

BL O/0108/23

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NUMBER 3669147
BY JUICE GLOBAL LIMITED
TO REGISTER THE TRADE MARK:**



IN CLASSES 9 and 28

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NUMBER 428720
BY ACCO BRANDS CORPORATION**

Background and Pleadings

1. On 15 July 2021, Juice Global Limited (“the applicant”) applied to register in the UK the trade mark shown on the cover page of this decision, under number 3669147 (“the contested mark”). The contested mark was published in the Trade Marks Journal for opposition purposes on 03 September 2021, in respect of goods in Classes 9 and 28.¹

2. On 03 December 2021, Acco Brands Corporation (“the opponent”) filed a notice of opposition. The opposition is brought under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). Within its Form TM7, the opponent indicated that the opposition is directed against all the goods in the application.

3. The opponent relies upon the following comparable United Kingdom Trade Marks (“UKTM”):²

(i) No. 00917906969 for the trade mark “POWERA” which was applied for on 24 May 2018, and which was entered in the register on 09 January 2019, in respect of goods in Classes 9 and 28.³

(ii) No. 00917906971 for the trade mark  which was applied for on 24 May 2018, and which was entered in the register on 28 December 2018, in respect of goods in Classes 9 and 28.⁴

4. The opponent essentially claims that the marks at issue are similar and cover identical or highly similar goods, and as such there is a clear likelihood of confusion and association between the marks. In its counterstatement, the applicant denies any likelihood of confusion between the marks and disagrees that the respective goods are identical or highly similar.

¹ These will be listed in the goods comparison.

² On 1 January 2021, the UK left the EU. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing EUTM. As a result of the opponent’s EUTM numbers 017906969 and 017906971 being registered at the end of the Implementation Period, comparable UK trade marks were automatically created. The comparable UK marks are now recorded on the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original EUTM filing dates remain.

³ These will be listed in the goods comparison.

⁴ These will be listed in the goods comparison.

5. Given the respective filing dates, the opponent's marks are earlier marks, in accordance with section 6 of the Act. However, as they had not been registered for five years or more at the filing date of the application, they are not subject to the proof of use requirements specified within section 6A of the Act. As a consequence, the opponent may rely upon all of the goods for which the earlier marks are registered without having to establish genuine use.

6. Neither party filed evidence. The opponent is represented by Lane IP Limited; the applicant is represented by Boulton Wade Tennant LLP. Both parties were given the option of an oral hearing but neither requested to be heard on this matter. Both parties chose to file written submissions in lieu. This decision is taken following a careful review of the papers before me, keeping all submissions in mind.

7. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark case law.

PRELIMINARY ISSUES

8. During the proceedings the opponent was granted two extensions to the time limit for filing evidence, totalling one month and two weeks. The opponent stated that the extensions were required in order to compile evidence of enhanced distinctiveness. However, the Registry notes that neither evidence nor submissions were filed by the requested deadline, nor was a request for additional time within which to file evidence received. Accordingly, as the opposition is based on Section 5(2)(b) only, and no proof of use is required, the opponent was informed that the opposition would proceed.

DECISION

Section 5(2)(b)

9. Sections 5(2)(b) and 5A of the Act read 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.

[...]

5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

10. I am guided by the following principles which are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) 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 might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

11. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.”

12. In comparing the respective specifications, all relevant factors should be considered, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* where the CJEU 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.”

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

“82 ... there is a close connection between [the goods], 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...”.

14. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited* (“Treat”) [1996] R.P.C. 281 for assessing similarity between goods and services also include an assessment of the channels of trade of the respective goods or services.

15. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J said:

“... 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.”

16. For the purposes of considering the issue of similarity of goods or services, it is permissible to consider groups of terms collectively where they are sufficiently

comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10), Mr Geoffrey Hobbs QC, sitting as the Appointed Person, and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

