

BL O/395/20

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION 3418443

BY OMARCO NETWORK SOLUTIONS LIMITED

**TO REGISTER THE FOLLOWING SERIES OF THREE TRADE MARKS IN
CLASSES 9, 16, 38, 41:**

KNOCK KNOCK OMARCO

NOK NOK OMARCO

NOC NOC OMARCO

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BY OMARCO NETWORK SOLUTIONS LIMITED
TO REGISTER THE FOLLOWING SERIES OF THREE TRADE MARKS IN
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- 1) KNOCK KNOCK OMARCO
- 2) NOK NOK OMARCO
- 3) NOC NOC OMARCO

Background

1. On the 2 August 2019, Omarco Network Solutions Limited ("the applicant") applied to register the above series of three marks for the following goods and services:

Class 9

Apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data relating to draws, prize draws, free prize draws and competitions; recorded and downloadable media; recorded and downloadable media relating to draws, prize draws, free prize draws and competitions; computer software and computer programs relating to or featuring entertainment, investment, charity or cultural activities; computer software and computer programs relating to or featuring entertainment, investment, charity or cultural activities relating to draws, prize draws, free prize draws and competitions; downloadable electronic publications; downloadable electronic publications relating to draws, prize draws, free prize draws and competitions; downloadable electronic tokens, tickets and vouchers; downloadable electronic tokens, tickets and vouchers relating to draws, prize draws, free prize draws and competitions; electronic bulletin boards; electronic bulletin boards relating to draws, prize draws, free prize draws and competitions; installations for the transmission of data and information; installations for the transmission of data and information relating to draws, prize draws, free prize draws and competitions.

Class 16

Printed matter relating to entertainment, investment, charity or cultural activities; printed matter concerning entertainment, investment, charity or cultural activities relating to draws, prize draws, free prize draws and competitions; tokens, tickets, vouchers, diaries, calendars, stationery, books, programmes, magazines, periodicals, newsletters and instructional and teaching materials; tokens, tickets, vouchers, diaries, calendars, stationery, books, programmes, magazines, periodicals, newsletters and instructional and teaching materials relating to draws, prize draws, free prize draws and competitions.

Class 38

Providing access to multiple user network systems allowing access to entertainment, investment, charity or cultural information and services over the Internet and other global networks; providing access to multiple user network systems allowing access to entertainment, investment, charity or cultural information and services relating to draws, prize draws, free prize draws and competitions over the Internet and other global networks.

Class 41

Entertainment services; entertainment services relating to draws, prize draws, free prize draws and competitions; cultural activities; cultural activities relating to draws, prize draws, free prize draws and competitions; provision of information relating to entertainment, investment or charity or cultural activities; provision of information relating to entertainment, investment or charity or cultural activities relating to draws, prize draws, free prize draws and competitions; organization and conducting draws, prize draws, free prize draws and competitions.

2. On 9 August 2019, the Intellectual Property Office (“IPO”) issued an examination report in response to the application. In that report the following objection was raised under section 41(2) of the Trade Marks Act 1994 (“the Act”):

There is an objection under Section 41(2) of the Act, because the marks differ to such a degree that they do not function as series of marks on one application.

The first mark consists of the term “KNOCK KNOCK OMARCO” the second mark consists of the term “NOK NOK OMARCO” while the third mark consists of the term “NOC NOC OMARCO”. It would not be immediately apparent when seen independently of each other that the marks all originate from a single trade source.

Since the marks are visually, and conceptually different they cannot remain on the same application as the differences are distinctive and therefore substantially affect the overall identity of the trade marks.

This objection may be overcome by deleting two marks from the application and proceeding with the remaining mark. You can if you wish file new applications for the marks you choose to delete.

3. On 9 October 2019, TL Brand & Co (“the representative”) acting on behalf of the applicant requested an extension of time (“EOT”) for two months to deal with the outstanding section 41(2) objection, which was granted. On the 16 December 2019, the representative requested a further EOT for one month, which was granted by the examiner. On the 9 January 2020, the representative requested another EOT for one month. Although only one month was requested, the examiner granted an EOT for two months; however, the letter was marked as ‘Final’ and stated that any requests for further time would be refused.
4. On 11 March 2020, a refusal letter was issued by the IPO, as no response was received within the specified time and therefore the application was refused under section 37(4) of the Act.
5. On 5 June 2020, the representative submitted a form TM5 ‘Request for a statement of reasons for registrar’s decision’. I am now asked under section 76 of the Act, and Rule 69 of the Trade Mark Rules 2008, to state the grounds of my decision and the material used in arriving at it.
6. The applicant only requested EOTs and no submissions or substantive arguments pertaining to the objection raised under section 41(2) have been put forward by the applicant.
7. Whilst I deem the examiner’s refusal of the application to be entirely correct under section 37(4) of the Act, I provide below the Registrar’s grounds for refusal.

