

O/054/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3398723

BY SHENZHEN JIUYI KEJI YOUXIAN GONGSI

TO REGISTER THE TRADE MARK:

The logo for AIMOS, featuring the word "AIMOS" in a bold, sans-serif font. The letter "A" is stylized with a diagonal slash through it. The logo is centered within a light gray rectangular border.

IN CLASS 9

AND

OPPOSITION THERETO UNDER NO. 417091

BY

SWISS AVIATION SOFTWARE AG

Background and pleadings

1. Shenzhen Jiuyi Keji Youxian Gongsi (“the applicant”) applied to register the trade mark below in the UK on 13 May 2019.

The logo for the trade mark 'AIMOS' is displayed in a bold, black, sans-serif font. The letter 'A' is stylized with a diagonal slash through it.

2. It was accepted and published in the Trade Marks Journal on 24 May 2019 in respect of the following goods:

Class 9 Computer peripheral devices; Meters; Scales; Light-emitting electronic pointers; Radios; Transmitters of electronic signals; Audio- and video-receivers; Enlarging apparatus [photography]; Cables, electric; Battery chargers; Mouse [computer peripheral]; Computer keyboards; Mouse pads; Cabinets for loudspeakers; Computer software, recorded; Smart glasses; Tablet computers; Memory cards for video game machines; Phototelegraphy apparatus; Quantity indicators; Weighing machines; Slide calipers; Electronic notice boards; Headphones; Electric and electronic effects units for musical instruments; Cinematographic cameras; Mechanisms for counter-operated apparatus; Balancing apparatus; Thermostats; Air analysis apparatus; Audiovisual teaching apparatus; Lenses for astrophotography; Protection devices for personal use against accidents; Whistle alarms; Sun glasses; Decorative magnets.

3. Swiss Aviation Software AG (“the opponent”) opposes the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon its International trade mark, shown below, number

1401242, with a date of designation in the EU¹ of 1 February 2018, a priority date of 9 August 2017 from a Swiss application, and a date on which protection was granted of 16 October 2018.

AMOS

4. The following goods and services are relied upon in this opposition:

- Class 9 Data processing software and programs; computer hardware; electronic publications downloadable from databases and via the Internet, in particular user manuals and work instructions for the use of data processing programs and software.
- Class 16 Manuals, catalogs, user manuals and work instructions for the use of data processing programs and software.
- Class 35 Services provided by consultants in the field of commercial business management; commercial administration services; systematization of information, updating and maintenance of data in computer databases.
- Class 41 Instruction and training services; organization services and conducting of training workshops.
- Class 42 Design and development of computer hardware; design, development, maintenance, installation, implementation and updating of software; services provided by consultants and assistance services for computer hardware design and development; services provided by consultants and support services for software design, development, maintenance,

¹ Although the UK has left the EU and the transition period has now expired, EUTMs, and International Marks which have designated the EU for protection, are still relevant in these proceedings given the impact of the transitional provisions of The Trade Marks (Amendment etc.) (EU Exit) Regulations 2019 – please see Tribunal Practice Notice 2/2020 for further information.

installation, implementation and updating; monitoring of computer systems; technical support services relating to software; data migration services; data hosting.

5. In its notice of opposition, the opponent argues that the respective goods and services are identical or similar and that the marks are similar. The original grounds of opposition included section 5(3) of the Act, but due to the failure of the opponent to file supporting evidence, this was struck out by the tribunal.
6. The applicant filed a Form TM8 denying the claims made. Following a case management conference on the admissibility of the form and whether it was sufficiently particularised, it was held (and not challenged) that the form was sufficiently particularised to form a defence.
7. To confirm, neither party filed any evidence in this case.
8. No hearing was requested and so this decision is taken following a careful perusal of the papers. Neither party filed written submissions in lieu of a hearing.
9. The applicant is represented by BETTERSVAT LTD and the opponent is represented by Womble Bond Dickinson (UK) LLP.

DECISION

10. Section 5(2)(b) of the Act reads as follows:

“5(2) A trade mark shall not be registered if because –

(a)...

(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 6A of the Act, the relevant parts of which state:

“(1) This section applies where

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

...”