17. The competing goods are as follows:

Opponent's goods ⁵	Applicant's goods
<p>Class 9 Video game, mobile phone and handheld electronic device accessories, namely, adaptors, cables, chargers for video game controllers and remotes; cases configured to convert mobile phones into remote controllers, cases for providing mobile phones with additional battery supplies, connector hubs, docking stations, speakers, headphones, earbuds, styluses, screen filters and screen protectors; accessories, namely, clutch bags, shoulder bags, handbags, sleeves, tote bags, folios, purses, hard-sided cases and wallets, all adapted to carry video game cards or cartridges, and handheld electronic devices; accessories, namely, cases specially adapted for carrying video game cards and cartridges; accessories, namely, sleeves, skins, jackets and gloves adapted to cover handheld electronic devices; video game accessories, namely, adaptors, sensor bars for use with wireless video remotes, video game controllers, video game remotes; all of the aforementioned for use with video games, handheld devices and electronics; and cleaning cloths sold as a unit with the aforementioned goods.</p> <p>Class 28 Accessories, namely, clutch bags, shoulder bags, handbags, sleeves, tote bags, folios, purses, hard-sided cases and wallets, all adapted to carry video game playing units; accessories, namely, protective covers for handheld video game controllers and remotes;</p>	<p>Class 9 Keyboards; computer keyboards; wireless keyboards; PC mice; computer mice; wireless computer mice; computer peripherals; computer peripheral apparatus; computer peripheral equipment; computer peripheral devices; gaming keyboards.</p> <p>Class 28 Gaming apparatus; video game apparatus; gaming mice; gaming keypads; game controllers for computers; controllers for game consoles.</p>

⁵ The goods are the same for both the earlier rights relied upon.

<p>accessories, namely, sleeves, skins, jackets and gloves adapted to cover video game controllers and remotes; accessories, namely, toy musical instruments, toy weapons, toy athletic equipment, toy steering wheels and other toys specifically adapted to carry video game remotes during game play; accessories for video game playing units, namely, shoulder straps, drumsticks, wrist straps and decorative skins; all of the aforementioned for use with video games; and cleaning cloths sold as a unit with the aforementioned goods.</p>	
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18. With regard to the similarity of the goods, the applicant states the following:⁶

“In terms of nature, intended purpose, method of use, and their complementary nature, all of the Earlier goods are ‘dumb’ accessories which have no electronic function themselves. By contrast, the Later Goods are electronic goods all of which perform a function and hence are different from the earlier goods which are selected primarily for aesthetic reasons rather than for their function.”

19. With regard to the similarity of the goods, the opponent states the following:⁷

“The opponent’s protection is essentially comprised of various Class 9 and 28 goods which are accessories for gaming apparatus and other electronic devices, including adaptors, cables, chargers, sensor bars, cases and bags.

The goods covered by the Subject Mark can essentially be summarised as various gaming software/hardware in Class 9, along with the various video game apparatus in Class 28.

The respective parties’ goods are therefore all targeted at the gaming market and therefore coincide in end user, provider, purpose and trade channels, and are highly complementary.”

⁶ Written submissions in lieu.

⁷ Written submissions in lieu.

Class 9 of the contested application

Gaming keyboards; Keyboards; computer keyboards; wireless keyboards; PC mice; computer mice; wireless computer mice

20. Broadly speaking, the above goods are computer peripheral devices that can all be used in gaming and video gaming. The opponent's goods include *adaptors, cables, chargers for video game controllers and remotes* and *video game accessories, namely, adaptors, sensor bars for use with wireless video remotes, video game controllers, video game remotes*. Accordingly, I find that the competing goods share a degree of similarity on the basis that they can all be used in connection with video gaming. Whilst I acknowledge that the physical nature and purpose of the competing goods differ, and that they are neither in competition nor complementary, I recognise that these goods are likely to be found in the same aisle of a retail store and will share the same user, who may well purchase the competing goods at the same time for their gaming set-up, for example. Therefore, I find that the competing goods are similar to a low degree.

Computer peripherals; computer peripheral apparatus; computer peripheral equipment; computer peripheral devices

21. The contested *computer peripherals* is a broad term relating to devices that can be easily removed from, or connected to a computer, and include, amongst other things, *game controllers* and *video game controllers*. The opponent's goods in Class 9 include *video game accessories, namely, adaptors, sensor bars for use with video game controllers*. Accordingly, the competing goods have a certain connection on the basis that the opponent's goods can be considered as accessories to the applicant's *computer peripherals*, which as previously stated is a broad term which will include, *game controllers* and *video game controllers*. Therefore, given that the opponent's accessories are dependent on the applicant's computer peripherals, (i.e. *game controllers* and *video game controllers*), for their use and that it is common for undertakings to offer for sale computer peripheral devices and accompanying accessories, I consider these goods to be complementary. While the nature and uses

of the goods differ, the users will overlap. Additionally, the competing goods are likely to be found under the same category online and in the same or adjacent aisles in physical stores. Consequently, I find these goods to be similar to a low degree.

