

O-280-18

TRADE MARKS ACT 1994

**IN THE MATTER OF INTERNATIONAL REGISTRATION No. 1311318
AND THE REQUEST BY PAKTON DEVELOPMENTS PTY LIMITED
TO PROTECT THE TRADE MARK**

IP Energizer

IN CLASS 9

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 408494
BY ENERGIZER BRANDS LLC.**

BACKGROUND

1) On 3 June 2016, Pakton Developments Pty Limited (hereinafter the applicant) on the basis of its international registration based upon its registration held in Australia, requested protection in the United Kingdom of the trade mark shown below:

IP Energizer

2) Protection was sought for the following goods and services:



In Class 9: Electric fence energisers.

3) The United Kingdom Trade Marks Registry considered that the request satisfied the requirements for protection in accordance with Article 3 of the Trade Marks (International Registration) Order 1996 and particulars of the international registration were published in accordance with Article 10.

4) On 9 February 2017 Energizer Brands LLC. (hereinafter the opponent) filed notice of opposition to the conferring of protection on this international registration. The grounds of opposition are in summary:

a) The opponent is the proprietor of the following trade marks:

Mark	Number	Dates of filing and registration	Class	Specification relied upon
ENERGIZER	EU 7339261	10.10.08 25.08.09	9	Batteries and battery chargers.
ENERGIZER	EU 8866212	08.02.10 02.08.10	9	Solar batteries, cells and panels.

	IR 1029628	International registration 01.02.10 Protection granted in EU 10.01.11	9	Electric batteries and cells; packs of batteries and cells; chargers for batteries and cells; devices to charge and recharge electrical and electronic apparatus and instruments; power supply units; electric cables, particularly connection and charging cables; electric devices for connecting and connection junctions; electric inverters and power inverters.
	IR 1028629	International registration 01.02.10 Protection granted in EU 10.01.11	9	Electric batteries and cells; packs of batteries and cells; chargers for batteries and cells; devices to charge and recharge electrical and electronic apparatus and instruments; power supply units; electric cables, particularly connection and charging cables; electric devices for connecting and connection junctions; electric inverters and power inverters.
ENERGIZER MAX	IR 1121653	International registration 30.05.12 Protection granted in EU 28.05.13	9	Electric cells, batteries and accumulators.
ENERGIZER ULTIMATE	EU 12579447	10.02.14 24.12.14	9	electric batteries; accumulators; cells; batteries.

- b) The opponent contends that the six earlier marks shown above are similar to the mark in suit and that the goods are identical and/or similar. As such the mark in suit offends against section 5(2)(b) of the Act.
- c) The opponent contends that in respect of the six earlier marks shown above that it has a reputation in the UK and that the relevant public is used to the mark ENERGIZER used in combination with other graphic or word elements as part of a family of marks owned by the opponent which have a reputation in the UK. Use of the mark in suit upon the goods applied for will lead consumers into believing that the mark is an addition to the opponent's family of marks or that there is an economic connection between the parties. The opponent has invested heavily in promoting its brand which the mark in suit will benefit from as a result of consumers associating the mark in suit with the opponent's earlier marks. The opponent has a reputation for high quality goods, and use of the mark in suit on goods of a lower quality will cause detriment to the opponent's earlier marks by tarnishing the valuable reputation of the earlier marks as an indicator of high quality goods. Use of the mark in suit will erode the distinctiveness of the opponent's earlier marks and will affect the economic behaviour of the relevant public by reducing consumer recognition and trust in the earlier marks causing a loss of sales. As such the mark in suit offends against section 5(3) of the Act.

5) On 17 May 2017 the applicant filed a counterstatement basically denying the charges laid by the opponent, emphasising that they are in completely different industries. The applicant does not put the opponent to proof of use.

6) Both sides filed evidence. Both seek an award of costs in their favour. Neither party wished to be heard. Only the opponent provided written submissions which I shall refer to as and when necessary in my decision.

