

O/001/12

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2542423A
BY JONATHAN SILLETT AND TIM WORRALL TO REGISTER THE TRADE
MARK**

TEKKERS

IN CLASSES 9, 18 AND 25

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 101327A
BY D&K S.R.L.**

BACKGROUND

1) On 19 March 2010, Tekkers Limited applied under the Trade Marks Act 1994 for registration of the mark TEKKERS in respect of lists of goods in Class 9, 18, 25 and 28.

2) The application was given the number 2542423. The application was advertised in the Trade Marks Journal on 24 September 2010 and on 22 December 2010, D&K S.r.l (“the opponent”) filed notice of opposition to the application in respect of some of the goods in Class 9, 18 and all of the Class 25 goods. The application was subsequently divided so that Part A is in respect of the classes opposed in these proceedings. Part B is in respect of the Class 28 and is not subject to these proceedings.

3) The opponent relies on the following earlier marks:

Mark and relevant details	Goods relied upon
IR*718576 DEKKER Date of international registration: 19 May 1999 Date of designation in UK: 18 June 2009	Class 18: <i>Leather goods, bags, suitcases.</i> Class 25: <i>Clothing, knitwear, lingerie, shirts, footwear, belts.</i>
CTM#5982616 DEKKER Filing date: 08 June 2007 Registration date: 02 April 2008	Class 9: <i>Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus.</i>

* International Registration

Community Trade Mark

4) The grounds of opposition are that the application offends under Section 5(2)(b) of the Act because the respective marks are very similar and the

application includes many goods that are identical or, in the case of *purses* either identical or very similar.

5) The list of the applicant's goods, as opposed, is:

Class 9

Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, supervision, life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin operated apparatus; cash registers; calculating machines, data processing equipment and computers; fire-extinguishing apparatus; recorded media, computer hardware and firmware; computer software; software downloadable from the Internet; downloadable electronic publications; compact discs; digital music; telecommunications apparatus; computer games equipment adapted for use with an external display screen or monitor; [...]; mobile phone accessories; [...], spectacles and sunglasses; [...].

Class 18

[...]; trunks and travelling bags; handbags, rucksacks, purses; [...].

Class 25

Clothing, footwear, headgear

6) I subsequently permitted the name of the applicant to be substituted for the current names, namely Jonathan Sillett and Tim Worrall ("the applicants")

7) The applicants subsequently filed a counterstatement denying the opponent's claims.

8) Both sides filed evidence in these proceedings and the opponent also filed written submissions. Both sides ask for an award of costs. The matter came to be heard on 1 December 2011 when the opponent was represented by Guy Hollingworth for counsel, instructed by Nabarro LLP and the applicants were represented by Julius Stobbs for Ipulse.

Opponent's Evidence

9) This takes the form of a witness statement, 17 May 2011, by David Parrish, a solicitor for Nabarro LLP, the opponent's representatives in these proceedings. Mr Parrish provides two exhibits, the first of which, Exhibit DP1, is a print-out from the online *Scrabble* dictionary illustrating the results of a search for "kk". These results list twenty one words. They do not include the words TEKKER, TEKKERS or DEKKER.

10) Exhibit DP2 is a print-out from the online *Collins* dictionary providing the meaning for the words containing the letters "kk" that are listed in the results of the search of the *Scrabble* dictionary.

11) These exhibits are supported by written submissions that I will not detail here but I will keep them in mind.

Applicants' Evidence

12) This takes the form of two witness statements, the first by Joe Sillett, managing director of Tekkers Limited and the second by Geoff Weller, registered trade mark attorney at Ipulse (IP) Limited, the applicants' representative in these proceedings.

13) Mr Sillett provides information regarding the scale of Tekkers Limited's trading activities and provides, at Exhibit JS1, customer testimonials. Mr Sillett explains that the business trades in a range of "lifestyle clothing" and despite receiving about 6,000 unique visitors a month to its website there has not been one query or question related to any confusion with the mark DEKKER.

14) Mr Sillett states that its customers are mainly football fans and are knowledgeable about where the word TEKKERS came from. He explains that it was created by Andy Ansah, co-founder of Tekkers Limited. Exhibit JS4 is an extract from the user-authored website Wikipedia and provides information about Mr Ansah and the origins of the word TEKKERS. It explains that Mr Ansah, a past professional football player, coined the term "unbelievable tekkers" while working on the television programme "Wayne Rooney's Street Striker".

