

BL O/0480/23

TRADE MARKS ACT 1994

IN THE MATTER OF

TRADE MARK APPLICATION No. 3713659

BY

XI MEDIA LIMITED

TO REGISTER THE SERIES OF TRADE MARKS:



IN CLASS 9

-AND-

THE OPPOSITION THERETO UNDER No. 431111

BY

XIMEA GmbH

Background and pleadings

1. On the 25 October 2021, XI MEDIA LIMITED (“the Applicant”) applied to register the series of trade marks shown below (“the Contested Marks”) in the UK in respect of goods in Class 9. The application was accepted and published for opposition purposed in the Trade Marks Journal on 17 December 2021.

Representation of the trade marks:	<p>Mark 1 of 2:</p>  <p>Mark 2 of 2:</p> 
Goods applied for:	<p><u>Class 9</u></p> <p>Wire; Electronic power supplies; Power supplies for smartphones; Power adaptors; Power cables; Power banks; Power wires; Power controllers; Batteries; Batteries, electric; Battery cables; Rechargeable batteries; Chargeable batteries; Battery chargers; Smartphone battery chargers; Batteries for phones; Battery jump starters; Electric battery chargers; Wireless battery chargers; Batteries for electronic cigarettes; Battery chargers for electronic cigarettes; Battery chargers for mobile phones; Battery chargers for tablet computers; Battery chargers for laptop computers; Battery chargers for use with telephones; Battery chargers for home video game machines; Video cables; Network cabling; Modem cables; Audio cable; Audio cables; USB cables; Electric cables; Cable adapters;</p>

	Printer cables; Data cables; Extension cables; Cables and wires; Audio cable connectors; Data link cables; Cable television transmitters; Data processing apparatus; Electronic data processing apparatus; Mouse [data processing equipment]; USB hubs; USB hardware; USB sticks; USB readers; USB adapters; USB chargers; Electric cables and wires; Cables for transmitting and receiving cable television signals; Wires (Telephone -); Portable telephones; Portable speakers; Portable chargers; Telecommunications devices; Telecommunications transmitters; Telecommunications cables; Telecommunication cables; Telecommunications switches; Data wires.
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2. XIMEA GmbH (“**the Opponent**”) has opposed the application under section 5(2)(b) of the Trade Marks Act 1994 (“**the Act**”). The opposition is directed at all the goods applied for.

3. The opposition is based on the Opponent’s word-only comparable UK trade mark (EU),¹ shown below (“**the Earlier Mark**”).² The Earlier Mark is registered in respect of the following goods in Class 9, all of which are relied upon for the purposes of this opposition:

Representation of the trade mark:	xi
Registration Number:	UK00917632316
Filing date:	22 December 2017

¹ Following the end of the transition period of the UK’s withdrawal from the EU, all EU trade marks (“EUTM”) registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A ‘comparable trade mark (EU)’ retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

² Given the respective filing dates, the Opponent’s mark is an earlier trade mark in accordance with section 6 of the Act.

Registration date:	20 June 2018
Goods:	<p><u>Class 9</u></p> <p>Cameras [photography]; Digital cameras; Light filters for cameras; Photographic lenses; Memory cards for cameras; Camera lens mounts; Image capturing and developing devices; Apparatus for the processing of images; Imaging apparatus; Apparatus for the transmission of images; Electronic imaging devices; Imaging devices for scientific purposes; Recording apparatus; USB hardware; Image recognition software; Computer programmes for image processing; Software; Image intensifiers; none of the aforementioned goods relating to the collection, processing, testing and/or control of blood and blood products.</p>

4. The Opponent claims that *“the Marks are similar. The dominant and distinctive element in the contested sign is ‘XI’ which is identical to the earlier mark. The goods are highly similar and/or similar, being electronic equipment and the accessories and parts of the same [and as a consequence] there exists a likelihood of confusion”*.
5. The Applicant filed a counterstatement denying the claims made.
6. Only the Opponent elected to file written submissions and evidence during the evidence rounds. No hearing was requested and neither party elected to file written submissions in lieu of a hearing. I make this decision following a careful consideration of the papers.
7. The Opponent is represented by HGF Limited. The Applicant has no professional legal representation in these proceedings.
8. Although the UK has left the EU, section 6(3)(a) of the European Union (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 Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to the case law of the EU courts.

Preliminary Issue

9. The Applicant filed its Form TM8 'Notice of defence and counterstatement' stating that three sheets were attached to the form. In its counterstatement, the Applicant refers to three attachments which it states are: (1) its 'company certificate'; (2) a quote from the Opponent's website; and (3) the title of a book, 'XIMEDIA' sold "*on Amazon*".
10. In its covering email to its Form TM8, the Applicant makes submissions and refers to two attachments, namely: (1) a copy of its 'company certificate'; and (2) a picture of its "*products [listed] on Amazon*".
11. The attachments I have before me consist of the certificate of incorporation for 'XI MEDIA LIMITED', and two partial screenshots from the website "amazon.co.uk", one of which includes a partial image of the word 'XIMEDIA'. I have not been provided with a copy of the quote from the Opponent's website, although this quote is in any event transcribed by the Applicant in its counterstatement.
12. Whilst no formal evidence has been submitted by the Applicant, the 'company certificate' and the 'XIMEDIA' book screenshot have nonetheless entered into proceedings via the Applicant's Form TM8 which was verified by a statement of truth, as such I am required to take it into consideration.
13. The task before me under section 5(2)(b) of the Act is to compare the trade mark application with the Opponent's earlier registration and decide whether sufficient similarity exists such that the average consumer of the goods at hand would be confused as to the trade origin of those goods. The fact that the Applicant's company name 'XI MEDIA' coincides with the word element of the trade mark applied for can have no bearing on that comparison I am required to make, therefore I shall make no further reference to the Applicant's company certificate.

14. The Applicant submits that they have “searched on Amazon, there is also a book called “XIMEDIA” in German edition. It doesn’t seem to be a problem between the author and opponents” and that “there is a popular book named XIMEDIA selling on Amazon globally [...], it is an ordinary name no need to worry about a confusion”.
15. The fact that a book (the contents of which, I note, is unknown to me, since the exhibit I have before me does not include that information), published “in German” bears the title ‘XIMEDIA’ can have no bearing on the task before me and it in any event does not show me that the word ‘XIMEDIA’ is an “ordinary name”. I shall make no further reference to this material in my decision.

Evidence

16. The Opponent’s evidence is provided in the witness statement of Lauren Richardson dated 8 September 2022. Ms Richardson is a trade mark attorney employed by HGF Limited, the legal representative of the Opponent in these proceedings. Attached to the witness statement are five exhibits labelled LR1 to LR5.

17. Ms Richardson states that:

“3. The purpose of this statement is to file evidence of fact demonstrating the goods of the Opponent are sold alongside, by the same undertakings, via the same trade channels, can be complementary to one another and have the same purpose and intended user as those of the Applicant.”

18. Ms Richardson provides a summary of the nature of the exhibits which I have reproduced below:

“5. I attach at Exhibit LR1 printouts from the Opponent’s own website (<https://www.ximea.com/>) showing the retail of the various accessories sold alongside and together with its cameras. More specifically, cables and power supplies.

6. I attach at Exhibit LR2 printouts taken from well-known UK retailers Argos and Currys. These show that as well as selling cameras, they also retail cables,

USB hardware and batteries for use specifically with them. The types of cables include USB and HDMI cables and are used for both the transference of data from the camera itself to another device such as a laptop, as well as charging cables.

7. I attach at Exhibit LR3 printouts taken from Jessops' website, a specialist retailer of leading cameras and accessories. The website has 'accessories' which include batteries and chargers, cables and sound and audio transmitters and microphones all for use with cameras.

8. I attach at Exhibit LR4 a printout taken from Amazon listing the various sub-categories associated with cameras, including batteries. It also shows the best sellers in this category as being cables, batteries.

9. I attach at Exhibit LR5 printouts from the websites of well-known brands specialising in cameras and their accessories. These include Canon, Nikon, Sony and Fujifilm. The printouts themselves detail specifically batteries and battery chargers, microphone and audio equipment and wires/cables.