12. Given what are classed as their respective filing dates, the trade mark upon which the opponent relies qualifies as an earlier trade mark. As this trade mark had not completed its protection process more than 5 years before the filing date of the application in issue in these proceedings, it is not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all of the goods and services it has identified.

Section 5(2)(b) – case law

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

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

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely

upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater 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 to mind the earlier mark, 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 and services

15. The goods and services in question are as follows:

Opponent's goods and services	Applicant's goods
<p><u>Class 9</u></p> <p>Data processing software and programs; computer hardware; electronic publications downloadable from databases and via the Internet, in particular user manuals and work instructions for the use of data processing programs and software.</p>	<p><u>Class 9</u></p> <p>Computer peripheral devices; Meters; Scales; Light-emitting electronic pointers; Radios; Transmitters of electronic signals; Audio- and video-receivers; Enlarging apparatus [photography]; Cables, electric; Battery chargers; Mouse [computer peripheral]; Computer keyboards; Mouse pads; Cabinets for loudspeakers; Computer software, recorded; Smart glasses; Tablet computers; Memory cards for video game machines; Phototelegraphy apparatus; Quantity indicators; Weighing machines; Slide calipers; Electronic notice boards; Headphones; Electric and electronic effects units for musical instruments; Cinematographic cameras; Mechanisms for counter-operated apparatus; Balancing apparatus; Thermostats; Air analysis apparatus; Audiovisual teaching</p>

	<p>apparatus; Lenses for astrophotography; Protection devices for personal use against accidents; Whistle alarms; Sun glasses; Decorative magnets.</p>
<p><u>Class 16</u></p> <p>Manuals, catalogs, user manuals and work instructions for the use of data processing programs and software.</p>	
<p><u>Class 35</u></p> <p>Services provided by consultants in the field of commercial business management; commercial administration services; systematization of information, updating and maintenance of data in computer databases.</p>	
<p><u>Class 41</u></p> <p>Instruction and training services; organization services and conducting of training workshops.</p>	
<p><u>Class 42</u></p> <p>Design and development of computer hardware; design, development, maintenance, installation,</p>	

<p>implementation and updating of software; services provided by consultants and assistance services for computer hardware design and development; services provided by consultants and support services for software design, development, maintenance, installation, implementation and updating; monitoring of computer systems; technical support services relating to software; data migration services; data hosting.</p>	
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16. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.”

17. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

(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.

18. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... 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.”

19. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term ‘computer software’. In the course of his judgment he set out the

following summary of the correct approach to interpreting broad and/or vague terms:

“...the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded.”

20. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

21. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court (“GC”) stated that:

“29. 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 for 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.”

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

“... there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think the responsibility for those goods lies with the same undertaking.”

23. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted, as the Appointed Person, in *Sandra Amelia Mary Elliot v LRC Holdings Limited*, BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.”

While on the other hand:

“... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

24. The applicant claims that its goods have specific definitions whereas the opponent's "computer hardware" is "indistinct" and that these goods are not similar or complementary. Furthermore, when referring to computer hardware, the consumer will not call to mind its goods. It also argues that its "computer software, recorded" is totally different from the opponent's "data processing software and programs".
25. The opponent contends that the applicant's goods are highly similar to the opponent's goods and services and in some cases are identical. It provides examples of what it considers to be complementarity. It argues that its "data processing software and programs" would be required to run the applicant's "thermostats" where those thermostats are "smart". It also contends that the applicant's "Audiovisual teaching apparatus" may be used in the supply of its "instruction and training services".
26. I will now make my comparison with reference to the applicant's goods.
27. I first consider the applicant's "Computer software, recorded" and the opponent's "Data processing software and programs." Absent any fall back specification being provided by the applicant, I regard these as *Meric* identical in that goods designated by the earlier mark are included in a more general category designated by the trade mark application.
28. I next consider: "Computer peripheral devices; Mouse [computer peripheral]; Computer keyboards; Mouse pads; Smart glasses; Tablet computers." I compare these below with the opponent's "computer hardware". I define computer hardware as the physical components of a computer, which could also include computers themselves, as opposed to software.
29. Looking first at "tablet computer", to the extent that the term computer hardware includes computers themselves, the goods are *Meric* identical. Even if I am wrong in my interpretation and computer hardware is limited just to components, the average consumer would recognise that a "tablet computer" consisted of computer hardware – the physical components, plus

the software that was loaded on to it. The trade channels would be the same. There is a very high degree of complementarity in that computer hardware is indispensable to a tablet computer. The nature of the relationship is one where the average consumer may think the responsibility for those goods lies with the same undertaking. I consider these goods to be highly similar.

