

O-317-15

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK REGISTRATION 2552035
IN THE NAME OF CLIVE RUSSELL KINTON
OF THE FOLLOWING TRADE MARK IN CLASS 9:**

MATRIX AMPLIFICATION

AND

**AN APPLICATION FOR INVALIDATION (NO 500406)
BY ANDREW HUNT**

Background and pleadings

1. On 2 July 2010 Mr Clive Russell Kinton applied for the trade mark **MATRIX AMPLIFICATION**. It was subsequently registered on 29 October 2010 for:

Class 9: Loudspeakers; amplifiers; audio amplifiers; speaker management systems; loud speaker management systems; signal processors; signal processors for amplifiers; audio equipment; equipment for the reproduction of sound; parts and fittings for the aforesaid goods

2. Mr Andrew Hunt seeks the invalidation of the registration under sections 5(4)(a) and 3(6) of the Trade Marks Act 1994 (“the Act”). In summary, his grounds are:

- Section 5(4)(a): Mr Hunt claims to have manufactured and sold goods under the sign Matrix Amplification since June 1995 creating an established and longstanding reputation and goodwill, protectable under the law of passing-off.
- Section 3(6): Mr Hunt claims that Mr Kinton was the secretary and minor shareholder of one of Mr Hunt’s companies and was aware of Mr Hunt’s long and established use when he applied for the mark in his own name. It is claimed that Mr Kinton acted in bad faith by making his application.

3. Mr Kinton filed a counterstatement defending his registration. His defence has a number of aspects including:

- Mr Kinton is aware of the activities of two companies in this area (of which he was a member), both of which failed. As a result, any goodwill is long past and was never owner by Mr Hunt.
- The subsequent adoption of the mark MATRIX by a company owned by Mr Hunt [Matrix Amplification Ltd] was improper and has not given rise to any goodwill owned by him. Mr Hunt is not entitled to any rights in the mark.
- Mr Hunt is not the owner of the alleged earlier unregistered trade mark.
- Mr Hunt advised Mr Kinton that he was not planning on manufacturing amplifiers, so he is estopped from relying on the subsequent activity of Matrix Amplification Ltd as a ground of invalidation.

4. Mr Hunt is represented by Sandiford Tennant LLP, Mr Kinton by Gallafents LLP. Both sides filed evidence. A hearing subsequently took place before me at which Mr Hunt was represented by Mr Errol Sandiford of Sandiford Tennant. Despite being the party that requested the hearing, Mr Kinton did not attend, nor was he represented at it, nor were any written submissions filed in lieu of attendance.

The evidence

Mr Hunt’s evidence

Witness statement of Mr Hunt

5. Mr Hunt states that he first used the name Matrix Amplification in Manchester in June 1995 in relation to a range of amplifiers sold under the 2U1200 series. He

explains that the same amplifiers were also manufactured for companies (three companies are identified) on an OEM basis; the circuit boards were marked with a copyright symbol and “AR HUNT”.

6. Mr Hunt states that in September 1995, Matrix Audio Development Limited was incorporated (company no. 03104777). The name of this company was changed to Matrix Audio Manufacturing Limited on 7 March 2000. The company was dissolved on 4 February 2003. Mr Hunt states that he was the sole director and major shareholder. Mr Kinton and Pauline Kinton (Mr Kinton’s wife) were minor shareholders each holding one share. Mr Kinton was company secretary. This is shown in an annual return in Exhibit AH2. It is not expressly explained what this company did.

7. Mr Hunt then refers to another company, Trupart (Sales) Limited (company no. 3359879) which changed its name to Matrix Audio Development Limited on 7 March 2000. Mr Kinton was the sole director of that company, holding the one issued share; Pauline Kinton was the company secretary. Mr Hunt states that the sole purpose of this company was that of a sales outlet for goods manufactured by “him” under the mark.

8. A company called AS Laser Limited (company no. 04591917) was incorporated in November 2002 with Mr Hunt and a Mr Robinson as directors. Mr Hunt states that this company took over the manufacturing of the goods from him, goods which continued to be sold through Matrix Audio Development Limited.

9. Mr Hunt explains that in June 2003 Matrix Audio Development Limited was unable to meet the payment of outstanding invoices so it was informed that AS Laser Limited could no longer supply it with goods. Sales were then brought in house (to AS Laser Limited). Exhibit AS4 is an extract from the publication *LSIOnline* dated 7 October 2003, it reads:

“Kinton leaves Matrix Audio to form new sound company

UK – Following the decision of brand-holder Andrew Hunt to take the sales and marketing of Matrix amplifiers into his new manufacturing company, Clive Kinton has left the firm he jointly founded with Hunt in 1995. Tony O’Neil also left the company earlier this year for family reasons.

“We have over the last eight years steadily built the Matrix brand to be a major player in the amplifier field but production has always been a challenge. Andrew feels he has solved the problems with his latest factory and wants to optimise the profit in what is a very competitive market” said Kinton at the launch of his new sound company – Meteor Electronics.

Meteor Electronics is a specialist sound distribution company and is working closely with several manufactures on new and developing products. A lightweight class D amplifier range including speaker modules will be available shortly under the Meteor brand and negotiations have been completed with a world-class loudspeaker manufacturer on a range of units for the MI sector”.

10. Mr Hunt explains that Matrix Audio Development Limited had to find new sources of goods as a result of AS Laser no longer supplying it. They were unable to do so which led it to be placed into administration. Exhibit 5 consists of a chairman's closing statement made by Mr Kinton dated 23 October 2003; it includes the following information:

- Matrix Audio Developments Limited commenced trading in 2000 selling amplifiers under the Matrix brand. The initial shareholders were Mr Kinton and Mr Hunt (each having a 50% shareholding).
- The amplifiers were designed by Mr Hunt and supplied to Matrix Audio Development Limited by his (Mr Hunt's) Oldham factory.
- In 2002 Mr Hunt closed his Oldham factory and the building of the amplifiers was sub-contracted to Epco Electronics Ltd of Newport.
- Mr Hunt joined Epco as a production manager.
- Epco was unable to meet demand, but this was addressed in late 2002 with Epco investing in new plant and staff.
- Matrix Audio Development took out a £20,000 loan to help with the new plant.
- Despite the above, Epco could not keep up with demand and was placed into compulsory liquidation.
- The production of amplifiers was taken over by AS Laser Ltd. The transition went smoothly, but ultimately AS Laser advised that sales would be brought in house.
- Matrix Audio Development could not find new products to trade, so, went into liquidation.