15) Mr Sillett goes on to explain that production staff on Mr Ansah's programme, that airs on *Sky* television, asked for permission to use the word in another weekly programme called *Soccer AM*. It has been used on that program, since January 2010, in respect of the most skilful play of the week. Mr Sillett states that the programme was viewed by one to two million a week.

16) Mr Sillett states that a Google search for the term TEKKERS will reveal a listing in the *Urban Dictionary* where TEKKERS means "technique in sport".

17) At Exhibit JS3, Mr Sillett provides Internet extracts, all dated 15 July 2011, showing use of marks that he contends are similar to the mark DEKKER. The geographical target and origin of most is either not identifiable, or clearly not targeted at the UK with, for example, prices being quoted in dollars, information being provided related to the company's stock listing on the US stock index, NASDAQ and country domain names other than the UK. Those clearly originating from or conducting a trade in the UK are:

- Two extracts from amazon.co.uk. The first advertises "Dekker – Barbie Princess Dress Up Chest" but indicating that it is "currently unavailable". The second advertises a "Jaxon Hats Crushable Dekker Trilby".
- An extract from littletrekkers.co.uk providing "outdoor gear for kids"
- An extract from alfredbekker.com offering clothing from Alfred Bekker Ltd
- An extract from Kickers.co.uk offering various shoes for sale
- An extract from simplyneckers.com offering a range of neckerchiefs for sale and priced in pounds
- An extract from eu.dockers.com/uk_en. The content visible in the extract is very limited but does indicate that there are stores in Great Britain.

18) In his witness statement, Mr Weller provides, at Exhibit GW1, extracts from the Registry's database illustrating the existence of DEKKER marks in respect of Class 25 goods. Six of these marks are in the same name and feature the name "Marlies Dekkers", two are for "Dekkers Toys", one for the mark "nekker" and one for "Lekker Kids".

Opponent's Evidence in reply

19) This takes the form of a second witness statement by Mr Parrish, dated 14 September 2011. At Exhibit DP5, he provides a print-out from the website of the *Broadcasters' Audience Research Board* that shows that, as of 21 March 2010, the television programme *Soccer AM* was watched by 163,000 people and not 2 million as Mr Sillett stated, but did not substantiate.

20) Mr Parrish also refutes a number of points raised by the applicants and I will keep this in mind.

DECISION

Section 5(2)(b)

21) Section 5(2)(b) reads:

“(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 of association with the earlier trade mark.”

22) 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, international trade mark (UK), Community trade mark or international trade mark (EC) 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.”

23) The opponent relies upon two earlier marks, both are registered. Its IR protection extends to the UK. Therefore, they both qualify as earlier marks as defined by Section 6 of the Act. The CTM has completed its registration procedure within five years of the publication of the applicants’ mark (the relevant date) and the International Registration also designated the UK within the same period. Consequently, the “proof of use” provisions in Section 6A of the Act do not apply.

24) In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the Court of Justice of the European Union (CJEU) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] FSR. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] ETMR 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). 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*,

(b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG*, 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.*,

(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*,

(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*,

(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.*,

(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*,

(g) in determining whether similarity between the goods or services covered by two marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(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*,

(i) further, 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; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(j) 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.*

(k) assessment of the similarity between two marks means more than taking just one component of a composite mark and comparing it with another mark; the comparison must be made by examining each of the

marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(I) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM (LIMONCELLO)*

Comparison of goods

25) In assessing the similarity of goods, it is necessary to apply the approach advocated by case law and all relevant factors relating to the respective goods and services should be taken into account in determining this issue. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at paragraph 23:

'In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. 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.'

26) Other factors may also be taken into account such as, for example, the distribution channels of the goods concerned (see, for example, *British Sugar Plc v James Robertson & Sons Limited (TREAT)* [1996] RPC 281).

27) I also keep in mind, the guidance of the GC, in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-133/05* paragraph 29, that goods can be considered as identical when the goods designated by the earlier mark are included in a more general category covered by the application or vice versa and in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-325/06 ("Boston Scientific")* that "goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking".

