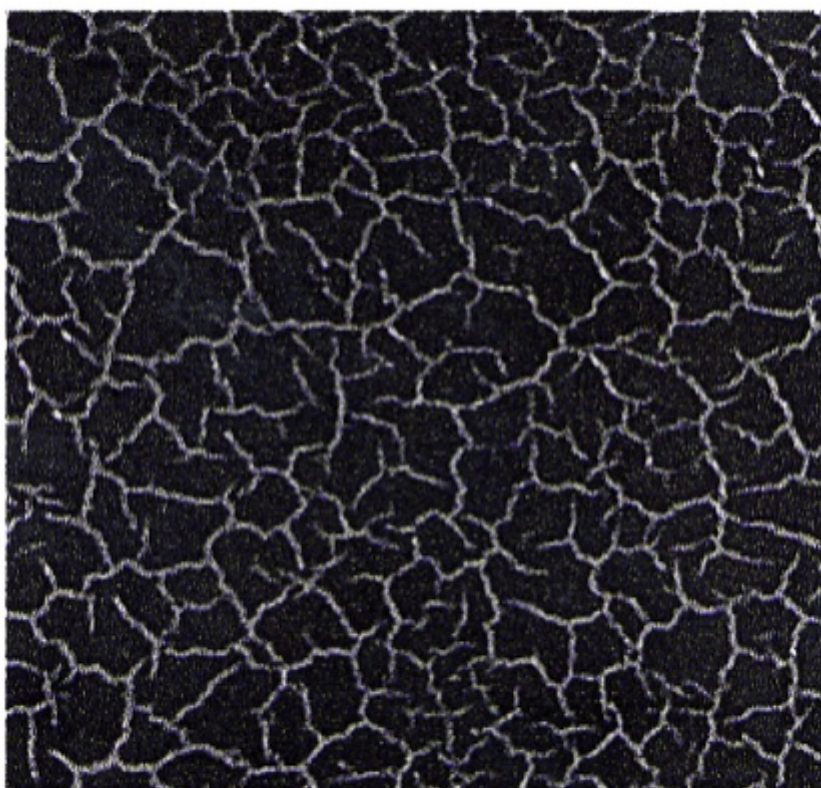


**TRADE MARKS ACT 1994**

**In the matter of an application under  
No. 2390030 to register a repeating pattern  
as a trade mark in Class 9**

**Background**

1. On 7 June 2005 Vibe Technologies Limited applied to register the trade mark shown below in respect of 'loudspeaker enclosures' in Class 9:



2. The mark is limited to the colours black and grey as shown on the application form, and is described in Box 3 of the application form as a repeating pattern. It is common ground that the mark is intended to represent the appearance of the goods.

3. The application was examined and an objection was raised under Section 3(1)(b) of the Act because the mark was considered to be devoid of any distinctive character when applied to the surface of the goods in suit.

4. The applicant's attorney subsequently filed evidence in the form of a Witness Statement made by Emma Jane Ward, Marketing Director of the applicant company. This is dated 13 December 2005. Ms Ward provides details of the applicant's use of

the pattern applied for, intended to demonstrate that the mark has acquired a distinctive character through such use. The examiner did not consider that the evidence demonstrated factual distinctiveness, and the objection was maintained.

5. On 14 February 2006 further written submissions in support of the application were made by the applicant's attorney. However, the examiner was not persuaded to waive the objection. A request to be heard was subsequently made.

### **The Hearing**

6. The matter came to be heard on 22 November 2006 when the applicant was represented by Mr Gee of DW & S W Gee. Mr Gee was accompanied by Ms Ward of the applicant Company.

7. I maintained the objection under Section 3(1)(b) of the Act and gave brief reasons for my decision.

8. Mr Gee informed me that the applicant had conducted a small scale survey and described its format and content. Although I did not have sight of the survey results I indicated that I considered they were unlikely to be of persuasive value; my reasons for indicating this are recorded in the after hearing report.

9. Mr Gee requested additional time to formally admit as evidence statements made in his letter dated 14 February 2006. He also informed me that the applicant would like to undertake an additional survey.

10. I allowed Mr Gee further time, but made it clear that based on the evidence I had seen so far, I considered that it would be a difficult task to demonstrate that at the relevant date the mark had acquired a distinctive character because of the applicant's use of it for the purpose of guaranteeing the origin of the goods.

