

O-599-19

**TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION No. 3317946
BY AMAZON TECHNOLOGIES INC.
TO REGISTER IN CLASSES 9, 11, 12, 35, 38, 41, 42 & 45
THE TRADE MARK**

BLINK

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER No. 414029
BY NICK LOUGHRAN**

AND

**IN THE MATTER OF APPLICATION No. 3321958
BY AMAZON TECHNOLOGIES INC.
TO REGISTER IN CLASSES 9, 11, 12 & 35
THE TRADE MARK**

AMAZON BLINK

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER No. 414258
BY NICK LOUGHRAN**

BACKGROUND`

1) On 14 June 2018, Amazon Technologies Inc. (hereinafter the applicant) applied (under application 3317946) to register the trade mark BLINK in respect of a large range of goods and services in Classes 9, 11, 12, 35, 38, 41, 42 and 45, only some of which are opposed. The goods and services, and whether they are opposed, is detailed further on in the decision.

2) The applicant claimed priority dates of 19 December 2017 based upon registration No. 53556 in Trinidad And Tobago, and also, 19 April 2018 based upon registration No. 53970, also in Trinidad And Tobago. In both instances the priority date is claimed for the whole of the instant application. The application was examined and accepted, and subsequently published for opposition purposes on 13 July 2018 in Trade Marks Journal No. 2018/028.

3) On 12 October 2018 Nick Loughran (hereinafter the opponent) filed notice of opposition. The opponent is the proprietor of the following trade mark:

Mark	Number	Dates of filing & registration	Class	Specification relied upon
BLINK CHAT	UK 3238662	21.06.17 08.09.17	9	Downloadable computer software, namely: messaging software configured to conceal messages or parts of messages when such messages are presented on a visual display; messaging software configured to conceal messages or parts of messages selectively when such messages are presented on a visual display.
			38	Telecommunications services, namely: messaging services for sending and receiving concealed or partially concealed messages; messaging services for sending and receiving concealed or partially concealed messages via devices programmed with or operating messaging software configured to conceal messages or parts of messages when such

				<p>messages are presented on a visual display; messaging services for sending and receiving concealed or partially concealed messages via devices programmed with or operating messaging software configured to conceal messages or parts of messages selectively when such messages are presented on a visual display.</p>
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4) There is only a single ground of opposition. The opponent contends that the marks of the two parties are very similar and that certain of the goods and services applied for in classes 9, 35 and 38 (but not all) are identical and/or similar to the goods and services for which the earlier mark is registered. As such the mark in suit offends against Section 5(2)(b) of the Act. The opposition does not cover any of the goods and services in classes 11, 12, 41, 42 & 45. The opposed goods and services are:

- In Class 9: data processing equipment; intercommunication apparatus; apparatus for recording, transmission or reproduction of sound or images; computer hardware and software for processing, reproducing, synchronizing, recording, organizing, downloading, uploading, transmitting, streaming, receiving, playing and viewing images, audio, video and data files; communication devices for voice, data, or image transmission; voice and data transmitters and receivers; computer software; parts, fittings and accessories for all the aforesaid goods; security software; Electronic control systems for machines; Software for monitoring and controlling communication between computers and automated machine systems; electronic systems, equipment and instruments, Communications headsets for use with mobile phones.
- In Class 35: Data processing; data management; collection of data; database and file management; subscriptions to telecommunications database services.
- In Class 38: Telecommunication services; electronic communication services; transmission of data and images through a global communications network; communications services; data communication services.

5) On 17 December 2018 the applicant filed a counterstatement denying that the marks or goods and services of the two parties are similar and stating that there is no likelihood of confusion. The applicant did not seek proof of use.

6) On 2 July 2018, the applicant applied (under application 3321958) to register the trade mark AMAZON BLINK in respect of a number of goods and services in classes 9, 11, 12 and 35. Precise details are provided further in the decision.

7) The application was examined and accepted, and subsequently published for opposition purposes on 3 August 2018 in Trade Marks Journal No. 2018/031.