OPPONENT'S EVIDENCE

7) The opponent filed a witness statement, dated 28 August 2017, by Nadia Kowalczyk, the senior director of Energizer Brands LLC and has been employed by the opponent for fifteen years. She states that since 1994 the ENERGIZER brand has been used in the UK in relation to batteries, and has expanded to include items such as power packs of various types, chargers, cables, inverters and surge protectors. In addition the mark has been used on lighting apparatus and devices including chargers for lighting, flashlights, lanterns, torches, electric lamps and bulbs, LED light sticks and bicycle lamps. The mark ENERGIZER has been used on its website, Facebook page and Twitter account as well as on display units in stores and advertising material. The opponent's goods are sold in retail stores such as Homebase, B&Q, Travis Perkins, Sainsbury and Boots and via online sellers such as Amazon and eBay. She states that during the period 2011-2015 average sales of the goods sold under the ENERGIZER brand across EU markets amounted to over US\$200million per annum and approximately 500million units per annum. She states that during the years 2014-2015 ENERGIZER accounted for a 16% by volume and 20% by value market share for batteries in the UK. In the same years sales of batteries in the UK amounted to approximately US\$65,000 -70,000. The opponent promotes its ENERGIZER brand through various advertising and promotional activities including television, print media, social media and on-line as well as in-store displays. She provides the following exhibits:

- NK3/4: examples of ENERGIZER products (torches, light bulbs, batteries and battery chargers) being sold on third party websites. At page 6-8 are nine batteries which are clearly made by companies other than the opponent such as *Gallagher* and *Air Alkaline*, which offer "battery electric fencing energiser" and "solar powered fencing energiser" where the term "energiser" is being used in a descriptive sense of simply an item which provides power. A further twenty five examples of other companies using the term ENERGISER in relation to electric fencing are on pages 10-12. Further instances are found at page 10 of NK4 where two other such devices appear and are clearly produced by companies other than the opponent. Further examples of use of the term ENERGISER, all relating to electric fencing by third parties can be found at

pages 15, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34 and 35. I also note that page 9 of NK4 includes an item described as “Apollo 12v Electric Fence Energizer Battery” which is clearly not use of the mark by the opponent; but use of the term “Energizer” in a descriptive manner as providing power. The term “Energizer” is also used on other similar electric fence products from companies other than the opponent at pages 18, 21, 23 and 28.

- NK5: Copies of pages from the opponent’s website showing items such as batteries, chargers and torches, branded ENERGIZER offered for sale.
- NK6: An extract from Retail Merchandiser dated 2 December 2015 which states that ENERGIZER has 98% global awareness.
- NK7: This is said to be the result of a survey which apparently found that the mark “energizer” was well known amongst UK consumers. However, it is not clear from the evidence filed precisely what it was well known for, or whether the survey merely registered whether UK consumers knew of the dictionary word “ENERGIZER”.
- NK8: Figures from AC Nielson for the years 2014-15 corroborate the UK sales figures mentioned above.
- NK10: During the period 2007 – 2015 inclusive the opponent spent a considerable sum advertising its products in the UK.

APPLICANT’S EVIDENCE

8) The applicant filed a witness statement, dated 12 December 2017, by Paul Thompson a Director of the applicant company, a position he has held since June 2010. He states:

“2.1 The term “energizer refers to an electronic device used to generate the electrical “pulse” for an electric fence. The use of the term “energizer” (also spelt energiser) along

with “controller”, “charger” and “fencer” for this application in electric fencing has been in common use in many countries including the United Kingdom, United States, Australia and New Zealand since the 1930s.”