Class 28 of the contested application

Gaming apparatus; video game apparatus; gaming mice; gaming keypads; game controllers for computers; controllers for game consoles

22. The contested goods are *gaming apparatus*. The opponent's goods in Class 28 are *accessories* specifically for use with various types of *gaming apparatus*. Therefore, the opponent's goods are accessories specifically intended for use with goods that will either include those specifically mentioned in the contested Class 28 goods or that are covered by the contested broad terms *gaming apparatus* and *video game apparatus*. Accordingly, given that the opponent's various *accessories* are dependent on the contested goods for their use, and that it is common for undertakings to offer for sale *gaming apparatus* and accompanying *accessories*, I consider the competing goods to be complementary. While the nature and uses of the goods differ, the users will overlap. Additionally, the goods at issue are likely to be found under the same category online and in the same or adjacent aisles in physical stores. Overall, I find these goods to be similar to a medium degree.

The average consumer and the nature of the purchasing act

23. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see *Lloyd Schuhfabrik Meyer*, Case C-342/97).

24. 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.”

25. The average consumer for the goods will be a member of the general public who will likely pay a medium degree of attention as a number of factors will be taken into account such as suitability, etc. These purchases are likely to vary from fairly frequent to infrequent, depending on the nature of the goods being purchased. The goods will most likely be obtained by self-selection from the shelves of a retail outlet or from an online or catalogue equivalent. Consequently, visual considerations are likely to dominate the selection process. However, I do not discount that there may be an aural component to the purchase of the goods, given that advice may be sought from a sales assistant.

Comparison of the marks

26. It is clear from *Sabel BV v. Puma AG* 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 in *Bimbo SA v OHIM*, that:

“34. [...] 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.”

27. 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 the trade marks.

28. The trade marks to be compared are as follows:

Opponent's marks	Applicant's mark
<p><u>Mark 1: UK00917906969</u></p> <p>POWERA</p> <p><u>Mark 2: UK00917906971</u></p> 	

29. With regard to the similarity of the marks, the opponent states the following:⁸

“The stylisation of the subject mark is *de minimis* and it is self-evident that ‘GAMING’ is descriptive/non-distinctiveness in the context of the goods at issue, which are all gaming-related. The only logical conclusion of these points is that ‘POWER’ is the dominant and distinctive element of the Subject Mark and this word is wholly contained by the Opponent’s registration.

This is particularly the case given that the ‘POWER’ element is written in a much larger font than ‘GAMING’ and emboldened, thereby meaning that it will attract the focus of the consumer.

Indeed, when comparing the dominant and distinctive element of the Subject mark (POWER) with POWERA / PowerA, the sole point of difference is the final character and it is settled case law that consumers pay a lesser degree of attention to the end of the sign.”

⁸ Written submissions in lieu.

30. With regard to the similarity of the marks, the applicant states:⁹

“Consumers will not extract the word “power” from the word mark POWERA. There is nothing in the Earlier Marks to indicate that consumers should do so: the letter string p-o-w-e-r is not highlighted, made bold, stylised, or indeed separated from the letter “a”. Hence it is not correct to say that POWERA contains the word “power”: it does not and will not be perceived as such.”

31. With regards to the applicant’s comments, it has to be put forward that whilst the opponent’s first mark ‘POWERA’ is an invented word, with no emphasis on the ‘POWER’ element, it is reasonable to conclude that consumers would see the ordinary word ‘POWER’ within the mark. Whilst it is acknowledged that average consumers normally perceive a mark as a whole and do not proceed to analyse its various individual elements, they do attempt to break marks down into verbal elements known to them.¹⁰ This is even more likely where the mark encompasses an entire ordinary dictionary word with only one additional letter at the end, as in the present case.

32. Furthermore, it is important to recall that as the first earlier mark ‘POWERA’ is a word-only mark, fair and notional use would mean that the opponent could use their mark in upper-, lower-, or sentence case, and to this extent, could reasonably use their mark as ‘PowerA’, thereby highlighting the word ‘power’.