8) On 12 October 2018 the opponent filed notice of opposition. The opponent is the proprietor of the trade mark shown in paragraph 3 above. There is only a single ground of opposition. The opponent contends that the marks of the two parties are very similar and that some (but not all) of the goods in class 9 and services in class 35 are identical and/or similar to the goods and services for which the earlier mark is registered and as such the mark in suit offends against Section 5(2)(b) of the Act. The opposed goods and services are:

- Class 9: Electronic control systems for machines; electronic systems, wearable computers in the nature of smartwatches; wearable computers in the nature of smartglasses; Communications headsets for use with mobile phones, Communications headsets for use with mobile phones, or other communications network transceivers.
- Class 35: Retail store services in connection with apparatus for recording, transmission or reproduction of sound and images, computer hardware, communication devices for voice, data, or image transmission, voice and data transmitters and receivers, software, computer software, security software, software applications.

9) On 9 January 2019 the applicant filed a counterstatement denying that the marks or goods and services of the two parties are similar and stating that there is no likelihood of confusion. The applicant did not seek proof of use.

10) Both parties filed evidence and submissions; both sides seek an award of costs in their favour. Neither side wished to be heard in this matter.

APPLICANT'S EVIDENCE

11) The applicant filed a witness statement, dated 14 May 2019, by Martin George Henshall the applicant's Trade Mark Attorney. At exhibits MGH1 & 2 he provides copies of web searches he carried out on the terms BLINK and BLINK CHAT. In neither search did the opponent feature in the top search results. The first results were Blinkchat Inc and for a home security app Blink Home Monitor.

OPPONENT'S EVIDENCE IN REPLY

12) The opponent filed a witness statement, dated 15 July 2019, by Dominic Stephen Elsworth , the opponent's Trade Mark Attorney. He describes searching Apple's app store using the term BLINK CHAT. This returned a result for an app called BLINK. He also searched the term BLINK which yielded as its first result BLINK HOME MONITOR the applicant's app. Searches for "Amazon Blink" returned results which did not feature the word "Amazon".

13) That concludes my summary of the evidence filed, insofar as I consider it necessary.

DECISION

14) The only ground of opposition is under Section 5(2)(b) which states as follows:

"5.-(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."

15) An "earlier trade mark" is defined in section 6, the relevant part of which states:

“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.”

16) The opponent is relying upon its trade mark listed in paragraph 3 above which is clearly an earlier trade mark. The marks in suit were published on 13 July 2018 (3317946) and 3 August 2018 (3321958) at which point the opponent’s mark had not been registered for over five years. Therefore, the proof of use requirements do not bite.

17) When considering the issue under section 5(2)(b) I take into account the following principles which are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

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

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

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

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and

dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

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

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

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

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

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

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

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

The average consumer and the nature of the purchasing decision

18) As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership*

(Trading) Limited, U Wear Limited, J Fox Limited, [2014] EWHC 439 (Ch), Birss J. 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.”

19) The goods and services at issue in these two proceedings are, broadly speaking:

- 3317946 /414029: **Class 9**: Computer hardware & software; communications devices; electronic control devices. **Class 35**: Data processing services. **Class 38** Telecommunications and communication services.
- 3321958 / 414258: **Class 9**: Communications and electronic control systems; computers. **Class 35**: Retail services in relation to computers, software and telecommunications equipment.

20) The average consumer for such goods and services will be the public at large, including businesses. These types of goods and services will be sold through traditional retail outlets and via the internet/telephone. They will be advertised on the front of shops, in the print & social media, radio, television and the internet. The selection process is likely to be predominantly a visual one; but given the potential interaction with staff at the outlet or on the telephone, aural considerations cannot be overlooked. Turning now to the level of attention the average consumer will display when selecting the goods and services, this will vary considerably from relatively low if purchasing low cost software to relatively high if purchasing a new telephone system for a suite of offices. Overall, the average consumer is **likely to pay at least a reasonable level of attention to the selection of the goods and services at issue, ranging to a high degree for more expensive or complex items.**

Comparison of goods and services

21) In the judgment of the Court of Justice of the European Union (CJEU) in *Canon*, Case C-39/97, the court stated at paragraph 23 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”.