30. “Computer peripheral devices; Mouse [computer peripheral]” and “Computer keyboards” are “peripherals” – detachable items that are used in conjunction with a computer. I consider that the term computer hardware is broad enough to cover such peripheral items, and, as such, the goods are *Meric* identical. However, even if I am wrong in that interpretation, the trade channels would be the same. There is a very high degree of complementarity in that computer hardware is indispensable to peripherals – they cannot function other than in conjunction with a computer that consists of hardware and software. The nature of the relationship is one where the average consumer may think the responsibility for those goods lies with the same undertaking. I consider these goods to be highly similar.

31. “Smart glasses” are spectacles that connect to computers and relay sound and images. While the average consumer would not describe them as computers, bracketing them with other devices such as mobile phones and smart watches, they would see them as reliant upon computer components – computer hardware – to function. The trade channels would be the same. There is a very high degree of complementarity in that computer hardware is indispensable to smart glasses. They cannot function without computer hardware. The nature of the relationship is one where the average consumer may think the responsibility for those goods lies with the same undertaking. I consider these goods to be highly similar.

32. “Mouse pads” or mats are important to the efficient working of a computer mouse as a peripheral, which I have found to be an item of computer hardware (or else highly similar to it). However, in terms of their natures, mouse mats and computer hardware (including a mouse) are very different.

For example, a mouse mat is a purely physical object which requires no motive power, while computer hardware needs to be enabled by a power source. While they could have trade channels in common, mouse mats are sold across a wide range of retail outlets, including stationers and printers, and can be produced as novelty gift items. To the extent that I consider a mouse to be an item of computer hardware (as well as being characterised as a peripheral) the complementary link is clear and the nature of the relationship is one where the average consumer may think the responsibility for those goods lies with the same undertaking e.g. that they could provide both a mouse and accompanying mouse mat. That said, the differences I have highlighted mean that I consider the goods in this case to be of low similarity. Were computer hardware considered not to cover a mouse, the similarity is of only a very low degree.

33. “Memory cards for video game machines” overlap with the opponent’s “computer hardware”. The trade channels would be the same. There is a very high degree of complementarity in that computer hardware is indispensable to memory cards. Memory cards interface with the computer hardware components that process the memory and so memory cards cannot function without computer hardware. The nature of the relationship is one where the average consumer may think the responsibility for those goods lies with the same undertaking. Furthermore, computer hardware would include within its ambit memory banks, be it Random Access Memory or storage memory. The physical nature and purpose will be similar, as are the trade channels. I consider these goods to be highly similar.

34. While “transmitters of electronic signals” might exist in a non-computerised form, they often take the form of computer hardware which is specifically designed to transmit electronic signals, such as computer hardware that establishes a wireless connection between an internet hub, printer, or TV box. In that respect, they would be *Merit* identical, or else highly similar.

35. “Audio- and video-receivers” receive audio and video signals. While they might exist in non-computerised form, they often take the form of computer hardware which is specifically designed to receive audio and video signals. In that respect, the goods would be *Merix* identical, or else highly similar.
36. “Electronic notice boards” are goods that display information electronically. Such a device will often be fully computerised, containing computer hardware such as graphics cards, but, at a minimum, will be completely reliant on computers and hence computer hardware. Consequently, there is a high degree of complementarity in that computer hardware is indispensable to such a device and the average consumer – a procurer of screens which convey information in workplaces, shops, railway stations and so on – with the nature of the relationship being one where the average consumer may think the responsibility for those goods lies with the same undertaking. While the purpose of the applicant’s goods is quite specific (conveying information to a group of people), by contrast with the more general purpose of computer hardware (to allow computers to function), overall, I consider these goods to be highly similar.
37. “Cinematographic cameras” are cameras which record moving images – video. While such cameras can be freestanding, they are in direct competition with video cameras which connect to computers as peripherals or built in cameras that are part of a computer’s hardware. In the light of such camera-specific computer hardware, the goods would have a similar nature and purpose. Even though the trade channels might not overlap strongly, I still consider the average consumer may think the responsibility for those goods lies with the same or linked undertakings. I find these goods to be highly similar.
38. “Audiovisual teaching apparatus” is apparatus that allows a teacher to communicate with their students audiovisually. This could take the form of systems which utilise “smart” boards, display screens, loudspeakers, and projectors, all of which can be controlled by the teacher and/or interfaced with by the students. These systems will often be fully computerised, but, at a

minimum, will be completely reliant on computers and hence computer hardware. Following the same rationale as for my comparison with electronic notice boards, I consider these goods to be highly similar.