### **Post Hearing Communication**

11. On 27 February 2007 Mr Gee submitted additional evidence of use of the mark, and on 28 June 2007 he filed the results of a survey that was undertaken on behalf of the applicant on 23 and 24 June 2007.

12. On 6 July 2007 I informed Mr Gee, by letter, that I was refusing the application because I did not consider that the evidence filed demonstrated that the mark was factually distinctive at the relevant date. I gave brief reasons for my decision to refuse the application.

13. I have now been asked to formally state the reasons for refusing this application, which I now do.

### **The Prima Facie Case for Registration**

#### **The Law**

14. Section 3(1)(b) of the Act reads as follows:

“3.-(1) The following shall not be registered-

(b) trade marks which are devoid of any distinctive character,”

15. In *Henkel KGaA v Deutsches Patent – und Markenamt C-218/01* the ECJ identified the essential purpose of a trade mark. The court said:

“30 As in the case of every other mark, the sign of which registration is applied for must fulfil the mark's essential function, which is to guarantee the identity of the origin of the marked product or service to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin. For a trade mark to be able to fulfil its essential role in the system of undistorted competition which the Treaty seeks to establish, it must offer a guarantee that all the goods or services bearing it have originated under the control of a single undertaking which is responsible for their quality (see, in particular, Case C-349/95 *Loendersloot* [1997] ECR I-6227, paragraphs 22 and 24, Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 28, and *Philips*, cited above, paragraph 30).”

16. The approach to be adopted when considering the issue of distinctiveness under Section 3(1)(b) of the Act has been summarised by the European Court of Justice in paragraphs 37, 39 to 41 and 47 of its Judgment in Joined Cases C-53/01 to C-55/01 *Linde AG, Winward Industries Inc and Rado Uhren AG* (8th April 2003) in the following terms:

“37. It is to be noted at the outset that Article 2 of the Directive provides that any sign may constitute a trade mark provided that it is, first, capable of being represented graphically and, second, capable of distinguishing the goods or services of one undertaking from those of other undertakings.

.....

39. Next, pursuant to the rule in Article 3(1)(b) of the Directive, trade marks which are devoid of distinctive character are not to be registered or if registered are liable to be declared invalid.

40. For a mark to possess distinctive character within the meaning of that provision it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from products of other undertakings (see *Philips*, paragraph 35).

41. In addition, a trade mark's distinctiveness must be assessed by reference to, first, the goods or services in respect of which registration is sought and, second, the perception of the relevant persons, namely the consumers of the goods or services. According to the Court's case-law, that means the presumed expectations of an average consumer of the category of goods or services in question, who is reasonably well informed and reasonably observant and circumspect (see *Case C-210/96 Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31, and *Philips*, paragraph 63).

.....

47. As paragraph 40 of this judgment makes clear, distinctive character means, for all trade marks, that the mark must be capable of identifying the product as originating from a particular undertaking, and thus distinguishing it from those of other undertakings.”

## Decision

17. The mark put forward for registration is described on the application form as a repeating pattern and is limited to the colours black and grey. The applicant’s attorney indicates that the pattern is intended to replicate a particular paint finish which is applied to the goods. The examiner considered that in the *prima facie* the mark is devoid of distinctive character because patterns are commonly applied to the surface of goods, such as loudspeaker enclosures, for merely decorative purposes.

18. An objection under Section 3(1)(b) of the Act may arise when a mark consists of a sign which appears to serve a merely decorative purpose in relation to the goods. This is the basis for the objection.

19. At the hearing Mr Gee disputed the examiner’s objection and commented that no evidence to substantiate the objection had been provided by the Registry. I informed Mr Gee that since the focus of the objection is under Section 3(1)(b), and not 3(1)(d) of the Act, the examiner was not required to provide evidence to support the objection. However, as such evidence was easily accessible [via the Internet], I considered that it would have been prudent to provide it. In the event I informed Mr Gee that in preparation for the hearing I had put the words ‘loudspeaker + finishes’ into the Google search engine. This had retrieved a significant number of hits which clearly demonstrate that traders manufacture the goods in suit in a variety of colours and finishes for purely decorative purposes. Further, I informed Mr Gee that I had also Google searched the combination ‘loudspeaker + crackle finish’; ‘crackle paint finish’ is the term used by Mr Gee in his correspondence, and in evidence, to describe the applicant’s mark. This combination had also retrieved a significant number of hits which confirmed that the goods in suit are manufactured with this particular finish for decorative purposes by traders, other than the applicant.

