

O/779/18

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION UK3309595

BY

CENTAUR ROBOTICS LIMITED

TO REGISTER THE FOLLOWING TRADE MARK IN CLASSES 9, 12 AND 42

CYMBIONT

AND OPPOSITION THERETO (NO. 600000897)

BY

CREDIT CARD MERCHANT SERVICES LIMITED

Background and Pleadings

1. CENTAUR ROBOTICS LIMITED (The Applicant) applied to register the word trade mark, CYMBIONT, on the 9 May 2018 for goods and services in classes 9, 12 and 42 listed below. It was accepted and published on the 1 June 2018.

CLASSES 9: Apparatus and instruments for conducting, distributing, transforming, switching, accumulating or regulating electricity and energy; Autonomous driving control systems for vehicles; Batteries, electric; Computer applications for vehicle navigation apparatus; Computer programs for use in autonomous control of vehicles; Computer programs for use in the assisted driving of vehicles; Computer programs for use in the autonomous navigation of vehicles; Computer programs to operate vehicles; Computer software; Computer software to operate vehicles; Computers for autonomous-driving vehicles; Personal assistant software; Recorded computer software for safe vehicle driving; Software for GPS navigation systems; Software for inertial navigation systems; Software for mobile devices; Software for navigation systems; Software for vision navigation systems; Electric control devices for energy management; Electricity conduits; Electricity indicators; GPS navigation devices; Gyro sensors using GPS functions; Gyroscopes; Home automation and home device integration software; Integrated electronic driver assistance systems for land vehicles; Integrated electronic safety systems for land vehicles; Navigation apparatus for vehicles; On board computers for vehicles; Speed indicators; Steering apparatus, automatic, for vehicles; Storage apparatus for electricity, including for charging accumulators or batteries for electric vehicles; Vehicle autonomous driving systems featuring interactive displays; Vehicle batteries; Vehicle tracking apparatus; Vehicle tracking systems; Voice command and recognition software, speech to text conversion software, and voice-enabled software applications.

CLASS 12: Apparatus for locomotion by land; Vehicles; Land vehicles and conveyances; Electric land vehicles; Motor land vehicles; Wheelchairs; Electric wheelchairs; Electric motors for wheelchairs; Electric vehicles; Electrically

operated wheelchairs; Electrically-powered wheelchairs; Powered stand up wheelchairs; Parts and fittings for vehicles; Parts and fittings for land vehicles.

CLASS 42: Design and development of computer hardware and software; Design of land vehicle parts; Design of land vehicles; Design of motor vehicles; Design services for parts of motor vehicles; Development of vehicles; Industrial analysis and research services; Product development for vehicle construction and for vehicle body construction; Safety technology services relating to land vehicles; Scientific and technological services and research and design relating thereto; Software as a Service [SaaS]; Vehicle design services.

2. CREDIT CARD MERCHANT SERVICES LIMITED (the Opponent) opposes the application by way of the Fast Track opposition procedure, under section 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 (the Act). It relies on its two earlier UK registered trade marks “Symbiant”. The first trade mark numbered UK 3044875 was filed on the 3 March 2014 and registered on the 6 June 2014 for goods in class 9 and the second numbered UK3153094 was filed on the 4 March 2016 and registered on the 27 May 2016 for goods and services in classes 9, 35, 36 and 38.

3. For the purposes of this opposition the Opponent is only relying on its goods and services in classes 9 and 38 listed below, for which the marks are registered claiming that there is a likelihood of confusion because under sections 5(2)(a) and (b) the trade marks are identical or are similar and are to be registered for goods or services identical or similar to those for which the earlier mark is protected.

