

O/491/18

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION NO. 3251104 BY
SHENZHEN KEAN DIGITAL CO LTD
TO REGISTER:**

ANNKE

AS A TRADE MARK IN CLASS 9

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 600000797 BY
ANKER TECHNOLOGY CO LIMITED**

Background and pleadings

1. Shenzhen Kean Digital Co Ltd (“the applicant”) applied to register the trade mark ANNKE in the UK on 17 August 2017. It was accepted and published in the Trade Marks Journal on 3 November 2017 in respect of the following goods proper to Class 9:

Monitoring apparatus, electric; Camcorders; Materials for electricity mains [wires, cables]; Anti-theft warning apparatus; Locks, electric; Electric door bells; Batteries, electric; Monitors [computer hardware]; Bells [warning devices]; Video recorders; Electrical adapters; Switches, electric.

2. On 5 February 2018, the application was opposed under the fast track opposition procedure by Anker Technology Co. Limited (“the opponent”). The opposition is based upon Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), with the opponent relying upon two earlier EU Trade Mark registrations:

- No. 16662355 which has an application date of 28 April 2017 and registration date of 11 October 2017. It is registered for the following goods in Class 9:

Power banks; batteries and battery chargers; battery cases; battery charge devices; battery jump starters; power supply for use with electronic devices, namely mobile phones, digital audio and video players, handheld computers, tablet computers, ebook readers, personal digital assistants, electronic organizers, electronic notepads, and cameras; solar panels; network hubs; usb hubs; electrical sockets; electric plugs; power strips; electric switches; power switches; electric charging cables; data cables; audio cables; mobile phone cases; display screen protectors; car mounts, namely electronic device holders adapted for use in cars; laptop stands; keyboards; keyboard cases; mouse; headphones; earbuds; speakers; wireless speakers; home theatre systems; audio transmitter units; voice control devices.

The trade mark is shown below:



- No. 15812101 which has an application date of 6 September 2016 and registration date of 16 February 2017. It is registered for the following goods:

Class 7

Vacuum cleaners; robotic cleaner (robotic vacuum cleaner, robotic window cleaner, robotic floor cleaner, robotic carpet cleaner); steam mop; blender; juicer; electrical coffee grinder; food processor.

Class 8

Electric irons.

Class 9

Webcams; IP (internet protocol) cameras; sports cameras; video door bells; thermostats; carbon monoxide detectors; projectors; cube camera; pan/tilt camera; smoke detectors; baby monitors; battery camera; fisheye camera; outdoor camera; fire alarms; door/window sensors; motion sensors; flood sensors.

Class 11

LED lamps; lights, oil diffuser (aroma diffuser), humidifier, garment steamer (fabric steamer); air purifier; Coffee machine (Coffee maker, Espresso machine, percolator, moka pot, capsule coffee machine); sous vide immersion circulator cooker; sous vide water oven; dehumidifier

The trade mark is the word mark ANKER.

3. The opponent is relying on all goods covered by the two trade marks.

4. The opponent argues that the mark of the application is similar to the earlier marks, and the goods covered are identical with or similar to the goods covered by the earlier marks. The opponent claims that there is therefore a likelihood of confusion.
5. The applicant denies the opponent's claims and sets out in detail the differences it sees between the marks. I shall consider these in due course.
6. In these proceedings, the opponent is represented by Harrison IP Limited and the applicant is represented by London IP Limited.
7. Rule 6 of the Trade Marks (Fast Track Opposition)(Amendment) Rules 2013, S.I. 2013/2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.
8. The net effect of these changes is to require parties to seek leave in order to file evidence in fast track oppositions. No leave was sought in respect of these proceedings.
9. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary. Neither party made written submissions.

Decision

10. Section 5(2)(b) of the Act states that:

A trade mark shall not be registered if because -

...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.

11. An “earlier trade mark” is defined in section 6(1) of the Act:

In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

12. The registrations upon which the opponent relies qualify as earlier trade marks under the above provision. As these earlier marks were registered within the five years before the date on which the applicant’s mark was published, they are not subject to proof of use. The opponent is therefore entitled to rely upon them for all the goods for which they stand registered.