20. With that in mind, and taking into account the guidance provided by the authorities above, I concluded at the hearing that the *prima facie* objection to the mark was strong; the Internet evidence reinforced the examiner’s view that patterns such as that applied for are commonly used on the goods for decorative purposes and are therefore not capable of guaranteeing the origin of the goods to the average consumer - the average consumer in this case being the general loudspeaker buying public.

21. Mr Gee made no further submissions on the *prima facie* case for registration and went on to tell me that the finish is now being copied by other traders and that is why the applicants are keen to secure registration.

22. Given the correctness of the *prima facie* registrability of the mark has not been vigorously challenged I do not believe that I need say much more about it.

23. On the face of it, the mark is of a kind that appears to serve a merely decorative purpose in relation to the goods and as such is excluded from *prima facie* registration under Section 3(1)(b) of the Act.

### **The case for Registration based upon acquired distinctiveness**

#### **The Law**

24. The proviso to Section 3 of the Act permits acceptance of a mark that is otherwise unacceptable under the provisions of Section 3(1)(b) if it has in fact acquired a distinctive character because of the use made of it. Guidance on the test to be applied was provided by the ECJ in *Windsurfing Chiemsee (C108&109/97) [1999] ETMR 585* where it was stated:

“If the competent authority finds that a significant proportion of the relevant class of persons identify goods as originating from a particular undertaking because of the trade mark, it must hold the requirement for registering the mark to be satisfied.”

25. In that particular case the ECJ were considering whether a plain word used as a primary mark had acquired a distinctive character because of its use. However, as will become apparent when I move on to consider the evidence, in this particular case the applicant’s mark is not used as the sole badge of origin, nor is it used as the primary badge of origin.

26. In *Societe des produits Nestle SA v Mars UK Ltd, (C-353/03)*, the ECJ determined that a mark may acquire a distinctive character as a result of it being used as part of, or in conjunction with, another mark. There is therefore no requirement for a non-distinctive mark to have been used alone before it can be registered on the basis of acquired distinctiveness. However, where such a mark is used alongside another distinctive sign the burden on the applicant to show that a non-distinctive mark has come to be seen as a secondary trade mark will be greater, as in *British Sugar Plc v James Robertson & Sons Ltd [1997] E.T.M.R. 118 [1996] R.P.C 281 [1996]*.

27. The ECJ ruled in *Henkel KGaA v Deutsches Patent – und Markenamt (C-218/01)* that the perception of the average consumer is not necessarily the same in the case of a three-dimensional trade mark, consisting of the packaging of a product, as it is in the case of a word or figurative mark which consists of a sign that is independent from the appearance of the goods it denotes. Average consumers are not in the habit of making assumptions about the origin of goods based on the shape of their packaging, in the absence of any graphic or word element, and it could therefore prove more difficult to establish distinctive character in the case of such a three-dimensional trade mark than in the case of a word or figurative mark .

28. That must also be the case where there is evidence that various decorative finishes are used by traders in the relevant field for the products at issue without those finishes having trade mark character.

29. Further guidance on the test to be applied is provided by the ECJ in *Philips Electronics NV v Remington Consumer Products Ltd (C-299/99)* which, although in

the context of a mark that was a particular shape of a kind of goods from only one known supplier, it was nevertheless found that the proviso could only be relied upon where reliable evidence shows that recognition of the mark as indicating the goods/services of one undertaking is as a result of *its use as a trade mark [my emphasis]* . The ECJ, in *Societe des produits Nestle SA v Mars UK Ltd*, at paragraph 29, indicated that this latter point means “use of the mark for the purposes of the identification, by the relevant class of persons, of the product or services as originating from a given undertaking.”

30. Having regard to the guidance provided above it seems to me that if the proviso is to be utilised the evidence must show that the mark in suit is taken by the average consumer as a guarantee that the goods sold under it originate from the applicant because of the use of the mark for that purpose.

31. I now go on to assess the evidence filed on that basis.

### **Preliminary issues**

32. On 12 October 2005 Mr Gee provided evidence of use of the mark. Before considering this evidence the examiner asked for it to be presented in the form of a Witness Statement. This was duly filed and is dated 13 December 2005. It is made by Emma Jane Ward, who is the Sales and Marketing Director of Vibe Technologies Limited – the applicant company. She has held the position since 2003 and is authorised to speak on behalf of the company.