UK3044875 Symbiant	CLASS 9: Computer software [programmes].
UK3153094 Symbiant	Class 9: Internet servers; Internet access software.
	Class 38: internet portal services

4. The Opponent is only opposing the application for registration in relation to the following goods and services:

CLASSES 9: Apparatus and instruments for conducting, distributing, transforming, switching, accumulating or regulating electricity and energy; Autonomous driving control systems for vehicles; Batteries, electric; Computer applications for vehicle navigation apparatus; Computer programs for use in autonomous control of vehicles; Computer programs for use in the assisted driving of vehicles; Computer programs for use in the autonomous navigation of vehicles; Computer programs to operate vehicles; Computer software; Computer software to operate vehicles; Computers for autonomous-driving vehicles; Personal assistant software; Recorded computer software for safe vehicle driving; Software for GPS navigation systems; Software for inertial navigation systems; Software for mobile devices; Software for navigation systems; Software for vision navigation systems; Electric control devices for energy management; ~~Electricity conduits; Electricity indicators;~~ GPS navigation devices; Gyro sensors using GPS functions; ~~Gyroscopes;~~ Home automation and home device integration software; Integrated electronic driver assistance systems for land vehicles; Integrated electronic safety systems for land vehicles; Navigation apparatus for vehicles; On board computers for vehicles; ~~Speed indicators; Steering apparatus, automatic, for vehicles; Storage apparatus for electricity, including for charging accumulators or batteries for electric vehicles;~~ Vehicle autonomous driving systems featuring interactive displays; Vehicle batteries; Vehicle tracking apparatus; Vehicle tracking systems; Voice command and recognition software, speech to text conversion software, and voice-enabled software applications.

~~CLASS 12: Apparatus for locomotion by land; Vehicles; Land vehicles and conveyances; Electric land vehicles; Motor land vehicles; Wheelchairs; Electric wheelchairs; Electric motors for wheelchairs; Electric vehicles; Electrically operated wheelchairs; Electrically powered wheelchairs; Powered stand up wheelchairs; Parts and fittings for vehicles; Parts and fittings for land vehicles.~~

CLASS 42: Design and development of computer hardware and software; Design of land vehicle parts; Design of land vehicles; Design of motor vehicles; Design services for parts of motor vehicles; Development of vehicles; Industrial analysis and research services; Product development for vehicle construction and for vehicle body construction; Safety technology services relating to land vehicles; Scientific and technological services and research and design relating thereto; Software as a Service [SaaS]; Vehicle design services.

5. The Opponent submits that “The marks SYMBIANT and CYMBIONT are visually similar, phonetically identical and conceptually identical. “

6. The Applicant filed a defence and counterstatement denying the claims made, submitting that “there cannot exist a likelihood of confusion if the relevant trade marks and their owners do not operate within the same market. There is no overlapping part of the relevant public to be confused by the marks.”

7. The Applicant is represented by Basck Ltd. The Opponent is unrepresented. Both parties have filed additional submissions in lieu of a hearing. Neither party has applied for leave to file evidence and the matter has therefore proceeded in accordance with the Fast Track procedure. The decision is taken upon the careful perusal of the papers.

Preliminary issues

8. The Applicant in its email dated the 12 September 2018 and in its final submissions in lieu of a hearing asked the tribunal to disregard the modified statement of grounds submitted by the Opponent on the 7th September on the basis that it was filed past the deadline. The Opponent offered an explanation in its reply dated the 12th September 2018 arguing that “no new evidence or material changes to the reasoning of its opposition was submitted” and that it was merely “to clarify incorrect information

supplied in the counterstatement”. I bear in mind point 4.1(Amendment of Pleadings) of the Tribunal Trade Marks Manual 2018 and Rules 18 and 20 of the Trade Marks Rules 2008. The question of whether to allow any amendments is a matter of discretion for the Tribunal. As far as I can see from the official file, the Tribunal did not provide a preliminary view, make a decision or provide either party with the opportunity to be heard on the matter. However, having got this far, in order to progress matters efficiently and fairly, I have considered the amendments sought and I find that they make no difference to the opponent’s case as it originally stood. This is because the amendments concern the types of market in which the Opponent currently operates and into which it may want to expand. However, under section 5(2) of the Act, the authorities direct that I must only consider the parties’ specifications on the basis of what they notionally cover, not what the parties are actually doing.