9) He states that whereas the opponent began using the term in the 1980s the electric fencing industry use predates this, as well as being used concurrently. He states that the mark in suit has not been promoted or sold in the UK as at the date of the statement. He concludes by stating that the mark in suit is used in the electric fencing industry whereas the opponent uses its marks on batteries and lighting. He provides the following exhibits:

- A: Copies of pages from a brochure (dated 1978 from New Zealand) and patent (dated 1949 from the USA) showing historical use of the term “energizer” for electric fencing.
- B: Results of a Google search for the words “electric fence energizer”. This is clearly a search on an Australian search engine as all the results relate to Australian websites.
- C: A copy of a page from the applicant’s website showing that the mark in suit is used on a new internet linked energizer.
- D: Results of a Google search for the mark in suit dated December 2017 which shows mostly results for the applicant’s products, and seems confined to Australia and New Zealand.

10) That concludes my summary of the evidence filed, insofar as I consider it necessary.

DECISION

11) The first ground of opposition is under section 5(2)(b) which reads:

“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.”

12) An “earlier trade mark” is defined in section 6, the relevant part of which states:

“6.-(1) In this Act an "earlier trade mark" means -

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

13) The opponent is relying upon its trade marks listed in paragraph 4 above which are clearly earlier filed trade marks. The applicant did not seek proof of use. The opponent is therefore able to rely on the specification of the earlier marks without having to show genuine use.

14) When considering the issue under section 5(2)(b) I take into account 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

The average consumer and the nature of the purchasing process

15) As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods/services. I must then determine the manner in which these goods/services are likely to be selected by the average consumer in the course of trade.

16) Broadly speaking the class 9 goods of the two parties consist of batteries, battery chargers and power supply apparatus. The average consumer for such goods will be the public at large, including businesses. Such goods will typically be offered for sale in retail outlets, in brochures and catalogues as well as on the internet. The initial selection is therefore primarily visual. I accept that more expensive items of apparatus may, for example, be researched or discussed with a member of staff. The latter, along with personal recommendations, bring aural considerations into play.

17) Clearly, the average consumer's level of attention will vary considerably depending on the cost and nature of the item at issue. When purchasing a small pack of batteries the only

concern may be to ensure that the correct size is purchased, whereas with more complex items such as an electric fence power modulator slightly more attention will be paid as it is essential that the current deters livestock but does not cause undue harm. **Overall the average consumer for these types of goods is likely to pay a low to medium degree of attention to the selection of such items.**

Comparison of goods and services

18) When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*, the CJEU stated at paragraph 23 of its judgement:

“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”.

19) 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.

20) 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”.

21) In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) OHIM* case T-133/05, the General Court (“GC”) stated:

“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 the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by

the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 Oberhauser v OHIM – Petit Liberto (Fifties) [2002] ECR II-4359, paragraphs 32 and 33; Case T110/01 Vedral V OHIM France Distribution (HUBERT) [2002] ECR II-5275, paragraphs 43 and 44; and Case T- 10/03 Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42).”

22) The specifications of both sides are reproduced below for ease of reference:

Applicant's goods	Opponent's goods
Class 9: Electric fence energisers.	EU 7339261: Class 9: Batteries and battery chargers.
	EU 8866212: Class 9: Solar batteries, cells and panels.
	IR 1029628 & IR 1028629: Class 9: Electric batteries and cells; packs of batteries and cells; chargers for batteries and cells; devices to charge and recharge electrical and electronic apparatus and instruments; power supply units; electric cables, particularly connection and charging cables; electric devices for connecting and connection junctions; electric inverters and power inverters.
	IR 1121653: Class 9: Electric cells, batteries and accumulators.
	EU 12579447: Class 9: electric batteries; accumulators; cells; batteries.

23) It seems relatively clear from the evidence provided by both parties that electric fencing energisers can take a number of forms, from simple batteries to solar powered units or mains converters. To my mind, the opponent's goods encompass those of the applicant. **As such I regard every specification of the opponent listed above to be identical to the applicant's applied for specification.**

Comparison of trade marks

24) 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 them, 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.”