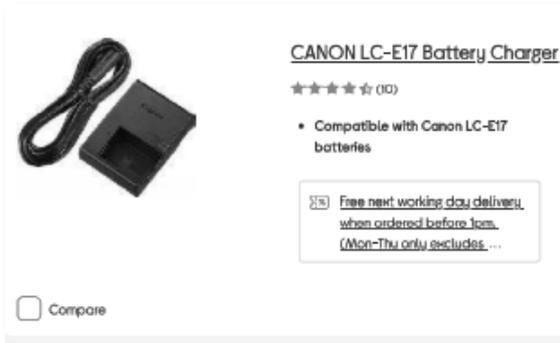
19. Having reviewed the evidence, I note the following:

(1) Ms Richardson has stated that the *"evidence of fact comprises [of] printouts and screenshots of websites showing the goods of the Opponent are sold together with and alongside the goods of the Applicant"*. I must clarify that I have not been presented with any evidence that shows me that goods bearing the Opponent's trade mark are sold alongside goods bearing the Applicant's applied-for mark. Rather, the evidence shows that retailers such as 'Jessops', 'Argos', 'Currys' and 'Amazon' and manufacturers of cameras such as *"Canon, Nikon, Sony and Fujifilm"* sell goods that are suitable for use in or with cameras. Such goods being:

(a) made by the manufacturer of the camera specifically for use with its own cameras, for example, this battery bearing the brand name

'FUJIFILM' and this 'CANON' branded battery charger:

Rechargeable battery



(b) made by third party manufacturers as equivalent parts, specifically for use with certain brands, or are compatible with certain brands. For example, the following battery bearing the brand name 'HAHNEL' which is a replacement battery for a 'FUJIFILM' battery model, and the 'ATMOS' USB converter that is compatible with 'CANON' branded cameras:

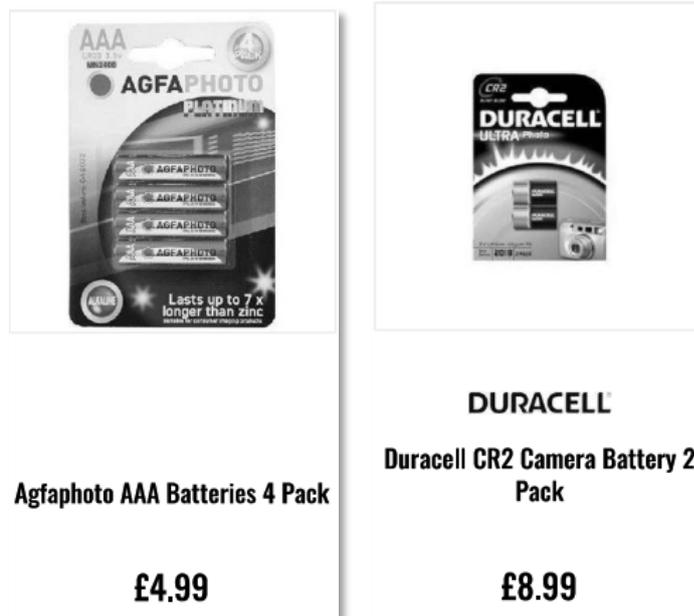


Atmos Connect 4K HDMI to USB Converter

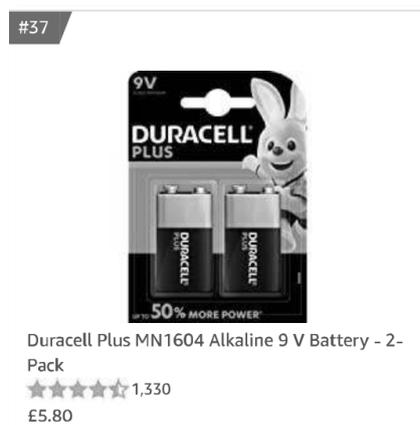
- Works with any Canon camera with HDMI output
- Supports 4K input and 1080p output
- Works with Android, Windows, and Mac OS - no drivers required

£ 53.99

or made by third party manufacturers for cameras, for example:



(c) generic goods that aren't specifically for any camera brand or aren't specifically for cameras (although retailers classify them as camera accessories). For example, included in the 'Amazon evidence' is a list of 'Best Sellers in Camera & Photo Accessories', in which this battery is included:



or as another example, this universal battery charger included in the 'Currys evidence':



(2) the evidence relating to the Opponent’s website pages display goods such as power cables, USB cables and power supply units (‘AC adaptors’), for example:

Power cable 2m for MJ models



- Part number: **CBL-MJ-PWR-2M0**
- AUX power cable for use with power injector
- Length: 2m
- DC AUX Power In Socket Female
- Ends with barrel connector - pigtail allows easy extension in length
- Recommended Voltage is 20V with range 12-24V
- The adequate power supply should be around 30W
- Suitable for specific camera models from xiJ and xiRAY family

Technical details
Support page
Camera family brochure
CONTACT SALES

Power supply for xiB camera



- Standard Power supply unit
- Input 100-240V, 60 Watt
- Output 24V
- DC-output plug 5.5 x 2.1 x 12mm
- AC Adapter
- Weight: 332g
- Part Number: **PSU-GSM60B24-P1J**

xiB camera line brochure
xiB-64 camera line brochure
xiX camera line brochure
xSwitch multi camera platform
NVIDIA Jetson carrier board
Support pages
CONTACT SALES

USB 3.1 Gen1 Accessories for xiC models

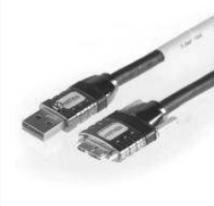
- PCI Express adapters - USB 3.1 host cards
- Passive USB 3.0 cables
- Active repeater USB 3.0 cables
- Synchronization Trigger Cables
- Tripod brackets

Product page
USB3 Zone
Compatible Hardware



Cable lengths and distance options

1 m USB 3.0 passive cable



1m Cable with thumbscrews lock connector for xiQ, xiC and xiD family of USB3 cameras

3 m USB 3.0 passive cable



3m Cable with thumbscrews lock connector for xiQ, xiC and xiD family of USB3 cameras

5 m USB 3.0 passive cable



5m Cable with thumbscrews lock connector for xiQ, xiC and xiD family of USB3 cameras

Contact Sales

- (3) a large proportion of the ‘Amazon evidence’ relates to ‘memory cards’ and ‘HDMI cables’, for example:



- (4) the ‘Jessops evidence’ includes cables such as ‘headphone’ cables; and
- (5) none of the Opponent’s nor the Applicant’s branded goods are displayed for sale in the retailer evidence (i.e. the evidence relating to the webpages of ‘Jessops’, ‘Argos’, ‘Currys’ and ‘Amazon’).

Conclusions on the Opponent’s evidence

20. The Opponent’s evidence demonstrates the marketplace for photographic cameras insofar as it shows that cameras can be used with or require certain accessories such as power supplies, data storage devices and specifically adapted batteries and cables, and that such accessories are sold alongside cameras and/or are marketed by retailers as ‘camera accessories’.

DECISION

Legislation and Case Law

21. Section 5(2)(b) and 5A of the Act are as follows:

“5(2) 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”.

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

22. I am guided by the following principles which 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 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 might believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

Comparison of goods

23. In *Gérard Meric v Office for Harmonisation in the Internal Market*,³ (“**Merik**”), the General Court held to the effect that goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application and vice versa.

³ Case T- 133/05

24. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

- (a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification
- (b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.”

25. When considering whether goods and services are similar, all the relevant factors relating to the goods and services should be taken into account. Those factors include, inter alia:⁴

- (1) the physical nature of the goods or acts of service;
- (2) their intended purpose;
- (3) their method of use / uses;
- (4) who the users of the goods and services are;
- (5) the trade channels through which the goods or services reach the market;
- (6) in the case of self-serve consumer items, where in practice they are found or likely to be found in shops and in particular whether they are, or are likely to be, found on the same or different shelves; and
- (7) whether they are in competition with each other (taking into account how those in trade classify goods and services, for instance whether market research companies put them in the same or different sectors)

or

- (8) whether they are complementary to each other. Complementary means *“there is a close connection between them, in the sense that one is*

⁴ See *Canon*, Case C-39/97, paragraph 23; and *British Sugar PLC v James Robertson & Sons Ltd.*, [1996] R.P.C. 281 – the “*Treat*” case

indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking".⁵ I note that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity.⁶ Complementarity can be clearly distinguished from 'use in combination' the latter being where goods/services are merely used together, whether by choice or convenience (e.g. bread and butter; or wine and wine glasses⁷), this means that they are not essential for each other.