33. In a letter dated 28 June 2007 Mr Gee restricted the scope of coverage of the application to ‘loudspeaker enclosures for in-car entertainment systems’. I therefore consider the evidence in respect of the limited specification.

### **The evidence and the decision**

34. The mark for which registration is sought is described on the form of application as a repeating pattern. It was first used by the applicant in 2002. On inspection of the exhibits filed I can see that this pattern appears on a significant part of the surface area of some, but not all, car audio loudspeaker enclosures manufactured by the applicant.

35. On the next page is an example of the mark in use:-



36. In this example, which is from the applicant's 2001/2002 sales brochure, submitted as Exhibit C, it is possible to see exactly how the mark appears on the product.

37. I have read through all the evidence filed and in my view it demonstrates that the applicant is one of the leading manufacturers of subwoofer enclosures. Further, based on this evidence, I am left in no doubt that the trade mark VIBE is well known in connection with the sale of these goods. It is clear from the evidence that VIBE is the applicant's primary trade mark and it has been used extensively in connection with the promotion of such goods; the mark is emblazoned across their advertising literature and appears prominently on the products themselves.

38. However, I have been unable to conclude from the evidence that a significant proportion of the relevant class of persons identify goods as originating from the applicant because of the repeating pattern trade mark.

39. There are plenty of examples of use of the pattern on the goods, as illustrated above. However, evidence of use does not always equate to evidence of distinctiveness as a trade mark. The use must be in a distinctive sense to have any materiality (*Bach Flower Remedies Ltd v Healing Herbs Ltd* [2000] RPC 513 at 530).

40. Having reviewed all of the applicant's product brochures it is noticeable that the pattern is promoted as a finish. In the 2001/2002 brochure, in which the above illustration appears, I can find no verbal reference to the pattern. There are numerous other TM references in the brochure, such as VIBE®, VIBE Turbo Ports [tm] and VIBE port pug [tm]. I notice that on the back cover of the brochure the applicant lists its trade marks, but there is no mention of the mark applied for; though I accept this of itself is not determinative.

41. Exhibit E is a poster, printed in September 2003, which contains details of a range of the applicant’s products. Some of these products have a black finish; some have the finish illustrated above, whilst others have what appears to be the same pattern as that illustrated above, but with a slightly lighter overall colouring. At the bottom of this brochure are the words “FEEL THE DIFFERENCE....”, these words are followed by an oval border which contains the pattern applied for. Next to this appear the words CBR Black Crackle Finish. Alongside this is another oval border. This contains the same pattern, but is slightly lighter in colour than the first oval. The words ‘New Metallic finish only available on the AC and new SPL enclosures’ appear next to it.

42. In my view this use does not demonstrate acquired distinctiveness. On the contrary, this use does no more than inform the consumer that the goods are available in a number of finishes, the pattern applied for being one.

43. Exhibit G, is a copy of the applicant’s 2005 show catalogue ; this again contains products bearing the pattern applied for, but this time there is a verbal reference for it.

44. The following is an example of what appears in the show catalogue:

**CBR & AC actives**  
Ported and bandpass active enclosures

The BlackAir II subwoofers incorporate unique quality components and cutting edge technology that significantly increase the systems lifespan, while producing overwhelming power. A multi layered voice coil, on a vented alloy former, and double flux progressive spiders are just some of the features that allow these subwoofers to both produce enormous bass with absolute control and sustain ability to keep the bass tight and deep.

	CBR 10 Active	CBR 12 Active	AD 10 Active
Height	220mm	250mm	220mm
Width	410mm	390mm	390mm
Top Depth	885mm	885mm	885mm
Bottom Depth	360mm	385mm	360mm
Driver	BlackAir 10"	BlackAir 12"	BlackAir 10"
Peak Power	1800 W	1500 W	1800 W
Turntable	1	1	1
Amplifier Power rms	300 W	300 W	300 W
Characteristics	Low Hand	Deep Hand	Deep Smooth
Characteristics	Hand	Hand	Hand
Amplifier Type	Monoblock 1	Monoblock 1	Monoblock 1

**Black crackle finish**  
**Silver crackle finish**

Class AD subwoofer monoblock amplifier used on all active VIBE enclosures, featuring variable low pass filter, level control and 0/180 degree phase switch. Incorporates line level inputs/outputs, high level speaker inputs for connection directly to factory fitted head units and quick connect power connectors for easy and fast installation.