39. “Cables, electric” involve the supply of power. While electricity is required to power a computer, whether directly or through charging, and a computer is dependent on computer hardware, I do not think that this is a significant enough point of connection for it to be regarded as a strong argument for similarity. Electric cables are required to power numerous items which are not computerised. The limited extent of complementarity is outweighed by the goods’ different core purposes – the means of transmitting electricity and the basis for operating a computer. Consequently, the average consumer would not think that responsibility for those goods lies with the same or linked undertakings. Overall, I find these goods to be of low similarity.

40. “Battery chargers” support the supply of power. While computers use battery chargers and a computer is dependent on computer hardware, I do not think that this is a significant enough point of connection for it to be regarded as a strong argument for similarity. Battery chargers are required to support the supply of power to numerous other goods such as cordless tools and electric cars. The limited extent of complementarity is outweighed by the goods’ different core purposes – supporting the supply of power and the basis for operating a computer. Consequently, the average consumer would not think that responsibility for those goods lies with the same or linked undertakings. Overall, I find these goods to be of low similarity.

41. “Radios” receive audio broadcasts and can function without recourse to computer hardware. While there may be a limited coincidence of trade channels where retailers sell both computer products and a wide range of electrical goods, radios differ in terms of their nature and function. They are not in competition with computer hardware in that the consumer would not be faced with a choice between the two and a radio does not need to rely on computer hardware, so there is no complementarity. Overall, I find these

goods to be dissimilar. If I am wrong, the degree of similarity would be very low.

42. “Enlarging apparatus [photography]” allows professional photographers or dedicated amateurs to enlarge photographs. They are specialist pieces of optical equipment which function without recourse to computer hardware. They differ from computer hardware in respect of method of use, nature, and core purpose. As specialised items, the trade channels would also differ significantly as retailers of analogue photographic equipment have a narrow focus when compared with the broad trade channels through which computer hardware is sold. The goods would not be complementary, nor would they be competitive, and the average consumer would not envisage that the responsibility for the goods in question vested in the same or linked economic undertaking. Overall, I find these goods to be dissimilar. If I am wrong, the degree of similarity would be very low. In making this finding, I have not ignored the fact that a digital photograph on a computer may be enlarged via the use of software. However, this creates no meaningful similarity with computer hardware, nor is it likely that such enlarging software would be classed as data processing software as in the opponent’s “Data processing software and programs.” In any event, I am doubtful that the specialised apparatus described would represent a true competitive choice as, even by comparison with software, they would not be sold through the same channels, and are not complementary – so the finding of very low similarity at best would remain.

43. I define “phototelegraphy apparatus” as a means for transmitting images that pre-dates the computer, utilising an earlier form of technology such as the telephone network. A fax machine would be an example of a phototelegraphy apparatus. Given that these goods are not computerised, complementarity is not present. Also, the average consumer would not think the responsibility for those goods lies with the same undertaking. Overall, I consider these goods to be dissimilar. If I am wrong, the degree of similarity would be very low. In making this finding, I have not ignored the fact that images can be transmitted by computers via the use of software. However,

this creates no meaningful similarity with computer hardware, nor is it likely that the particular software that would be used to transmit images would be classed as data processing software as in the opponent's "Data processing software and programs." In any event, I am doubtful that the specialised apparatus described would represent a true competitive choice as, even by comparison with software, they would not be sold through the same channels, and are not complementary – so the finding of very low similarity at best would remain.