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) In *YouView TV Ltd v Total Ltd* ,[2012] EWHC 3158 (Ch), Floyd J. (as he then was) 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."

24) In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context.”

25) In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the GC stated that “complementary” means:

“...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”.

26) As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.”

Whilst on the other hand:

“.....it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

27) I also note that if the similarity between the goods/services is not self-evident, it may be necessary to adduce evidence of similarity even if the marks are identical. In *Commercy AG, v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-316/07, the GC pointed out that:

“43. Consequently, for the purposes of applying Article 8(1)(b) of Regulation No 40/94, it is still necessary, even where the two marks are identical, to adduce evidence of similarity between the goods or services covered by them (see, to that effect, order of 9 March 2007 in Case C-196/06 P *Alecansan v OHIM*, not published in the ECR, paragraph 24; and Case T-150/04 *Mülhens v OHIM – Minoronzoni(TOSCA BLU)* [2007] ECR II-2353, paragraph 27).”

28) Thus, where the similarity between the respective goods or services is not self-evident, the opponent must show how, and in which respects, they are similar. In case 414029 the goods and services of the two parties are as follows:

Applicant’s goods and services	Opponent’s goods and services
<p>In Class 9: data processing equipment; intercommunication apparatus; apparatus for recording, transmission or reproduction of sound or images; computer hardware and software for processing, reproducing, synchronizing, recording, organizing, downloading, uploading, transmitting, streaming, receiving, playing and viewing images, audio, video and data files; communication devices for voice, data, or image transmission; voice and data transmitters and receivers; computer software; parts, fittings and accessories for all the aforesaid goods; security software; Electronic control systems for machines; Software for monitoring and controlling communication between computers and automated machine systems; electronic systems, equipment and instruments, Communications headsets for use with mobile phones.</p>	<p>In Class 9: Downloadable computer software, namely: messaging software configured to conceal messages or parts of messages when such messages are presented on a visual display; messaging software configured to conceal messages or parts of messages selectively when such messages are presented on a visual display.</p>
<p>In Class 35: Data processing; data management; collection of data; database and file management; subscriptions to telecommunications database services.</p>	

<p>In Class 38: Telecommunication services; electronic communication services; transmission of data and images through a global communications network; communications services; data communication services.</p>	<p>Telecommunications services, namely: messaging services for sending and receiving concealed or partially concealed messages; messaging services for sending and receiving concealed or partially concealed messages via devices programmed with or operating messaging software configured to conceal messages or parts of messages when such messages are presented on a visual display; messaging services for sending and receiving concealed or partially concealed messages via devices programmed with or operating messaging software configured to conceal messages or parts of messages selectively when such messages are presented on a visual display.</p>
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29) The opponent, in its submissions merely contended that the applicant's specification contained "generic terms which encompass the goods and services" of the opponent. It quoted part of the applicant's class 38 specification and stated that the class 38 services of the opponent "clearly fall within the generic terms" used by the applicant. It then states that the same is also the case in relation to the other classes of goods and services.

30) For its part the applicant states that the opponent's goods and services are very specific and do not encompass any of its goods or services. It states that its class 35 services include retail services connected with the sale of software, but not messaging software.

31) I do not find either party's submissions convincing or helpful. Whilst the opponent's goods and services are narrowly specified, they do clearly fall within certain of the applicant's specified goods and services. To my mind, the opponent's Class 9 goods of, broadly speaking, "messaging software" is encompassed by the following terms within the applicant's class 9 specification "computer software for processing, reproducing, synchronizing, recording, organizing, downloading, uploading, transmitting, streaming, receiving, playing and viewing images, audio, video and data files; computer

software; parts, fittings and accessories for all the aforesaid goods; security software.” In my opinion, all the aforementioned goods could include messaging software and so must be regarded as identical.