Case law

13. The following principles are gleaned from the decisions of the courts of the European Union in *Sabel BV v Puma AG* (Case C-251/95), *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* (Case C-39/97), *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v OHIM* (Case C-3/03), *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* (Case C-120/04), *Shaker di L. Laudato & C. Sas v OHIM* (Case C-334/05P) and *Bimbo SA v OHIM* (Case C-591/12P):

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

14. The opponent has claimed that the applicant’s mark is identical or similar to goods for which its earlier mark is protected. In its statement of grounds, it highlighted the competing goods that are shown in the table below:

The opponent’s goods	The applicant’s goods
EU 16662355: Power banks; batteries and battery chargers; battery cases; battery charge devices; battery jump starters; power supply for use with electronic devices, namely mobile phones, digital audio and video players, handheld computers, tablet computers, ebook readers, personal digital assistants, electronic organizers, electronic notepads, and cameras; solar panels; network hubs; usb hubs; electrical sockets; electric plugs; power strips; electric switches; power switches; electric charging cables; data cables; audio cables; mobile phone cases; display screen protectors; car mounts, namely electronic device	Monitoring apparatus, electric; Camcorders; Materials for electricity mains [wires, cables]; Anti-theft warning apparatus; Locks, electric; Electric door bells; Batteries, electric; Monitors [computer hardware]; Bells [warning devices]; Video recorders; Electrical adapters; Switches, electric.

<p>holders adapted for use in cars; laptop stands; keyboards; keyboard cases; mouse; headphones; earbuds; speakers; wireless speakers; home theatre systems; audio transmitter units; voice control devices.</p> <p>EU 15812101: Webcams; IP (internet protocol) cameras; sports cameras; video door bells; thermostats; carbon monoxide detectors; projectors; cube camera; pan/tilt camera; smoke detectors; baby monitors; battery camera; fisheye camera; outdoor camera; fire alarms; door/window sensors; motion sensors; flood sensors.</p>	
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15. This is a long list, covering a wide range of products. The opponent commented that all the goods are electrical or technology products:

All the goods can be produced by the same companies, sold in the same outlets, via the same trade channels, and have the same consumers. The average consumer would expect all these goods to originate from one undertaking.

16. It is possible to identify straight away some goods that are identical:

The opponent's goods	The applicant's goods
Batteries and battery chargers	Batteries, electric
Electric switches	Switches, electric

These are both covered by EU 1662355.

17. When making the comparison of the rest of the goods, all relevant factors relating to the goods in the specifications should be taken into account, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer* C-397/97.
18. Guidance on this issue has come from Jacob J in *British Sugar Plc v James Robertson & Sons Limited ("Treat")* [1996] RPC 281, where the following factors were highlighted as being relevant when making the comparison:
- (a) The respective uses of the respective goods or services;
 - (b) The respective users of the respective goods or services;
 - (c) The physical nature of the goods or acts of service;
 - (d) The respective trade channels through which the goods or services reach the market;
 - (e) In the case of self-serve consumer items, where in practice they are respectively found, or likely to be found, in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
 - (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.
19. In comparing the goods, I have also considered the meaning of the expressions used in the specifications, following the comments of Floyd J in *YouView TV Ltd v Total Ltd* [2012] EWHC 3158:
- ... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks)* (IP

TRANSLATOR) [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.

20. Goods that are not worded identically may still be considered identical if one term is encompassed by a more general term used in the specification of the earlier mark, or vice versa, as set out by the General Court in *Gérard Meric v OHIM* T-133/05:

In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM (Educational Services (ELS))* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.¹

21. As I have noted in paragraph 8, neither party sought leave to submit evidence as to the similarity, or otherwise, of the respective goods. In *Canon Kabushiki Kaisa*, the Court of Justice of the European Union (CJEU) stated:

It is, however, important to stress that, for the purposes of applying Article 4(1)(b), even where a mark is identical to another with a highly distinctive character, it is still necessary to adduce evidence of similarity between the goods or services covered.²

¹ Paragraph 29

² Paragraph 22

22. It may be that the nature of the goods is so well-known that such evidence is superfluous. I recall the comments of Mr Geoffrey Hobbs QC (sitting as the Appointed Person) in *Raleigh International trade mark* [2001] RPC 11:

If the goods or services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered, the objection should be supported by evidence as to their “similarity” (whether or not the objective is directed to the use of an identical mark).