26. When interpreting the terms in a specification I bear in mind the following:

(1) in *YouView TV Ltd v Total Ltd*,⁸ Floyd J. (as he then was) stated:

"11. Mr Daniel Alexander QC, who appeared for the appellants with Mr James Abrahams, drew my attention to the facts of the Treat case. The court there held that jam was not encompassed within the description of "dessert sauce". The mere fact that some people did or could use jam as a dessert topping did not mean that in ordinary parlance it was a dessert sauce. It was necessary to focus on the core of what is described.

12. There are sound policy reasons for this. 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

⁵ *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82

⁶ *Kurt Hesse v OHIM*, Case C-50/15 P

⁷ 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."*

⁸ [2012] EWHC 3158 (Ch)

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.”

(2) where *“the words chosen may be vague or could refer to goods or services in numerous classes [of the Nice classification system], the class may be used as an aid to interpret what the words mean with the overall objective of legal certainty of the specification of goods and services”*,⁹

(3) the following applicable principles of interpretation:

“(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.”*¹⁰

27. For the purposes of making a comparison, the goods can be grouped together where the same reasoning applies.¹¹

28. The goods to be compared are set out in the table below. I note that all of the Opponent’s goods are subject to the following restriction: *“none relating to the collection, processing, testing and/or control of blood and blood products”*.

⁹ *Pathway IP Sarl (formerly Regus No. 2 Sarl) v Easygroup Ltd (formerly Easygroup IP Licensing Limited)*, [2018] EWHC 3608 (Ch), paragraph 94

¹⁰ See *Sky v Skykick* [2020] EWHC 990 (Ch), paragraph 56 (wherein Lord Justice Arnold, in the course of his judgment, set out a summary of the correct approach to interpreting broad and/or vague terms)

¹¹ *Separode Trade Mark* BL O/399/10, paragraph 5

Earlier Mark	Contested Marks
<p>Cameras [photography]; Digital cameras; Light filters for cameras; Photographic lenses; Memory cards for cameras; Camera lens mounts; Image capturing and developing devices; Apparatus for the processing of images; Imaging apparatus; Apparatus for the transmission of images; Electronic imaging devices; Imaging devices for scientific purposes; Recording apparatus; USB hardware; Image recognition software; Computer programmes for image processing; Software; Image intensifiers; none of the aforementioned goods relating to the collection, processing, testing and/or control of blood and blood products.</p>	<p>Wire; Electronic power supplies; Power supplies for smartphones; Power adaptors; Power cables; Power banks; Power wires; Power controllers; Batteries; Batteries, electric; Battery cables; Rechargeable batteries; Chargeable batteries; Battery chargers; Smartphone battery chargers; Batteries for phones; Battery jump starters; Electric battery chargers; Wireless battery chargers; Batteries for electronic cigarettes; Battery chargers for electronic cigarettes; Battery chargers for mobile phones; Battery chargers for tablet computers; Battery chargers for laptop computers; Battery chargers for use with telephones; Battery chargers for home video game machines; Video cables; Network cabling; Modem cables; Audio cable;</p>

	<p> Audio cables; USB cables; Electric cables; Cable adapters; Printer cables; Data cables; Extension cables; Cables and wires; Audio cable connectors; Data link cables; Cable television transmitters; Data processing apparatus; Electronic data processing apparatus; Mouse [data processing equipment]; USB hubs; USB hardware; USB sticks; USB readers; USB adapters; USB chargers; Electric cables and wires; Cables for transmitting and receiving cable television signals; Wires (Telephone -); Portable telephones; Portable speakers; Portable chargers; Telecommunications devices; Telecommunications transmitters; Telecommunications cables; Telecommunication cables; Telecommunications switches; Data wires. </p>
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29. The Opponent submits that its goods “*comprise of cameras, accessories and parts for cameras, as well as transmission and image processing apparatus. These goods are technical electronic goods.*” And that the “*Contested Goods are wires, cables, batteries, battery chargers and audio equipment. These are all accessories that are sold with the Opponent’s goods or separately to be used with the goods of the Opponent. [...] It is evident that these goods and the [Opponent’s goods] coincide with their intended user, trade channels and are complementary to one another. For example, a camera cannot be used without power nor cables and transmitters to transfer the data from the camera itself to for example a computer. [The respective goods] belong to the same or very close market sector and are sold and promoted together via the same economic undertaking. [...] they share the same distribution channels since they can be found in leading retailers such as Argos and Currys.*”

USB

30. The Applicant’s specification contains the following:

“USB hardware; USB cables; USB hubs; USB sticks; USB readers; USB adapters; USB chargers.”

31. The Opponent’s specification contains the following:

“USB hardware; none of the aforementioned goods relating to the collection, processing, testing and/or control of blood and blood products”

The Opponent’s term “*USB hardware*” is self-evidently **identical** to the Applicant’s “*USB hardware*”. Although the Opponent’s term is subject to a restriction, it remains identical to the Applicant’s term on the principle outlined in *Meric*.

32. It is my understanding that ‘USB’ is a form of electrical connection which enables the delivery of power and the transfer of data. In the absence of any submissions to the contrary, I find that the term “*USB hardware*” describes the component part that is the physical socket or port that enables devices to connect using USB, and the connectors/plugs themselves, rather than it being a broad, collective

term to describe any conceivable hardware device that integrates ‘USB hardware’. For instance, just because a laptop computer may have integrated USB hardware in the form of a USB port, does not in itself give rise to material similarity between the USB hardware and the laptop itself.

33. The term “*USB hardware*” however could encompass hardware devices that allow USB connections such as “*USB hubs*” and “*USB readers*”, and it could extend to the “*USB cables*” themselves. With that in mind, I consider the following applied-for terms to be **identical** on the principle outlined in *Merit*, to the Opponent’s “*USB hardware*”:

“*USB cables; USB hubs; USB readers; USB adapters*”.

34. **In the alternative**, they are at least **highly similar** as they overlap in nature and purpose, they would have the same method of use and the same users. They would share the same trade channels and be complementary.
35. My understanding of the term “*USB sticks*” is that it refers to data storage devices and that “*USB chargers*” refers to a battery charger that has a USB connection interface. The term “*USB hardware*” could also conceivably extend to hardware devices with a primary function to transfer data and supply power via USB (given that, based on my understanding, ‘USB’ is a mode of power and data delivery).
36. Therefore, to the extent that “*USB sticks*” and “*USB chargers*” specifically relate to ‘USB’ devices for data and power delivery, there is at least a **low degree of similarity** between them and the Opponent’s “*USB hardware*” term as they are likely to overlap in nature, they may overlap in purpose since the purpose of the USB hardware is to transfer power and data, as such they would overlap in user and they would be complementary to each other. They may also share the same trade channels.
37. **In addition, or in the alternative**, I consider the Applicant’s “*USB sticks*” to be **similar to a low degree** to the Opponent’s “*memory cards for cameras*” since both are data storage devices. They would have the same purpose and user and they may be in competition with each other. They may also overlap in trade channels.

38. Whilst my primary finding is that the term “*USB hardware*” could extend to the USB cables that interconnect the USB hardware to peripheral devices, I do not consider it appropriate to equate “*USB hardware*” to every permutation of electrical cable or wires, since it is the ‘USB’ connecting plug i.e. the USB hardware itself, that differentiates it from other cables and wires.
39. Equally, although I have found “*USB hardware*” similar to a low degree to “*USB chargers*” I do not consider it appropriate to equate the term “*USB hardware*” with every permutation of “charger” , neither should it be extended to include any conceivable electronic device that incorporates USB hardware. To do so would be straining the core meaning of “*USB hardware*”, which is incorrect.