32) The applicant’s specification includes a number of goods which might be considered “hardware” items. Whilst these may use software, they do not necessarily use messaging software. To my mind, it is not self-evident that the following are either similar nor complementary to the opponent’s goods. The following list also includes other software, but it is restricted to communications between computers and automated machines which would not require messages to be concealed in the manner stated in the opponent’s specification. I also note that the opponent has not provided any reasons or evidence as to why these goods should be considered similar to its specification.

“Data processing equipment; intercommunication apparatus; apparatus for recording, transmission or reproduction of sound or images; computer hardware for processing, reproducing, synchronizing, recording, organizing, downloading, uploading, transmitting, streaming, receiving, playing and viewing images, audio, video and data files; communication devices for voice, data, or image transmission; voice and data transmitters and receivers; Electronic control systems for machines; Software for monitoring and controlling communication between computers and automated machine systems; electronic systems, equipment and instruments, Communications headsets for use with mobile phones”.

33) Turning to the applicant’s class 35 services there is, to my mind, no self-evident reason why these services should be considered similar or complementary to the opponent’s goods or services.

34) Lastly, I turn to the applicant’s services in class 38. Clearly, both parties class 38 specifications have the term “Telecommunication services” within them, albeit that the opponent’s specification is limited. These must be regarded as identical. The balance of the applicant’s specification is concerned with communications which must be at least similar to a high degree to the opponent’s telecommunications messaging services.

35) I now turn to consider the goods and services of the two parties in opposition 414258 which are set out below for ease of reference.

Applicant's goods and services	Opponent's goods and services
<p>Class 9: Electronic control systems for machines; electronic systems, wearable computers in the nature of smartwatches; wearable computers in the nature of smartglasses; Communications headsets for use with mobile phones, Communications headsets for use with mobile phones, or other communications network transceivers.</p>	<p>In Class 9: Downloadable computer software, namely: messaging software configured to conceal messages or parts of messages when such messages are presented on a visual display; messaging software configured to conceal messages or parts of messages selectively when such messages are presented on a visual display.</p>
<p>Class 35: Retail store services in connection with apparatus for recording, transmission or reproduction of sound and images, computer hardware, communication devices for voice, data, or image transmission, voice and data transmitters and receivers, software, computer software, security software, software applications.</p>	<p>In Class 38: Telecommunications services, namely: messaging services for sending and receiving concealed or partially concealed messages; messaging services for sending and receiving concealed or partially concealed messages via devices programmed with or operating messaging software configured to conceal messages or parts of messages when such messages are presented on a visual display; messaging services for sending and receiving concealed or partially concealed messages via devices programmed with or operating messaging software configured to conceal messages or parts of messages selectively when such messages are presented on a visual display.</p>

36) Both sides' submissions are almost identical to those set out at paragraphs 29 & 30 above. As stated previously I do not find either party's submissions convincing or helpful. I will first consider the two parties' class 9 specifications. To my mind, there is no self-evident reason why the applicant's goods in class 9 should be considered similar or complementary to the opponent's goods or services. I therefore find that they are not similar.

37) I next turn to the class 35 services of the applicant. To my mind, the following services "Retail store services in connection with apparatus for recording, transmission or reproduction of sound and images, communication devices for voice, data, or image transmission, voice and data transmitters

and receivers” must be regarded as similar to a low degree to the provision of “telecommunication services” in class 38 for which the opponent’s mark is registered. Similarly, I consider the applicant’s specification of “Retail store services in connection with software, computer software, security software, software applications” similar to a low degree to the opponent’s class 9 software goods. However, the applicant’s “Retail store services in connection with computer hardware” are not, in my opinion, similar or complementary to the opponent’s goods or services.

Comparison of trade marks

38) 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 them, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Case C-591/12P, Bimbo SA v OHIM*, that:

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

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

Applicant’s trade marks	Opponent’s trade mark
3317946 BLINK	BLINK CHAT
3321958 AMAZON BLINK	

40) I note that in *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU found 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)”.