23. Bearing these comments in mind, and following the guidance in the case-law referred to above, I have considered the remaining goods contained in the applicant’s specification against those in the opponent’s specification to see whether I can identify anything that is self-evidently similar. My findings are set out in the table below:

Applicant’s term and my finding	Analysis
Monitoring apparatus, electric Identical (EU 15812101)	The opponent has in its specification the term “baby monitors”. The applicant’s term is broader and I have construed it in line with what is, in my view, its ordinary and natural meaning, i.e. electrical equipment that is used for monitoring. The applicant has not placed any limitations on this term. Following <i>Meric</i> , I find that the broader term “monitoring apparatus, electric” encompasses “baby monitors” and consequently the goods are identical.
Camcorders Highly similar (EU 15812101)	The opponent’s specification includes the terms “sports cameras” and “cube camera”. These have similar uses to a camcorder, in that they are all portable devices for recording moving images and sound. They have the same users (the general public) and are sold through the same trade channels (shops selling electrical goods, department stores) both physically and online. Their nature is the same and there is a

	<p>degree of competition between cube cameras and camcorders. This is not the case with sports cameras which are designed to be attached to the person or equipment in a way that is not possible for a camcorder. I find that there is a high degree of similarity between camcorders and cube cameras.</p>
<p>Materials for electricity mains [wires, cables]</p> <p>A low degree of similarity (EU 16662355)</p>	<p>In my view, the natural and ordinary meaning of the term in the applicant’s specification is the wires and cables that are used to enable electricity to enter a building from the mains supply. Having gone through the opponent’s specification, I find that the nearest comparison is with the term “electric charging cables”, which transmit electric current to a device to recharge its battery. While the general public uses charging cables, they are highly unlikely to use materials for electricity mains, which will be used by businesses and tradespeople. The trade channels are likely to be different too. The nature of the goods is similar. I find that these goods are similar to a low degree.</p> <p>Electrical sockets (also covered by EU 16662355) are used with materials for electricity mains as part of a system to transmit electric current. They can be used by professionals or by the general public, as it is relatively straightforward to replace a socket and people can choose to do this when redecorating a room. The products are not in competition and are likely to have different channels. Consequently, I find they also have a low degree of similarity to wires and cables for electricity mains.</p>
<p>Anti-theft warning apparatus</p>	<p>The opponent’s specification contains terms that refer to warning devices (“carbon monoxide detectors”, “smoke detectors”, “fire alarms”). In my view, “anti-theft warning apparatus” refers to devices that draw people’s attention to an</p>

<p>Similar (EU 15812101)</p>	<p>attempt to steal the property. These are goods that I found to be specialist in nature, but that may also be purchased by members of the public. Fire alarms are more likely than smoke detectors or carbon monoxide detectors to all within this category. The latter are more readily available for DIY installation. Fire alarms are not competitive or complementary, but have the same uses and users as anti-theft warning devices. I find them to be similar, although not to a high degree.</p> <p>I have also considered whether motion sensors are similar goods. They may be part of some anti-theft warning apparatus. However, this does not in itself indicate similarity (see <i>Les Éditions Albert René v OHIM</i>, T-336/03, paragraph 61). Motion sensors have a variety of uses, such as automatic doors or automated lighting controls. I find that motion sensors are not as similar as fire alarms.</p>
<p>Locks, electric</p> <p>No similarity</p>	<p>The applicant denies the opponent's claim that "Locks, electric" are identical or similar to the goods covered by the opponent's earlier marks. I have gone through the opponent's specification and can find nothing similar.</p>
<p>Electric door bells</p> <p>Identical (EU 15812101)</p>	<p>Bearing in mind the case law outlined above and the importance of construing terms in line with the ordinary and natural meaning of the words, it seems to me that the term "electric door bells" includes "video door bells". Video door bells require electricity in some form (whether mains or battery). Following <i>Meric</i>, I find that these goods are identical.</p>
<p>Monitors [computer hardware]</p>	<p>Both monitors and webcams are accessories for desktop computers. The users are the same and they are complementary. The users who will need to purchase a</p>