The *prima facie* case for registration of a series

The Law

8. The appropriate sections of the Act read as follows:

41. - (1) Provision may be made by rules as to –

- (a) ...
- (aa) ...
- (b) ...
- (c) the registration of a series of trade marks.

(2) A series of trade marks means a number of trade marks which resemble each other as to their material particulars and differ only as to matters of a non-distinctive character not substantially affecting the identity of the trade mark.

(3) Rules under this section may include provision as to –

- (a) the circumstances in which, and conditions subject to which, ... registration of a series is permitted, and
- (b) the purposes for which an application or registration to which the rules apply is to be treated as a single application or registration and those for which it is to be treated as a number of separate applications or registrations.

The relevant legal principles – section 41(2)

9. The highest authority in the United Kingdom on the question of series is the decision of *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 455 (25 May 2016). The judgement made by Lord Justice Kitchin was handed down by the Court of Appeal and I derive the following guiding principles cited from the ruling:

- 32. The history of s.41 was helpfully set out by Professor Ruth Annand in *Logica plc's Trade Mark Application* (O/068/03). As she explained, the concept of a registration of a series of trade marks has its origin in s.66 of the Patents Designs and Trade Marks Act 1883 and was carried forward through the 1905 Trade Marks Act to s.21(2) of the 1938 Trade Marks Act, the immediate predecessor of s.41. It has no counterpart in the Directive or Council Regulation (EC) No.207/2009 on the Community trade mark ("the Regulation").
- 33. The requirements for registration of a series of trade marks upon one application are contained in s.41(2)...
- 35. Finally, I must mention s.46(2) for it has played a part in the reasoning of a number of the decisions to which I must refer...Section 46(2) then provides some guidance as to what constitutes use of a variant of the trade mark and it reads, so far as relevant:

"(2) For the purposes of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, ..."

- 36. *That brings me to the first critical question, namely whether...an application for a series of trade marks gives rise to a single registered trade mark or whether, as the Comptroller contends, it gives rise to a series of different trade marks, each of which is registered, albeit under a single registration number.*
- 37. *In my judgment the structure of the 1994 Act and the terms of s.41 support the Comptroller's contention. I say that for the following reasons [see paras 37-44].*
- 40. *Fourth, the words of s.41 are, so it seems to me, consistent with the interpretation for which the Comptroller contends. Specifically, s.41(1)(c) refers to the registration of a series of trade marks. Section 41(2) says a series of trade marks means a number of trade marks which resemble each other in the defined way and differ only in particular and limited respects. These references suggest that a series of trade marks consists of a number of different (albeit very similar) trade marks. I recognise that the closing words of subsection (2), in referring to the permitted differences, say that those differences must not substantially affect "the identity of the trade mark" but it seems to me that these words call for a comparison of the marks in the series, one with another, and require no difference between them substantially to affect the identity of any one of them. Certainly these closing words form far too flimsy a basis for the contention that s.41 creates a new kind of registered trade mark.*
- 43. *Seventh, I have given careful consideration to the submission made by Mr Purvis for Fox that the interpretation urged by the Comptroller is unworkable. How, said Mr Purvis, are the non-use provisions of s.46 to be applied? I am not persuaded this presents any difficulty. Once it is appreciated that a registration of a series of trade marks is a registration of a series of different trade marks, each of which is registered under the same number, the non-use provisions can be applied just as they are for any registered trade mark. If some of the trade marks in the series have been used and others not, then it may be that none is susceptible to revocation as a result of the saving conferred by s.46(2) in respect of use of the mark in a form differing in elements which do not alter its distinctive character. If, however, some of the trade marks in the series which have not been used for some reason do not satisfy the s.46(2) test then the registration of those trade marks may be revoked.*
- 50. *It can be seen that in these different cases an application for the registration of a series of trade marks was considered as an application for the registration of a number of different trade marks, each of which was required to satisfy the statutory requirements. There is no suggestion that the applications were considered as applications for the registration of what was in substance a single trade mark.*
- 54. *...It is true that an application for a series of trade marks is treated as a single application. It is also true that, if accepted, all of the trade marks in the series are registered under a single registration number. I do not, however, understand Professor Annand to have suggested in these sub-paragraphs that an application for a series of trade marks gives rise to a single registered trade mark. I think she was focusing on the need for a careful examination of each of the trade marks in the series and was seeking to discern the extent to which s.41(2) accommodated a difference between each such trade mark and the other trade marks in the series...*

