

**BL O-688-19**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF AN INTERNATIONAL REGISTRATION DESIGNATING THE  
UNITED KINGDOM NO. 1374868 BY XAD, INC.  
TO REGISTER:**

**GROUNDTRUTH**

**AS A TRADE MARK IN CLASS 42**

**AND**

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 412511 BY  
GROUNDSURE LIMITED**

## BACKGROUND & PLEADINGS

1. On 29 September 2017 and claiming an international convention priority date of 29 June 2017 from an earlier filing in the USA, XAD, Inc. (“the applicant”), designated the UK seeking protection of the trade mark **GROUNDTRUTH** for services in class 42. The designation was published for opposition purposes on 16 February 2018. The amended specification is shown in paragraph 10 below.

2. On 17 May 2018, the designation was opposed in full by Groundsure Limited (“the opponent”). Although initially opposed under sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”), as the opponent elected not to file any evidence, in an official letter dated 8 May 2019, the tribunal advised it that its opposition based upon sections 5(3) and 5(4)(a) of the Act would be struck-out; the opponent did not challenge that decision

3. In relation to its remaining objection based upon section 5(2)(b) of the Act, the opponent relies upon the goods and services (shown in paragraph 10 below) in UK registration no. 3093952 for the word **Groundsure** which was applied for on 12 February 2015 and which was entered in the register on 8 May 2015. The opponent states:

“The sign applied for "GROUNDTRUTH" (word) is highly similar (phonetically, visually and conceptually) to the Opponent's earlier mark "GROUNDSURE". The respective word marks begin with the identical element "GROUND" and end in the words "TRUTH" and "SURE", which are conceptually similar. Therefore the mark and the sign are highly similar and indeed, the sign applied for is likely to be seen as indicative of the Opponent's products.

The services opposed are either identical or highly similar to the services protected under the Opponent's earlier mark in class 42. The respective parties services are both provided to businesses as opposed to consumers. Because of these factors, there is a high risk of confusion and/or association on the part of the relevant public.”

4. The applicant filed a counterstatement in which the basis of the opposition is denied.

5. In these proceedings, the opponent is represented by Kempner & Partners LLP and the applicant by Cooley (UK) LLP. Although neither party filed evidence, the applicant filed written submissions during the evidence rounds. While neither party requested a hearing, both filed written submissions in lieu of attendance. I have reviewed all of these submissions and will, to the extent I consider it necessary, refer to them later in this decision.

## **DECISION**

6. The opposition is now based solely upon section 5(2)(b) of the Act which reads as follows:

“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.”

7. 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.”

8. The trade mark relied upon by the opponent qualifies as an earlier trade mark under the above provisions. Given the interplay between the dates on which the opponent’s trade mark was entered in the register and the publication date of the designation, this earlier trade mark is not subject to the proof of use provisions.

### **Case law**

9. The following principles are gleaned from the decisions of the courts of the European Union 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.

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 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.

## Comparison of goods and services

10. The competing goods and services are as follows:

The opponent's goods and services	The applicant's services
<p><b>Class 9</b> - Surveying, photographic, optical, measuring apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; data processing equipment and computers; including the aforesaid for the provision of data relating to the location of features, objects or things and other associated information; apparatus for searching electronic information; computer programs for use as searching directories; digital mapping apparatus; downloadable electronic publications; data and information recorded on CD-ROMS and other electronic and magnetic media; data processing apparatus; computer software for database management.</p> <p><b>Class 42</b> - Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software; mapping services; digital mapping services; geospatial services;</p>	<p><b>Class 42</b> - Application service provider (ASP) featuring software for use in creating advertisements for programmatic buying based and dynamic messaging based advertising, promotion, and marketing services for others via wireless networks for display on mobile devices.</p>

geological site information services; technological planning services; consultancy services for planning information services; environmental planning services; geographical planning services; advisory services relating to planning applications; land and property search information services; planning and environmental risk information services; services for the combining and consolidating of environmental and geographical datasets; services for the provision of information relating to the current and historic land use and other specific features of a particular geographical area.	
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11. 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:

“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”.

12. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

(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.

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

"... 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."

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



“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.”

15. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

16. 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 General Court (“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”.

17. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. 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.”

### **The correct approach to the comparison**

18. In its submissions filed during the evidence rounds and mentioned again in its submissions filed in lieu of a hearing, the applicant refers to what it describes as “The realities of the marketplace”, concluding:

“25. The applicant further maintains that given the distinction between the parties’ respective commercial interests, with their respective goods and services being offered in separate areas, a likelihood of confusion cannot exist in a factual vortex, entirely detached from commercial reality.”

19. The opponent responded to the above in its submissions in which, inter alia, it stated:

“25. The second reason the Applicant's argument cannot succeed is that it runs directly contrary to the judgment in *Compass Publishing* (2004) RPC 41, specifically paragraphs 22-26, which was also applied by the Appointed Person in *Galileo Brand Architecture Ltd's Trade Mark Application* (No.2280603) (2005) RPC 22 at para 18. When it comes to assessing likelihood of confusion in an opposition situation, the actual use to which the marks have been put is irrelevant. What matters is whether the goods and services in relation to which the marks have been registered or applied for is similar, and so whether the notional use to which they may be put under their specifications is similar.”

20. As the earlier trade mark relied upon is not subject to the proof of use provisions, the opponent's position is clearly correct and it is upon that basis I must proceed.

21. In its submissions, the applicant states that the opponent's goods and services are dissimilar to its services, whereas the opponent states:

“16...is also similar to the Opponent's "downloadable electronic publications" in Class 9 and "design and development of computer hardware and software" in Class 42. The Opponent's former goods are similar because the Applicant's services are used for the purpose of creating such or similar goods available over the internet, and so these goods and services can be seen as complementary. The Opponent's latter services are similar because they are used for the same purpose as the Applicant's services - creation of digital content such as software or online advertising - and so can be seen as being in competition with one another.”

22. It is my understanding that an Application Service Provider (ASP) provides applications and associated services to others over the Internet. The applicant is, therefore, an ASP who utilises software to create advertisements for advertising promotional and marketing purposes for display on mobile devices.

23. Other than a reference to services which, following amendment, have now been removed from the designation, in its submissions, the only potential clashes identified by the opponent between the competing goods and services are those shown above. On a fair reading that is, in my view, to be regarded as representing what the opponent considers to be the high-point of its case i.e. that the competing goods and services are similar because they are either complementary to or in competition with one another. It is on that basis I intend to proceed.

24. I accept that in the course of the provision of the applicant's ASP services the software it utilises will generate advertising content for display on mobile devices. However, having applied the guidance mentioned in *YouView* and *Beautimatic*, the advertising content that is downloaded to the mobile device is, in my view, most unlikely to be referred to as a downloadable electronic publication.

25. However, the opponent also relies upon its “design and development of computer hardware and software.” The opponent’s “design and development of software” is broad enough to include the design and development of the type of software being utilised by the applicant in the provision of its ASP services. Keeping in mind the guidance in *Avnet* and while the core of the competing services may differ, it appears to me that software designed and developed by the opponent may be used for exactly the same purpose as the software which underpins the applicant’s services. As a potential customer may choose to have a bespoke software application designed and developed for it by the opponent for use on its own in-house IT systems or to make use of a software application provided by the applicant over a network, it appears to me that there is a very real competitive relationship in play. That degree of competition results in what I regard as at least a medium degree of similarity between the services at issue. While that is the basis on which I intend to proceed, I shall return to this point when I consider the likelihood of confusion.

### **The average consumer and the nature of the purchasing act**

26. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods and services at issue. 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.”

27. In its Notice of opposition, the opponent states:

“...The respective parties services are both provided to businesses as opposed to consumers...”