‘Batteries, battery chargers, power supplies and power cables’ and ‘wires and cables’¹²

40. I remind myself of the Opponent’s submissions that its goods comprise of, “*cameras, accessories and parts for cameras, as well as transmission and image processing apparatus. These goods are technical electronic goods*”, and that “*a camera cannot be used without power nor cables and transmitters to transfer the data from the camera itself to for example a computer.*” With this in mind, I shall proceed with comparing the Opponent’s ‘cameras and accessories’ with the Applicant’s ‘batteries and cables’.
41. The Opponent’s specification contains the following terms which can be characterised as ‘cameras and imaging devices’, ‘imaging and recording apparatus’ and ‘accessories and parts for cameras’. They are as follows:

(1) ‘cameras and imaging devices’

“Cameras [photography]; Digital cameras; Image capturing and developing devices; Electronic imaging devices; Imaging devices for scientific purposes; Image intensifiers; none of the aforementioned goods relating to the collection, processing, testing and/or control of blood and blood products”

¹² This heading refers to my grouping of the applied-for goods and is for ease of reference only.

A 'device', within the ordinary meaning of the word, relates to a thing that is made or adapted for a particular purpose, it can relate to a specific machine or tool. Therefore "*image capturing and developing devices*", and "*electronic imaging devices*" would encompass 'photographic cameras'; "*imaging devices for scientific purposes*" could include specifically adapted photographic cameras and it could also encompass 'x-ray scanners' and 'microscopes'; a 'microscope' could also be considered to be an "image intensifier" and an "image intensifier" could also encompass a 'photographic lens'.

(2) 'imaging and recording apparatus'

"Apparatus for the processing of images; Imaging apparatus; Recording apparatus; Apparatus for the transmission of images; none of the aforementioned goods relating to the collection, processing, testing and/or control of blood and blood products."

- (a) Unlike the term 'device' (which I interpret as relating to a machine or tool having a specific function), I interpret the term 'apparatus', as referring not only to the device itself but also to the assortment of equipment that is needed to perform a specific function.
- (b) I note that (i) the term 'recording apparatus' is broad and could relate to apparatus for the recording of static images, moving images and/or the recording voice and sound; and (ii) the term 'transmission', in the ordinary meaning of the word, relates to the conveyance or transference of something.
- (c) The Opponent's 'apparatus' terms are therefore likely to not only refer to the devices themselves e.g. 'cameras', but also related audio-visual peripheral equipment.

(3) 'accessories and parts for cameras'

“Light filters for cameras; Photographic lenses; Memory cards for cameras; Camera lens mounts; none of the aforementioned goods relating to the collection, processing, testing and/or control of blood and blood products”.

42. Goods in the Applicant’s specification may be conveniently grouped as follows:

(1) 'batteries, battery chargers, power supplies and power cables':¹³

Power supplies and power cables	Batteries and battery chargers	Batteries and battery chargers for specific electronic goods
Electronic power supplies; Power adaptors; Power cables; Power banks; Power wires; Power controllers; Electric cables; Electric cables and wires; Portable chargers.	Batteries; Batteries, electric; Battery cables; Rechargeable batteries; Chargeable batteries; Battery chargers; Battery jump starters; Electric battery chargers; Wireless battery chargers.	Batteries for electronic cigarettes; Battery chargers for electronic cigarettes; Battery chargers for tablet computers; Battery chargers for laptop computers; Battery chargers for home video game machines.

(2) 'wires and cables':¹⁴

Generic wires and cables	Video, audio and data cables and connectors	Other cables with specific functions
Wire; Cable adapters; Extension cables; Cables and wires.	Video cables; Audio cable; Audio cables; Audio cable connectors; Data cables; Data link cables; Data wires.	Printer cables; Cables for transmitting and receiving cable television signals.

¹³ The table headings are for ease of reference and do not form part of the Applicant’s specification.

¹⁴ The table headings are for ease of reference and do not form part of the Applicant’s specification.

43. Whilst I acknowledge that audio-visual and data wires and cables perform different primary functions to that of an imaging device, I do not overlook that 'digital cameras' and 'electronic imaging devices' for example, require cables that perform certain functions in order to record, capture and transmit sound and/or images.
44. I also take into consideration that the Opponent's "*Apparatus for the processing of images; Imaging apparatus; Recording apparatus; Apparatus for the transmission of images*" are broad terms. Given my interpretation of the term 'apparatus', it is conceivable that these terms could encompass not only the imaging and recording devices themselves, but also the necessary cables needed to achieve the particular functions.
45. In reaching this conclusion I have kept in mind the trade practices as demonstrated in the evidence, and I am cognisant of the fact that digital cameras (that do not require photographic film) require accessories such as 'memory cards' to store the digital photographs and various cables to transfer the images from the cameras to another device such as a computer.
46. Therefore, to the extent that certain cables and wires are required by imaging devices such as digital cameras and/or are encompassed in the Opponent's broad 'apparatus' terms, I consider the following applied-for goods, namely:

"Video cables; Audio cable; Audio cables; Audio cable connectors; Data cables; Data link cables; Data wires; Cables for transmitting and receiving cable television signals"

to be **similar, to a low degree**, to the Opponent's 'imaging devices' and 'apparatus' terms (because they would form part of the apparatus) on the basis that they would be complementary, – this is because the applied-for goods are indispensable and/or important for the use of the Opponent's goods. They would therefore share the same user and the same trade channels (they would likely be manufactured by the same undertakings).

47. The goods such as batteries, battery chargers and power cables differ in their nature and intended purpose, to for example, "*digital cameras*" and "*electronic*

imaging devices”. To the extent that the imaging devices require accessories such as batteries, battery chargers and power cables in order to function,¹⁵ the respective goods can be deemed to be complementary. This is because the applied-for goods are indispensable and/or important for the use of the Opponent’s goods. As such, I also consider they have the same trade channels (and are likely to coincide in their producer, as has been shown in the Opponent’s evidence) and that they would have the same user.

48. The following applied-for goods are therefore **similar to a low degree** to the Opponent’s goods:

“Batteries; Batteries, electric; Battery cables; Rechargeable batteries; Chargeable batteries; Battery chargers; Electric battery chargers; Wireless battery chargers; Electronic power supplies; Power adaptors; Power cables; Power wires.”

49. The applied-for terms *“Wire; Cables and wires; Electric cables; Electric cables and wires”* are broad. I have deliberated over the breadth of these terms since the ordinary meaning of the words could encompass wire for hanging a picture frame or cables for a cable car or suspension bridge for example. However, using the class number as an aid to interpretation, I consider these terms are likely to refer to cables and wires that can carry electric current and/or be used to transfer data, audio and video. To the extent that these applied-for goods could be encompassed in the Opponent’s ‘apparatus’ and/or they are indispensable for the use of the Opponent’s ‘imaging devices’, I consider there to be a **low degree of similarity** between the applied-for terms and the Opponent’s *“Apparatus for the processing of images; Imaging apparatus; Recording apparatus; Apparatus for the transmission of images; Electronic imaging devices”*.

50. That said, I do not think that it follows that the applied-for terms of *“cable adapters”* and *“extension cables”* should therefore be considered to be similar to the Opponent’s ‘apparatus’ goods. To do so would be straining the core meaning of the Opponent’s terms. In my view, a *“cable adapter”* is something used to connect two cables that would otherwise be incompatible; and an *“extension*

¹⁵ and the evidence demonstrates that certain batteries can be exclusively for use in cameras.

cable” within the ordinary meaning of the term is a length of electric cable which permits the use of appliances at some distance from a fixed electrical socket. I therefore find these goods to be **dissimilar** to the Opponent’s.

51. The Applicant’s specification also contains “*printer cables*”. I interpret a printer as an imaging device which is capable of receiving digital images, and producing a hard copy of those digital images. As such, to the extent that “*printer cables*” are encompassed in the Opponent’s “*imaging apparatus*” term, then I consider the applied-for goods to be **similar** to the Opponent’s **to a low degree**.

52. Owing to their specificity of purpose, I consider the following applied-for goods to be **dissimilar** to the Opponent’s goods:

“Batteries for electronic cigarettes; Battery chargers for electronic cigarettes; Battery chargers for tablet computers; Battery chargers for laptop computers; Battery chargers for home video game machines.”

53. I am mindful that tablet computers, laptop computers and video games could have the capability to capture and/or transmit images, however, I do not consider it appropriate to extend the Opponent’s ‘imaging and recording apparatus’ terms to battery chargers for such devices. I do not consider those devices to be ‘imaging devices’, therefore it follows that the battery chargers for such goods would not be encompassed in the Opponent’s terms and they are not complementary to the Opponent’s goods. To extend the Opponent’s terms in such a way would unnaturally strain the language of the Opponent’s terms so as to produce a meaning which does not cover the contested goods.