- 66. *In light of all of these matters, I have come to the firm conclusion that the interpretation of s.41 for which the Comptroller contends is correct. In my judgment Mr Arnold fell into error in characterising the registration of marks in a series in the way that he did. The interpretation contended for by the Comptroller gives effect to the ordinary meaning of the words used and takes proper account of the context in which those words appear. An application for the registration of a series of trade marks is an application to register a bundle of trade marks under a single reference number. Each of the marks in the series must satisfy the requirements of the 1994 Act. If the application is accepted and any opposition proceedings have been resolved in favour of the applicant, then the series of marks will be registered, but it will remain what it always was, namely a bundle of different marks, albeit now registered under the same reference number.*
 - 76. *...Finally, a trade mark which has been registered as part of a series of marks is as self-contained, easily accessible and intelligible and will be perceived as unambiguously as a trade mark which has been registered on its own.*
10. As referenced in the Court of Appeal decision, there have also been a number of very useful Appointed Persons (“AP”) decisions, i.e., Professor Ruth Annand Q.C. acting as the AP in *LOGICA (O/068/03)* and Geoffrey Hobbs Q.C. acting as the AP in *GATEWAY (O/322/03)*.
11. The main guiding principles from the *Logica* decision and *Gateway* decisions which I believe are relevant to this case are quoted below:

LOGICA

- 6. *I have found it useful in determining the boundaries of series registration to consider also section 46(2) of the TMA...39 (i). It is inconsistent with the scheme of the TMA and the Directive to accord section 41(2) a wider ambit than section 46(2)... Mr. Simon Thorley QC sitting as Deputy High Court Judge held that section 46(2) was of narrow scope and the same was true despite the different language of sections 39 (amendment), 41 (series) and 44 (alteration).*
- 7. *Sections 39(2) and 44(2) do not come from the Directive but are closely modelled on arts. 44(2) and 48(2) of Council Regulation (EC) 40/94 on the Community trade mark (CTMR). In severely restricting the circumstances in which amendment or alteration can take place, they reflect the desire for legal certainty in a trade mark that pervades the harmonised trade marks law (see, e.g., Ralf Sieckmann v. Deutsches Patent- und Markenamt, Case C-273/00, 12 December 2002, (ECJ)).*
- 38. *...First, on the positive side, section 41(2) requires the trade marks for which series registration is sought to resemble each other in their material particulars. Second and third, the negative aspects are that any difference in the trade marks must not comprise matter, which when considered:*
 - (a) *as a separate element of the trade mark would be regarded as having distinctive character; and*
 - (b) *in the context of the trade mark as a whole, substantially affects the identity of the trade mark.*

- 39 (iii). *An application for a series of trade marks is treated as a single application and, if accepted, results in a single registration (section 41(3) TMA, rule 21(1) TMR). The TMA speaks variously of “a trade mark”, “a registered trade mark” and “the registration of a trade mark”. Section 41(2) itself refers to “the identity of the trade mark”. There is a growing body of authority under the Directive, which recognises that certainty in the form of a registered trade mark is essential to the effective operation of the trade mark system. Recently in Sieckmann, supra., the Court of Justice of the European Communities stated (at para. 53):*

“In order to fulfil its role as a registered trade mark a sign must always be perceived unambiguously and in the same way so that the mark is guaranteed as an indication of origin.”

- 39 (v). *Again following from (iii) – the UK is a member of the Madrid System for the International Registration of Marks, which is based on the need for a basic application or registration of the trade mark in the country of origin (Agreement art. 1(2), Protocol art. 2(1)). The Madrid System does not recognise series registrations. Yet the UK Trade Marks Registrar is required to certify that the mark for which international registration is sought is the same as the “home” mark.*
- 40. *Turning to the meaning of “not substantially affecting the identity of the trade mark”, I believe it would be hard to improve on Jacob J.’s observation in Neutrogena Corporation v. Golden Limited [1996] RPC 473, at 488 – 489 regarding, in effect, the identical phrase in section 30(1) of the Trade Marks Act 1938:*

“Not substantially affecting its identity’ means what it says, both in this section and in other sections of the Act (e.g. section 35). An alteration which affects the way a mark is or may be pronounced, or its visual impact or the idea conveyed by the mark cannot satisfy the test.”