11. Mr Hunt explains that due to "difficult trading" AS Laser collapsed and was dissolved in December 2006. Mr Hunt states that he subsequently resumed manufacturing and selling amplifiers under the mark as a sole trader. He states that the goods were placed on eBay. Exhibit AH7 is a copy of his eBay registration dated 24 October 2006. He states that sales grew year on year over the next four years. Exhibit AH8 contains some supporting evidence, as follows:

- A series of message board posts on the forum speakerplans.com from June 2009. The topic is "New UKP2100". There are frequent references to "Andy [Hunt]". The poster is asking for feedback on this new model and how it stacks up against other models. There is a reference to a blind test between the "qsc" and the "matrix". Later, a poster asks if there is a Matrix website. Another poster advises that the main link is through the eBay site amps4u.
- A print of a Paypal transaction dated 30 November 2006 in respect of a MATRIX STR1500 amplifier. It is for one amplifier costing £192.
- Another Paypal transaction dated 2 December 2007 for a single amplifier (MATRIX UKP1300) costing £190.
- Another Paypal transaction dated 26 July 2007 for a single amplifier (MATRIX VECOR 350) costing £90.
- Another Paypal transaction dated 6 November 2008 for a single amplifier (MATRIX UKP1300) costing £190.00.
- Another Paypal transaction from 26 November 2008 for a single amplifier (MATRIX UKP1300) costing £190.00.

- Another Paypal transaction from 24 February 2009 for a single amplifier (UKP1300) costing £200.
- Another Paypal transaction from 29 May 2009 for a single amplifier (MATRIX UKP1300) costing £220.
- Another Paypal transaction from 25 January 2007 for a single amplifier (MATRIX VECOR 350) costing £80. Unlike the other transactions, this one contains the seller details, namely “Andrew Hunt (amps-4U@hotmail.com)”.

12. As a result of his increasing sales, Mr Hunt explains that he then incorporated Matrix Amplification Limited (company no. 07122437) in January 2010. Exhibit 10 is another article from *LSIOnline*. It is from January 2011 and reads:

“Andy Hunt returns with Matrix Amplification

UK – Matrix Amplification is a new company with a familiar name. Over the past 18 months, from its base in South Wales, the company has developed, manufactured and field-tested a new range of lightweight switch mode power amplifiers.

Amplifier designer Andy Hunt, the man behind the original Matrix Amplifiers, has now re-established the brand along with business partner Mark Button. Save for some metalwork which is sourced from a local supplier the new manufacturing operation is remarkably self-sufficient, with the design and manufacturing taking place in-house, including the switch mode power supplies and surface-mounting of the PCBs. Button told L&SI that following extensive end user testing and feedback, the company now has 13 product lines in production all of which are either class AB or Class G topologies.

So successful has the field testing been that Matrix is already providing amplifiers on an OEM basis for two sound system manufactures, Sherman Sound Systems and A.S.S. More OEM customers are in the pipeline, says Button.”

13. Mr Hunt states that the new company has been manufacturing and selling amplifiers under the mark (Matrix Amplification) throughout the UK and internationally. AH11 contains copies of “some” invoices issued between 2010 and 2014. For reasons that will become apparent, I detail below only those filed up to 2 July 2010:

- An invoice to S.P.A. Systems Ltd dated 16 April 2010 for 4 amplifiers (model numbers are identified but not the brand name), with a total invoice value of £2408. The invoice is headed Matrix Amplification Limited.
- An invoice to Stage Engage dated 26 April 2010 for 3 amplifiers with a total value of £787. The model numbers are provided and it is on the same headed paper as above.
- An invoice to S.P.A. Systems dated 26 May 2010 for 3 amplifiers (model numbers not given) for a total value of £1175.

14. Mr Hunt states that the amplifiers are sold by product number as shown on the invoices but confirms that they all bear the mark. He states that when Mr Kinton applied for the mark:

“...he was aware of the continued use over the years of the Mark by myself, or by my companies or companies with which I have been associated and had granted permission to use the mark.”

15. He estimates that since the first use (in 1995) there have been sales in excess of £7,000,000 of which £4,200,000 was prior to the filing of Mr Kinton’s mark. Mr Hunt states that Mr Kinton has never manufactured goods under the mark nor has he any intention of doing so.

Witness statement of Alex Skan

16. Mr Skan is the managing director of Void Acoustics Research Ltd. He has been aware of the Matrix brand of amplifiers since 1997 having seen them in use and also owning a number of them. He always associates the Matrix brand with Mr Hunt, who, to the best of his knowledge, has been the brand manufacturer. In 2008 he met with Mr Hunt who demonstrated some amplifiers to him and which were offered to him for sale under the Matrix brand name. Mr Skan was interested in these because he had become aware that a number of his customers were using the amplifiers with speakers sold by Mr Skan’s company. A number of “Matrix” branded amplifiers were purchased to meet this demand. Mr Hunt was then employed on a part time basis in January 2009 to develop a version of these products to be sold under the Void brand name. A copy of a press release relating to this is provided. He adds that during this time Mr Hunt continued to sell Matrix amplifiers. There is no mention of Matrix in the press release, although, Mr Hunt is referred to as a renowned audio designer.

Witness statement of Michael Popham

17. Mr Popham is a freelance designer with, he says, a particular interest in the audio industry. He first became aware of the Matrix brand of amplifiers in 2002. He later met Mr Hunt at “the PLASA show” in 2007. The two discussed producing art work for “his” amplifiers. The production was subsequently done and he co-ordinated the physical production of the artwork on to acetate film. Examples are provided in MP1. They show use of “MATRIX” on the front of amplifiers and “designed and manufactured in the UK by Matrix” on the back panel. One also includes the domain name (on the back of the amplifier) www.matrixamplification.com. Mr Popham states that he continued this work in January 2010 when Matrix Amplification Limited was formed. He states that he has produced artwork for at least 30 different designs all of which bore the Matrix logo or refers to Matrix Amplification.