9. I also note that in its modified statement of grounds (which I have not accepted) the Opponent refers to a UK trade mark registration number **No. 3064328**. This number refers to a completely different trade mark to the one pleaded in the TM7. I will therefore consider that this is a typographical error and that the Opponent had no intention of referencing this number in its submissions and will continue with my decision based on the correct trade mark numbers as originally pleaded.

10. I have considered the caselaw raised by the Applicant and will refer to it in so far as it is relevant.

Decision

11. The opposition is based on section 5(2)(a) and section 5(2)(b) of the Act. Section 5(2)(a) requires the respective marks to be identical. The Act states:

“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

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

12. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA, Case C-291/00*, the Court of Justice of the European Union (“CJEU”) held that:

“54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

13. The Applicant’s trade mark constitutes the word mark “CYMBIONT” whereas the Opponent’s trademarks comprise of the word mark “Symbiant”. I take note that a word trade mark protects the word itself irrespective of font, capitalisation or otherwise and therefore a trade mark in capitals covers use in lower case and vice versa.¹ I have not therefore, taken account of the difference in font or casing as part of my deliberation.

14. Despite this however, there are obvious visual differences between the marks which I do not consider to be insignificant, especially as they are one word only marks: - namely the first and sixth letters of both marks are different. The Applicant’s mark starting with a “C” and the Opponent’s starting with a “s” and the “O” as opposed to an “a”. The Applicant’s mark is therefore not identical to the Opponent’s mark as the differences in the letters cannot be discounted or considered insignificant. The Opponent’s opposition therefore fails under section 5(2)(a).

¹ *Bentley Motors Limited v Bentley 1962 Limited* BL O/159/17

15. I will go on therefore to consider the opposition under section 5(2)(b), which states:

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

(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 trade mark is defined in section 6 of the Act, which states:

“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,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

17. In these proceedings, the Opponent is relying upon its UK trade mark registrations shown above, which qualify as earlier trade marks under section 6 of the Act. As the earlier marks had been registered for less than five years at the date the application was published they are not subject to the proof of use provisions contained in section 6A of the Act. Consequently, the Opponent is entitled to rely upon all the goods and services of its registrations without having to establish genuine use.

18. I am guided by the following principles gleaned from the decisions of the EU courts; *Sabel BV v Puma AG, Case C-251/95, Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc, Case C-39/97, Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V. Case C-342/97, Marca Mode CV v Adidas AG & Adidas Benelux BV, Case C-425/98, Matratzen Concord GmbH v OHIM, Case C-3/03, Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH, Case C-120/04, Shaker di L. Laudato & C. Sas v OHIM, Case C-334/05P and Bimbo SA v OHIM, Case C-591/12P.*

The principles:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

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

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings to mind the earlier mark, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

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

Comparison of goods and services

19. When conducting a goods and services comparison, all relevant factors should be considered as per the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon Kabushiki Kaisha v Metro Goldwyn Mayer Inc* Case C-39/97, where the court stated at paragraph 23 of its judgment that:

“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”.

20. I am also guided by the relevant factors for assessing similarity identified by Jacob J in *Treat*, [1996] R.P.C. 281 namely:

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

21. In addition, in *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J stated that:

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless, the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

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

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

23. The Opponent submits "that the services for which the application has been filed are similar to Computer software[programmes] and internet access software in that such services are identical/complementary to the services that are set out in Classes 9 and 42 of the application". The Applicant disagrees that there is an overlap between the parties' goods and services submitting that if there are any, then they are minor similarities.

24. I have noted the parties' various submissions in relation to the identity or similarity of the goods and services in question. In my view there is an overlap

between the parties' specifications within class 9 where the identical wording is used as per the table below and on the *Meric* principle.