28) At the hearing, Mr Stobbs made no issue of the stylisation of the mark in the opponent's IR. Consequently, for the purposes of the comparison of goods, I will consider the scope of the opponent's earlier marks by reference to a single list of its goods. With this in mind, the respective goods are as follows:

The opponent's relevant goods	The Applicants' goods
<p>Class 9: <i>Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus.</i></p>	<p>Class 9: <i>Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, supervision, life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin operated apparatus; cash registers; calculating machines, data processing equipment and computers; fire-extinguishing apparatus; recorded media, computer hardware and firmware; computer software; software downloadable from the Internet; downloadable electronic publications; compact discs; digital music; telecommunications apparatus; computer games equipment adapted for use with an external display screen or monitor; [...]; mobile phone accessories; [...], spectacles and sunglasses; [...].</i></p>
<p>Class 18: <i>Leather goods, bags, suitcases.</i></p>	<p>Class 18: <i>[...]; trunks and travelling bags; handbags, rucksacks, purses; [...].</i></p>
<p>Class 25: <i>Clothing, knitwear, lingerie, shirts, footwear, belts.</i></p>	<p>Class 25: <i>Clothing, footwear, headgear</i></p>

29) Mr Stobbs also conceded that the respective goods are identical or similar. Despite this concession, I find it necessary to comment as follows.

30) Applying the guidance provided by *Meric*, it is clear to me that the following of the applicants' goods are identical to goods listed in the opponent's registrations:

Class 9: Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, supervision, life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs;

automatic vending machines and mechanisms for coin operated apparatus; cash registers; calculating machines, data processing equipment and computers; fire-extinguishing apparatus; recorded media; computer hardware and firmware; compact discs; telecommunications apparatus, mobile phone accessories, spectacles and sunglasses

Class 18: *trunks and travelling bags; handbags, rucksacks, purses*

Class 25: *Clothing, footwear, headgear*

31) In respect of the applicants' remaining goods (in Class 9), I shall consider them briefly below.

32) In respect of Class 9, the applicants' *computer software; software downloadable from the Internet* such goods are often integral to *computers* and, therefore, often share the same trade channels as these goods. Whilst, such goods are different in nature, it can be said that they are complementary in the sense that *computers* are essential for the existence of *computer software*. Taking these points together, I conclude that the applicants' *computer software; software downloadable from the Internet* and the opponent's *computers* are similar to a reasonably high degree.

33) In respect of the applicants' *downloadable electronic publications* and *digital music*, these are different in nature, purpose and method of use and are not generally provided through the same trade channels as the opponent's goods. Neither are they complementary in the sense expressed in *Boston Scientific*. In view of Mr Stobbs' concession, any level of similarity is on the very low side.

34) In respect of the applicants' *computer games equipment adapted for use with an external display screen or monitor*, such games may be used for educational and teaching purposes. Consequently, there is a close relationship with the opponent's *teaching apparatus* and such goods may, in fact, overlap. Therefore, they are identical or if not identical, share a high level of similarity.

The average consumer

35) As matters must be judged through the eyes of the average consumer (*Sabel BV v. Puma AG*, paragraph 23) it is important that I assess who the average consumer is for the goods and services at issue.

36) In response to Mr Sillet's assertion that the word TEKKERS has become well known as a term which refers to skilful play in soccer and that the applicants' customers are largely football fans that know the origin of the word, Mr Parrish submitted that this is not the relevant test as I must consider the "average notional consumer" and not football fans. This is correct, the applicants' list of

goods is not limited in any way to football related goods and consequently, I must consider who the average consumer is for the wide range of goods claimed.

37) At the hearing, Mr Hollingworth argued that the average consumer is ordinary members of the public. Certainly, this will be the case in respect of many of the goods, including all those listed in the parties' Class 18 and Class 25 specifications where the goods are essentially consumer items. Similarly, in respect of Class 9 goods such as *data carriers, digital music and recorded media*, these are items commonly purchased by ordinary members of the public and where the purchasing process is predominantly a visual one. The respective Class 9 specifications also include terms that cover more specialist goods where the purchasing act will be more considered and with specialist scientists and other professionals being the relevant consumers of such goods.

Comparison of marks

38) For ease of reference, the respective marks are:

Opponent's mark	Applicants' mark
DEKKER	TEKKERS

39) As I have already made reference to, Mr Stobbs conceded that the slight stylisation of earlier DEKKER mark, the subject of the opponent's IR, does not impact upon the outcome of these proceedings. As such, I intend to consider the DEKKER marks as one for the purposes of my analysis, and I will not discuss the slight stylisation of the earlier mark in question, other than to say here that I concur with Mr Stobbs in that the stylisation has a negligible impact upon the comparison of marks.

40) When assessing the extent of similarity between the respective marks, I must do so with reference to their visual, aural and conceptual similarities bearing in mind their distinctive and dominant components (*Sabel BV v. Puma AG*, para 23). As the respective marks consist of single words, it follows that no individual elements of the respective marks are more dominant than any other.