<p>Similar (EU 15812101)</p>	<p>webcam to talk to other users are those who don't have the facility already integrated into their computer (as in a laptop). Such users will also need a monitor to be able to use the webcam successfully. It is possible that the average consumer would think that both these goods were produced by the same, or related, undertakings. I find that they are moderately similar.</p>
<p>Bells [warning devices]</p> <p>Similar (EU 15812101)</p>	<p>I have already noted that the opponent's specification includes types of warning devices ("carbon monoxide detectors", "smoke detectors" and "fire alarms"). These devices contain audible alerts so that users can take appropriate action in a dangerous situation. However, the detectors and alarms contain other components that monitor the temperature or the atmosphere and trigger an alert when a certain level has been reached. In my view, there are differences in their nature, but given that they have similar uses, users and trade channels, I find that "bells [warning devices]" are moderately similar to "fire alarms", "carbon monoxide detectors" and "smoke detectors".</p>
<p>Video recorders</p> <p>Similar (EM 15812101)</p>	<p>A video recorder is a device for recording and playing back moving images. It will be connected to other devices, such as a television, or cameras or webcams that capture the images. It is sold by electrical goods stores, department stores and specialist retailers, both physically and online. The same trade channels are also used for the camera-related terms in the opponent's specification, whether from a consumer perspective (sports camera, webcam) or a security perspective (pan/tilt camera, outdoor camera). The goods are not in competition, but they are complementary, as a device is needed for capturing the images. I find that video recorders are moderately similar to the cameras listed in the opponent's specification.</p>

<p>Electrical adapters</p> <p>Highly Similar (EU 16662355)</p>	<p>“Electrical adapters” are devices that regulate the voltage of an electrical supply, for example to enable a low-voltage consumer appliance to use mains electricity. In my view, they are highly similar to “electric plugs”, which are also devices for enabling an electrical appliance to work. They have the same users (the general public) and the same trade channels (electrical stores, hardware stores, internet suppliers).</p>
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24. As shown above, the following goods were found to be not similar to anything in the opponent’s specification. For there to be a finding of confusion under section 5(2)(b), there must be similarity or identity between the respective goods. Therefore, the opposition is dismissed in so far as it relates to:

Locks, electric.

The average consumer

25. Having compared the goods, I shall now consider the average consumer. In *Hearst Holdings Inc & anr v A.V.E.L.A & ors* [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.³

26. I have already noted the diversity of the goods listed in the applicant’s specification. It is, I think, fair to say that the average consumer will not be the

³ Paragraph 60.

same for all of them. Some of the goods, are, in my view, specialist products where the average consumer will be a skilled tradesperson or business:

Materials for electricity mains [wires, cables]

Other goods can be said to be specialist in nature, but may also be purchased by members of the public who, in this example, wish to protect people's lives or their property:

Monitoring apparatus, electric; Anti-theft warning apparatus; Locks, electric; Bells [warning devices]

Finally, there are goods that could be purchased and used either by a member of the public or by a business:

Camcorders; Electric door bells; Batteries, electric; Monitors [computer hardware]; Video recorders; Electrical adapters; Switches, electric.

27. While the average consumer is reasonably observant and circumspect, the degree of care and attention that they pay can change depending on the particular goods and/or services in question. It seems to me that the specialist goods (materials for electricity mains) are ones where the average consumer would display a higher degree of care and attention than the norm. While the goods are likely to be purchased regularly and may not necessarily be high cost items, in my view considerations of safety are likely to be prominent in the average consumer's mind. Such considerations would tend to increase the level of care and attention paid during the purchasing process.
28. For the remainder of the goods, the levels of care and attention are likely to vary, depending on factors such as frequency of purchase and price of the item. Apart from batteries, all seem to me to be infrequent purchases, with electric switches and electrical adapters being at the relatively inexpensive end of a price scale, and anti-theft warning apparatus, monitoring apparatus and electric locks being relatively costly.