Applicant	Opponent
<p>Class 9: Computer applications for vehicle navigation apparatus; Computer programs for use in autonomous control of vehicles; Computer programs for use in the assisted driving of vehicles; Computer programs for use in the autonomous navigation of vehicles; Computer programs to operate vehicles; Computer software; Computer software to operate vehicles; Personal assistant software; Recorded computer software for safe vehicle driving; Software for GPS navigation systems; Software for inertial navigation systems; Software for mobile devices; Software for navigation systems; Software for vision navigation systems; Home automation and home device integration software; Voice command and recognition software, speech to text conversion software, and voice-enabled software applications.</p>	<p>Class 9: Computer software(programmes) Class 9: Internet access software</p>

25. Whilst the remaining specifications include computer and internet related goods and services it would be wrong to determine the matter of similarity on this point alone as the majority of businesses and commercial undertakings rely on information technology to some degree in order to function. I must therefore consider the appropriate factors when comparing the respective goods and services as per the general principles as set out by the caselaw above namely, the nature and purpose of the goods and services, the distribution channels, the producers, method of use and whether they are in competition with each other or are complementary.

26. The GC in the case of *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-325/06* defined “complementary”:

“82 It is true 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...”.

27. In addition, I take note of the decision in *Les Editions Albert René v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-336/03*, the GC stated:

“69. Next, the Court must reject the applicant’s argument that all the goods and services covered by the Community trade mark application are linked, in one way or another, to ‘computers’ and ‘computer programs’ (Class 9) covered by the earlier trade mark. As the defendant rightly points out, in today’s high-tech society, almost no electronic or digital equipment functions without the use of computers in one form or another. To acknowledge similarity in all cases in which the earlier right covers computers and where the goods or services covered by the mark applied for may use computers clearly exceeds the scope of the protection granted by the legislature to the proprietor of a trade mark. Such a position would lead to a situation in which the registration of computer

hardware or software would in practice exclude subsequent registration of any type of electronic or digital process or service exploiting that hardware or software”.

28. The contested “*Computers for autonomous-driving vehicles; On board computers for vehicles;*” are transportable computers that use software to operate. They may have the same producer, relevant consumer and distribution channels as the Opponent’s “*computer software(programmes)*”. Furthermore, they are complementary in so far as self-driving vehicles are unable to operate without highly specialised computers and programmes to run them. Those providers specialising in this type of computer would also be developing the software to operate them. The computers and the software in this field have a very distinct connection and the one is unable to work without the other.² Both the on-board computers and the software will be used together, share a core purpose and be perceived as being the responsibility of the same undertaking. Therefore, I consider that they are similar to a medium degree.

29. The contested “*GPS navigation devices; Gyro sensors using GPS functions; Navigation apparatus for vehicles; Vehicle tracking apparatus;*” are navigational/tracking instruments whose purpose is to determine the direction of a vehicle in order to arrive at a point of destination or to monitor the location of a vehicle. They are complementary to “*Computer software (programmes)*” because GPS/tracking devices/apparatus function in a similar manner to computers and enable their users to upload or install satellite navigational software. They are therefore similar to a low degree to the Opponent’s registered “*Computer software (programmes)*” since they will have the same producers, relevant consumers and distribution channels.

30. The contested “*Integrated electronic driver assistance systems for land vehicles; Integrated electronic safety systems for land vehicles; Vehicle autonomous driving systems featuring interactive displays; Autonomous driving control systems for*

² [58] *Compagnie des montres Longines, Francillon SA v OHIM*, Case T-505/12

vehicles; Vehicle tracking systems; are all types of automatic vehicle assistance systems to assist drivers. They use computer software in order to function and their main purpose is as a manual override support system. They are therefore similar to a medium degree to “*Computer software(programmes)*” in their purpose, sharing the same producers, relevant public and distribution channels.