54. I consider the Applicant’s “*battery jump starters*” to be **dissimilar** to the Opponent’s goods, since I interpret “*battery jump starters*” as referring to cables to jump start the battery of a vehicle and not as referring to jump starting batteries of imaging devices.

55. The following applied-for goods are also **dissimilar** to the Opponent’s goods:

“Power banks; Portable chargers; Power controllers”

This is because:

- (1) I interpret the terms “*power banks*” and “*portable chargers*” as portable charging devices that can charge an electronic device (‘on-the-go’) without the need for using mains electricity (the power bank/portable charger would itself require a battery charger before it can be used to charge another device). It is therefore one step removed from the battery charger of an imaging device, such battery chargers being chargers that would plug into a mains supply.
- (2) the term “*power controller*” implies an instrument, within the meaning of Class 9, for ‘switching, transforming, regulating or controlling the distribution or use of electricity’, which is different to the function of an ‘imaging device’ and I do not think that it would be encompassed within the term ‘imaging apparatus’.

Portable telephones and battery chargers for mobile phones

56. The Applicant’s specification contains the following goods:

“Portable telephones; Power supplies for smartphones; Smartphone battery chargers; Batteries for phones; Battery chargers for mobile phones; Battery chargers for use with telephones”

57. The term “*portable telephones*” refers to voice communication devices that enable users to have conversations at a distance. Whilst I acknowledge that nowadays, goods such as ‘mobile phones’ and ‘smartphones’ can have in-built digital photographic cameras, the core meaning and primary function of a “*portable telephone*” relates to a voice communication device, not a photographic or imaging device. Applying the reasoning in the *Treat* case, the mere fact that a portable telephone such as a smartphone could be used for taking photographs does not mean that in ordinary parlance it is a photographic camera. In other words, the core meanings are different. For example, if someone wanted to make a telephone call, they could not use a photographic camera, they would still require a telephone. I consider the applied-for goods to be **dissimilar** to the Opponent’s goods.

58. With the foregoing in mind, owing to their specificity of purpose, I consider the following applied-for goods to be **dissimilar** to the Opponent's goods:

“Power supplies for smartphones; Smartphone battery chargers; Batteries for phones; Battery chargers for mobile phones; Battery chargers for use with telephones”

Data processing apparatus

59. The Applicant's specification contains the following terms:

“Data processing apparatus; Electronic data processing apparatus”

60. I have deliberated the meaning of these terms and what 'data processing' refers to. I do not have any submissions from the parties about these goods and I remind myself that an unclear or imprecise term should be narrowly interpreted as extending only to such goods as it clearly covers. It is my opinion that the most logical interpretation, bearing in mind the ordinary meanings of the words, is that these terms refer to goods such as personal computers and laptop computers that accumulate, process and store data. In reaching this conclusion I have not overlooked the plausibility that digital images could be considered to be a collection of data, however, the core meaning of *“data processing apparatus”* is different to *“apparatus for the processing of images”*. To strain the relevant language is incorrect, therefore I consider these applied-for goods to be **dissimilar** to the Opponent's goods.

Telecommunication related goods

61. The Applicant's specification contains the following:

*“Telecommunications devices; Telecommunications transmitters;
Telecommunications cables; Telecommunication cables;
Telecommunications switches; Cable television transmitters; Wires
(Telephone -); Network cabling; Modem cables.”*

62. In the absence of any submissions to the contrary, I interpret *“Telecommunications devices”* as referring to electronic communication devices

that enable people to communicate with one another, such as a telephone; and *“Telecommunications transmitters; Telecommunications cables; Telecommunication cables; Telecommunications switches; Cable television transmitters; Wires (Telephone -); Network cabling; Modem cables”* as devices and apparatus used in communication infrastructures such as phone, internet and broadcasting infrastructures, that are capable of transmitting and/or receiving information by electronic means over a distance.

63. I am mindful that the Opponent’s specification includes the term *“apparatus for the transmission of images”* and that information that is transmitted via a telecommunications network can include ‘images’. On that basis, there is a **low degree of similarity** between the Opponent’s term and the applied-for *“cable television transmitters”* since there may be an overlap in nature and purpose and they may share the same trade channels.
64. However, I do not consider it appropriate to equate the term *“apparatus for the transmission of images”* with telecommunication devices and apparatus since the core meanings are different. To find similarity between the respective goods would require a straining of the language so as to produce a meaning which does not cover the contested goods. The core meaning of ‘telecommunications’ relates to communication, as such, I consider the following applied-for goods to be **dissimilar** to the goods contained in the Opponent’s specification:

“Telecommunications devices; Telecommunications transmitters; Telecommunications cables; Telecommunication cables; Telecommunications switches; Wires (Telephone -); Network cabling; Modem cables.”

Miscellaneous electronic devices

65. The Applicant’s specification contains the following:

“Mouse [data processing equipment]; Portable speakers.”

66. The applied-for goods bear no similarity with any of the Opponent’s goods, the respective goods are therefore **dissimilar**.

Conclusions on the comparison of the goods

67. I have found identity and/or similarity (to varying degrees) between some of the applied-for goods and the Opponent's goods. For ease, I have set this information out in the table below:

Identical / similar	Dissimilar
<p><i>USB hardware; USB cables; USB hubs; USB readers; USB adapters; USB sticks; USB chargers; Video cables; Audio cable; Audio cables; Audio cable connectors; Data cables; Data link cables; Data wires; Cables for transmitting and receiving cable television signals; Batteries; Batteries, electric; Battery cables; Rechargeable batteries; Chargeable batteries; Battery chargers; Electric battery chargers; Wireless battery chargers; Electronic power supplies; Power adaptors; Power cables; Power wires; Wire; Cables and wires; Electric cables; Electric cables and wires; printer cables; Cable television transmitters.</i></p>	<p><i>Cable adapters; Extension cables; Batteries for electronic cigarettes; Battery chargers for electronic cigarettes; Battery chargers for tablet computers; Battery chargers for laptop computers; Battery chargers for home video game machines; battery jump starters; Power banks; Portable chargers; Power controllers; Portable telephones; Power supplies for smartphones; Smartphone battery chargers; Batteries for phones; Battery chargers for mobile phones; Battery chargers for use with telephones; Data processing apparatus; Electronic data processing apparatus; Telecommunications devices; Telecommunications transmitters; Telecommunications cables; Telecommunication cables; Telecommunications switches; Wires (Telephone -); Network cabling; Modem cables; Mouse [data processing equipment]; Portable speakers.</i></p>

68. Since some similarity between the goods is required for the purposes of a section 5(2)(b) claim, the opposition must fail in respect of the dissimilar goods listed above. I therefore proceed to consider a likelihood of confusion only in relation to the goods that are identical or similar in some degree.

The average consumer and the nature of the purchasing act

69. Trade mark questions, including the likelihood of confusion, must be viewed through the eyes of the average consumer of the goods in question. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. The word “average” merely denotes that the person is typical,¹⁶ which in substance means that they are neither deficient in the requisite characteristics of being well informed, observant and circumspect, nor top performers in the demonstration of those characteristics.¹⁷

70. It is therefore necessary to determine who the average consumer of the respective goods is, and how the consumer is likely to select those goods. It must be borne in mind that the average consumer’s level of attention is likely to vary according to the category of goods in question.¹⁸

71. The Opponent’s goods can be characterised in general terms as cameras and other imaging devices as well as computer programs for image processing.

72. The Applicant’s goods can be characterised in general terms as electronic accessories or peripherals for use with electronic devices such as cables, batteries and battery chargers.

73. The average consumer of the applied-for goods would be members of the general public (even though professionals will also use those products).

74. The average consumer of some of the Opponent’s goods (for example “*Cameras [photography]*” are likely to also be members of the general public, as well as professionals such as professional photographers, scientists (in the case of

¹⁶ *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), paragraph 60

¹⁷ *Schutz (UK) Ltd v Delta Containers Ltd* [2011] EWHC 1712, paragraph 98

¹⁸ *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97

“imaging devices for scientific purposes”), as well as businesses that specialise in the processing and developing/printing of photographs.