41) I shall first compare the applicant’s mark 3317946 for the word BLINK to the opponent’s mark BLINK CHAT. In terms of submissions, both parties merely point out the differences / similarities. Neither offers any meaning other than to say they must be the same / different without stating any actual meanings they attach to the words. Visually and phonetically both marks share the same first word and differ due to the presence of a second word in the opponent’s mark. They must be regarded as similar to a medium degree. With regard to telecommunications and communications goods and services the word CHAT has an obvious descriptive meaning, inviting the purchaser to chat or communicate with friends and family etc. The dominant and distinctive element of the opponent’s mark is clearly the word BLINK which has, to my knowledge, no meaning in relation to such goods and services. **Overall the marks are similar to at least a medium degree.**

42) Turning to consider the marks AMAZON BLINK to BLINK CHAT. Visually and phonetically the first elements of each party’s mark are completely different. They clearly share the word BLINK but it appears in different places within the mark. Each mark has a word which does not appear within the other mark. To my mind, they have a low degree of visual and phonetic similarity. With regard to telecommunications and communications goods and services the word CHAT has an obvious

descriptive meaning, inviting the purchaser to chat or communicate with friends and family etc. The dominant and distinctive element of the opponent's mark is clearly the word BLINK, whilst that of the applicant is in both "AMAZON" and "BLINK" as neither is more distinctive than the other for the goods and services under consideration. Nor do the words "Amazon" and "Blink" hang together or form a unit to create a different meaning. Neither "Amazon" or "Blink" have, to my knowledge, any meaning in relation to such goods and services. **Overall I consider the marks are similar to a low degree.**

Distinctive character of the earlier trade mark

43) 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)."

44) The opponent's mark consists of two words which are well known words individually but do not form a unit to provide a distinctive image. The word CHAT clearly has a descriptive meaning in relation to the opponent's communications / telecommunications goods and services, whereas the word BLINK has no obvious descriptive meaning in relation to any of the goods or services involved in these cases. To my mind, **it has a medium degree of inherent distinctiveness**. As the opponent

has not provided any evidence of use they **cannot benefit from an enhanced degree of distinctives through use in relation to the goods and services for which it is registered.**

Likelihood of confusion

45) In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark as the more distinctive the trade mark is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods and services, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind. Earlier in this decision, I concluded that:

- the average consumer for the goods and services in both cases is a member of the general public (including businesses) who will select the goods and services by predominantly visual means, although I do not discount aural considerations and that they are likely to pay at least a reasonable degree of attention to the selection of the goods and services, rising to a high level in relation to some of the goods and services.
- the applicant's mark 3317946 (BLINK) is **similar to the opponent's mark to at least a medium degree.**
- the applicant's mark 3321958 (AMAZON BLINK) is **similar to the opponent's mark to a low degree.**
- the opponent's mark has a medium degree of inherent distinctiveness but cannot benefit from an enhanced distinctiveness through use.
- the goods and services of the two parties range from identical to not similar as set out in the following table.

Application / opposition	Identical or high degree of similarity	Low degree of similarity	Not similar
3317946/ 414029	<p>Class 9: Computer software for processing, reproducing, synchronizing, recording, organizing, downloading, uploading, transmitting, streaming, receiving, playing and viewing images, audio, video and data files; computer software; parts, fittings and accessories for all the aforesaid goods; security software</p> <p>Class 38: Telecommunication services; electronic communication services; transmission of data and images through a global communications network; communications services; data communication services.</p>		<p>Class 9: "Data processing equipment; intercommunication apparatus; apparatus for recording, transmission or reproduction of sound or images; computer hardware for processing, reproducing, synchronizing, recording, organizing, downloading, uploading, transmitting, streaming, receiving, playing and viewing images, audio, video and data files; communication devices for voice, data, or image transmission; voice and data transmitters and receivers; Electronic control systems for machines; Software for monitoring and controlling communication between computers and automated machine systems; electronic systems, equipment and instruments, Communications headsets for use with mobile phones".</p> <p>Class 35: Data processing; data management; collection of data; database and file management; subscriptions to telecommunications database services.</p>
3321958 / 414258		Class 35: Retail store services in	Class 9: Electronic control systems for machines; electronic systems,