28. Although the opponent’s “design and development of computer hardware and software” may be provided to both businesses and members of the general public, in reality, the average consumer is much more likely to be a business user. The same is true of the applicant’s services. Although I have no evidence as to how such services will be selected, as in many areas of business, I assume a potential customer is most likely to encounter the trade marks at issue on, for example, websites and in trade publications (both in hard-copy and on-line). That suggests to me that visual considerations are likely to be the most important part of the selection process. However, as such services may also be the subject of word of mouth recommendations by, for example, one business user to another, aural considerations may also play their part.

29. Absent evidence on the point, the selection of an ASP to provide access to specific software or an undertaking to design or develop bespoke software is, in my view, likely to be a critical business decision which may have a significant long-term impact on the success or otherwise of the business concerned. Selection is likely to involve a number of steps which may include, for example, a tendering process and is likely to culminate with the entering into of contracts which involve a not inconsiderable financial outlay and which may last a number of years. Considered in that context, I think the average consumer is likely to pay a fairly high degree of attention during the selection process.

### **Comparison of trade marks**

30. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade 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.”

31. It would be wrong, therefore, artificially to 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 they create. The trade marks to be compared are as follows:

<b>Opponent's trade mark</b>	<b>Applicant's trade mark</b>
Groundsure	GROUNDTRUTH

32. A good deal of the parties' competing submissions dealt with this aspect of the case. While I do not intend to include all these submissions here, for the avoidance of doubt, I have read them all and have taken them into account in the conclusions which follow. I do, however, begin by noting that in *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the GC noted that the beginnings of words tend to have more visual and aural impact than the ends.

33. The opponent's trade mark consists of a single word i.e. Groundsure presented in title case. It is in that word the overall impression lies. Although no part of the word is highlighted or emphasised in any way, I think it is highly likely that the average consumer will notice that it consists of the well-known English language words "Ground" and "sure" conjoined.

34. The applicant's trade mark also consists of a single word i.e. GROUNDTRUTH, albeit presented in block capital letters. Once again, it is in that word the overall impression lies. Like the opponent's trade mark, although no part of the word is highlighted or emphasised in any way, once again, I think it is highly likely that the average consumer will notice that it consists of the well-known English language words "GROUND" and "TRUTH" conjoined. I will now assess the competing trade marks with the above conclusions in mind.

### **The visual comparison**

35. The competing trade marks consist of single words consisting of ten and eleven letters respectively, in which the first six letters are identical and which also contain the letters "U" and "R" (in the eighth and ninth letter positions in the opponent's trade mark and in the ninth and eighth letter positions in the applicant's trade mark). Weighing the similarities and differences and, in particular, as both trade marks begin with the word GROUND, it results in what I regard as a medium degree of visual similarity between them.

### **The aural comparison**

36. Both trade marks consist of two syllables in which the first syllable i.e. GROUND is identical. Although, in my view, the second syllables vary considerably, considered overall, there is a medium degree of aural similarity between the trade marks at issue.

### **The conceptual comparison**

37. As I mentioned earlier, both trade marks consist of conjoined words with the meanings of the individual words of which they are composed being well known to the average consumer. The word GROUND in both trade marks is likely to convey the same conceptual message to the average consumer. As to the words "sure" and "TRUTH" in its submissions, the opponent states:

“11...As a result, although not directly synonymous, “TRUTH” and “SURE” both refer to or can be used in relation to knowledge which has the qualities of certainty and reliability as a result of its ability to be tested through observation, and so these words have a close conceptual affinity...”

38. While I understand the opponent’s submission, in my view, only a very small minority of the average consumers at issue are likely to embark on the thought process the opponent suggests. Rather, when considered as totalities, I think it much more likely that neither trade mark will convey any concrete conceptual message to the average consumer.