41) From a visual perspective, both marks share the identical "EKKER" element, but differ in that the opponents mark begins with the letter "D" and the applicants' mark with the letter "T". Further, the applicants' mark has the addition of a letter "S" at the end. Mr Stobbs submitted that the different first letters is a critical consideration with the beginning of marks often being capitalised thus highlighting the differences between marks. Whilst I accept this as a valid point, the mere capitalisation of the first letter is not likely to significantly change the perception of the consumer created by the common five letters present in both marks. Similarly, the letter "S", appearing at the end of the applicants' mark, is likely to have a minimal impact upon the perception of the consumer.

Consequently, I conclude that the respective marks share a high level of visual similarity.

42) From an aural perspective, Mr Hollingworth referred me to the OHIM Manual of Trade Mark Practice, Part C, Part 2, Chapter 2, Section 4 and the decision of Richard Arnold QC (as he then was) sitting as the Appointed Person in *SOUTH BECK trade mark*, BL O-160-08 to support his submission that whilst it is an accepted principle that the first part of words has a greater importance, this is more so in respect of short words. He argued that in the current case, the respective marks share structure, rhythm and pronunciation and consequently the minor differences in first letters and the addition of the letter “S” in the applicants’ mark make little difference.

43) I concur with Mr Hollingworth’s interpretation, with the “ekker” sound being the common to both marks. As neither word is particularly short, to my mind, this has the effect of diluting the impact of the different first letters. Even so, as Mr Hollingworth contended, the letters “T” and “D” are both similar sounding, hard consonants. Consequently, their sounds are not dissimilar.

44) Taking account of all these points, I conclude that the respective marks also share a high level of aural similarity.

45) From a conceptual perspective, Mr Stobbs contended that the word TEKKERS has a meaning, coined by the applicants and publicised through a football programme broadcast on Sky television and that because the consumers of the applicants’ goods are predominantly football fans they will be alert to the conceptual difference between the marks created by this meaning. I reject this line of reasoning on a number of grounds. Firstly, the specifications of goods of both parties do not indicate that the goods are limited to any particular field such as football and, consequently, it would be wrong to assume that the average consumer has the level of knowledge suggested by Mr Stobbs. Secondly, as Mr Hollingworth pointed out, the show was aired from December 2009, a maximum of eleven weeks prior to the relevant date. The parties dispute the level of exposure such airing attracted. Mr Sillett, in his witness statement, claims that the show attracted one to two million viewers, but the opponent has obtained figures from an independent source, the *Broadcasters’ Audience Research Board*, illustrating viewing figures of 163,000. Finally, Mr Sillett’s statement that the word TEKKERS is listed on www.urbandictionary.com is of little persuasive value as he does not include the extract in his evidence and, secondly, it is not possible to ascertain from what date the reference originates. In the absence of such a date, I only have the date of the witness statement itself and this was some sixteen months after the relevant date. Taking these facts together, I conclude that the length and scale of exposure of the word TEKKERS, being used descriptively, is minimal prior to the filing date and, as such, has not educated the average consumer to its meaning.

46) As a fall back, Mr Stobbs contended that the “TEK” element of the applicants’ mark will be grasped by consumer as having a meaning (as an abbreviation for “technology” or “technical”) and that this is absent in opponent’s mark. I am not persuaded by this. The “TEK” element of the mark does not stand out in this way, it forms part of the complete word that, as I have already concluded, has no conceptual identity. This is particularly so because of the appearance of the “KK” element in the middle of the mark having the effect of blending the two halves of the mark. To artificially dissect the mark, as Mr Stobbs suggests, is contrary to the principle of considering the marks as a whole (*Sabel v Puma AG*).

47) Mr Stobbs also argued that the addition of a letter “S” can, in some circumstances, alter how a word is perceived, such as when added to adjectives. He built on this argument by contending that marks are used like adjectives and that marks with and without an “S” are only interchangeable where “the brand is huge”, for example, *Reebok(s)*, *Tesco(s)* etc. Mr Hollingworth argued the addition of the letter “S” is a point of no distinction. The consumer encounters trade marks in many different ways and will refer to them in many different ways and to select one particular way that consumers encounter marks has the effect of artificially influencing the argument. Where a consumer encounters or refers to a mark in a way other than as an adjective, such as when encountering it in the market place or referring to it as a proper noun, the distinction identified by Mr Stobbs does not exist. As such, I conclude that the addition of the letter “S” to the applicants mark does not generally have the impact suggested.

48) Having regard for all my comments above, the respective marks must both be regarded as made-up words with no meaning.