44. "Headphones" could be used in conjunction with a computer which is dependent on computer hardware and to that extent there is an argument that there could be a very limited degree of complementarity. However, they can also be used with non-computerised items such as radios and televisions. Their core purposes – listening to audio without disturbing other people, and the basis for operating a computer – are different. Therefore, the association between them is weak and the average consumer would not, on balance, see the relationship as one where the average consumer may think the responsibility for those goods lies with the same undertaking. Overall, I find these goods to be dissimilar. If I am wrong, the degree of similarity would be very low.

45. "Electric and electronic effects units for musical instruments" allow for the electronic reproduction and alteration of sound from musical instruments. These goods can function without recourse to computer hardware. Complementarity is not present. The trade channels would be different in respect of specialist retailers of musical equipment when compared with the broad trade channels relating to computer hardware. The average consumer – a musician or music production company – would not see the relationship between them as one where they may think the responsibility for those goods lies with the same undertaking. The method of use and core purpose also differ. Overall, I find these goods to be dissimilar. If I am wrong, the degree of similarity would be very low. In making this finding, I have not ignored the fact that musical effects can be produced on computers via the use of

software. However, this creates no meaningful similarity with computer hardware, nor is it likely that the particular software that would be used to produce musical effects would be classed as data processing software as in the opponent's "Data processing software and programs." In any event, I am doubtful that the specialised apparatus described would represent a true competitive choice as, even by comparison with software, they would not be sold through the same channels, and are not complementary – so the finding of very low similarity at best would remain.

46. "Thermostats" control temperature. These goods often function manually and without recourse to computers. Complementarity is not present. The trade channels would be different in respect of specialist retailers of central heating systems and other machinery which is subject to temperature control when compared with the broad trade channels relating to computer hardware. The average consumer would not think that the responsibility for the goods lies with the same undertaking. The method of use and core purpose also differ. Overall, I find these goods to be dissimilar. If I am wrong, the degree of similarity would be very low. In making this finding, I have not ignored the fact that thermostats can be controlled using software and that the opponent cited its "Data processing software and programs" as complementary with thermostats where those thermostats are "smart". However, I do not consider it likely that the particular software that would be used to operate the thermostat would be classed as data processing software. In any event, my analysis as to the trade channels and perception of the average consumer would still stand, so the finding of very low similarity at best would remain.

47. "Air analysis apparatus" is a very specialised item whereby air composition and thereby air quality can be analysed. It differs from computer hardware in respect of method of use, nature, and core purpose. As a highly specialised item, the trade channels would also differ significantly as retailers of such equipment have a narrow focus when compared with the broad trade channels through which computer hardware is sold. The goods would not be

complementary, nor would they be competitive, and the average consumer would not see that the responsibility for those goods lies with the same undertaking. Overall, I find these goods to be dissimilar. If I am wrong, the degree of similarity would be very low.

48. The following goods, which perform a measuring function of some kind, have no immediate association with computer hardware: “Meters; Scales; Quantity indicators; Weighing machines; Slide calipers; Mechanisms for counter-operated apparatus” and “Balancing apparatus.” They are not in competition and would differ in terms of trade channels. The relevant public would be quite specific - a professional person or member of the public needing to measure something as opposed to the very wide customer base of computer hardware. I find these goods to be dissimilar.

49. “Protection devices for personal use against accidents” and “Whistle alarms” are goods with the particular purpose of health and safety. They have no association with computer hardware. I find these goods to be dissimilar.

50. “Cabinets for loudspeakers” are the housing for speakers, not the speakers themselves, and therefore have no relationship with computer hardware. I find these goods to be dissimilar to the opponent’s goods.

51. Finally, “Light-emitting electronic pointers; Lenses for astrophotography; Sun glasses” and “Decorative magnets” are also dissimilar to the opponent’s goods.

52. Having carefully considered all the opponent’s goods and services, I find that no other of the opponent’s goods and services put them in a stronger position than those discussed above. This includes the instance cited by the opponent in arguing for similarity between the applicant’s “Audiovisual teaching apparatus” and its “instruction and training services”. Having

already thoroughly analysed the applicant's "Audiovisual teaching apparatus" by comparison with the opponent's "computer hardware" and found it to be highly similar, my finding based on the comparison recommended by the opponent would be no have been no higher, indeed, any similarity on that basis would have been low at best.