### **Distinctive character of the earlier trade mark**

39. The distinctive character of a trade mark can be appraised only, first, by reference to the goods and services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods and services for which it has been registered as coming from a particular undertaking and thus to distinguish those goods and services from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

40. As the opponent has not filed evidence of any use it may have made of its earlier trade mark, I have only its inherent characteristics to consider. Despite consisting of the conjoining of two well-known words, as far as I am aware, the opponent’s Groundsure trade mark is neither descriptive of nor non-distinctive for the goods and service upon which it relies. It is, as a consequence, possessed of a medium degree of inherent distinctive character.



## Likelihood of confusion

41. 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 it 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.

42. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods/services down to the responsible undertakings being the same or related. Earlier in this decision I concluded that:

- there is at least a medium degree of similarity between the opponent's "design and development of software" in class 42 and the applicant's services;
- the average consumer is a business user who is likely to select the competing services using a combination of visual and aural means but in which visual considerations are likely to dominate;
- the average consumer is likely to pay a fairly high degree of attention to the selection of the services at issue;
- the competing trade marks are visually and aurally similar to a medium degree and conceptually similar to the extent that both contain the word GROUND;

- the opponent's earlier trade mark enjoys a medium degree of inherent distinctive character.

43. I begin by reminding myself that the opponent accepts that the specific goods and services it has identified are only similar to the applicant's services. Having done so, I ask myself what would the position be if I have: (i) underestimated the degree of similarity between the applicant's services and the opponent's software services in class 42, and/or (ii) not given sufficient weight to the opponent's argument in relation to the clash between the applicant's services and its named goods in class 9. Even if I am wrong in relation to the latter, it is, in my view, unlikely to put the opponent in a more favourable position than it is in relation to its software services in class 42. As to the former, if I am wrong and the competitive relationship that exists between the opponent's software services and the applicant's services is thought to result in a higher (than at least medium) degree of similarity in the services at issue, there is still, in my view, no likelihood of direct confusion.

44. I reach that conclusion because although the word Ground/GROUND appears at the beginning of the competing trade marks, they also contain other words i.e. sure/TRUTH which are, in my view, visually and aurally quite different and conceptually sufficiently different to one another. That difference is, in my view, most unlikely to escape the attention of an average consumer paying even a low degree of attention during the selection process, let alone an average consumer paying a fairly high degree of attention and who is, as a consequence, less prone to the effects of imperfect recollection.

45. That leaves indirect confusion to be considered. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained the difference in the following manner:

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that

the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark."

46. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

47. Having applied the guidance in the above cases, I am also satisfied there is no likelihood of indirect confusion. Even if it was thought that the presence in the applicant's trade mark of the well-known word GROUND may call the opponent's trade mark to mind (which I think is unlikely), as Mr Mellor Q.C. points out in *Duebros*, that is mere association not indirect confusion. Much more likely, in my view, is that the average consumer will assume that the presence in the competing trade marks of the well-known word GROUND in combination with words which are, in my view, visually and aurally quite different and conceptually sufficiently different to one another, stems from a desire on the part of unrelated commercial undertakings to attempt to allude to the type of services they are providing or intend to provide under their respective trade marks. As a result of the above conclusions, the opposition fails

### **Overall conclusion**

**48. The opposition has failed and, subject to any successful appeal, the designation will become protected.**

## **Costs**

49. As the applicant has been successful, it is entitled to a contribution towards its costs. Awards of costs in proceedings are governed by Annex A of Tribunal Practice Notice (“TPN”) 2 of 2016. Applying the above guidance, I award costs to the applicant on the following basis:

Reviewing the Notice of opposition and filing a counterstatement:	£400
Written submissions (x2)	£300
<b>Total:</b>	<b>£700</b>

50. I order Groundsure Limited to pay to XAD, Inc. the sum of **£700**. This sum is 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.

**Dated this 12<sup>th</sup> day of November 2019**

**C J BOWEN**

**For the Registrar**