Witness statement of Leanne Hughes

18. Ms Hughes was, until August 2013, a director of S.P.A Systems. From 2009 onwards it purchased amplifiers from Mr Hunt either through his Amps4U business or from Matrix Amplification Limited. She states that they were all labelled Matrix, using the Matrix brand name, and carrying the matrix logo. She provides some example invoices to support this. Three of the four invoices are from before the

relevant date, all issued by Matrix Amplification Limited. She estimates that some 60-70 customers purchased these amplifiers either as individual items or sold with the Shermann brand of loudspeakers.

Mr Kinton's evidence

Witness statement of Mr Kinton

19. Mr Kinton states that he began working with Mr Hunt in 1993 "supplying materials for his productions and selling finished product to three companies under their our brands" [I assume "our" is a typographical error which should read "own"]. He states that because Mr Hunt was an un-discharged bankrupt and could not finance production or issue VAT invoices, this was done through Mr Kinton's company called Meteor Semiconductors. The profits from this exercise were put back into materials for production "until the level of potential finished amplifiers exceeded the requirements of the three brand customers".

20. Mr Kinton states that it was then agreed to sell amplifiers on the open market and, so, Matrix Audio Developments was formed. Due to Mr Hunt's bankruptcy, Mr Kinton was registered as director and Mr Kinton's wife as secretary. It is stated that Mr Hunt handled production and Mr Kinton all other aspects of the business.

21. It is stated that "production continued in various guises" until a decision was made to stop production "ourselves" and to buy finished amplifiers from a third party called Epco Electronics Ltd. Mr Hunt had been employed by them as a production manager. Mr Kinton states that Matrix Audio Developments continued as a sales company under his direction. This continued until Epco went into administration. This led to production being taken over by AS Lasers Ltd, a company owned by Mr Hunt and a former director of Epco. AS Laser produced amplifiers under the name Quantum Amplification as well as Matrix. Matrix Audio Developments purchased and supplied some materials for AS Laser as advance payment for amplifiers. In some cases, due to credit issues, Mr Kinton's own company (which company is not clear) supplied materials.

22. In 2003 Mr Hunt "unilaterally decided to cease supply of amplifiers to Matrix Audio Developments Ltd" which led to leaving it in an insolvent position. This left Mr Kinton with some debts. The liquidators apparently advised that the trade mark Matrix belonged to Matrix Audio Developments and he was asked to help find a buyer (nothing more is said about whether a buyer was found).

23. Mr Kinton states that Mr Hunt worked for a time with his present company, Idex Ltd, and on several occasions Mr Hunt apparently stated that he was not interested in manufacturing amplifiers, seeing his future in metal cutting lasers. Mr Kinton says that he felt justified in applying for the trade mark.

Witness statement of Mr Jozef Zdislaw Olenski

24. Mr Olenski is the CEO of Idex Limited. Mr Olenski's evidence is of limited assistance as it relates more to a dispute between it and Mr Hunt (who, according to Mr Olenski, worked for Idex) about monies, designs and parts supplied to him (which

Mr Hunt may have used to produce his own amplifiers). There is nothing in the evidence regarding the Matrix brand of amplifiers. He alleges, for example, that Mr Hunt is selling amplifiers which include parts where the copyright in the designs belongs to him. I note that Mr Olenski states that when he commissioned Mr Hunt to produce a Switch Mode Power Supply Amplifier, Mr Hunt apparently stated that he had no future interest in amplifiers as he saw his future in the design and manufacture of lasers.

Witness statement of Anita Tracey Thomas

25. Ms Thomas is an employee of Idex Limited. Again, most of her evidence is not particularly relevant to the matters that need to be determined. I note that she states that whilst working with Mr Hunt at Idex, it was her impression that Mr Hunt's long term goal was to design and produce lasers.

Mr Hunt's reply evidence

Second witness statement of Mr Hunt

26. Mr Hunt states that the relationship between himself and Mr Kinton (the early relationship involving Meteor Semiconductors) was as customer and supplier. He repeats that company No 03104777 incorporated in 1995 as Matrix Audio Developments Limited had Mr Hunt as sole director and Mr Kinton as secretary. He provides a copy of an annual return dated 21 September 1998 showing this in exhibit AH2. A further annual return dated 21 September 2000 shows the same appointments. It also gives detail of the shareholding. Of the 100 shares issued, Mr Hunt has 98, Mr Kinton 1 and Pauline Kinton 1.

27. Mr Hunt notes that Mr Kinton stated "Andrew Hunt unilaterally decided to cease supply of amplifiers to Matrix Audio Development Ltd" which he says is an admission that Mr Hunt was the sole owner and controlled the supply of goods bearing the Matrix mark. He states that what Mr Kinton was told by the liquidators (in terms of ownership of the trade mark) is not correct as he has never relinquished his rights. Mr Hunt states that what Mr Kinton says about him not being interested in the production of amplifiers is untrue.

Estoppel

28. Mr Kinton pleads on the basis of estoppel, but does not say which form of estoppel is relied upon. The basis for the claim is that Mr Hunt indicated to him that he was no longer interested in manufacturing amplifiers as he saw his future in lasers. Mr Hunt denies that he gave this indication.

29. Estoppel comes in various guises, but estoppel by record and estoppel by deed can be quickly ruled out. The former relates, essentially, to the principle that matters already adjudicated upon should not be litigated and adjudicated upon again. This is clearly not the case here. Estoppel by deed relates to facts that have been stated in a deed, again, this is not the case here. Estoppel by conduct is closer to Mr Kinton's position. However, this form of estoppel has a number of sub-sets. I do not intend to summarise them all, this is because a necessary ingredient of the majority of these

forms of estoppel is that the conduct which is said to give rise to the estoppel was intended to have some form of impact upon the legal relations of the parties. For example, in relation to promissory estoppel, *Halsbury's Laws of England* states:

“Promissory estoppel is an extension by equity of common law estoppel by representation. The principle of promissory estoppel is that, when one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but must accept their legal relations subject to the qualification which he himself has so introduced. This principle was developed in a line of authority from 1877 onwards but first clearly enunciated in 1944. The term ‘promissory estoppel’ was not, however, used in the 1944 judgment generally taken as the basis of the doctrine.”