		connection with apparatus for recording, transmission or reproduction of sound and images, communication devices for voice, data, or image transmission, voice and data transmitters and receivers, software, computer software, security software, software applications.	wearable computers in the nature of smartwatches; wearable computers in the nature of smartglasses; Communications headsets for use with mobile phones, Communications headsets for use with mobile phones, or other communications network transceivers. Retail store services in connection with computer hardware
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46) The opponent refers to its Internet search which did not produce a result for the opponent's mark and claims that this, and the fact that it is not aware of any confusion as being conclusive. I agree that it is a factor to take into account but on its own it is not conclusive.

47) In view of all of the above, and allowing for the concept of imperfect recollection, when considering application 3321958 (AMAZON BLINK) there is no likelihood of consumers being directly or indirectly confused into believing that any of the goods and services applied for and listed above as of low or no similarity and provided by the applicant are those of the opponent or provided by an undertaking linked to it. **The opposition under Section 5(2) (b) therefore fails in respect of all the goods and services applied for.**

48) In view of all of the above, and allowing for the concept of imperfect recollection, when considering application 3317946 (BLINK) there is a likelihood of consumers being directly confused into believing that the goods and services listed above as identical or highly similar and provided by the applicant are those of the opponent or provided by an undertaking linked to it. **The opposition under Section 5(2) (b) therefore succeeds in respect of all these goods and services.** However,

when considering the goods and services deemed not to be similar in the table above there is no likelihood of consumers being directly or indirectly confused into believing that the goods and services provided by the applicant are those of the opponent or provided by an undertaking linked to it. **The opposition under Section 5(2) (b) therefore fails in respect of all these goods and services.**

CONCLUSION

49) A large number of goods and services applied under both marks for were not part of the opposition. The opposition to application 3317946 under section 5(2)(b) has only been partly successful. The following goods and services in respect of application 3317946 will not be allowed onto the Register:

- Class 9: Computer software for processing, reproducing, synchronizing, recording, organizing, downloading, uploading, transmitting, streaming, receiving, playing and viewing images, audio, video and data files; computer software; parts, fittings and accessories for all the aforesaid goods; security software.
- Class 38: Telecommunication services; electronic communication services; transmission of data and images through a global communications network; communications services; data communication services.

50) This means that application 3317946 will be registered for the following:

- Class 9: Class 9: Data processing equipment; intercommunication apparatus; apparatus for recording, transmission or reproduction of sound or images; computer hardware for processing, reproducing, synchronizing, recording, organizing, downloading, uploading, transmitting, streaming, receiving, playing and viewing images, audio, video and data files; communication devices for voice, data, or image transmission; voice and data transmitters and receivers; Electronic control systems for machines; Software for monitoring and controlling communication between computers and automated machine systems; electronic systems, equipment and instruments, Communications headsets for use with mobile phones; Devices and software for use to connect and control internet of things (IoT) devices; devices for home and environmental monitoring, control, and automation; security surveillance apparatus; alarm monitoring systems; devices and computer software that allow the sharing and transmission of