29. Turning to the manner of purchase, it seems reasonable to take the view that the selection process could involve research on the internet, browsing through trade publications or catalogues, or even, particularly in relation to the third category of goods, picking an item from a shelf in a retail environment. This suggests that visual considerations will be more significant, but the possibility of word-of-mouth recommendations or orders made via a telephone means that aural similarity should not be ignored.
30. The opponent's goods are also diverse. None of the goods strike me as ones that are likely to be purchased solely by specialists. The following goods in Class 9 are, in my view, specialist in nature but may be purchased by the general public:

IP (internet protocol) cameras; pan/tilt cameras; fisheye camera; outdoor camera; fire alarms; door/window sensors; motion sensors; flood sensors.

The remainder of the goods in the opponent's specification may be purchased by a member of the public or by a business. These range widely in cost and frequency of purchase. For example, a cube camera would be an infrequent and relatively costly item, while electric plugs would be relatively inexpensive.

Comparison of marks


31. It is clear from *Sabel BV v. Puma AG* C-251/95 (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union (CJEU) stated in *Bimbo SA v OHIM* C-591/12P that:

...it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight

in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.⁴

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

33. The respective marks are shown below:

Opponent's marks	Applicant's mark
 <p>(EU 16662355)</p> <p>ANKER</p> <p>(EU 15812101)</p>	ANNKE

34. The applicant's mark consists of the word "ANNKE". The word is in a standard font with no stylisation and is presented in capital letters.⁵ The overall impression of the contested mark rests in just that word.

⁴ Paragraph 34

⁵ Registration of a trade mark in capital letters covers use in lower case, as stated by Professor Ruth Annand, sitting as the Appointed Person, in *Bentley Motors Limited v Bentley 1962 Limited*, BL O/158/17.

35. The opponent's mark EU 15812101 also consists of one word "ANKER" in a standard font with no stylisation and is presented in capital letters. The overall impression of the contested mark rests in just that word.
36. I shall now turn to EU 16662355. The applicant claims that this mark does not give the impression of the word "ANKER":

If anything, the word is "NKER" which itself is very different from the Applicant mark. The initial element of the logo does not have a bar across creating the letter "A". In fact, it appears as an upturned letter "V" encompassing a vertical lighting strike running down its centre which (taking account of the purpose of the Applicant's goods and its "*charging technology*" field of activity), is likely intended to represent an encased electrical charge.

It is also questionable as to whether the letter following the letter "N" in the opposing logo is in fact a letter "K". The two outward projecting prongs, or at least single such prong from which the second emerges, traditionally emanate from the centre point of the vertical backline in a letter "K". In this instance, however, with the join of the vertical backline and projecting arm being at "floor" level, the third element of the logo appears more as the letter "V" or even a "tick" sign with the projecting right arm longer and slanting over a short backward "slash" element and pointing towards the following letter "E". The short backward slash could be viewed as dividing the "NV" from the "ER" suffix, further detracting from an appearance or prominence of a word "ANKER".

37. In paragraph 31 above, I referred to the CJEU's statement in *Sabel BV v Puma AG* that the average consumer perceives a mark as a whole and does not proceed to analyse its various details. I consider it unlikely that the average consumer would think about the elements of the opponent's mark in the minute detail set out by the applicant.
38. In my view, the overall impression of this mark is the word "ANKER". The first element of this word is, as the applicant notes, an upturned letter "V" with a vertical

lightning strike. It seems to me that the average consumer will perceive this as a letter “A”. The lightning strike apart, it is in the same style as the other letters and I see nothing to suggest that it should be considered purely as a device. I also think that the middle letter is likely to be seen as a “K”. It is in the nature of a stylised font that a letter may not fully resemble the way it is traditionally presented. Consequently, I find that the average consumer, on viewing this trade mark, would take from it the word “ANKER”.

39. In terms of a visual comparison, the applicant’s mark consists of letters found in the opponent’s mark. The difference is that the applicant’s mark contains an additional “N” towards the beginning of the word and does not end in an “R”, as the opponent’s mark does. The words are the same length. There is, in my view, a high degree of visual similarity between the applicant’s mark and the opponent’s mark EU 15812101.