53. As some degree of similarity between the goods and services is required for there to be a likelihood of confusion², the opposition must fail in respect of the following goods in the applicant's specification:

Class 9 Meters; Scales; Quantity indicators; Weighing machines; Slide calipers; Mechanisms for counter-operated apparatus; Balancing apparatus, Protection devices for personal use against accidents; Whistle alarms; Cabinets for loudspeakers; Light-emitting electronic pointers; Lenses for astrophotography; Sun glasses; Decorative magnets.

54. This also applies to the goods below for which I have found no similarity, but, as I have given a fall-back finding that if I am wrong then there may be a very low degree of similarity, I return to these later in my decision on a fall-back basis.

Radios; Enlarging apparatus [photography]; Phototelegraphy apparatus; Headphones; Electric and electronic effects units for musical instruments; Thermostats; Air analysis apparatus.

The average consumer and the nature of the purchasing act

55. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios*

² *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited, [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

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

56. When considering the average consumer and the nature of the purchasing act, there are a variety of goods under consideration. Those that vary in price and quality, but include the lower end of the pricing spectrum, purchased by individuals or businesses, with visual considerations predominating, I class as requiring a medium degree of attention. I place “Computer peripheral devices; Radios; Transmitters of electronic signals; Audio- and video-receivers; Cables, electric; Mouse [computer peripheral]; Computer keyboards; Mouse pads; Computer software, recorded; Memory cards for video game machines; Headphones” and “Electric and electronic effects units for musical instruments” in this category.

57. The other goods under consideration would, on average, require more deliberation by the consumer, whether by individuals or businesses, would generally be at the higher end of the pricing spectrum, and the more variable specifications of the items would need to be given due care and attention. There could be some interaction with an intermediary salesperson, and there could be verbal elements in the purchasing process, but visual matters would still predominate. I would put the following goods into the category of requiring a higher degree of attention: “Enlarging apparatus [photography]; Smart glasses; Tablet computers; Phototelegraphy apparatus; Electronic

notice boards; Cinematographic cameras; Air analysis apparatus” and “Audiovisual teaching apparatus”.


Comparison of the trade marks

58. It is clear from *Sabel BV v. Puma AG* (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 CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, 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.”

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

60. The respective trade marks are shown below.

Opponent's trade mark	Applicant's trade mark
<p data-bbox="395 376 555 421">AMOS</p>	

61. The applicant contends that consumers will not consider its mark to be similar to the opponent's, either visually or conceptually. It argues that most consumers will see the first character in its mark as a symbol and not a letter "A", implying that they would pronounce it *I-MOSS*.

62. The opponent states that the marks consist of single words which contain four identical letters in the same order. It asserts that consumers pay more attention to the beginning and the end of words and that the consumer might not notice the additional "I" in "AIMOS" due to the applicant's stylisation of its letter "A". It contends that the marks are aurally, visually and conceptually highly similar.

63. I set out my analysis below.

64. The opponent's mark is simply a word mark, AMOS. There are no other visual elements that contribute to the overall impression of the mark.

65. The applicant's mark is a stylised version of the word "AIMOS". The word itself most strongly contributes to the overall impression, but the stylisation also has a role to play. The stylisation takes the form of the right-hand line of the "A" being perpendicular, with the middle "branch" of the letter missing, the gap being filled in by a solid triangle. Nevertheless, the "A" is still recognisable as an "A", with the remaining letters IMOS being slightly stylised. It is highly unlikely that they would see the first character in the mark as a graphical symbol preceding the word "IMOS"

66. Visually, the earlier mark is a plain word mark. While the applicant's mark is stylised, particularly the first character, it would still be seen as a word without any separate elements. While the applicant's mark contains an extra letter, it contains all four of the letters in the opponent's mark, and in the same order. They are visually of at least medium similarity.
67. Aurally, the words "AMOS" and "AIMOS" will most likely be pronounced by the average consumer as *A-MOSS* in both cases. I consider them aurally identical. If they are not identical, the differences likely to exist in the respective articulations will not be great, and the marks would still be aurally similar to a high degree.
68. Conceptually, the words "AMOS" and "AIMOS" do not give rise to a particular concept or meaning. The word "AMOS" could be viewed as a name, albeit it is not one that is well known. It is more likely to be viewed as an acronym or invented word and not one that the average consumer would recognise as meaning anything in particular. It is also likely that the average consumer would see the word "AIMOS" as an acronym or an invented word, not recognising it as meaning anything. I consider both marks to be conceptually neutral, so there is neither a conceptual similarity nor difference.