31. The “*electric control devices for energy management*” are smart apparatus which function, often wirelessly, in order to manage heat or light. They are complementary because they work similarly to computers/ wireless devices and require computer software to be downloaded in order to function. They are therefore similar to “*Computer software(programmes)*” to a low degree as they share the same producers, relevant consumers and distribution channels.

32. The contested “*Design and development of computer software; Software as a Service [SaaS]*” and “*internet portal services*” and “*Computer software (programmes)*” are services in the architecture and infrastructure of computer technology. They are both information technology products. Manufacturers of software will also design and develop products and provide computer software related services. Although the nature of the services and goods are not the same both the relevant public and the usual providers of the goods and services overlap. The goods and services are complementary. They are therefore similar to a medium degree.

33. The “*Design and development of computer hardware*” are services provided for the physical component of the computer. Whilst the hardware is the actual processing unit the software is the set of instructions that are stored on and run by the hardware. They will not be in competition with each other but are complementary. Both the design of hardware and computer software can be undertaken by the same companies. They would target the same public and use the same distribution channels. It is not uncommon for the producers providing computer hardware services to also act as the retailer of the software or the programmes they have designed. Even though they do not share nature and intended purpose they are similar. “*Design and development of*

computer hardware” is therefore similar to a low degree to *“internet servers”* and *“computer software(programmes)”*.

34. I find the following contested goods and services dissimilar in that I am unable to identify any similarity or competitive /complementary relationship with the Opponent’s goods and services.

i. “Apparatus and instruments for conducting, distributing, transforming, switching, accumulating or regulating electricity and energy” are dissimilar to all the Opponent’s goods or services. These goods are all devices for the storage or supply of energy or electricity. They have no link to the Opponent’s computer software or internet services. The nature and purpose are clearly different.

ii. “Batteries, electric; Vehicle batteries” are all independent sources of power used for transporting or producing electricity. There is no similarity to the Opponent’s goods or services. The only possible connection would be that computer software uses electricity to work, however this is such a tenuous link that it is insufficient to make them similar. The nature and purpose of the goods are clearly different from those products that may be connected to them. They are dissimilar.

iii. The contested services “Design of land vehicle parts; Design of land vehicles; Design of motor vehicles; Design services for parts of motor vehicles; Development of vehicles; Product development for vehicle construction and for vehicle body construction; Safety technology services relating to land vehicles; Vehicle design services” do not have sufficient points in common with the Opponent’s goods or services. The mere fact that a certain type of software or operating system may be used to carry out these design functions is not sufficient for a finding of similarity.³ The design of vehicle services have different natures, intended purposes and methods of use. They will differ in

³ *Commercy AG v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-316/07

their producers and distribution channels. There is too tenuous a link to say that vehicle designers would use computer programmes to undertake the design process to make these specifications compatible. They are dissimilar.

iv. The contested services "*Industrial analysis and research services; Scientific and technological services and research and design relating hereto*" are dissimilar to the Opponent's goods and services. These services refer to various activities performed in the field of science and technology involving research, examination and development of technological or scientific information. The services are usually undertaken by scientists, engineers or chemists. Other than these personnel conducting their experiments or research on computers which use software they concern different matters and are unlikely to have anything in common commercially with the opponent's goods and services. They are targeted towards different public, have different producers and meet different needs. These services are therefore dissimilar to all the opponent's goods and services.

35. For "*Apparatus and instruments for conducting, distributing, transforming, switching, accumulating or regulating electricity and energy; Batteries, electric; Vehicle batteries*" in class 9 and "*Design of land vehicle parts; Design of land vehicles; Design of motor vehicles; Design services for parts of motor vehicles; Development of vehicles; Industrial analysis and research services; Product development for vehicle construction and for vehicle body construction; Safety technology services relating to land vehicles; Vehicle design services; Scientific and technological services and research and design relating hereto;*" in class 42, I have concluded that there is no identity or similarity with the Opponent's goods and services. Under section 5(2)(b) for there to be a likelihood of confusion between the marks there has to be at the very least a finding of some similarity. Since I have determined that there is not, then the opposition fails in relation to these goods and services. I will therefore compare the marks only for those goods and services that I have determined are identical or similar.