40. The opponent’s mark EU 16662355 contains a figurative element, with the lightning device, and the letters are in a stylised font. As I have already found, the word is the same as the word used in EU 15812101. Weighing the similarities and differences, and bearing in mind my assessment of the overall impression of the marks, I consider there to be a medium degree of visual similarity between the applicant’s mark and the opponent’s mark EU 16662355.

41. Both parties made comments on the conceptual aspects of the marks. The opponent stated that “Conceptually, all three marks bring to mind the word Anchor”.

42. The applicant stated that:

“Anker” is a known and recognised dictionary word in the English language meaning:

- a unit of measurement of spirits or wine, used in various countries and formerly in England, where it was equivalent to gallons;
- a drum or barrel that contains or can contain the amount of an anker

[Collins English Dictionary, Copyright © HarperCollins Publishers).

“Annke”, on the other hand, is not a dictionary or recognised word and it has no meaning in the English language. These facts distinguish it immediately from the opposing “ANKER” marks. It is submitted that ANNKE immediately strikes and conveys the impression to the average English speaking reader, and likely also the average UK consumer generally, as being a foreign (e.g. German or Dutch) or invented word, or a variation or possible “*pet*” (as in “affectionate”) name equivalent of the English female name “Ann”, none of these impressions being conjured [sic] up and/or conveyed by the word “ANKER”.

43. I shall deal first with “ANKER”. The average consumer is, in my view, unlikely to be aware of the use of the word quoted by the applicant. The dictionary definition supplied states that it is no longer in everyday usage. It is possible that they might make a connection with “anchor”, but in my view it is more likely they will think the word is invented. The average consumer is more likely to be encountering the mark visually than aurally. They will not necessarily articulate the word as they browse through catalogues or the internet. The mark EM 16662355 contains a device which appears to be a lightning strike. This is a commonly used symbol for electricity and can be found, for example, on warning signs.
44. Now I shall consider “ANNKE”. It seems to me that the average UK consumer is likely to think this is also an invented word. Adding “-KE” to make an affectionate name is not usual in English and the average consumer is unlikely to be sufficiently familiar with the patterns of foreign languages to assume that it is a foreign word. I find that “ANNKE” is conceptually neutral. Consequently, there is no conceptual similarity between the contested and the earlier marks.
45. I now come to the aural comparison. The opponent claims that the marks are phonetically the same and would be pronounced as the English word “anchor” (AN-KER). This claim is denied by the applicant, who states:

Whilst it is agreed that an English speaker (raised) in the UK, and quite likely the average UK consumer generally, are likely to pronounce the opposing mark ANKER in a phonetically same or similar way to the English word “anchor”, such persons would not have any idea how to correctly pronounce the non-English language/likely perceived invented word “ANNKE”, and are just as likely to pronounce it as if “ANNKEY” or “ANNKAY”.

I note that both parties are agreed on the likely pronunciation of the opponent’s marks.

46. Turning to the applicant’s mark, it is very unusual in English to end a word with a consonant followed by “-KE”. I consider it reasonable to say that the average consumer would not be sure of the correct pronunciation, but I am not convinced that they are likely to say “ANNKEY” or “ANNKAY”. If I am right that the average consumer will perceive the word as invented, in my view it is more likely that the word would be pronounced with the final syllable not a diphthong but unstressed, and therefore a neutral sound as in the final syllable of “SOFA” or “COLOUR”. In this case, I find that there is a high degree of aural similarity between the marks.

47. If I am wrong and the word would be pronounced in either of the ways suggested by the applicant, I would still find similarity, although to a lesser degree. The first syllable (AN-) and beginning of the second syllable (K) of the words are phonetically the same.

Distinctive character of the earlier trade marks

48. Having compared the marks, it is necessary to determine the distinctive character of the earlier mark, in order to make an assessment of the likelihood of confusion. In *Lloyd Schuhfabrik Meyer*, the CJEU stated that:

In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular

undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).⁶

49. The opponent has not filed any evidence to show that it has used its mark, so I must consider only the question of inherent distinctiveness. In doing so, I have considered the guidance given by Iain Purvis QC, acting as the Appointed Person, in *Kurt Geiger v A-List Corporate Limited* BL O-075/13:

It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.