Distinctive character of the earlier mark

69. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

"22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

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

71. I must make an assessment of the inherent distinctive character of the earlier mark. It is a word mark, “AMOS”, which I consider the average consumer would see as an acronym or invented word to which they would not ascribe a particular meaning. Consequently, it is not descriptive nor suggestive of the goods and services for which the mark is registered. As an acronym or invented word, I find the mark to be inherently distinctive to a high degree.

Likelihood of confusion

72. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of

confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

73. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognised that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

74. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. considered the impact of the CJEU's judgment in *Bimbo*, Case C-591/12P, on the court's earlier judgment in *Medion v Thomson*. The judge said:

“18. The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19. The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20. The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21. The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

75. I have found the parties' marks to be visually similar to at least a medium degree and aurally identical or, if I am wrong, similar to a high degree. I regard the marks as conceptually neutral. I have identified the average consumer as falling into two categories. They would be individuals or businesses having either a medium or high degree of attention. Visual scrutiny of the mark would be the decisive factor when it came to the selection of the goods. I have found the similarity between the parties' goods to range from a very low degree to identical (except for those where I have found no similarity and, for those of that group where I have considered the possibility that I am wrong, I have found them to be similar to a very low degree). I have found the opponent's mark to have a high degree of inherent distinctive character.

76. I first consider the question of direct confusion in relation to those goods that I have found to be identical or highly similar. For such goods, taking into account the similarity of the marks and the fact that the earlier mark has a high degree of inherent distinctive character, I consider there to be a likelihood of direct confusion, even where such goods are purchased with a high degree of attention. The average consumer will not recall the respective marks with sufficient accuracy to differentiate between them and they may mis-recall one mark for the other.

77. I then consider the question of indirect confusion in relation to those goods that I have found to be identical or highly similar, particularly in the event that I am wrong to have found that direct confusion exists. I consider there to be a likelihood of indirect confusion, even where such goods are purchased with a high degree of attention. My reasoning is as follows: it is more likely than not that the average consumer, even where they noticed the stylistic difference between the two marks, would mis-recall the extra letter "l" in the opponent's mark as missing. This is because the perpendicular right-hand line and stylisation of the applicant's letter "A" renders the adjacent letter "l" less prominent. Thus, the difference in graphic presentation would simply be seen as a brand variation whereby the average consumer would conclude

that the parties' marks indicate goods and services sold by the same or economically linked undertakings.

78. It is a step too far to find confusion, whether direct or indirect, between the marks where the goods are of very low or low similarity when the various factors are considered as part of the multi-factorial test that I must apply.

CONCLUSION

79. The opposition has succeeded in relation to the following goods, for which the application is refused:

Class 9 Computer peripheral devices; Transmitters of electronic signals; Audio- and video-receivers; Mouse [computer peripheral]; Computer keyboards; Computer software, recorded; Smart glasses; Tablet computers; Memory cards for video game machines; Electronic notice boards; Cinematographic cameras; Audiovisual teaching apparatus.

80. The application will proceed to registration, subject to appeal, in respect of the following goods:

Class 9 Meters; Scales; Light-emitting electronic pointers; Radios; Enlarging apparatus [photography]; Cables, electric; Battery chargers; Mouse pads; Cabinets for loudspeakers; Phototelegraphy apparatus; Quantity indicators; Weighing machines; Slide calipers; Headphones; Electric and electronic effects units for musical instruments; Mechanisms for counter-operated apparatus; Balancing apparatus; Thermostats; Air analysis apparatus; Lenses for astrophotography; Protection devices for personal use against accidents; Whistle alarms; Sun glasses; Decorative magnets.

COSTS

81. The applicant has been the more successful in this case. In line with Annex A of Tribunal Practice Notice 2 of 2016, I award costs to the applicant as below. My award reflects the fact that the applicant was not wholly successful.

Official fees:	£100
Preparing a counterstatement:	£200
Total:	£300

82. I order Swiss Aviation Software AG to pay Shenzhen Jiuyi Keji Youxian Gongsu the sum of £300. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 21st day of January 2021

JOHN WILLIAMS
For the Registrar