**CBR 12 Active**  
**CBR 10 Active**  
**AD 10 Active**

*"An exact balance of enclosure, amplifier and subwoofer make the CBR active seamlessly integrated for power, precision and reliability"*

Unsurpassable for quality the CBR Active is specifically designed to create the optimum environment to ensure precision performance of its component parts including the VIBE BlackAir II subwoofer and a Class AB Linearpassable for quality the VIBE MB1 amplifier. Perfectly integrated with both the driver and the pressurized enclosure the purpose built MonoBox 1 amp is power hungry and produces consistent sound quality even at low volumes. The distinctive Vibe TurboPort™ and the new PressureWedge™ (on the active cbr) design creates internal enclosure pressure to assist, surge control and enhance enclosure porting. Specifically tuned to peak frequency incorporating volume control, phono outputs (for linking), phase control and built in low pass crossover to adjust the bass frequency, the Active boxes: near indestructibility and is virtually distortion free.

45. It is not possible to read all the text in this reproduction, but I can confirm that it is a copy of a product description for a particular type of enclosure. There is information about the product; this particular model is available in either a black crackle finish or a silver crackle finish. The oval shapes appearing in the advert, which are visible in the reproduction, depict these finishes. Various other products are advertised in this catalogue and where they are finished with the pattern applied for the oval device appears with the words “black crackle finish” next to it.

46. Once again I consider this to be use of the sign for the purposes of informing the consumer which finishes the product is available in and nothing more.

47. Exhibit F consists of a 2004 sales brochure. Mr Gee, in his letter dated 27 February 2007, points out that in this brochure the applicant refers to their trade mark finish. The referred to extract appears on the first page of the brochure within the



general information provided about VIBE and its products. This is the relevant extract:

“The VIBE range of subwoofer enclosures are all designed and handcrafted at our production headquarters in England. Our trademark heavy cases are jointed, braced, glued and screwed to ensure solidity and perfectly sealed airtight enclosures, before being sprayed in our trademark crackle effect paint finish (now available in a new metallic finish on our AC series).”

48. Although here the applicant has used the word ‘trademark’ to describe the finish, this of itself does not demonstrate that the average consumer has understood the message to mean that this is a sign of origin, rather than just an attractive finish. I consider the fact that in the same sentence the applicant also uses the word trademark in relation to their ‘heavy cases’ reduces the impact that the word ‘trademark’ will have in the minds of the average consumer.

49. Exhibited at Q R and S are three A3 posters. Two of these posters contain a photograph of a semi-naked female. In the top left hand corner appears the distinctive VIBE logo mark. A picture of a VIBE audio enclosure is prominent in the poster, as is the telephone number of VIBE and its email address. To the right of the poster are details of the product and within these details is the statement ‘including the famous VIBE crackle paint’. This statement is listed underneath a description of the product but is quite prominent within the poster [at its A5 size]. The other poster contains similar material, but this time the statement ‘Vibe crackle paint is a trademark of VIBE Quality’ is present. This appears in a much smaller font than the other material. Mr Gee explains that these were adverts used by the applicant from April 2002 to June 2003. He states that these adverts appeared in several magazines directed at the applicant’s market during this period. Examples of the adverts in the magazines have not been provided nor have details of the frequency they appeared. Distribution figures are not given nor are any details of the actual size of the adverts.

50. Without any details of the aforementioned it is impossible to assess the likely reaction that the advert would have on the average consumer. The most I can say about this evidence is that it is an indication that the applicant sometimes refers to the finish as a trade mark.

51. Exhibit T consists of two emails sent to the applicant enquiring if or where they could purchase paint to achieve the trademark crackle finish used by VIBE for use on other car parts. Mr Gee states that the applicant believes that they had received other similar emails in the past, but no other details are provided. I do not consider that this is persuasive evidence to demonstrate that the sign acts as an indicator of origin. It could even be argued that the fact the enquirers wish to use the finish on other car parts suggest that they view it as merely decorative.