30. Firstly, I do not see how Mr Hunt can be said to have made a clear and unequivocal promise. Mr Hunt denies that he said anything along the lines suggested by Mr Kinton, but even if he did, all that can be taken, at best, is that he saw his future more in lasers than in amplifiers. This strikes me as nothing more than a passing remark and certainly not one that was intended to impact upon the legal relations between the two parties. There is also what is known as estoppel by election, which *Halsbury's Laws of England* explains as:

“On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that a person may not approbate and reprobate expresses two propositions, (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent. Thus a plaintiff, having two inconsistent claims, who elects to abandon one and pursue the other may not, in general, afterwards choose to return to the former claims and sue on it; but this rule of election does not apply where the two claims are not inconsistent and the circumstances do not show an intention to abandon one of them. The common law principle which puts a man to his election between alternative inconsistent courses of conduct has no connection with the equitable doctrine of election and relates mainly, though not exclusively, to alternative remedies in a court of justice.”

31. This can similarly be ruled out because what Mr Hunt said (if he said anything) cannot be taken to constitute any real form of election, and certainly not one from which he has taken a benefit. **The claim that Mr Hunt is estopped from raising claims in these proceedings is dismissed.**

Section 5(4)(a) – passing off

32. Section 5(4)(a) of the Act reads:

“A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b)...

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark.”

33. Halsbury’s Laws of England (4th Edition) Vol. 48 (1995 reissue) at paragraph 165 provides the following analysis of the law of passing-off. The analysis is based on guidance given in the speeches in the House of Lords in *Reckitt & Colman Products Ltd v. Borden Inc.* [1990] R.P.C. 341 and *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd* [1979] AC 731. It is (with footnotes omitted) as follows:

“The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

(1) that the plaintiff’s goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and

(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant’s misrepresentation.

The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House’s previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of passing off, and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House.”

34. Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that:

“To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant’s use of a name, mark or other feature which is the same or sufficiently similar that the defendant’s goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

(a) the nature and extent of the reputation relied upon;

(b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;

(c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;

(d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.”

In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

The relevant date

35. Whether there has been passing-off must be judged at a particular point (or points) in time. In the decision of the Court of Appeal in *Roger Maier and Assos of Switzerland SA v ASOS plc and ASOS.com Limited* [2015] EWCA Civ 220 it was stated:

“165. There is a further complication, however. Under the English law of passing off, the relevant date for determining whether a claimant has established the necessary reputation or goodwill is the date of the commencement of the conduct complained of (see, for example, Cadbury-

Schweppes Pty Ltd v The Pub Squash Co Ltd [1981] RPC 429). The jurisprudence of the General Court and that of OHIM is not entirely clear as to how this should be taken into consideration under Article 8(4) (compare, for example, T-114/07 and T-115/07 Last Minute Network Ltd and Case R 784/2010-2 Sun Capital Partners Inc.). In my judgment the matter should be addressed in the following way. The party opposing the application or the registration must show that, as at the date of application (or the priority date, if earlier), a normal and fair use of the Community trade mark would have amounted to passing off. But if the Community trade mark has in fact been used from an earlier date then that is a matter which must be taken into account, for the opponent must show that he had the necessary goodwill and reputation to render that use actionable on the date that it began.”

36. The above related to a community trade mark, however, the same applies, *mutatis mutandis*, to a UK national trade mark.

37. The filing date of the subject trade mark is 2 July 2010. There is no evidence of Mr Kinton using the mark himself. He does not claim to own any goodwill as a result of the earlier activities he was involved with. Accordingly, the matter need only be assessed as of 2 July 2010.

Ownership issues

38. One of the areas of dispute in these proceedings is, if goodwill was generated by way of the activities set out in the evidence, whether Mr Hunt can be taken as the owner of such goodwill. To make that assessment, it is useful of set out the chronology of those activities in so far as they go up to the relevant date. When doing so, I will refer to the two companies that have both gone by the name of Matrix Audio Development with reference to their company numbers, so as to avoid any confusion. I should stress, though, that some of the dates I give below are only approximate because of overlaps between a new company starting and the old one dissolving and/or the paucity of the evidence:

- i) June 1995 - September 1995: Mr Hunt claims to be operating, essentially, as a sole trader, manufacturing and distributing/selling goods.
- ii) September 1995 - March 2000: At the beginning of this period company 3104777 was established. Mr Hunt refers to his company but does not clearly explain its role. It is fair to assume that it was involved in the manufacturing process. Furthermore, as no separate distribution/selling company was in operation, it is fair to assume that it performed this role also.
- iii) March 2000 – early 2002: During this period company 3104777 continued to manufacture goods. However, the landscape changes because company 3359879 becomes active in the business as a distribution/selling arm.
- iv) Early 2002 – late 2002: During this period the manufacturing appears to be sub-contracted to Epc. Company 3359879 continues in its role as the

distribution/selling arm. Mr Hunt is a production manager for Epco but there is no evidence that he is an officer of the company.

- v) November 2002 – June 2003: AS Laser takes over the manufacturing role with company 3359879 continuing in its role as the distribution/selling arm.
- vi) June 2003 – December 2006: AS Laser continues with its manufacturing role, but also brings distribution/selling in house; company 3359879 is no longer involved in the business and is subsequently liquidated.
- vii) December 2006 – January 2010: Following the collapse of AS Laser, Mr Hunt returns to operating as a sole trader, manufacturing and distributing goods himself.
- viii) January 2010 – July 2010 (the relevant date): A new company, Matrix Amplification Ltd, takes over manufacturing and distribution/selling.

39. It is clear from the evidence that Mr Hunt is the only constant throughout all of the above phases. He has either been operating as a sole trader (periods i) and vii)) or, alternatively, has been in a position of responsibility in the various companies involved. Even when company 3359879 was involved in distribution/selling of the goods, a company which is, ostensibly, Mr Kinton's company, Mr Hunt was involved with the company that was responsible on the manufacturing side of things. The only phase, on the face of it, where this is not strictly true is period iv) when Epco were "sub-contracted" as manufacturer, although, Mr Hunt was employed by that company as production manager.