Average Consumer

36. When considering the opposing marks, I must determine first of all who the average consumer is for the goods and services and the purchasing process. The average consumer is deemed reasonably informed and reasonably observant and circumspect. For the purposes of assessing the likelihood of confusion the average consumer's level of attention is likely to vary according to the category of goods and services in question.⁴

37. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited, [2014] EWHC 439 (Ch)*, Birss J described the average consumer in these terms:

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

38. The Applicant submits that

“Both parties provide entirely different goods and services to a different range of consumers.

Its business focus is the next generation of an elegant, non-traditional, well presented dynamic personal mobility vehicles.

The wheelchairs including software will be sold through internet and retail stores to the elderly and disabled.

⁴ Lloyd Schuhfabrik Meyer, case c- 342/97.

The goods sold and the services provided are targeted at a special, sophisticated type of consumer, highly aware and observant as the goods and services provided will differ significantly to the regular wheelchairs (which users would already have been considered a highly sophisticated and targeted customer group characterised by a high level of awareness) and will be highly innovative and thus expensive.”

39. It further submits that the Opponent’s business is only

“focussed on providing computer programs for financial services, risk management, compliance and audit. The goods are provided through internet sale only on the Opponent’s website.” They believe that the Opponent’s consumer is *“Sophisticated and highly observant as the programs seem to be used by companies and corporations in need of financial management and advisory. Thus, the services on offer are specialised and the consumer level of attention would be rather high.”*

40. In *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, Kitchen L.J. stated that:

“78.the court must.... consider a notional and fair use of that mark in relation to all of the goods or services in respect of which it is registered. Of course it may have become more distinctive as a result of the use which has been made of it. If so, that is a matter to be taken into account for, as the Court of Justice reiterated in Canon at paragraph [18], the more distinctive the earlier mark, the greater the risk of confusion. But it may not have been used at all, or it may only have been used in relation to some of the goods or services falling within the specification, and such use may have been on a small scale. In such a case the proprietor is still entitled to protection against the use of a similar sign in relation to similar goods if the use is such as to give rise to a likelihood of confusion.”

41. Therefore, I am entitled to consider notional use rather than actual use of all the Opponent's goods and services and not just one aspect of its registered specification, nor limit the comparison only to those circumstances where the mark is currently used. Therefore, the average consumer may be in a broader category than the Applicant originally envisaged.

42. The Opponent submits that the parties have the same clientele, but that many of their "clients do not have English as their [sic] first language".

43. The goods and services of the Applicant's mark cover a broad range of computer related items from information technology devices to the software used to operate them. The average consumer will also therefore vary from members of the general public making casual purchases with an interest in computer based gadgetry whose level of care and attention will be reasonably attentive; to specialist business purchasers paying a higher level of attention and a measured considered approach including those who have a particular interest in specialised computer technology. Whilst the Applicant states their goods and services are targeted towards a highly sophisticated consumer who wish to purchase dynamic personal mobility vehicles there is no evidence to support this and in any event the Opponent is only opposing the goods and services in the field of computer related products. The purchasing process is likely to be visual primarily with the consumers purchasing the goods and services online through websites and internet search engines to locate the providers of such goods and services. However, I do not ignore the fact that an aural process may factor through recommendations.

Comparison of the marks

44. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its

various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

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

46. The respective trade marks are shown below:

Applicant's Mark	Opponent's Existing Marks
CYMBIONT	Symbiant

47. In comparing the marks there is no difference between the variation in the casing because a word trade mark registration protects the word itself irrespective of the font capitalisation or otherwise. Therefore, a trade mark in capital letters covers notional use in lower case and vice versa.⁵

⁵ *Bentley Motors Limited v Bentley 1962 Limited* BL O/159/17

48. Lengthy submissions have been submitted from both the Opponent and the Applicant on the similarity of the marks. Whilst I do not propose to reproduce those here, I have taken them into consideration in reaching my decision.

