommunication networks and data communication networks" assists the registered proprietor, there is no limitation in relation to the scope of the applicant's computer programmes and its computer programming services. Furthermore, consultancy services in relation to data communication must be at least similar to consultancy services relating to computer software even if that software is not dedicated to data communication networks.

31. To conclude, I believe that all the services contained within the registered proprietor's Class 42 specification are at least similar to services and goods contained within the applicant's specifications.

32. I now go on to a comparison of the mark in suit with the applicant's earlier registration. In the written submissions the registered proprietor has drawn attention to a number of trade marks containing the word AXE in the relevant classes. None of these are identical to the mark in suit or the opponent's mark. In any event I am not assisted by this evidence and I am guided on this point by the following comments of Mr Justice Jacob in *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 281:

"Both sides invite me to have regard to the state of the register. Some traders have registered marks consisting of or incorporating the word "Treat". I do not think this assists the factual inquiry one way or the other, save perhaps to confirm that this is the

sort of word in which traders would like a monopoly. In particular the state of the register does not tell you what the circumstances were which led the Registrar to put the marks concerned on the register. It has long been held under the old Act that comparison with other marks on the register is in principle irrelevant when considering a particular mark tendered for registration, see e.g. *MADAM Trade Mark* and the same must be true under the 1994 Act. I disregard the state of the register evidence.”

33. My decision involves a comparison of the applicant’s and opponent’s particular marks and must be made on its own merits, taking into account any use of the marks and also fair and notional use of the respective marks across the full width of their specifications.

34. The mark in suit consists of the obvious dictionary words Autonomy AXE. Neither the totality nor the individual elements have a reference to the goods and services at issue. The applicant’s earlier registration comprises the word AXE and I have no reason to suppose that the applicant’s registration does not deserve a good penumbra of protection. While the registered proprietor’s written submissions contend that the registered proprietor’s house mark AUTONOMY has a reputation the “Overview” taken from the company website after the relevant date for these proceedings does not substantiate this claim. There are no details of the extent of the use of the mark e.g. turnover, no details of the promotion of the mark, no examples of the mark in use and no supporting third party evidence.

35. On a visual, aural and conceptual comparison the marks differ in that the registered proprietor’s mark comprises two words and the applicant’s mark one word. However, the marks are similar in that the same word (AXE) is common to both marks and it seems to me that as the mark in suit (Autonomy AXE) has no meaning in its totality, it is likely that the AUTONOMY house mark of the registered proprietor’s would be perceived as a house mark in the market place.

36. In its written submissions the applicant has reminded me of the views expressed in *Bulova Accutron* [1969] RPC 102. While the case was decided under the 1938 Act, it seems to me that the following views, expressed at 109-140 by Stamp J, remain relevant today:

“As I have already said, if what had to be considered was a side by side comparison, the additional word would have had a vital significance, but where imperfect recollection is relevant what has to be considered is how far the additional word is significant to prevent imperfect recollection and the resultant confusion. Particularly having regard to the fact that BULOVA is the house name of the applicants and has a significance other than as a trade mark, its addition before the word ACCUTRON does not in my judgement serve to prevent the deception or confusion which would in the view of the Court of Appeal have been caused but for that adoption. As the Assistant Registrar remarks in his decision: “As Bulova and Accutron do not hold together as a phrase or present a wholly different meaning to the separate components, I think that their combination will be taken by many persons on first impression as an indication that the manufacturer of the watches is using two separate trade marks in connection with his products.” I would add that the combination of the two words is likely to be taken by other persons on first impression as an indication that the part of the trade mark which consists of BULOVA is a house name

of the marketers of the watches, that the trade mark is ACCUTRON and that they will confuse them with watches marketed under the trade mark ACCURIST simpliciter.”

37. The respective marks share a common element, the word AXE, and it seems to me that the addition of the registered proprietor’s house mark does not significantly defuse the risk of confusion.

38. In my considerations relating to a likelihood of confusion I must consider the services and/or goods at issue and the average customer for the services and/or goods. The relevant range of services and goods covered by the applicant’s and opponent’s specifications is sufficiently wide to encompass specialist customers and the general public. However, it seems to me that, in general, the respective services and/or goods would be purchased with a good degree of care and diligence. While this could mitigate against confusion occurring it does not follow that there is no likelihood of confusion and all relevant circumstances must be taken into account.

CONCLUSION

39. Notwithstanding the obvious difference in the marks, particularly on a side by side comparison. I take into account my earlier finding that the common element, the word AXE, comprises a fully distinctive mark of the applicant and that the addition element, the word Autonomy, would be perceived as the house mark of the registered proprietor. Also taking into account that there is identity of goods and services in relation to Classes 9 and 38 and that the Class 42 services are closely similar then, notwithstanding that the customer for the goods and services is likely to be relatively careful and discerning, I believe that there is a likelihood of confusion on the part of the public.

40. In reaching a decision in relation to the likelihood of confusion I have particularly borne in mind the following comments of the European Court of Justice in *Canon*:

“Accordingly, the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion within the meaning of Article 4(1)(b) of the Directive (see SABEL, paragraphs 16 to 18).”

41. In my view the AXE and Autonomy AXE goods and services would be assumed to come from “the same stable”.

42. The application for revocation under Section 47(2)(a) of the Act succeeds because there is an earlier right in relation to which the conditions set out in Section 5(2)(b) of the Act obtain.

43. In accordance with Section 47(6) of the Act, the registration will be declared invalid and deemed never to have been made.

Costs

44. In relation to costs the applicant has requested an exemplary award in respect of the

evidence filed by the registered proprietor as in the applicant's view the evidence was entirely superfluous and involved the applicant having to read through it without any justification. I have some sympathy with the applicant's view as the evidence, which goes to the applicant's use of its mark, does not preclude the consideration of normal fair use of the applicant's mark across the full width of its specifications. However, the evidence at issue was not particularly lengthy or complex and it seems to me that the identification of the areas in which a mark has been used can sometimes prove useful in identifying the potential for market place confusion or the possibility of negotiated settlement. I do not consider exemplary damages to be appropriate.

45. The applicant is entitled to a contribution towards costs and I therefore order the registered proprietor to pay the applicant the sum of £900. 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 14th day of August 2003

**JOHN MacGILLIVRAY
For the Registrar
the Comptroller General**

Annex in a paper copy.