49) In summary, I have found that the marks share a high level of visual and aural similarity and that neither mark has a conceptual identity.

Distinctive character of the earlier trade mark

50) I must consider the distinctive character of the earlier mark because the more distinctive it is, either by inherent nature or by use the greater the likelihood of confusion (*Sabel BV v Puma AG* [1998] RPC 199). The distinctive character of the earlier trade mark must be assessed by reference to the goods for which it is registered and by reference to the way it is perceived by the relevant public (*Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91). The opponent makes no claim to an enhanced distinctive character through use, so I only have the inherent nature of the mark to consider.

51) In its written submissions, the opponent claims that the letters “KK” are a very uncommon combination in English language. Mr Hollingworth directed me to the evidence illustrating that there are only eight words in the English language that contain this letter combination and, consequently, the opponent’s mark is

endowed with an inherently high level of distinctive character. I concur with this view.

Likelihood of confusion

52) In response to Mr Weller's evidence of the co-existence of a number of other DEKKER marks on the register covering Class 25 goods, Mr Parrish, in his reply statement, referred to the well-known comments of Jacob J in *TREAT* where it was noted that the state of the register is irrelevant. I have no idea how many of the marks, if any, are actually in use in the UK and what the relevant public's perception of these marks may be in relation to the various goods. Consequently, I am not persuaded by Mr Weller's submissions on this point.

53) In his second witness statement, Mr Parrish submits that, contrary to the applicants' position, a lack of actual confusion is seldom relevant let alone determinative. Mr Hollingworth pointed out that the opponent has yet to make much use of its mark in the UK. In this respect, I am mindful of the comments of Laddie J in *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41, where he cautioned against accepting such lack of confusion arguments, pointing out that the Act allows registration of a mark that has not yet been used. As such the register does not necessarily reflect what is happening in the market and that it is possible to register a mark which is not being used. He concluded that infringement in such a case must involve considering notional use of the registered mark where there may be no confusion in practice, but where there may be a finding of infringement. In light of this guidance and the comments of Mr Parrish, I am not persuaded by the applicants' submission on this point.

54) The applicants also make a statement that their mark had "a very extensive reputation since January 2010". This date is only two months before the relevant date and appears to relate to the purported descriptive use of the word TEKKERS. There is no evidence of use as a trade mark prior to the relevant date and as such, I conclude that the applicants' mark had no reputation at the relevant date. Therefore, it cannot be a factor to consider in my analysis of likelihood of confusion.

55) I must adopt the global approach advocated by case law and take into account that marks are rarely recalled perfectly with the consumer relying instead on the imperfect picture of them he has in kept in his mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27).

56) I must consider the likelihood of confusion at the relevant date, namely the filing date of the contested application, being 19 March 2010. At the hearing, Mr Stobbs suggested, but not with any force, that I should consider the position at some later date, but I reject this.

57) I have found that the respective marks share a high level of visual and aural similarity and that, as both marks will be perceived as invented words, neither has a conceptual identity. I have also found that the opponent's mark has a high level of distinctive character. The majority of the respective goods are identical or similar and I have found that in respect of the Class 18 and Class 25 goods and also some of the Class 9 goods, the average consumer is the public at large and the nature of the purchasing act is not particularly highly considered, but neither is it normal for the goods to be purchased on an impulse where very little consideration is given. I also acknowledged for some Class 9 goods the average consumer may be specialist professionals who apply a high level of consideration to the purchasing process.

58) When taking all of the above into account, the similarities between the marks far outweigh the differences identified and even where the purchasing act is a considered one, I find that in respect of identical goods, and goods with a reasonable degree of similarity, there is a likelihood that the average consumer will confuse the marks, in particular where their recollection of the mark may be imperfect.

59) Therefore, when considering normal and fair use, with regard for the notional and average consumer, I find that there is a likelihood of confusion in respect of all of the applicants' goods with the exception of *downloadable electronic publications* and *digital music*.

COSTS

60) The opposition having been substantially successful, D&K S.r.l. is entitled to a contribution towards its costs. I take account of the fact that a hearing has taken place and that both sides filed evidence. I award costs on the following basis:

Preparing Notice of Opposition and considering other side's statement	£500
Preparing and filing evidence and considering other side's evidence	£700
Preparing for, and attending hearing	£700
TOTAL	£1900

61) I order Jonathan Sillett and Tim Worrall to pay D&K S.r.l the sum of £1900. 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 4th day of January 2012

**Mark Bryant
For the Registrar,
the Comptroller-General**