### **Trade Evidence**

52. Evidence intended to demonstrate that those in the trade and/or those who read car publications associate the finish with the applicant has also been filed. This is found at Exhibit A and consists of three letters, addressed to the examiner, written by

persons involved in producing specialist car/audio publications; each were sent a copy of the representation of the trade mark:

(a) Statement from Louis McNamee, who works for Trader Publishing Limited [producer of such titles as Auto Trader]. He states that Vibe are the leading manufactures in car audio equipment and have a very strong reputation in the UK and abroad. He claims that Vibe products are very distinctive because of their use of crackle paint – crackle paint is Vibe. Vibe subwoofer enclosures are amongst the finest on the market and he believes that the readers of the publications he works on would recognise the distinctive finish that Vibe have been using.

(b) Statement from Adam Rayner, a specialist writer on the subject of 12V car electronics and sound systems for over a decade. He explains that his background is in professional reinforcement systems and he gives details of his career history which include in car electronics editor of Fast Car and Max Car. He helps judge magazine product awards and writes reviews on speaker equipment. He explains that in-car electronics is not a large market compared to many and that he is well known and respected in the field. He states that he examines more than three hundred in-car products a year and that he is therefore aware of Vibe Technologies Limited and the products that they sell. He states that the Vibe designs have rightfully won awards. He states that crackle paint isn't new but in 'in-car' it means Vibe.

(c) Statement from Fraser Scotcher, part of the editorial team working on Fast & Modified Magazine. He states that Vibe are market leaders in Subwoofer enclosures and are known in particular for their styling and distinctive crackle finish. He states that as far as he is aware they are the only brand who uses this particular finish and they are identifiable to both himself and magazine readers for their crackle finish.

53. In addition Exhibits H and I are a number of articles/reviews which have appeared in publications such as Fast Car Magazine [January and July 2004]. Again I am not given any information about circulation. Nor am I given any explanations regarding the articles/adverts. From what I can glean they seem to be third party reviews of the applicant's products and within the reviews there is a mention of 'Vibe's now famous black crackle paint' or 'it's finished in their trade mark black crackle paint'. I'm unclear whether they are all from those in the trade.

54. Exhibit O contains another extract from Fast Car [September 2002]. This is a full page review and contains the following extract:

“The whole install lies within one great assemblage of what looks like leather. It is in fact a special contracting paint finish that vibe use on all their boxes. It comes in a couple of shades, but black is my fave...”

55. It is well established that trade evidence may assist where there is doubt from the primary evidence about whether the mark has been used to a sufficient extent in the marketplace so as to have acquired a distinctive character in the eyes of a significant proportion of the relevant class of consumers.

56. However, in this particular case, my concern is not about the extent of use – it plainly has been used by the applicant- but the nature of the use.

57. It is possible to conclude from the trade evidence that there is an association with Vibe and the finish, at least on the part of those who write about and review car audio systems. I also note that both Mr McNamee and Mr Scotcher state that readers of the publications would associate the mark with Vibe. However, these statements have not been expanded upon so I do not know the basis for those comments. It is established that the perceptions of the consumers and end users of the relevant goods are usually decisive [*Bjornekulla Frukting AB v Procordia Food AB (C-371/02)*]. In this particular case the average consumer of the goods at issue will be the car speaker buying public, I do not therefore consider that the views from the trade can be substituted for actual evidence that the average consumer of audio loudspeakers recognise and rely upon the sign to indicate trade origin.

58. In my letter dated 5 April 2007 I informed Mr Gee that the weakness in the case is that it is not clear from the evidence that the average consumer has understood the message that this is a sign of origin, rather than just an attractive finish provided by only one known or the best known undertaking. The trade evidence indicates that there is an association between the finish and the applicant, but this is not the same as evidence which demonstrates that they or consumers place reliance on that finish when making their purchasing selection.

59. In that same letter I stated that evidence that the relevant public has come to rely upon the sign in question for the purpose of distinguishing between goods of different undertakings may be sufficient to show that the sign is recognised as serving a trade mark function. I indicated that the best evidence is that which shows (and in what way) those making selection decisions between competing products had come to rely upon the sign in the course of the selection process. I also stated that evidence of mere abstract recognition would be unlikely to assist.

60. In response to this the applicant elected to carry out a survey.

### **Survey Evidence**

61. The basic rules for the conduct of a survey were set out by Whitford J in *Imperial Group Plc v Philip Morris [1984] RPC. 293 at 302-303*. The requirements are:

- (a) All surveys conducted, their methodology and results must be disclosed.
- (b) The totality of all answers must be disclosed.
- (c) The questions asked must not be leading.
- (d) The questions asked must not lead the interviewee into a field of speculation upon which he would not otherwise have embarked.
- (e) Exact answers and not abbreviations must be provided.
- (f) Coding must be accurately carried out, and the coding methods disclosed.
- (g) The instructions given to the interviewers must be disclosed.