49. The Applicant's mark consists of an eight letter "made up" word "CYMBIONT". There are no other elements to contribute to the overall impression, which is contained in the word itself.

50. The Opponent's mark also consists of an eight letter word namely "Symbiant". Again, there are no other elements to contribute to the overall impression, which is contained in the word itself.

Visual Comparison

51. Both marks are word only marks consisting of eight letters they have the same structure, length and number of syllables. They coincide in six out of their eight letters, namely the sequence "*-Y-M-B-I-*-N-T" which present identically in both marks. The marks only differ in their first and sixth letters that is "S" and "A" in the earlier mark and "C" and "O" in the contested mark. The obvious visual difference between the first and sixth letters is reduced by the remaining common elements. I therefore consider the marks to share a medium degree of visual similarity.

52. The Applicant submits that with only a "two-letter difference" in the marks there is less likelihood that the consumer would confuse between the marks, as "the shorter a sign, the more easily the public is able to perceive all its single elements". Whilst I take into account the general rule that the beginnings of words tend to have more visual and aural impact than the ends⁶, this does not apply in all cases. The relevant public is likely to consider the mark as a whole and not necessarily dissect each

⁶ *El Corte Inglés, SA v OHIM, Cases T-183/02*

element even if it is made up of two or more distinctive components.⁷ In this case the marks are unable to be broken down into parts and must be considered as a whole. I therefore consider the marks to share a medium degree of visual similarity.

Aural Comparison

53. The Applicant's mark is likely to be pronounced SIMB-I-ONT or SIMB-I-UNT, because, it is unlikely that the UK average consumer would pronounce the "c" as a "k". Whereas the Opponent's mark is likely to be pronounced as SIMB-I-ANT or SIMB-I-UNT. In both cases the beginning of the words will be pronounced in an identical way despite the difference in the first letter and phonetically there will be little difference between the pronunciation of the letter "A" and "O". I therefore consider the marks to be aurally identical if pronounced SIMB-I-UNT or a high degree of aural similarity if pronounced otherwise.

Conceptual Comparison

54. The Opponent disputes that the Applicant's mark is an imaginary word and submits it is a misspelling of "Symbiont which is defined as an organism living in symbiosis". It further submits that "both names are from popular sci fi programs for beings with 2 parts working in harmony". The Applicant on the other hand submits that its mark is an invented word with no resemblance to a known word. In both cases it is the perception of the average consumer which is key. In my view it is unlikely that the UK average consumer will over analyse or dissect the marks in either case. For a conceptual message to be relevant it must be immediately grasped by the average consumer⁸. I do not consider the average consumer would necessarily or immediately recognise the origins of either mark as a derivative of symbiosis or of sci fi beings.

⁷ *Spa Monopole, compagnie fermière de Spa SA/NV v OHIM*, T-438/07

⁸ *Ruiz Picasso v OHIM* [2006] e.c.r.I-643; [2006] E.T.M.R.29

They will more likely perceive the word in both cases as an invented word and as such the conceptual similarity between them will be neutral.

Distinctiveness of the earlier mark

55. The degree of distinctiveness of the earlier mark is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark the greater the likelihood of confusion. The Opponent has not filed any evidence regarding use of its mark. I must therefore consider the matter on inherent characteristics.

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

57. The earlier mark consists of one word "Symbiant" with no apparent allusive association with the goods or services covered by the registration. Registered marks possess varying degrees of inherent distinctiveness on a scale of low to high. Some are descriptive or allusive of a characteristic of the goods or services whilst others have no such qualities if they are made up or invented. Since the word will be considered to be invented it has a high degree of inherent distinctiveness.

Likelihood of confusion

58. When considering whether there is a likelihood of confusion between the two marks I must consider whether there is direct confusion, where one mark is mistaken for the other or whether there is indirect confusion where the similarities between the marks lead the consumer to believe that the respective goods or services originate from the same or related source.