data and information between devices for the purposes of facilitating home and environmental monitoring, control, and automation; home automation control devices; stand-alone voice controlled information devices; anti-intrusion and anti-theft warning apparatus and devices; theft prevention installations; security control apparatus; photographic apparatus and instruments; optical apparatus and instruments; doorbells, electronic locks, motion sensors, alarms, alarm sensors, alarm systems, sensors and detectors, and speakers ; video monitors; security cameras; video cameras for monitoring the interior and exterior of residences and commercial buildings, and wireless controllers to remote monitoring, control, and automation; video streaming devices, video recording, and video receiving devices; cameras; webcams; apparatus and devices providing night vision; alarm system and camera mounts and stands; environmental hazard detectors, namely, devices that detect and record the presence of water, humidity levels, heat, temperature, movement, motion, and sound; closed circuit television apparatus and cameras; pet and baby monitors, pet viewing units; parts, fittings and accessories for all the aforesaid goods; computer software and software applications for home and environmental monitoring, control, and automation; software and software applications permitting users to identify and communicate with persons at their door; software development kits (SDKs) consisting of computer software for the development, use, and interoperability of APIs that are used by electronic devices, systems, and interchanges that exchange data via communications networks and the internet and that connect with cloud-based data storage and exchange services; software development kits (SDKs) comprising of software development tools and software for use as an application programming interface (API) for creating software and applications related to internet connected consumer electronic devices; software development kits (SDKs) comprising of software development tools and software for use as an application programming interface (API) for creating software and applications related to theft-prevention and security systems, and home and business surveillance systems ; voice command and recognition software; computer software used for controlling stand-alone voice controlled information and personal assistant devices; computer software for remote monitoring and analysis; electronic video surveillance products, namely, electronic components of security systems; navigation software for use with smart, autonomous vehicles and mobile machines for use in connection with internet of things (IoT) enabled devices; software for use in tracking and monitoring position and range of smart, autonomous vehicles and mobile machines for use in connection with internet of things (IoT) enabled devices; electronic systems, equipment and instruments, namely behavior engine software, positioning engine software, positioning sensors and dynamic intelligent software and sensors for use in connection with internet of

things (IoT) enabled devices; Automated self contained electronic surveillance devices that can be deployed to gather evidence or intelligence; wearable activity trackers; wearable cameras; wearable video display monitors; communication radios, intercom systems, or other communications network transceivers; light switches; lighting controls; light diodes; vehicle camera mount; equalizers.

- Class 11: Apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes; Floodlights, spotlights, wall lights; light bulbs; LED light bulbs; lighting fixtures; lighting fixtures with motion detection; battery powered lighting fixtures; electric lighting fixtures, namely, power failure backup safety lighting; sconce lighting fixtures; lanterns for lighting; lighting systems, namely, led (light emitting diode) modules, power supplies and wiring; lighting apparatus, namely, lighting installations; ceiling lights; ceiling light fittings; electric night lights; LED (light emitting diodes) lighting fixtures for use in display, commercial, industrial, residential, and architectural accent lighting applications; LED lighting fixtures for indoor and outdoor lighting applications; lights for illuminating stairs, doors and other portions of buildings; portable battery-operated lights that can be placed on surfaces where other light sources are unavailable; portable utility lights; solar light fixtures, namely, indoor and outdoor solar powered lighting units and fixtures; spot lights; wall lights; fixtures for incandescent light bulbs; lighting fixtures for use in parking decks and garages; lighting fixtures for use in parking lots and walkways; electrical magnifying light fixtures; miniature light bulbs; lighting fixtures that integrate natural daylight and fluorescent lighting into the fixture; lighting for cabinets, pantries, work spaces, sheds, shelving units, and cupboards; power outage lighting systems; security lights.
- Class 12: Land vehicles; motor vehicles, namely, concept motor vehicles; Land vehicle parts and accessories, namely, connecting rods, drive belts, diesel and non-diesel engines, axles, drive gears, steering units, windshields, running boards, mud guards, wheels, tire chains, fenders and transmissions; carts.
- Class 35: Data processing; data management; collection of data; database and file management; subscriptions to telecommunications database services; Services comprising the recording, transcription, compilation and analysis of video and audio; compilation and systemization of data into computer databases; data searches in computerized files for others; promoting consumer awareness of safety and crime prevention; Retail store services in the