12. At paragraph 42, Professor Ruth Annand Q.C. also cited (without necessarily laying down any prescriptive rule) the approach taken in an Australian case (Lynson Australia Pty Ltd) which she considered had addressed the same issues surrounding the notion of ‘the identity of a mark’:

the variation between members of a series must be such that no additional element or dimension is contributed thereby to the overall identity of the marks; the “idea” of the mark must remain the same. If the marks consist of a word, then that word must be the only element in the identity of each member of the series. The typescript may be varied, but only between known, conventional scripts, not fanciful get-up.

Similarly, the statements or representations referred to by s 39(1)(a) and (b) [section 21(2)(a) – (b) 1938 Act] must be such that they do not contribute to the function that the mark has in distinguishing the proprietor’s goods from those of other traders. They must be clearly and unambiguously separate from those features of the mark by which it, and the goods or services which it identifies, will be known.

GATEWAY

- 3. *A relatively high degree of homogeneity is required in order to ensure that the marks included in the application can be treated as uniformly eligible or uniformly ineligible for protection by registration. The wording of section 41(2) establishes that there must and can only be iteration of the material particulars of a trade mark with variations of a nondistinctive character not substantially affecting the identity of the trade mark thus reiterated. Each of the marks in question should be considered as a whole, from the perspective of the average consumer of the goods or services concerned, when assessing whether they form a series of the kind contemplated by the Act.*
- 4. *Section 41(2) permits less variation between marks than section 46(2) of the Act (article 10(2)(a) of the Directive; article 15(2)(a) of the CTMR). Variations can be treated as inconsequential under the latter provisions if they “do not alter the distinctive character of the mark” for which protection is claimed, but must also have no substantial effect on “the identity of the trade mark” in order to be acceptable under section 41(2). This reinforces the point that marks can be distinctively similar without necessarily satisfying the statutory requirements for registration as a series.*
- 20. *I consider that the identity of a mark resides in its specific individuality, assessed according to the way in which it would be perceived and remembered by the average consumer of the goods or services concerned. The average consumer is for that purpose taken to be reasonably well-informed and reasonably observant and circumspect. Marks presented for registration as a series must each be assessed from that perspective when they are being compared for the purpose of determining whether they satisfy the requirements of section 41(2)...*

...The need for comparison of the marks inter se is clear...The statute calls for a finding that all visual, aural and conceptual differences are insubstantial in terms of their effect upon the identity of the reiterated trade mark.

13. In *Glee [2016] EWCA Civ 455*, Lord Justice Kitchin helpfully summarised the requirements under section 41(2):

58. Pausing here, the requirements imposed by s.41(2) may be summarised as follows. In order to qualify as a series the trade marks must resemble each other in their material particulars. Any differences between the trade marks must be of a non-distinctive character and must leave the visual, aural and conceptual identity of each of the trade marks substantially the same. These matters must be assessed from the perspective of the average consumer of the goods or services in question.

14. In this regard, I believe that my assessment of the series application must take into account a consideration of the marks as a whole, the average consumers perception of the individual signs, and determine if the changes between the three marks substantially affect their overall identity.

Application of legal principles – section 41(2)

15. In order to satisfy the requirements of section 41(2) of the Act, all three marks applied for, whilst differing from one another, must resemble each other as to their material

particulars and differ only in respect of non-distinctive matter which does not substantially affect the identity of the marks.