75. The average consumer of the respective goods therefore consists of the general public and also of professionals.
76. The goods are likely to be sold through a range of retail outlets (and their online equivalents), such as electrical goods stores, supermarkets and other retailers selling a variety of general merchandise, including department stores and online marketplaces. The goods are likely to be displayed on shelves in stores and where they can be bought online, an image of them will likely be displayed on a webpage. In each instance, the consumer will select the goods having viewed them or an image or description of them first.
77. The selection of the goods is therefore primarily visual, although I do not discount that aural considerations may play a part by way of word-of-mouth recommendations and advice from sales assistants. However, it is my view that even where the goods are selected by making requests to staff, the selection process would primarily be visual in nature and the mark will be shown on the packaging of the goods. Accordingly, visual considerations dominate.
78. The majority of the applied-for goods, insofar as they relate to accessories such as cables, battery chargers, batteries etc. will, for the most part, be inexpensive and likely to be purchased occasionally as they degrade, or because the average consumer may require multiples of those goods to use simultaneously with various electronic devices. When selecting those goods the average consumer will consider things such as functionality e.g. whether a cable or battery charger has the correct connector or appropriate power supply to suit their requirements.
79. The electrical goods themselves, such as the cameras and portable telephones, will vary in price, but generally speaking they will have a significantly higher price point than mere batteries and cables for instance. When selecting those goods the average consumer is again likely to consider things such as functionality as well as operating features.

80. The purchasing process is likely to be casual for the accessory goods such as cables, batteries and battery chargers etc. and will not require an overly considered thought process. The average consumer is likely to demonstrate a low to medium level of attention when selecting those goods. Whereas the purchasing process will be more considered for the devices themselves i.e. the cameras, imaging devices and portable telephones etc., especially as they will likely have a much higher price-point and would be purchased less frequently. As such the average consumer is likely to demonstrate a medium to high level of attention when selecting the goods.

Comparison of marks

81. It is clear from established case law that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details.¹⁹ The assessment of likelihood of confusion must be made by considering and comparing the respective marks – visually, aurally and conceptually – as a whole, by reference to the overall impressions created by the marks in the mind of the average consumer, bearing in mind the distinctive and dominant components of the marks.²⁰ Then, in light of the overall impression, and all factors relevant to the circumstances of the case, it is necessary to assess the likelihood of confusion.²¹

82. The assessment of the similarity between two marks means more than taking into consideration only one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks at issue as a whole. However, that does not mean that the overall impression created in the mind of the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components.²²

83. There are situations in which the average consumer, while perceiving a composite mark as a whole, will perceive that it consists of several signs, one (or

¹⁹ *Sabel BV v. Puma AG*, Case C-251/95, paragraph 23

²⁰ *Ibid.*

²¹ *Bimbo SA v OHIM*, Case C-591/12P, paragraph 34

²² *Matratzen Concord AG v OHIM*, Case T-6/01, paragraph 34

more) of which has a distinctive character which is independent of the significance of the whole.²³ However, 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 to carry out a global assessment taking into account all relevant factors.²⁴

84. It would be wrong to dissect the trade marks artificially, 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. It is only where all the other components of a composite mark are negligible that the assessment of the similarity may be carried out solely on the basis of the dominant element. This could be the case, in particular, where that component is capable alone of dominating the image of that mark which members of the relevant public keep in their mind, such that all the other components of the mark are negligible in the overall impression which it creates.
85. In *HERNO S.p.A. v Miss Sparrow Ltd*,²⁵ Mr Iain Purvis KC, sitting as the Appointed Person considered the comparison between a word mark and a device mark containing a stylised word. Having reviewed and cited passages from various case law, including the following passage from the General Court's decision in *Faber Chimica v OHIM* [2005] ECR II-1297, at [38],²⁶ (my underlining):

38. In fact, it is not because an earlier word mark may adopt a written form in the future which would make it identical or similar to a complex mark applied for that the latter mark must be refused registration, but because the

²³ Although this principle does not apply where the meaning of one of the component parts is qualified by another component.

²⁴ *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271, paragraphs 19 to 21. In *Whyte and Mackay* Arnold J. (as he then was) considered the impact of the judgment in *Bimbo*, on the Court's earlier judgment in *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* (Case C-120/04) in relation to composite marks where a composite mark contains an element which is similar to an earlier mark.

²⁵ BL O/954/22

²⁶ In which the General Court rejected both the approaches of (i) making a comparison on the basis that the word mark was presented in a similar way to the device mark; and (ii) the word mark should be treated as if it were a device mark limited to the font in which it was presented on the Register.

complex mark is in fact made up, in addition to an unusual figurative aspect, of a word element identical or similar to that comprising the earlier mark, and that, as part of the global assessment of the likelihood of confusion, that word element cannot be regarded as subsidiary in relation to the other component of the sign (see, a contrario, the reasoning of the Court of First Instance in Case T-110/01 Vedial v OHIM — France Distribution (HUBERT) [2002] ECR II-5275, paragraph 50 et seq.).

Mr Purvis goes on to state (at paragraphs 36 et seq. of his decision) that (my underlining):

36. Having reviewed these authorities, it seems to me that the correct approach of an examiner or tribunal when comparing a word mark to a device comprising a different, stylised word is as follows. For simplicity, I will analyse the position on the basis of a registered word mark being relied on in opposition to the registration of a different, stylised word [...].

37. A word mark grants exclusive rights over the word or words themselves when used in relation to the goods or services of the mark. It is entirely agnostic as to the form in which the word is used. The typeface which appears on the Register is therefore entirely irrelevant.

[...]

39. The stylisation of a word in a device mark is part of the overall impression given by the device and it therefore cannot be ignored when assessing the likelihood of confusion with a different, word mark. It is self-evident that the way in which a word is styled may detract from the impact of its similarities with a different word, or it may increase that impact, either visually or conceptually. At the simplest level, a stylisation which serves to emphasise the letters which are common between the two marks is likely to increase the risk of visual confusion, and vice versa. At a more complex level, the stylisation may serve to emphasise a distinct concept conveyed by the word which distinguishes it from the word which is the subject of the word mark.

86. The respective trade marks are shown below:

Earlier Mark	Contested Marks
xi	<p data-bbox="847 349 1018 383"><u>Mark 1 of 2:</u></p>  <p data-bbox="847 656 1018 689"><u>Mark 2 of 2:</u></p> 

Overall impression

87. The Earlier Mark is a word-only mark consisting of the letters 'xi', therefore the overall impression of the mark rests purely in that combination of letters.
88. The Contested Marks are a series of device marks. The difference in the series rests in the presentation of the wording insofar as Mark 1 consists of the letters 'XI' in capital letters, followed by a space and then the word 'Media' (with an uppercase 'M'); whereas Mark 2 consists of the letters 'xi' in lowercase, followed by the word 'media', also in lowercase, there being no space between them. Although the words are in a relatively plain font, they are nonetheless stylised.
89. The word elements have a prominent position in the marks due to their sizing and placement – they form the widest part of the marks.
90. The letters 'XI' in both marks are in green and the word 'MEDIA' is in grey. Although the two word elements are conjoined in Mark 2, the colour contrast has the effect of creating a natural break between them such that they would be regarded as being separate elements.

91. The marks have a stylised, grey 'X' device with a green dot above it. The device is to the left of the wording and extends in an arch above part of the wording.
92. The only elements in green are the letters 'XI' and the dot in the device, the remainder of the elements are in grey.
93. Although the device is taller in height than the verbal elements, the size and prominence of the verbal elements contributes greatly to the overall impression of the mark and it is those verbal elements that penetrate the overall impression of the marks, whereas the device performs a more decorative role within the marks.
94. In the case of a mark consisting of both a word and figurative element, generally speaking, the mind of the average consumer 'latches on' to the word elements of such marks, and it is the word elements that the average consumer will use to identify the mark. In that regard, it should be noted that, *"according to well-established case-law, in the case of a mark consisting of both word and figurative elements, the word elements must generally be regarded as more distinctive than the figurative elements, or even as dominant, since the relevant public will keep in mind the word elements to identify the mark concerned, the figurative elements being perceived more as decorative elements"*.²⁷
95. The Opponent submits that the word 'MEDIA' *"would be considered merely descriptive of the contested goods"* and that it *"simply adds an entirely non-distinctive element to the Opponent's Earlier Mark."*
96. The Opponent provides no further submissions with regard to the 'descriptiveness' of the word and provides no definition of the word "MEDIA" to explain why it is descriptive of the applied-for goods. The word 'MEDIA' is an ordinary English word, the most prevalent meaning of the word to my knowledge is that it refers to the 'mass media' which includes a reference to reporters and journalists, press media such as newspapers and magazines, broadcasting

²⁷ *Migros-Genossenschafts-Bund v EUIPO – Luigi Lavazza (CREMESPRESSO)*, Case T-189/16, paragraph 52

media in the context of radio and television, and even online media forms such as ‘social media’.