40. In terms of periods iii)-v) (inclusive) where company 3559879 was responsible for distribution/selling, Mr Kinton has stated that the goodwill was owned by that company not by the manufacturing company. He relies on something which was told to him by the liquidators of 3559879. I have concerns over Mr Kinton's position because 3559879 was only involved for 3 years in the above chronology and, furthermore, the closing notice published by 3559879 intimates that it went into administration because it could not obtain alternative sources of goods to trade after AS Laser took its sales in house. This suggests that any use of Matrix that generated goodwill was of a manufacturer's mark not as a seller's or distributor's mark. If 3559879 was indeed the owner of the goodwill then it would not be for AS Laser to stop supplying them with Matrix amplifiers, it would be for 3559879 to seek a new manufacturer for its Matrix amplifiers. I also note the *LSIOnline* article from around the time Mr Kinton left the operation which refers to Mr Hunt as the brand holder.

41. Irrespective of the above, Mr Kinton's position is that any goodwill generated would not have been owned by Mr Hunt personally. This is clearly inaccurate in terms of period vii) because during this period of just over three years Mr Hunt was the only entity involved. Any goodwill generated will have been owned by Mr Hunt.

42. In terms of any goodwill generated in the preceding periods, and setting aside period i) for the time being, Mr Kinton's position is that the goodwill was owned by the relevant companies and that it would have ceased to exist long ago. I accept that in most circumstances goodwill generated by a business operated under the

auspices of a registered company would normally be owned by that company and not by an officer of that company. I also accept that if a company is dissolved without any assignment of that goodwill then the goodwill will normally be assumed to have extinguished with it. I put some of these points to Mr Sandiford at the hearing, he responded by stating that Mr Hunt owned all of the goodwill and that the companies were, effectively, using the MATRIX name with Mr Hunt's permission. Mr Sandiford highlighted the statement in Mr Hunt's evidence that Mr Kinton was aware of his "continued use over the years of the Mark by myself, or by my companies or companies with which I have been associated and had granted permission to use the mark."

43. There are indications in the evidence that go some way towards supporting Mr Sandiford's submission that Mr Hunt is, effectively, the MATRIX brand owner. In Mr Kinton's closing statement as chairman of 3559879 he refers to AS Laser as his [Mr Hunt's] "latest factory". Mr Kinton also refers (in the *LS Online* article from 2003) to the pre Epco manufacturer as "[Mr Hunt's] Oldham factory". That same article also refers to Mr Hunt as the "brand-holder"; those words are not attributable to Mr Kinton, but they nevertheless show some recognition in the trade as to ownership. Evidence from the trade also comes from Mr Skan who has been aware of MATRIX amplifiers since 1997 and associates the brand with Mr Hunt who he regards as the brand owner. I consider this to be further supported by the fact that when Epco were manufacturing the goods neither Mr Hunt nor Mr Kinton were officers of that company (although Mr Hunt was a production manager); based on the evidence, and having held already that 3559879 were just distributors/sellers and not brand owners, Mr Hunt was just using Epco to manufacture goods rather than having them manufactured by a company of which he was an officer. Thus, throughout periods ii) to vi), and in addition to period vii), Mr Hunt was, effectively, the brand holder and owner of any goodwill generated in those periods.

44. The reason I said I would come back to period i) is because there is a conflict of evidence. Mr Kinton states that in this first period (although he states that it started in 1993 rather than 1995) he and Mr Kinton worked together "supplying materials for his productions and selling finished product to three companies under their our [sic] brands". He states that the business was operated through his (Mr Kinton's) company called Meteor Electronics. Mr Hunt responded directly to that stating that the relationship between the two was of customer and supplier with, presumably, Mr Kinton being the supplier of parts and materials which Mr Hunt turned into amplifiers for onward sale (albeit, as I will come on to, under OEM brand names). On the face of it, the two positions are diametrically opposed. Neither provides any supporting documentary evidence. However I do not consider it necessary to make a formal finding here as I will come on later to say that any goodwill created in this period was not associated with the word MATRIX, so the question of ownership of goodwill does not arise.

45. The only period I have yet to discuss is period viii), the latest period, by which time Mr Hunt has set up a new company manufacturing and distributing/selling amplifiers. Again, any goodwill generated would ordinarily reside with the company, but consistent with the findings I have already made, I am satisfied that Mr Hunt would have remained the brand owner (and so owned any goodwill) with him giving the new company permission to use the MATRIX name.

46. A summary of my findings in respect of the ownership of goodwill is as follows:

- a) Mr Hunt was the owner of any goodwill generated in period vii).
- b) Mr Hunt was also the owner of any goodwill generated in periods ii)-vi), and period viii).
- c) If I am wrong in relation to the findings in the preceding paragraph, then any goodwill generated in periods ii)-vi) should be taken to have extinguished, but any goodwill generated in period viii) is owned by Matrix Amplification Limited.

Goodwill

47. In *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL) the following was stated in respect of goodwill:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.”

48. In *Hart v Relentless Records* [2003] FSR 36, Jacob J. (as he then was) stated that:

“62. In my view the law of passing off does not protect a goodwill of trivial extent. Before trade mark registration was introduced in 1875 there was a right of property created merely by putting a mark into use for a short while. It was an unregistered trade mark right. But the action for its infringement is now barred by s.2(2) of the Trade Marks Act 1994. The provision goes back to the very first registration Act of 1875, s.1. Prior to then you had a property right on which you could sue, once you had put the mark into use. Even then a little time was needed, see per Upjohn L.J. in BALI Trade Mark [1969] R.P.C. 472. The whole point of that case turned on the difference between what was needed to establish a common law trade mark and passing off claim. If a trivial goodwill is enough for the latter, then the difference between the two is vanishingly small. That cannot be the case. It is also noteworthy that before the relevant date of registration of the BALI mark (1938) the BALI mark had been used “but had not acquired any significant reputation” (the trial judge's finding). Again that shows one is looking for more than a minimal reputation.”

49. However, a small business which has more than a trivial goodwill can protect signs which are distinctive of that business under the law of passing off even though its reputation may be small. In *Stacey v 2020 Communications* [1991] FSR 49, Millett J. stated that:

“There is also evidence that Mr. Stacey has an established reputation, although it may be on a small scale, in the name, and that that reputation preceded that of the defendant. There is, therefore, a serious question to be

tried, and I have to dispose of this motion on the basis of the balance of convenience.”