In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask “in what does the distinctive character of the earlier mark lie?” Only after that has been done can a proper assessment of the likelihood of confusion be carried out.⁷

⁶ Paragraphs 22-23

⁷ Paragraphs 39-40

50. I found that the average consumer would consider that “ANKER” is an invented word that does not allude to the goods listed in the opponent’s specifications. Consequently, I find that the word mark (EU 15812101) has high distinctiveness. Even if the average consumer would associate the mark with “anchor”, the mark would still, in my view, have a medium level of distinctiveness as it does not allude to the goods in question.
51. The mark EU 16662355 contains a lightning device which, in my view, alludes to electricity. Some of the goods covered by the specification are devices for storing, transmitting or transforming electric current. Earlier in the decision, I found that the word “Anker” was the more significant contributor to the overall impression of the mark. Weighing up these factors, I find that this mark has a medium level of distinctiveness.

Conclusions on likelihood of confusion

52. I have so far considered the factors that need to be taken into account when assessing the likelihood of confusion and now come to a global assessment. As the CJEU stated in *Canon Kabushiki Kaisa*:

A global assessment of the likelihood of confusion implies some interdependence between the relevant factors, and in particular a similarity between the trade marks and between these goods or services. Accordingly, a lesser degree of similarity between these goods or services may be offset by a greater degree of similarity between the marks, and vice versa. The interdependence of these factors is expressly mentioned in the tenth recital of the preamble to the Directive, which states that it is indispensable to give an interpretation of the concept of similarity in relation to the likelihood of confusion, the appreciation of which depends, in particular, on the recognition of the trade mark on the market and the degree of similarity between the mark and the sign and between the goods or services identified.⁸

⁸ Paragraph 17

53. In its counterstatement, the applicant states that both companies have marketed the goods in question under the respective marks in the UK and that “to the best of our knowledge, there have been no reported incidences of public/customer confusion”. As I have noted several times, neither party has submitted evidence in these proceedings and so I can take no account of this statement.

54. I shall deal first with EU 16662355, the first of the marks that the opponent called upon to support its opposition. I recall that I found there to be a medium degree of similarity between this mark and the applicant’s mark. For convenience, I note again the goods that are being assessed:

Opponent’s Goods	Applicant’s Goods
Batteries and battery chargers	Batteries, electric
Electric plugs	Electrical adapters
Electric switches	Switches, electric
Electric charging cables	Materials for electricity mains [wires, cables]

55. I found that the first three of these goods were ones that could be purchased by the general public and by tradespeople and businesses. They are all relatively inexpensive and so the level of attention being paid is likely to be no more than average. “Batteries, electric” and “switches, electric” I found to be identical to “Batteries and battery chargers” and “electric switches” respectively. In my view, the average consumer’s imperfect recollection of the marks means that there is likely to be direct confusion between the marks in relation to these goods.

56. I found that “electrical adapters” and “electric plugs” were highly similar goods. Again, these are not costly items and the average consumer will not be paying a high level of attention. They can be said to be complementary, as the adapters will require a plug in order to be connected to the electricity supply via a socket. The average consumer could reasonably assume that they are produced by the same,

or related, undertakings. Given the similarity I found between the marks, in my view there is likely to be confusion.

57. Confusion is not, it seems to me, likely between the marks applied to materials for electricity mains and electric charging cables. These products have different consumers, with the former being bought by electricians and other specialist businesses or tradespeople. I recall that I considered that the purchasers would be paying a greater deal of attention, given the importance of safety concerns in the supply and installation of these goods. The uses, users and trade channels are sufficiently different, in my view for there to be no likelihood of confusion here.
58. Seven of the terms in the applicant’s specification are most similar to terms in the specification for EU 15821201. I recall that I found there to be a high degree of similarity between this mark and the applicant’s mark. Again, for convenience, these are set out below:

Opponent’s Goods	Applicant’s Goods
Webcams	Monitors [computer hardware]
IP (internet protocol) cameras; sports cameras; cube camera; pan/tilt camera; fisheye camera; outdoor camera	Video recorders
Video door bells	Electric door bells
Carbon monoxide detectors; smoke detectors; fire alarms	Bells [warning devices]
Cube camera	Camcorders
Baby monitors	Monitoring apparatus, electric
Fire alarms	Anti-theft warning apparatus

59. I found that “baby monitors” and “monitoring apparatus, electric” were identical terms, as per *Méric*, as were “video door bells” and “electric door bells”. The similarity of the marks leads me to find that there is likelihood of confusion for these goods.