97. That said, in a computing context, it relates to physical objects used for the storage of electronic files e.g. disks.²⁸ Therefore it could be a term that encompasses “*USB sticks*” for example (which is one of the applied-for terms). I am also aware that it is the term used for electronic files, i.e. ‘media files’ that consist of videos, music and photographs for instance. However, that is insufficient to satisfy me that the word ‘MEDIA’ is descriptive of all the applied-for goods and therefore non-distinctive. Absent any submissions and/or evidence to the contrary, I conclude that ‘MEDIA’ may have an allusive quality at most, as it may allude that the goods may be for communication or are computer related. Therefore the consequence of that is that ‘MEDIA’ plays a less significant role in the trade mark message of the Contested Marks.
98. The average consumer, while perceiving the Contested Marks will perceive that it consists of two verbal elements, ‘XI’ and ‘MEDIA’. ‘XI’ in the Contested Marks is not simply part of a unit whereby its incorporation into a composite mark gives it a different meaning than the meaning it has as a separate component, nor is its meaning qualified by the word ‘MEDIA’. It therefore follows that ‘XI’ has independent trade mark significance.
99. The colour contrast between ‘XI’ and ‘MEDIA’ gives particular visual prominence to the letters ‘XI’ in the marks, making them stand out, such that the letters ‘XI’ cannot be considered to be visually subsidiary to the other components making up the marks, indeed the colour contrast effectively conveys that the marks are dominated by the letters ‘XI’. In addition, I also note that generally, the consumer normally attaches more importance to the beginning of a word/the first word in a mark.²⁹
100. In conclusion, the overall impression of the Contested Marks is dominated by its verbal elements, and ‘XI’ has independent trade mark significance. The

²⁸ The Oxford English Dictionary entry for ‘media’ includes the following entry: “*Computing. A physical object (as a disk, tape cartridge, etc.) used for the storage of data.*”

²⁹ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, paragraph 81

stylisation of the marks serves to visually emphasise the independent significance of the letters 'XI'.

Visual comparison

101. The competing marks share the identical word element 'XI'. The marks share no other visual similarities.
102. Although the earlier word mark is registered in lowercase letters and the letters 'XI' appear in an uppercase stylised font in Mark 1, this does not provide a point of distinction.
103. The stylisation of the Contested Marks, in particular the colour of the marks, serves to visually distinguish the letters 'XI' from the word 'MEDIA' such that it renders that part of the marks particularly visually prominent. I therefore find that overall, the marks are visually similar to a low to medium degree.

Aural comparison

104. The letters 'XI' in the competing marks would be pronounced as separate letters i.e. "X-I". In this regard, they are aurally identical.
105. I do not think that the 'X' device in the Contested Marks would be articulated.
106. The word 'MEDIA' in the Contested Marks represents a point of aural dissimilarity between the competing marks.
107. Overall, due to the presence of the word 'MEDIA' in the Contested Marks, the aural similarity is on the lower end.

Conceptual comparison

108. There are no submissions before me from the Opponent with regard to the concept of the letters 'XI'. The Opponent states the *"addition of the word "MEDIA" does not have the effect of creating a conceptual gap between the marks, particularly when considering the colourisation of the identical element 'XI'. It is the word "XI" that will provide the conceptual hook in the mind of consumers"*, but remains silent as to what that conceptual hook is.

109. The Applicant has submitted words to the effect that 'XI' means happiness in Chinese. I do not think that the average UK consumer will be aware of this.
110. In my view the average consumer will merely perceive the letters 'XI' as an abbreviation or an acronym which they do not know the meaning of, and therefore the concept attributable to those letters is neutral. Potentially, the average consumer may perceive the letters as the Roman numerals for the number eleven, in which case they would have a clear concept.
111. Either way, the concept of the letters 'XI' is identical in the competing marks.
112. The prevailing concept of the word 'MEDIA' to the average UK consumer of the applied-for goods is likely to be the concept of 'mass media', and the consumer of those goods is unlikely to consider they are buying goods that they would describe as 'media' rather, they are more likely to consider they are buying goods which they would describe as electrical 'accessories'. Indeed, the Opponent itself, in its witness statement, refers to such goods as 'electrical accessories', for example, it states that the "[Jessops] website has 'accessories' which include batteries and chargers, cables [...] all for use with cameras"; and that "printouts from the websites of well-known brands specialising in cameras and their accessories [...] detail specifically batteries and battery chargers [...] wires/cables."
113. Therefore, with no evidence to the contrary, in my opinion 'MEDIA' has no clear descriptiveness in relation to the goods at issue. Even where I have found it has a potentially allusive quality, its inclusion in the Contested Marks does not affect the concept of the distinctive 'XI' component.
114. In any event, the word 'MEDIA' represents a point of conceptual difference between the respective marks such that the marks are conceptually similar to a low to medium degree overall.

Distinctive character of the Earlier Mark

115. The degree of distinctiveness of the Earlier Word Mark is one of the factors that must be taken into account when assessing whether there is a likelihood of confusion. This is because the more distinctive the Earlier Word Mark, the greater

the likelihood of confusion may be, although it is the distinctive character of a component that is similar between the marks that is particularly relevant.

116. 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.
117. The Opponent makes no claim to enhanced distinctiveness through the use made of the Earlier Mark, therefore I only have the inherent distinctiveness of the mark to consider.
118. The Earlier Mark is a word-only mark which comprises of the letters 'xi'. The inherent distinctive character of the mark therefore lies solely in those letters.
119. In *Kunze Folien GmbH v Kartell UK Limited*,³⁰ Mr Iain Purvis KC sitting as the Appointed Person, referred with approval to the decision of *Alfa-Beta Vassilopoulos AE v Agro de Bazan*,³¹ which stated as follows:³²

“As to the distinctive character of the letter combination ‘AB’ in the earlier marks and of the contested mark, [...] it should be noted that letters or letter combinations of two or three letters are inherently weak, given the limited number of letters in the alphabet, the great number of meanings that acronyms and abbreviations may have and the fact that consumers frequently encounter abbreviations and letter combinations of all kinds in everyday life and business as generic abbreviations but not as marks.”

120. I find that the inherent distinctive character of the letters 'xi' is low because the mark consists merely of a plain, two-letter combination.
121. I note that even where an earlier trade mark is deemed to have a weak distinctive character, that does not preclude a finding of a likelihood of confusion per se.³³

³⁰ BL O/085/14, paragraph 29

³¹ Case R 82/2011-4 of the Board of Appeal of OHIM (now the EUIPO), paragraph 16

³² The Board of Appeal considered the letters 'AB' in a stylised form against 'AB' in a different stylised form, for the same goods.

³³ *L'Oréal SA v OHIM*, Case C-235/05 P, paragraph 45

122. Indeed, in *L'Oréal SA v OHIM*,³⁴ the CJEU stated (my emphasis):

“42. It follows that the distinctive character of the earlier mark cannot have the significance which the applicant argues it should be given in the comparison of the signs in question, as it is not a factor which influences the perception which the consumer has of the similarity of the signs.

[...]

“45. The applicant’s approach would have the effect of disregarding the notion of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that where the earlier mark is only of weak distinctive character a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the marks in question. If that were the case, it would be possible to register a complex mark, one of the elements of which was identical with or similar to those of an earlier mark with a weak distinctive character, even where the other elements of that complex mark were still less distinctive than the common element and notwithstanding a likelihood that consumers would believe that the slight difference between the signs reflected a variation in the nature of the products or stemmed from marketing considerations and not that that difference denoted goods from different traders.”