16. Considering the legal requirements under section 41(2), to my mind, there are three questions to be answered: do the marks resemble each other as to their material particulars?, do they differ in matters of a non-distinctive character?, which does not substantially affect their identities?
17. Each of the marks are word only, with no stylisation or artistic embellishments.
18. It is clear that each of the marks forming the series consistently contain the word element 'OMARCO'. I cannot establish that that word is defined in any reputable dictionaries or that it has any relevance or meaning in connection with the goods and services applied for. Therefore, I deem the word element 'OMARCO' to be highly distinctive.
19. Therefore, with the word 'OMARCO' appearing within every mark in the series, I must consider the other word elements within each of the marks, whilst having a global appreciation of the signs, to establish if the differences alter their identities.
20. The first mark in the series contains the word element 'KNOCK KNOCK'. It is fair to say that the words 'KNOCK KNOCK', together, can have many different meanings, such as a way of describing the sound made when one hits a door with their hand, or it is often used as the first line of a joke. In the context of the goods and services applied for, it is not easy to establish which of the recognised or perceived meanings would enter the mind of an average consumer on immediate impression, but I believe that this is not entirely pertinent to my assessment. The fact is that the word combination 'KNOCK KNOCK' consists of dictionary words, which in combination, have a readily understood meaning or concept from the perspective of the average consumer.
21. Against this backdrop, I am required to compare the first mark in the series 'KNOCK KNOCK OMARCO' against the second mark in the series 'NOK NOK OMARCO' and then I must compare the first mark in the series against the third mark in the series 'NOC NOC OMARCO', and vice versa.
22. As referred to above, all three marks contain the word 'OMARCO', which is clearly the common element. Therefore, I am assessing the words 'KNOCK KNOCK' against the words 'NOK NOK' and then the words 'NOC NOC'. I cannot find any definitions in reputable dictionaries for the combination of words 'NOK NOK' or 'NOC NOC'. Similarly, I cannot establish via an Internet search that the word combinations are used or recognised in connection with the goods and services concerned and I am not aware of any meaning that may be derived from my own personal knowledge. Thus, I must conclude that the word elements 'NOK NOK' and 'NOC NOC' possess an inherent distinctive character within the marks as a whole. The Act states that marks can only differ *as to matters of a non-distinctive character*, and therefore in my view, the neologisms 'NOK NOK' and 'NOC NOC' appearing in the second and third marks in the series respectively, possess an independent distinctive character; they are distinctively different. Further, it appears entirely plausible that through the eyes of the average consumer, they will perceive the words 'KNOCK KNOCK', in comparison to 'NOK NOK' and 'NOC NOC', as completely different trade marks. Whilst being aurally identical, the visual and conceptual differences are so striking and stark, that it is inconceivable in my view, that they could constitute a series.

23. The average consumer will immediately identify that the first mark contains recognisable dictionary words, which will be readily understood and have a conceptual identity. However, the second and third marks in the series are invented, coined expressions which, in essence, bear no resemblance with the visual and conceptual identity portrayed by the first mark. The concept that 'KNOCK KNOCK' would conjure in the minds of average consumers, would not be constant or consistent if those same consumers encountered 'NOK NOK' or 'NOC NOC' in isolation.

24. I believe that the first mark in the series 'KNOCK KNOCK OMARCO' cannot be considered a series with the second and third marks i.e. they do not resemble each other as to their material particulars, for the above reasons. In this regard, I am mindful of the following comments made by Professor Ruth Annand in *LOGICA* (O/068/03):

*44. I believe the correct approach is to take the first mark in the application and to compare each of the other trade marks with that trade mark. The first mark in the claimed series is the word LOGICA. All of the remaining 307 trade marks comprise the word LOGICA and a domain name suffix. **The application therefore falls at the first hurdle** (my emphasis) in that the marks do not resemble each other as to their material particulars. Furthermore, even though the suffix might be regarded as a non-distinctive element, when the marks are viewed overall the difference substantially affects the identity of the trade mark LOGICA. That, of course, is sufficient to confirm the Hearing Officer's decision.*

25. It would appear from the foregoing that I am not required to draw any more comparisons between the marks as, in my opinion, it fails to constitute a series application based on the differences between the first mark compared to marks two and three. However, for the sake of completeness and legal clarity, I will explain the Registrar's decision to also refuse the second mark 'NOK NOK OMARCO' and the third mark 'NOC NOC OMARCO' as a series of two on a single application.

26. As I have already stated in paragraph 19 above, I consider 'NOK NOK' and 'NOC NOC' to be distinctive in their own right, within the marks as a whole. The average consumer would place no interpretation on those elements other than they are an arbitrary addition to the word 'OMARCO' and they simply enhance the distinctive character of the signs. They are coined expressions which form independent distinctive elements. Thus, the marks do not differ as to matters of a *non-distinctive* character, as 'NOK NOK' and 'NOC NOC' are individually and independently distinctive from one another; they are, in essence, different trade marks. Also, even though they are of course phonetically and aurally identical and would be pronounced in the same way, the visual differences between the marks are not insignificant. The elements of each of the marks which are different, are composed of very few characters – only three letters in each repeated word. Therefore, in my view, any change to one of those characters will have more of a profound effect than they would if the words were much longer. I accept, of course, that there must be a visual difference between marks, otherwise they would be identical, but there are, in my view, degrees of visual differences. The variation between 'NOK NOK OMARCO' and 'NOC NOC OMARCO' will not go unnoticed by the average consumer, due to the strong visual impact created by a letter 'K' instead of a letter 'C', and therefore this alters the overall identity of the marks.