Overall impression

33. The opponent’s first mark consists of the word ‘POWERA’ presented in capital letters with no additional stylisation. There are no other elements that contribute to the overall impression of the mark which lies in the word itself.

34. The opponent’s second mark is a figurative mark comprising an incomplete circle open at the top, containing an inverted “V” device placed over a small orange triangle. When considered as a whole, I find that this device resembles a ‘power

⁹ Written submissions in lieu.

¹⁰ *Usinor SA v OHIM*, Case T-189/05

button', similar to the types found on electronic devices. Directly following this device is the word 'PowerA' presented in slightly stylised upper and lower-case letters. Other than the small orange triangle, the remainder of the device and word is presented in dark grey. I find the word 'PowerA' to be the most dominant element of the mark due to its overall length in comparison to the device. Furthermore, I keep in mind *MigrosGenossenschafts-Bund v EUIPO*, T-68/17, where it was stated that:

“...in the case of a mark consisting of both word and figurative elements, the word elements must generally be regarded as more distinctive than the figurative elements, or even as dominant, since the relevant public will keep in mind the word elements to identify the mark concerned, the figurative elements being perceived more as decorative elements...”

35. Slightly less dominant is the device element present in the mark. However, this element still contributes to the overall impression of the mark.

36. The contested mark is a figurative mark containing the word 'POWER', centrally placed within the mark, presented in slightly stylised, large, white upper-case letters. A white line joins the letters 'O' and 'W' together at the top, and the letters 'E' and 'R' at the bottom. Directly below the word 'POWER' is the word 'GAMING', presented in white standard upper-case letters without any stylisation. In comparison to the word 'POWER', the word 'GAMING' is presented in much smaller text. There are two devices present in the mark, one positioned at the front of the word 'POWER' and one positioned at the end. The devices are mirror images of each other comprising four different-coloured quadrilateral shapes positioned one on top of the other. These quadrilateral shapes vary in size with the largest positioned at the bottom and the smallest positioned at the top. The words and devices are positioned on a black rectangular background.

37. I find the word 'POWER' to be the most dominant element of the mark due to its size and central position. Slightly less dominant are the two devices along with the word 'GAMING', bearing in mind its overall size within the mark and also because, as noted by the opponent, in terms of the contested goods, the word 'GAMING' is likely to be perceived as descriptive. However, that said, these elements are not

negligible and still contribute to the overall impression of the mark. I find that the black rectangular background will be perceived by the average consumer for what it is, namely a background, and will be attributed little significance.

Visual comparison

38. Visually, both of the opponent's marks and the contested mark overlap to the extent that they all contain the word 'POWER / Power' in the same order, though they differ in their stylisation. The figurative elements and the word 'GAMING' in the contested mark are absent from the opponent's marks, and the letter 'A' at the end of the opponent's marks ('POWERA / PowerA') is absent from the contested mark. There is also the addition of the background in the contested mark, although I recognise that this will be attributed little significance. Taking all of this into consideration, I consider all the marks to be visually similar to a medium degree.

Aural comparison

39. The opponent's marks consist of three syllables, namely 'POW-ER-A'. The first two syllables in each mark will be pronounced as the dictionary word 'POWER'. The third syllable ('A') in the opponent's first mark will likely be pronounced as either 'ah' as in artichoke and, arch, etc, (POW-ER-AH), or as 'ay' as in apex and angel, etc, (POW-ER-AY). With regards to the opponent's second mark, due to the use of the capital letters 'P' and 'A', the third syllable ('A'), will likely be pronounced as 'ay' as in apex and angel, etc, (POW-ER-AY).

40. The applicant's mark comprises four syllables, namely 'POW-ER-GAM-ING', which will be pronounced as the dictionary words 'POWER GAMING'. The figurative elements in the competing marks will not be articulated. Taking the above into account, whilst bearing in mind the overall impression of the marks, I find that the marks are aurally similar to a medium degree.

Conceptual comparison

41. With regard to the conceptual similarity of the marks the opponent states the following:¹¹

“The semantic content of the shared, dominant and distinctive POWER element is retained within the Subject Mark and the Opponent’s marks, thus they must be considered conceptually similar to a high degree.”