See also: *Stannard v Reay* [1967] FSR 140 (HC); *Teleworks v Telework Group* [2002] RPC 27 (HC); *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590 (COA).

50. I have already indicated that the activities conducted in period i) would not have generated any relevant goodwill. Whether Mr Hunt did or did not act as a sole trader, and whether he did or did not generate goodwill at this time is not clear, however, even if the position was clear, I am not satisfied that there was any real association at this point with the MATRIX name. The business was not referred to as Matrix. The goods appear to be predominantly sold on an OEM basis to other manufacturers. Reference is made to Mr Hunt’s name being added to the goods to indicate copyright (presumably copyright in the PCB). Whilst I do not rule out that some MATRIX goods may have been sold, I am not satisfied that such sales would have created a protectable goodwill associated with the MATRIX name.

51. In terms of the other periods during which I have held that Mr Hunt was the owner of any goodwill, I note Mr Hunt’s statement that there have been over £4 million worth of sales prior to Mr Kinton filing his trade mark. I bear in mind that this was just an estimate so the figure needs to be treated with caution. That being said, Mr Kinton’s position seems to be more to do with ownership/entitlement as opposed to the existence of goodwill, so there is no real counter-submission when it comes to goodwill existing. There are, in any event, plenty of signs to show that goodwill existed. There are message board posts which show not only knowledge of the business, but of customers. There are invoices, albeit they relate to Mr Hunt’s sole trader eBay business and the subsequent period when Matrix Amplification Limited was incorporated. There is evidence from two customers, Mr Skan and Ms Hughes, who have been buying amplifiers from Mr Hunt since 2008 and 2009 respectively. There is also evidence from the person who designed labels for the product and, furthermore, the two articles from *LSI Online* further support the existence of goodwill. The type of amplifiers involved do not appear to be everyday pieces of consumer audio equipment. Power amplifiers such as this are a more niche product no doubt aimed at particular consumers with an interest in high end audio. I consider Mr Hunt’s business(es) to have a reasonably sized (albeit not the highest) goodwill in that field.

52. For sake of completeness, I will deal with the situation in the event that I was wrong to have concluded that Mr Hunt was the owner of the goodwill generated in periods ii) to vi). From that perspective, and as I have already held, Mr Hunt would have been the owner of any goodwill generated in period vii). During this period Mr Hunt was operating as a sole trader through his eBay shop amps4u. He did so for a number of years and has provided examples of Paypal transaction invoices to customers. Direct evidence from two of his customers is also provided, both Mr Skan and Ms Hughes state they purchased MATRIX amplifiers from Mr Hunt during this sole trader period. The evidence of Mr Popham provides corroboration of an ongoing business, as he began producing MATRIX artwork for the amplifiers during this period, work which continued when Matrix Amplification was incorporated. Whilst, as observed earlier, there is no precise turnover/sales figures that can be attributed to

this period, I come to the view that the activities would have generated an independent goodwill, albeit of a small (but more than trivial) nature. The generation of goodwill associated with the sign MATRIX is also made easier by the fact that such a word is a somewhat unusual one for the goods (making no real allusion to the goods) as opposed to a suggestive or quasi descriptive word which one would expect to take more effort to secure a relevant goodwill.

53. I should also add that even if I am also wrong on the finding in the preceding paragraph, the use by Matrix Amplification Ltd would also have generated goodwill. If my decision is appealed then that company, given its clear relationship with Mr Hunt, may wish to consider making an application to be joined in order that its goodwill may also be relied upon in these proceedings. When such goodwill is taken into account in addition to that of Mr Hunt personally, there is in my view a clear existence of a more than trivial goodwill. I note Mr Kinton's counterstatement where he states that this company cannot rely on any goodwill because its adoption of the mark was improper. Based on the evidence, there is no reason to suggest that this is the case.

54. In terms of the goodwill, it is clearly associated with the sign MATRIX. This is the name by which the amps produced are known. This can clearly be seen not only from the labels provided by Mr Popham, but also from the message board entries and the *LSI Online* articles. I have borne in mind that Mr Hunt's pleading refers to the used sign as MATRIX AMPLIFICATION. This to my mind is not fatal. The word AMPLIFICATION is a pure descriptor. It is the word MATRIX that is the real subject of this dispute. I note that Mr Hunt states that MATRIX AMPLIFICATION is used, as does Mr Popham, but Mr Hunt gives no examples of use and those provided by Mr Popham are simply domain name indications used by the latest company which may not even have been from before the relevant date. That being said, for the reasons I have given, this does not matter.

Misrepresentation

55. The test for misrepresentation which was outlined by Morritt L.J. in *Neutrogena Corporation and Another v Golden Limited and Another*, 1996] RPC 473:

"There is no dispute as to what the correct legal principle is. As stated by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] R.P.C. 341 at page 407 the question on the issue of deception or confusion is

"is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents'[product]"

The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148 . The necessity for a substantial number is brought out also in *Saville Perfumery Ltd. v. June Perfect Ltd.* (1941) 58 R.P.C. 147 at page 175 ; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101."

And later in the same judgment:

“... for my part, I think that references, in this context, to “more than *de minimis* ” and “above a trivial level” are best avoided notwithstanding this court’s reference to the former in *University of London v. American University of London* (unreported 12 November 1993) . It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion.”

56. Mr Kinton’s trade mark is registered for the following goods:

Class 9: Loudspeakers; amplifiers; audio amplifiers; speaker management systems; loud speaker management systems; signal processors; signal processors for amplifiers; audio equipment; equipment for the reproduction of sound; parts and fittings for the aforesaid goods

57. Some of the goods (amplifiers; audio amplifiers) equate exactly to those sold by Mr Hunt’s business, or are broad terms (audio equipment; equipment for the reproduction of sound) which include such goods. Other goods (signal processors; signal processors for amplifiers) would appear to be very closely related to Mr Hunt’s amplifiers and will no doubt work in conjunction with them. There are also goods such as loudspeakers; speaker management systems; loud speaker management systems which have a key complementary role, a role where matched amps and loudspeakers may be of particular importance. This can be seen, for example, in the evidence of Mr Skan. Consequently, all of the goods are either identical or are highly similar, will be sold to the same types of people, through the same sales outlets. Mr Kinton’s mark is highly similar, visually, aurally and conceptually, to the sign associated with Mr Hunt’s goodwill. The only difference is that of the descriptive word AMPLIFICATION. As well as being distinctive of Mr Hunt’s business, the word MATRIX is also inherently distinctive. I consider it clear that if a consumer aware of Mr Hunt’s MATRIX amplifiers were to see the registered goods being sold under the trade mark MATRIX AMPLIFICATION, it is inevitable that they will believe that they are the responsibility of Mr Hunt’s business. I find the limb of misrepresentation to be satisfied.