27. I consider that the different letters, 'C' as opposed to a 'K' and vice versa, within 'NOK NOK' and 'NOC NOC' are a material particular which noticeably affects the

visual identity of each mark. The overall identity of the marks is, in my opinion, substantially affected by the visual differences.

28. As stipulated in the relevant case law, I have assessed the marks which comprise the series application *inter se*; that is to say, mark one against marks two and three, mark two against marks one and three, mark three against marks one and two. Also, in accordance with the case law, I deem that the three marks differ from each other in terms of their distinctive components, and the differences between the marks substantially alters their visual and conceptual identities.
29. All the differences between the three marks affects each of the signs distinctive character and visual and conceptual impact upon the relevant average consumer. It is insufficient, as the case law specifies, that the signs simply resemble each other. The additional matter of which the marks are composed must not be distinctive; however, the first mark contains the distinctive element 'KNOCK KNOCK', the second 'NOK NOK' and the third 'NOC NOC'. Also, the additional matter of which the marks are composed must not significantly alter the visual, aural or conceptual identity of the marks. As stated above, I acknowledge that the marks are aurally identical; however, the first mark against the second and third marks are visually and conceptually very different and the second mark against the third mark, are visually very different.
30. In my opinion, given that the marks are distinctively different in any case, I do not believe that it would be necessary to establish (independently) any visual, aural or conceptual differences which affect the identity of the trade marks. When comparing mark one against marks two and three, clearly there are visual and conceptual differences, as the average consumer will have different thoughts and perceptions when seeing the words 'KNOCK KNOCK' vs 'NOK NOK / NOC NOC'. However, contrasting the second mark against the third mark, due to them both being coined expressions as stated above, it is more difficult, in my view, to establish a conceptual difference. I feel that it is more straightforward to determine that different concepts would exist between the first mark and the other two, but a conceptual link or difference affecting the overall identity is much more difficult to establish in respect of marks two and three. Nevertheless, the difference between the distinctive elements and the visual impact is sufficient, in my view, to render them not a series.
31. In accordance with the Act and the relevant case law, assessment of a series in the *prima facie* is, of course, a multifaceted exercise: do the marks resemble each other as to their material particulars, are the marks distinctively different, are they visually different, are they aurally different, are they conceptually different; if the answer to any of these questions is in the affirmative, then do these differences alter the identity of the marks? In my view, a series assessment is not a tick-box exercise. It is clear that if differences are identified in respect of all the above criterion that would almost certainly render a series of marks unacceptable, however, it is equally apparent that the law allows for a series to fail the test where differences exist in respect of only one of the above criterion.
32. In *Glee [2016] EWCA Civ 455*, Lord Justice Kitchin ruled that a series application is not a single registered trade mark. In his judgment, it is a bundle of "different" trade marks under a single trade mark number, which would be individually protected under EU law. Whilst Lord Justice Kitchin held that a series is a number of "different" trade marks, he also went on to say that:

'66. ...Each of the marks in the series must satisfy the requirements of the 1994 Act...'

Thus, differences between the marks comprising a series are clearly permitted, provided that they meet the requirements under section 41(2), according to the law. In my view, the differences between the three marks applied for on a single application, cannot be ignored or relegated to insignificance from the perspective of the average consumer – they are considered to substantially affect the identities of the marks from one another, for the reasons I have given.

33. As directed in the case law, I do not believe that the signs would constitute “variant use” within the terms of section 46(2) of the Act. Given that the case law also establishes that section 41(2) is an inherently stricter prohibition in terms of its scope, I believe that the signs applied for cannot be acceptable as an application of three marks.

Conclusion

34. The applicant has failed to address the series objection raised by the registrar, nor has he chosen to amend the application.
35. In the absence of any substantive arguments from the applicant within the specified timeframes, I have carefully considered all the information as filed. Having done so, I am satisfied that the marks contained within this application differ as to their material particulars in such a way that they do not satisfy the requirements of section 41(2) of the Act.

Dated this 10th day of August 2020

**Matthew Davies
For the Registrar
The Comptroller-General**