42. With regard to the conceptual similarity of the marks, the applicant states the following:¹²

“Conceptually, the Earlier Marks is [sic] meaningless as the p-o-w-e-r letter string will not be separated out from POWERA by the consumer.

Further and in the alternative, even if the consumer were to separate out the letter string p-o-w-e-r, from the final “a”, the Later Mark references gaming and so the conceptual comparison would be “power + gaming” versus “power + a”, that latter mark being distinctive solely by means of the added letter “a”. In neither case would the consumer rely upon “power” as an origin indicator.”

43. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer.

44. Due to its overall presentation, I find that a proportion of consumers will perceive the opponent’s first mark ‘POWERA’ as an invented word and attribute no meaning to it. However, I also take into account that a separate proportion of consumers will invariably recognise the word ‘POWER’ at the start of the mark and immediately think of the ordinary dictionary meaning of the word.

¹¹ Written submissions in lieu.

¹² Written submissions in lieu.

45. With regard to the contested mark, the words 'POWER' and 'GAMING' will be understood according to their ordinary dictionary meanings, namely, *power* - *to supply with mechanical or electrical energy; to provide with a source of power*,¹³ and *gaming* - *the playing of computer (video, etc.) games*.¹⁴ I do not consider that the figurative elements contained in the contested mark will convey any meaning. Accordingly, for those consumers who perceive the opponent's first mark as an invented word the marks will be conceptually different, as one will convey a meaning and the other will be viewed as an invented word. However, for consumers who recognise the word 'POWER' at the start of the opponent's first mark, they will immediately think of the dictionary meaning of that word, and therefore, as the marks at issue share a concept with regards to the word *power*, I find the marks to be conceptually similar to a medium degree.

46. With regards to the opponent's second mark, in my view, due to the use of the capital letters 'P' and 'A', the mark will be perceived as two separate words, namely 'Power-A'. As previously stated, the 'Power' element of the mark will be understood according to its ordinary dictionary meaning. I find that this perception will be further reinforced by the presence of the device element, which as previously stated, resembles a 'power button' similar to the type found on electronic devices. I consider that the letter 'A' in the mark will be understood as the first letter of the English alphabet.

47. As previously stated, the words 'POWER' and 'GAMING' contained in the contested mark will also be understood according to their ordinary dictionary meanings. Accordingly, as the word 'Power / POWER' is present in both the competing marks this word conveys the same conceptual meaning. However, the word 'GAMING' in the contested mark conveys its dictionary meaning, which has no counterpart in the opponent's mark; and the word or letter 'A' contained in the opponent's second mark conveys its dictionary meaning, which has no counterpart in the contested mark. The figurative elements contained in the contested mark will not convey any meaning. Overall, I find that the opponent's second mark and the contested mark are conceptually similar to a medium degree.

¹³ www.oed.com

¹⁴ www.oed.com

Distinctive character of the earlier trade marks

48. The distinctive character of a trade mark can be measured only, first, by reference to the goods or services in respect of which registration is sought and, second, by reference to the way it is perceived by the relevant public. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, 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).”

49. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The degree of distinctiveness 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.

50. Although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use. Consequently, I have only the inherent position to consider.

51. While the opponent's first mark 'POWERA' is invented, I am of the view that consumers are likely to recognise the 'POWER' element at the start of the mark. Therefore, bearing in mind the nature of the goods at issue, I find the mark to be allusive for the majority of the goods at issue, and even descriptive for some of the goods in Class 9 that facilitate the provision and transmission of power, such as adapters, cables and chargers. That said, I acknowledge that the 'A' at the end of the mark does add to its overall distinctiveness, however, bearing in mind my comments above, I find that for the majority of the goods at issue, the mark is inherently distinctive to a medium degree. With regards to goods such as adapters, cables and chargers, I find the mark to be inherently distinctive to a low to medium degree.

52. In terms of the opponent's second mark 'PowerA', as previously discussed I am of the view that due to the capital letters 'P' and 'A' in the mark it will likely be perceived as two separate words, namely 'Power-A'. The words 'POWER' and 'A' are common dictionary words with recognisable meanings, as previously stated, and therefore, generally in such circumstances, in terms of the goods at issue, the degree of inherent distinctiveness would range between low to medium. However, as the inherent distinctiveness of the mark lies in its combination of the device and words 'POWER' and 'A' as a whole, as well as the mark's stylisation, I find that the mark has a medium degree of inherent distinctiveness.