Damage

58. Clearly, the prospect of Mr Kinton selling the same goods as Mr Hunt leads to the potential for a direct loss of sales. This is one of the clearest forms of damage possible. This may not apply to loudspeakers (and associated goods), however, damage can be wider than simply a loss of sales. In *Maslyukov v Diageo Distilling Ltd* Arnold J stated:

“85 Secondly, counsel submitted that the hearing officer had wrongly failed to recognise that damage resulting from Diegeo’s loss of control over the marks, including erosion of distinctiveness of the marks, was sufficient damage to sustain a passing off action, as shown by the following passage from McAlpine at [20] which the hearing officer himself quoted at para.128 of the decision:

“When it comes to considering damage, the law is not so naïve as to confine the damage to directly provable losses of sales, or ‘direct sale for sale substitution’. The law recognises that damage from wrongful association can be wider than that. Thus in *Ewing v Buttercup Margarine Ltd (1917)* 34 R.P.C. 232 Warrington L.J. said:

‘To induce the belief that my business is a branch of another man's business may do that other man damage in all kinds of ways. The quality of the goods I sell; the kind of business I do; the credit or otherwise which I might enjoy. All those things may immensely injure the other man, who is assumed wrongly to be associated with me.’

In so saying, he was not limiting the kinds of potential damage to those listed by him. Rather, he was indicating that the subtleties of the effect of passing off extend into effects that are more subtle than merely sales lost to a passing off competitor. In *Associated Newspapers Ltd v Express Newspapers [2003]* F.S.R. 909 at 929 Laddie J. cited this passage, referred to other cases and went on to say:

‘In all these cases [that is to say, the *Clock Ltd* case referred to above and *Harrods v Harrodian School [1996]* R.P.C. 679], direct sale for sale substitution is unlikely or impossible. Nevertheless the damage to the claimant can be substantial and invidious since the defendant's activities may remove from the claimant his ability to control and develop as he wishes the reputation in his mark. Thus, for a long time, the common law has protected a trader from the risk of false association as it has against the risk of more conventional goods for goods confusion.’

The same judge expressed himself more picturesquely, but equally helpfully, in *Irvine v Talksport Ltd [2002]* 1 W.L.R. 2355 at 2366. Having pointed out the more familiar, and easier, case of a defendant selling inferior goods in substitution for the claimant's and the consequential damage, he went on to say:

‘But goodwill will be protected even if there is no immediate damage in the above sense. For example, it has long been recognised that a defendant cannot avoid a finding of passing off by showing that his goods or services are of as good or better quality than the claimant's. In such a case, although the defendant may not damage the goodwill as such, what he does is damage the value of the goodwill to the claimant because, instead of benefiting from exclusive rights to his property, the latter now finds that someone else is squatting on it. It is for the owner of goodwill to maintain, raise or lower the quality of his reputation or decide who, if anyone, can use it alongside him. The ability to do that is compromised if another can use the reputation or goodwill without his permission and as he likes.’

Thus Fortnum and Mason is no more entitled to use the name FW Woolworth than FW Woolworth is entitled to use the name Fortnum and Mason ...' 'The law will vindicate the claimant's exclusive right to the reputation or goodwill. It will not allow others so to use goodwill as to reduce, blur or diminish its exclusivity.' (at 2368)

In *Taittinger SA v Allbev Ltd* [1994] 4 All ER 75 at 88, Peter Gibson L.J. acknowledged that:

'Erosion of the distinctiveness of the name champagne in this country is a form of damage to the goodwill of the business of the champagne houses.' The same view was expressed by Sir Thomas Bingham MR at 93."

59. To illustrate the point further, I note that in *WS Foster & Son Limited v Brooks Brothers UK Limited* [2013] EWPC 18, Mr Recorder Iain Purvis QC stated:

"Damage

55 Although proof of damage is an essential requirement of passing off cases, it will generally be presumed where a misrepresentation leading to a likelihood of deception has been established, since such deception will be likely to lead to loss of sales and/or more general damage to the exclusivity of the Claimant's unregistered mark. Mr Aikens accepted that if there was a misrepresentation in the present case, then he had no separate case on damage. I hold that damage is inevitable, at least in the sense recognised in *Sir Robert McAlpine v Alfred McAlpine* [2004] RPC 36 at 49 (the 'blurring, diminishing or erosion' of the distinctiveness of the mark)."

60. Therefore, even in relation to the goods which are not amplifiers, I consider the notional use of Mr Kinton's mark to have the potential to damage Mr Hunt's business in the types of ways indicated above. **The ground under section 5(4)(a) of the Act succeeds.**

Section 3(6) of the Act

61. I will firstly set out the relevant legislation and the leading case-law. Section 3(6) of the Act states that:

"A trade mark shall not be registered if or to the extent that the application is made in bad faith."

62. In *Red Bull GmbH v Sun Mark Ltd & Anr* [2012] EWHC 1929 and [2012] EWHC 2046 (Ch) ("Sun Mark") Arnold J summarised the general principles underpinning section 3(6) as follows:

"Bad faith: general principles

130 A number of general principles concerning bad faith for the purposes of section 3(6) of the 1994 Act/ Article 3(2)(d) of the Directive/ Article 52(1)(b) of

the Regulation are now fairly well established. (For a helpful discussion of many of these points, see N.M. Dawson, “Bad faith in European trade mark law” [2011] IPQ 229.)

131 First, the relevant date for assessing whether an application to register a trade mark was made in bad faith is the application date: see *Case C-529/07 Chocoladenfabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* [2009] ECR I-4893 at [35].