62. The survey was conducted at the 'Fast and Furious' show, held at Brighton race course, over the weekend of 23 and 24 June 07. Details of the nature of the show are not provided. For example, there is no information regarding the likely audience it would attract i.e. the trade, car enthusiasts, in-car entertainment enthusiasts, or the general public. I am therefore unclear whether the interviewees comprise a relevant cross section of the public. There are no details given regarding who and how many exhibited at the show; I know that the applicant had a stand because Mr Gee makes reference to it in his letter dated 28 June 2007, but I am not told how many other exhibitors of 'in-car electronics' were there.

63. Mr Gee states that two interviewers were employed to carry out the survey. He comments that neither had any existing relationship with the applicant and neither of them wore any badge, insignia etc relating to the applicant. There is no further information given about who the interviewers were, what training they had or what briefing they were given prior to conducting the interviews. Nor have the interviewers filed evidence of their own confirming how they conducted the interviews. No specific details about how the interviews were conducted are provided. The interview was conducted away from the applicant's stand – although it is not stated where; it is not stated whether the interviewees were interviewed before or after visiting the applicant's stand.

64. I might just add that Mr Gee does not say that he himself attended the show, nor does he identify who commissioned the interviewees to undertake their work, and his statements are therefore in effect hearsay.

65. Mr Gee states that 148 people were interviewed. Each filled in their personal details, although their age or occupation was not recorded. Each was then shown a flat piece of board with the trade mark finish applied to one side. The interviewee was then asked 'Have you ever purchased or considered purchasing loudspeakers for an in car entertainment system?' Regardless of the answer, the following question was asked 'what can you tell me about the finish used on this sample?' and finally they were asked 'can you identify the manufacturer of a car audio product bearing this surface finish?' This final question, in particular, encourages artificial speculation and guesswork as per 61(d) above.

66. Of the 148 people interviewed 118 (79.7%) identified VIBE as the manufacturer. In light of these results Mr Gee claims that 'The Test' set out in Section 45.1 of the guidelines for examination is met; that is "a significant proportion of the relevant class of persons identify the goods as originating from a particular undertaking because of the trade mark'

67. On the face of it the results of this survey look to favour the applicant's case. However, that would be on the assumption that the survey was conducted using the criteria set out above, those interviewed comprised the average consumer and, finally, that the answer 'VIBE' to the third question demonstrated positive proof that the mark is relied upon as an indication of trade origin.

68. The survey can be described as informal at best, although it should not be dismissed on that basis alone. It was carried out two years after the relevant date and, whilst some delay is inescapable, there is nothing in the evidence to suggest that the

views of the interviewees would have been the same two years previously; this is not without significance when considering a mark that only commenced being used three years prior to the filing date. As mentioned in paragraph 62 above, I am not certain that the results represent the views of the relevant consumer. Finally, without any follow up questions to test the reasons given for the answer to question 3, I find myself reaching the same conclusion that I reached when assessing the primary evidence. That is that there is an association between the mark and the applicant. The word 'associates' can have a number of meanings...'first come to mind', 'best known one', 'only one I can think of...but there may be more'. None of these meanings amount to recognition of the sign as a trade mark [*Dualit Ltd's Trade Mark Application [1999] RPC 809*]. I note that this quotation has been endorsed by the learned editors of Kerley's Law of Trade Marks and Trade Names [Fourteenth Edition] at 8-129.

69. Therefore, absent any positive proof that the mark is relied upon as an indication of origin, the survey results have failed to demonstrate that the mark applied for is factually distinctive.

### **Conclusion**

70. In this decision I have taken into account all the written submissions/evidence filed to support this application. I have concluded that the mark is excluded from *prima facie* registration under Section 3(1)(b) of the Act because it consists of a sign which serves a merely decorative purpose in relation to the goods. The evidence has failed to demonstrate that because of the applicant's use the mark is taken by the average consumer as a guarantee that the goods sold under it originate from the applicant because of the use of the mark for that purpose.

71. Consequently the application is refused under the terms of Section 37(4) of the Act because it fails to qualify for registration under Section 3(1)(b).

**Dated this 10th day of September 2007**

**Lynda Adams  
For the Registrar  
The Comptroller-General**