fields of consumer electronics, general consumer merchandise, security and surveillance equipment, and audiovisual equipment; Retail store services and online retail store services connected with the sale of devices and software for use to connect and control internet of things (IoT) devices, devices for home and environmental monitoring, control and automation, apparatus for recording, transmission or reproduction of sound or images, computer hardware, communication devices for voice, data or image transmission, home automation control devices, intercommunication apparatus, optical apparatus and instruments, photographic apparatus and instruments, stand-alone voice controlled information devices, speakers, video streaming devices, video recording devices, video receiving devices, voice and data transmitters and receivers, alarms, alarm monitoring systems, alarm sensors, alarm systems, alarm system and camera mounts and stands, anti-intrusion and anti-theft warning apparatus and devices, apparatus and devices providing night vision, closed circuit television apparatus and cameras, doorbells, electronic locks, motion sensors, security lights, security surveillance apparatus, sensors and detectors, theft prevention installations, software, computer software, security software, software applications, voice command and recognition software, and parts, fittings for all the aforesaid goods.

- Class 38: transmission of data, audio, video and multimedia files; transmission of messages, voice and video; broadcasting services; video communication services; video telephone services; data streaming; providing voice communication services over the Internet; consultancy and advisory services relating to the aforesaid services.
- Class 41: Audio and video recording services; subscription video recording services; electronic library services for the supply of electronic information (including archive information) in the form of audio and/or video information; consultancy and advisory services relating to the aforesaid services.
- Class 42: Platform as a service (PAAS) featuring computer software platforms for use with home and environmental monitoring, control, and automation systems; software as a service (SAAS) services featuring computer software for use with home and environmental monitoring, control, and automation systems; application service provider featuring application programming interface (API) software for home and environmental monitoring, control, and automation; Platform as a service (PAAS) featuring computer software for use to connect and control internet of things (IoT) electronic devices; Software as a service (SaaS) featuring

computer software for connecting, operating, integrating, controlling, and managing networked consumer electronic devices; Platform as a service (PAAS) featuring computer software for use to connect and control internet of things (IoT) electronic devices; Software as a service (SaaS) featuring computer software for connecting, operating, integrating, controlling, and managing networked consumer electronic devices; application service provider (ASP) services featuring software for controlling, integrating, operating, connecting, and managing voice controlled information devices, namely, cloud-connected and voice-controlled smart consumer electronic devices; Providing temporary use of non-downloadable security and anti-theft software applications; Providing temporary use of non-downloadable software applications permitting users to identify and communicate with persons at their door; Providing temporary use of non-downloadable voice command software applications; computer services, namely, providing an internet site featuring technology for use in home and environmental monitoring, control, and automation systems; computer services, namely, providing an internet portal featuring technology enabling users to remotely interact with home and environmental monitoring, control, and automation systems; providing online non-downloadable software for recording, viewing, storing, sharing and analyzing online audio and video; providing temporary use of on-line non-downloadable software for the management and transmission of data; design and development of computer hardware and software; hosting a website for the electronic storage of data; monitoring of computer systems by remote access; monitoring of camera systems by remote access; installation, maintenance and repair of computer software; cloud recording and storage services; electronic storage of electronic media, namely, images, text, audio, and video data; providing an online non-downloadable internet-based application featuring technology enabling users to share videos; providing an on-line network environment that features technology that enables users to share data; providing temporary use of online non-downloadable software for recording, viewing, storing, sharing, and analyzing data; information technology support services; provision of technical support; consultancy and advisory services relating to the aforesaid services.

- Class 45: Home security monitoring services; consultancy, advisory and information services relating to home security monitoring; electronic monitoring and security services for residential and commercial properties; providing information about safety and crime prevention; consultancy, advisory and information services relating to home security monitoring; providing a website featuring information about safety and crime prevention.

51) In respect of application 3321958 (AMAZON BLINK) the opposition failed entirely and so the full specification applied for can be registered.

COSTS

52) The applicant has been successful in defending one of its marks in full and achieving a draw in relation to the other. It is therefore entitled to a contribution towards its costs.

Preparing a statement and considering the other side's statement x 2	£400
Preparing evidence and considering the other side's evidence x 2	£400
Providing submissions x 2	£400
TOTAL	£1200

53) I order Nick Loughran to pay Amazon Technologies Inc. the sum of £1,200. This sum to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

07 October 2019

George W Salthouse
For the Registrar,
the Comptroller-General