Conclusions on Likelihood of Confusion

123. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them that they have kept in mind.³⁵ I must also keep in mind the average consumer of the services, the nature of the purchasing process and have regard to the interdependency principle i.e. a lesser degree of similarity between the

³⁴ Case C-235/05 P

³⁵ *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*, Case C-342/97, paragraph 27

respective trade marks may be offset by a greater degree of similarity between the respective services and vice versa.³⁶

124. Making an assessment as to the likelihood of confusion is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused. The global assessment is supposed to emulate what happens in the mind of the average consumer on encountering the later mark with an imperfect recollection of the earlier mark in mind. It is not a process of analysis or reasoning, but an impression or instinctive reaction.³⁷ The relative weight of the factors is not laid down by law but is a matter of judgment for the tribunal on the particular facts of each case.³⁸
125. The legal test 'likely to cause confusion amongst the average consumer' is inherently imprecise, not least because the average consumer is not a real person; it involves a prediction as to how the public might react to the presence of two trade marks in ordinary use in trade and, it is often very difficult to make such prediction with confidence.³⁹ The global assessment is supposed to emulate what happens in the mind of the average consumer on encountering the Contested Mark with an imperfect recollection of the Earlier Mark in mind. It is not a process of analysis or reasoning, but an impression or instinctive reaction.⁴⁰
126. I am keenly aware from the case of *Whyte and Mackay*⁴¹ (particularly paragraph 44) that "*if the only similarity between the respective marks is a common element which has low distinctiveness, that points against there being a likelihood of confusion.*" However, it is important to remember in that case, the mark ORIGIN was being relied on in opposition to the trade mark JURA ORIGIN for alcoholic drinks. The Judge held that there was no likelihood of confusion, essentially because when used after the name of the island Jura, the name Origin became entirely descriptive and would simply be taken as indicating that the product in

³⁶ *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, Case C-39/97, paragraph 17

³⁷ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, paragraph 81

³⁸ See paragraph 33 of the Appointed Person's decision in Case No. O/049/17, (*Rochester Trade Mark*).

³⁹ Again see comments of Iain Purvis as the Appointed Person, *ibid*

⁴⁰ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, paragraph 81

⁴¹ *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another*, [2015] EWHC 1271 (Ch)

question came from the island, rather than having any independent trade mark significance.⁴²

127. In *Face2FaceHR Partners Limited v Peninsula Business Services Limited*,⁴³ Emma Himsworth K.C., as the Appointed Person, reviewed the case law in *Whyte and Mackay*, and *Nicoventures Holdings Limited v The London Vape Co Ltd*,⁴⁴ as well as guidance in the Common Communication on the Common Practice of Relative Grounds of Refusal - Likelihood of Confusion (impact of non-distinctive/weak components) dated 2 October 2014, which is referred to in the case law. Miss Himsworth, at paragraph 44 of her decision, summarised the correct approach when assessing the likelihood of confusion where the only common element between the marks in issue has no or low distinctiveness as follows:

“(1) The distinctiveness of the mark as a whole must be assessed, taking into account that a minimum degree of distinctiveness must be acknowledged.

(2) The distinctiveness of each of the components of both marks must be assessed with priority being given to the coinciding elements.

(3) The focus of the assessment of the likelihood of confusion should be on the impact of the non-coinciding components on the overall impression of the mark.

(4) Account must be taken of the similarities/differences in the non-coinciding elements of the marks.

(5) A coincidence of an element with a low level of distinctiveness will not usually lead to a likelihood of confusion.

(6) There may be a finding of a likelihood of confusion if (a) the non-coinciding elements of the mark are of lower (or equally low) degree of distinctiveness or are of insignificant visual impact and the overall

⁴² *Dominique Tillen v Design Go Limited and DG Capital Limited*, BL O/331/19, paragraph 16

⁴³ BL O/0368/23

⁴⁴ [2017] EHW 3303 (Ch)

impression is similar; or (b) the overall impression of the marks is highly similar or identical.”

128. There are three sets of circumstances where a consumer may associate a later mark with an earlier mark:⁴⁵ (i) direct confusion, which is a simple matter of the consumer mistaking one mark for another; (ii) indirect confusion, which is where the consumer recognises that the marks are different, but also that they share common elements, and because of those similarities, they conclude, for example, that the later mark is another brand of the owner of the earlier mark;⁴⁶ and (iii) mere association, where the later mark merely brings the earlier mark to mind but it does not lead to confusion between them.
129. I have found that some of the goods applied for are identical to the Opponent's and that some are similar. I have determined that the selection of the goods will be predominantly visual and that the average consumer's degree of attention when selecting the goods will vary from low to high depending on the nature and value of the goods. However, the Applicant's goods which I have found to be 'identical or similar' to the Opponent's goods, predominantly consist of electrical accessories/ accessories for electronic goods, and that the consumer of such goods is likely to pay a low to medium degree of attention when selecting them.
130. The Contested Marks are identical visually, aurally and conceptually to the Earlier Mark insofar as the 'XI' element is concerned, however, due to the presence of the word 'MEDIA' and the 'X' device in the Contested Marks, overall the marks are visually similar to a low to medium degree, aurally similar to a low degree and 'MEDIA' represents a point of conceptual difference.
131. I have found 'XI' has an inherently low distinctive character and that 'MEDIA' has a potentially allusive quality.

⁴⁵ See to that effect *Sabel BV v Puma AG*, Case C-251/95, paragraph 16

⁴⁶ See *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10, paragraphs 16 to 17 wherein Mr Iain Purvis QC (as he then was), sitting as the Appointed Person, dealt with the distinction between direct and indirect confusion; see also the comments of Arnold LJ in *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, paragraph 12, in relation to 'L.A. Sugar' i.e. "This is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition."

132. The question of likelihood of confusion must be assessed globally and notwithstanding the letters 'XI' have a lower degree of distinctive character, it is not devoid of distinctive character and is still capable of indicating trade origin, therefore it is the overall impressions that are relevant.
133. The overall impression of the Contested Marks is dominated by its verbal elements and 'XI' has an independent trade mark significance within the marks. The stylisation of the Contested Marks serves to visually emphasise the letters 'XI' which are common between the respective marks. Since the purchasing process is predominantly visual, this factor is significant.
134. I am conscious that in this decision I have found similarity where the nature and purpose of the compared goods is such, that the similarity is low. However, the global assessment requires me to take a look at all the relevant factors, including the trade channels through which the goods reach the market and to take into account whether they are in the same or different market sectors. I must also take into account the realities of the marketplace for the respective goods as presented to me in the evidence.
135. Having weighed up all the relevant factors, it is my opinion that the average consumer will be confused as to the origin of the goods even where the similarity between some of the respective goods is low, and even though 'XI' has a low degree of distinctive character.
136. The visual differences owing to the word 'MEDIA' and the 'X' device, are not enough to outweigh the overall impression of the Contested Mark that the average consumer is likely to keep in mind i.e. the average consumer will recognise that the marks have differences but because of the identical common element 'XI', which dominates the overall impression of the Contested Marks, they would conclude that the Contested Marks are another brand of the Opponent's, rather than considering that the identical and/or similar goods come from different undertakings and therefore would be confused as to the origin of those goods.

OUTCOME

137. The opposition under section 5(2)(b) of the Act has been partially successful. Subject to appeal, the application will proceed to registration for the goods set out at **Annex 1** to this decision.

COSTS

138. Due to the partial success of the opposition, I direct that the parties bear their own costs.⁴⁷

Dated this 24th day of May 2023

Daniela Ferrari
For the Registrar

⁴⁷ I note that had the opposition been unsuccessful then no award of costs would have been made to the Applicant in any event as the Applicant had not made a request for an award of costs and did not complete and return the costs pro-forma to the Tribunal.

Annex 1

The Applicant's goods which may proceed to registration

Cable adapters; Extension cables; Batteries for electronic cigarettes; Battery chargers for electronic cigarettes; Battery chargers for tablet computers; Battery chargers for laptop computers; Battery chargers for home video game machines; battery jump starters; Power banks; Portable chargers; Power controllers; Portable telephones; Power supplies for smartphones; Smartphone battery chargers; Batteries for phones; Battery chargers for mobile phones; Battery chargers for use with telephones; Data processing apparatus; Electronic data processing apparatus; Telecommunications devices; Telecommunications transmitters; Telecommunications cables; Telecommunication cables; Telecommunications switches; Wires (Telephone -); Network cabling; Modem cables; Mouse [data processing equipment]; Portable speakers.