Likelihood of confusion

53. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. One such factor 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 vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier trade

marks, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be mindful to 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 that they have retained in their mind.

54. 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 down to the responsible undertakings being the same or related.

55. As I have found the opponent's second mark to share a greater degree of similarity with the contested mark, I will assess the likelihood of confusion on the basis of that mark, referring to the opponent's first mark only if it is necessary to do so.

56. I have found the goods at issue to vary from being similar to a low degree to medium. I have identified that the average consumer for the goods will be a member of the general public who will likely pay a medium degree of attention during the purchasing process. The purchasing process will be predominantly visual, although I do not discount an aural component. The contested mark and the opponent's second mark are visually, aurally and conceptually similar to a medium degree. I have found the opponent's second mark to be inherently distinctive to a medium degree.

57. I acknowledge that the word 'Power / POWER' are present in the competing marks at issue, nevertheless there is an additional letter 'A' at the end of the opponent's second mark which has no counterpart in the contested mark, and there is the additional word 'GAMING' present at the end of the contested mark which has no counterpart in the opponent's mark. Whilst I keep in mind that the beginnings of marks tend to make more of an impact than the ends being where consumers tend to focus¹⁵, I do not consider it likely that consumers would entirely forget the letter 'A'

¹⁵ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

at the end of the opponent's mark, as it not only changes the length of the mark but also adds a third syllable to the word. Furthermore, the marks at issue both contain different devices, stylisation and colours. Accordingly, I am of the view that these additional and differing elements would not be overlooked or disregarded by the average consumer upon a visual inspection of the marks, which is of heightened importance given that I have found the purchasing process to be predominantly visual in nature. Due to the impact of these differences, it is unlikely that consumers will mistake them for each other. Moreover, even in circumstances where the goods are purchased aurally, for instance, over the telephone, it is unlikely that consumers would mistake the marks for one another when hearing them uttered aloud or making orders verbally. Accordingly, even when factoring in the principles of imperfect recollection and interdependency, I do not consider there to be a likelihood of direct confusion.

58. Having found no likelihood of direct confusion, I now go on to consider indirect confusion.

59. 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 that:

“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.”

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

60. Further, in *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

61. These examples are not exhaustive but provide helpful focus.

62. I acknowledge that a finding of indirect confusion should not be made merely because the two marks share a common element. However, it is not sufficient that a mark merely calls to mind another mark:¹⁶ this is mere association not indirect confusion.

¹⁶ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

63. In order to find indirect confusion in this case, it would be necessary to conclude that the average consumer will see in  and  respectively, an element common between the marks, leading them to conclude that due to the presence of 'POWER' in the contested mark, that this is a brand of the owner of the earlier mark. I do not think this is likely. Whilst I keep in mind the similarities between the marks, I recognise that there are also considerable differences. In terms of the goods at issue, the word 'POWER' is not so distinctive that consumers would assume only one undertaking would use it in their mark, nor would the word 'GAMING' present in the contested mark be seen as a logical brand extension of 'PowerA', present in the opponent's mark. Similarly, adding the letter 'A' to the end of the word 'POWER' is also not logical with a brand extension or rebranding. Accordingly, there is no proper basis for a finding of indirect confusion. The average consumer would put the presence of the common element 'POWER' in both marks down to coincidence rather than economic connection. I can see no reason why consumers would believe that the marks originate from the same or economically linked undertakings, and as such, I do not consider there to be a likelihood of indirect confusion.

Conclusion

64. The opposition under section 5(2)(b) of the Act has been unsuccessful and the contested mark may proceed to registration.

Costs

65. The applicant has been successful and is entitled to a contribution towards its costs in line with the scale set out in Tribunal Practice Notice (TPN) 2/2016. In the circumstances, I award the applicant the sum of £550 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Considering the notice of opposition	£250
and preparing the counterstatement	

Preparing submissions in lieu of a hearing	£300
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Total	£550
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66. I therefore order Acco Brands Corporation to pay Juice Global Limited, the sum of £550. This should be paid within twenty-one days of the expiry of the appeal period or, if there is an unsuccessful appeal, within twenty-one days of the appeal proceedings.

Dated this 2nd day of February 2023

**Sam Congreve
For the Registrar**