132 Secondly, although the relevant date is the application date, later evidence is relevant if it casts light backwards on the position as at the application date: see *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2009] EHC 3032 (Ch), [2009] RPC 9 at [167] and cf. *Case C-259/02 La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 at [31] and *Case C-192/03 Alcon Inc v OHIM* [2004] ECR I-8993 at [41].

133 Thirdly, a person is presumed to have acted in good faith unless the contrary is proved. An allegation of bad faith is a serious allegation which must be distinctly proved. The standard of proof is on the balance of probabilities but cogent evidence is required due to the seriousness of the allegation. It is not enough to prove facts which are also consistent with good faith: see *BRUTT Trade Marks* [2007] RPC 19 at [29], *von Rossum v Heinrich Mack Nachf. GmbH & Co KG* (Case R 336/207–2, OHIM Second Board of Appeal, 13 November 2007) at [22] and *Funke Kunststoffe GmbH v Astral Property Pty Ltd* (Case R 1621/2006-4, OHIM Fourth Board of Appeal, 21 December 2009) at [22].

134 Fourthly, bad faith includes not only dishonesty, but also “some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined”: see *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 at 379 and *DAAWAT Trade Mark* (Case C000659037/1, OHIM Cancellation Division, 28 June 2004) at [8].

135 Fifthly, section 3(6) of the 1994 Act, Article 3(2)(d) of the Directive and Article 52(1)(b) of the Regulation are intended to prevent abuse of the trade mark system: see *Melly's Trade Mark Application* [2008] RPC 20 at [51] and *CHOOSI Trade Mark* (Case R 633/2007-2, OHIM Second Board of Appeal, 29 February 2008) at [21]. As the case law makes clear, there are two main classes of abuse. The first concerns abuse vis-à-vis the relevant office, for example where the applicant knowingly supplies untrue or misleading information in support of his application; and the second concerns abuse vis-à-vis third parties: see *Cipriani* at [185].

136 Sixthly, in order to determine whether the applicant acted in bad faith, the tribunal must make an overall assessment, taking into account all the factors relevant to the particular case: see *Lindt v Hauswirth* at [37].

137 Seventhly, the tribunal must first ascertain what the defendant knew about the matters in question and then decide whether, in the light of that

knowledge, the defendant's conduct is dishonest (or otherwise falls short of the standards of acceptable commercial behaviour) judged by ordinary standards of honest people. The applicant's own standards of honesty (or acceptable commercial behaviour) are irrelevant to the enquiry: see *AJIT WEEKLY Trade Mark* [2006] RPC 25 at [35]-[41], *GERSON Trade Mark* (Case R 916/2004-1, OHIM First Board of Appeal, 4 June 2009) at [53] and *Campbell v Hughes* [2011] RPC 21 at [36].

138 Eighthly, consideration must be given to the applicant's intention. As the CJEU stated in *Lindt v Hauswirth*:

“41. ... in order to determine whether there was bad faith, consideration must also be given to the applicant's intention at the time when he files the application for registration.

42. It must be observed in that regard that, as the Advocate General states in point 58 of her Opinion, the applicant's intention at the relevant time is a subjective factor which must be determined by reference to the objective circumstances of the particular case.

43. Accordingly, the intention to prevent a third party from marketing a product may, in certain circumstances, be an element of bad faith on the part of the applicant.

44. That is in particular the case when it becomes apparent, subsequently, that the applicant applied for registration of a sign as a Community trade mark without intending to use it, his sole objective being to prevent a third party from entering the market.

45. In such a case, the mark does not fulfil its essential function, namely that of ensuring that the consumer or end-user can identify the origin of the product or service concerned by allowing him to distinguish that product or service from those of different origin, without any confusion (see, inter alia, Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 48).”

63. Whether the trade mark was applied for in bad faith must be assessed at a particular point in time. As stated in the *Sun Mark* case, the relevant date is the application date of the application to register the trade mark. The relevant date is 2 July 2010.

64. Mr Kinton clearly knew the basic history of the MATRIX business as I have set out above. In his evidence, he does not state whether or not he knew of Mr Hunt's sole trading (period vii) or the use by Matrix Amplification Limited (period viii). Mr Kinton states that when company 3559875 was liquidated he was left with a number of debts. He states, as I have touched on earlier, that Mr Hunt had indicated to him that he had no interest in manufacturing amplifiers so “I therefore felt justified in registering the Matrix Amplification trade mark”. However, nowhere in his evidence does Mr Kinton explain his plans for the mark. There is no evidence to show that any plans to use the mark have been made (let alone any use) despite the fact that

nearly four years had passed between Mr Kinton applying for the mark to Mr Hunt applying to invalidate it. Mr Sandiford highlighted at the hearing the fact that Mr Kinton applied for his mark six months after Mr Hunt incorporated Matrix Amplification Limited. It was argued that Mr Kinton must have got wind of this which led him to make the application.

65. Based on the evidence before me, I agree with Mr Sandiford that Mr Kinton applied for his mark in the knowledge of the new company being set up by Mr Hunt. I also take the view that Mr Kinton's application was motivated not by a genuine intention to use the mark himself, but more by some form of blocking registration to prevent Mr Hunt's new company from registering it. This is something that will be viewed as falling below the standards of acceptable commercial behaviour and should be regarded as an act of bad faith. **The ground under section 3(6) of the Act succeeds.**

Costs

66. Mr Hunt has been successful and is entitled to a contribution towards his costs. The one point on costs raised by Mr Sandiford was that the hearing that took place was requested by Mr Kinton, who ultimately did not attend. Mr Sandiford submitted that had he been informed earlier that Mr Kinton no longer wished to be heard then Mr Hunt may have elected to just file written submissions. I think there is some force in this argument, not so much that I will go above the published scale, but sufficient force to make the award for attending the hearing at the higher end of the scale. I award costs on the follow basis:

Official Fee - £200

Preparing statements and considering the other side's statements - £400

Filing and considering evidence - £1000

Attending the hearing - £700

Total - £2300

67. I therefore order Mr Kinton to pay Mr Hunt the sum of £2300. This should be paid within 14 days of the expiry of the appeal period or within 14 days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 7th day of July 2015

**Oliver Morris
For the Registrar,
The Comptroller-General**