60. The next most similar goods comparison is, in my view, cube cameras and camcorders. They have the same uses, users, nature and trade channels and, as with the goods above, are purchased by the general public as well as businesses and specialists. They are also in competition with each other. The purchasing process will involve an average amount of care and attention: these are relatively costly items and are not frequently purchased. Taking into account the similarity of the marks and imperfect recollection, I find that there is likelihood of confusion for these goods.

61. Next, I come to goods which I found to be moderately similar:

*Video recorders and IP (internet protocol) cameras; sports cameras; cube camera; pan/tilt camera; fisheye camera; outdoor camera
Monitors [computer hardware] and Webcams*

These are complementary goods and it seems to me that the average consumer would find it plausible that the same, or related, undertaking that had produced cameras had also produced a video recorder. The same argument applies, in my view, to computer monitors and webcams. The average consumer is less likely to see these goods side-by-side as they are not in competition with each other. In my view, imperfect recollection will come into play and so I find there is likelihood of confusion with regard to these goods.

62. What remains for me to assess are the goods that I found to be specialist in nature but that could be purchased by members of the general public. These are:

*Bells [warning devices] and Carbon monoxide detectors; smoke detectors; fire alarms
Anti-theft warning apparatus and fire alarms.*

In my view, these goods were similar to a lesser degree than the ones I have considered in the above paragraphs 59-61. When the average consumer is purchasing warning bells, smoke detectors, carbon monoxide detectors, fire alarms and anti-theft warning devices, they are likely to be paying above average

care and attention. These goods are intended to protect life and property. I found that there were some areas of difference between the goods, both in terms of their specific uses and their physical nature. They are also not in competition with each other.

63. I have considered the principle of interdependency, as stated by the CJEU and quoted in paragraph 52 above. I found the marks to be highly similar, particularly visually, which I considered to be the main way in which the average consumer would encounter them. While imperfect recollection may not be as strong a factor in these circumstances, it cannot be completely discounted. Weighing all these considerations, I find there is a likelihood of confusion.

64. The opposition succeeds under section 5(2)(b) of the Act in respect of the following goods: monitoring apparatus, electric; camcorders; anti-theft warning apparatus; electric door bells; batteries, electric; monitors [computer hardware]; bells [warning devices]; video recorders; electrical adapters; switches, electric.

65. The opposition fails under section 5(2)(b) of the Act in respect of the following goods: Materials for electricity mains [wires, cables]; locks, electric.

Conclusion

66. The opposition has been partially successful. The application will be refused in respect of the following goods in Class 9:

Monitoring apparatus, electric; Camcorders; Anti-theft warning apparatus; Electric door bells; Batteries, electric; Monitors [computer hardware]; Bells [warning devices]; Video recorders; Electrical adapters; Switches, electric.

67. It can proceed to registration in respect of the following goods in Class 9:

Materials for electricity mains [wires, cables]; Locks, electric.

Costs

68. Both parties have achieved a measure of success, with the opponent succeeding on a higher proportion of goods. In the circumstances I make an award to the opponent of a contribution towards its costs. Awards of costs in proceedings commenced on or after 1 July 2016 are governed by Tribunal Practice Notice (TPN) 2/2016. For fast track opposition proceedings, costs are capped at £500, excluding the official fee.⁹ I have awarded £175 as a contribution towards the cost of preparing the statement and considering the other side's statement. The breakdown of the award is as follows:

Official fee - £100

Preparing a statement and considering the other side's statement – £175

Total: £275

69. I therefore order Shenzhen Kean Digital Co Ltd to pay Anker Technology Co., Limited the sum of £275. The above sum should be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

Dated this 8th day of August 2018

Clare Boucher
For the Registrar,
The Comptroller-General

⁹ TPN 2/2015.