59. In determining whether there is a likelihood of confusion there are a number of factors to bear in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the Opponent's trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must consider that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

60. I have found that the marks are visually similar to a medium degree and that they share an identical or high aural similarity. I have found the conceptual similarity between the marks to be neutral. I have found that the earlier mark has a high degree

of inherent distinctive character. I have identified the average consumer either to be a member of the general public or a computer Information technology specialist who would primarily select the goods or services via visual means but with aural means not being discounted. I have concluded that a reasonable degree of attention will be paid in the purchasing process by the general public and a higher level of attention to specialists. I have found that a number of the parties' goods and services are either identical or similar from a medium to a low degree.

61. Therefore bearing in mind the principle of imperfect recollection, when consumers compare the marks they are unlikely to remember the difference in spelling regarding the first and sixth characters particularly with the strikingly identical remaining sequence of letters. Since the mark is considered to be invented with nothing attributed to it to link it with the goods or services in question then I am satisfied that there is sufficient visual and aural similarity for consumers to mistake one mark for the other even in those goods and services that I have determined are only similar to a low degree. I therefore conclude that there is a likelihood of direct confusion.

Outcome

62. The opposition succeeds under section 5(2)(b) for the goods and services in classes 9 and 42 below. The application is refused for:

Class 9: Computer applications for vehicle navigation apparatus; Computer programs for use in autonomous control of vehicles; Computer programs for use in the assisted driving of vehicles; Computer programs for use in the autonomous navigation of vehicles; Computer programs to operate vehicles; Computer software; Computer software to operate vehicles; Personal assistant software; Recorded computer software for safe vehicle driving; Software for GPS navigation systems; Software for inertial navigation systems; Software for

mobile devices; Software for navigation systems; Software for vision navigation systems; Home automation and home device integration software; Voice command and recognition software, speech to text conversion software, and voice-enabled software applications. Computers for autonomous-driving vehicles; On board computers for vehicles; GPS navigation devices; Gyro sensors using GPS functions; Navigation apparatus for vehicles; Vehicle tracking apparatus; Integrated electronic driver assistance systems for land vehicles; Integrated electronic safety systems for land vehicles; Vehicle autonomous driving systems featuring interactive displays; Autonomous driving control systems for vehicles; Vehicle tracking systems; electric control devices for energy management.

Class 42: Design and development of computer hardware and software; Software as a Service [SaaS]

63. There being no opposition raised in relation to goods in Class 12 and the opposition having failed under section 5(2)(b) for the goods and services specified in classes 9 and 42, the application may proceed to registration for all the following goods and services:

Class 9: Apparatus and instruments for conducting, distributing, transforming, switching, accumulating or regulating electricity and energy; Batteries, electric; Electricity conduits; Electricity indicators; Gyroscopes; Speed indicators; Steering apparatus, automatic, for vehicles; Storage apparatus for electricity, including for charging accumulators or batteries for electric vehicles; Vehicle batteries.

Class 12: Apparatus for locomotion by land; Vehicles; Land vehicles and conveyances; Electric land vehicles; Motor land vehicles; Wheelchairs; Electric wheelchairs; Electric motors for wheelchairs; Electric vehicles; Electrically

operated wheelchairs; Electrically-powered wheelchairs; Powered stand up wheelchairs; Parts and fittings for vehicles; Parts and fittings for land vehicles.

Class 42: Design of land vehicle parts; Design of land vehicles; Design of motor vehicles; Design services for parts of motor vehicles; Development of vehicles; Industrial analysis and research services; Product development for vehicle construction and for vehicle body construction; Safety technology services relating to land vehicles; Vehicle design services; Scientific and technological services and research and design relating hereto.

Costs

64. As the parties have both had a roughly equal measure of success I order both sides to bear their own costs.

Dated this 6th day of December 2018

Leisa Davies

For the Registrar