25) I take into account the comments in *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, where the General Court noted that the beginnings of words tend to have more visual and aural impact than the ends. The court stated:

“81. It is clear that visually the similarities between the word marks MUNDICOLOR and the mark applied for, MUNDICOR, are very pronounced. As was pointed out by the Board of Appeal, the only visual difference between the signs is in the additional letters ‘lo’ which characterise the earlier marks and which are, however, preceded in those marks by six letters placed in the same position as in the mark MUNDICOR and followed by the letter ‘r’, which is also the final letter of the mark applied for. Given that, as the Opposition Division and the Board of Appeal rightly held, the consumer normally attaches more importance to the first part of words, the presence of the same root ‘mundico’ in the opposing signs gives rise to a strong visual similarity, which is, moreover, reinforced by the presence of the letter ‘r’ at the end of the two signs. Given those similarities, the applicant’s argument based on the difference in length of the opposing signs is insufficient to dispel the existence of a strong visual similarity.

82. As regards aural characteristics, it should be noted first that all eight letters of the mark MUNDICOR are included in the MUNDICOLOR marks.

83. Second, the first two syllables of the opposing signs forming the prefix 'mundi' are the same. In that respect, it should again be emphasised that the attention of the consumer is usually directed to the beginning of the word. Those features make the sound very similar.

26) I also note that in *Bristol Global Co Ltd v EUIPO*, T-194/14, the General Court held that there was a likelihood of confusion between AEROSTONE (slightly stylised) and STONE if both marks were used by different undertakings in relation to identical goods (land vehicles and automobile tyres). This was despite the fact that the beginnings of the marks were different. The common element – STONE – was sufficient to create the necessary degree of similarity between the marks as wholes for the opposition before the EUIPO to succeed.

27) To my mind, the opponent's strongest case is under its EU marks 7339261 and 8866212 for the mark ENERGIZER as its other marks have additional words or device elements. Clearly the marks of the two parties share the element "ENERGIZER" whilst the applicant's mark has the letters "IP" as its initial element. Visually and phonetically the marks have differences and also similarities. Conceptually, the word "ENERGIZER" will be taken to mean giving enthusiasm, vitality or energy to someone/something. The letters IP could be said to stand for "Internet protocol" or "intellectual property". In the context of electric fencing and power supply generally it is perhaps more likely to be seen as a reference to the fact that it can be controlled via the internet, although I accept a number of consumers will be initially unaware that the letters IP signify anything. Visually, aurally and conceptually the marks are similar to a low to medium degree. **Overall, the marks are similar to a low to medium degree.**

Distinctive character of the earlier trade mark

28) 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).”

29) In *Formula One Licensing BV v OHIM*, Case C-196/11P, the Court of Justice of the European Union found that:

“41.it is not possible to find, with regard to a sign identical to a trade mark protected in a Member State, an absolute ground for refusal, such as the lack of distinctive character, provided by Article 7(1)(b) of Regulation No 40/94 and Article 3(1)(b) of Directives 89/104 and 2008/95. In this respect, it should be noted that the characterisation of a sign as descriptive or generic is equivalent to denying its distinctive character.

42. It is true that, as is clear from paragraph 48 of the judgment under appeal, where an opposition, based on the existence of an earlier national trade mark, is filed against the

registration of a Community trade mark, OHIM and, consequently, the General Court, must verify the way in which the relevant public perceives the sign which is identical to the national trade mark in the mark applied for and evaluate, if necessary, the degree of distinctiveness of that sign.

43. However, as the appellant rightly points out, their verification has limits.

44. Their verification may not culminate in a finding of the lack of distinctive character of a sign identical to a registered and protected national trade mark, since such a finding would not be compatible with the coexistence of Community trade marks and national trade marks or with Article 8(1)(b) of Regulation No 40/94, read in conjunction with Article 8(2)(a)(ii).”

30) The word “ENERGIZER” will be viewed as “ENERGISER” despite the misspelling as, unfortunately, due to the increasing prevalence of computers with American software correct English spelling is being undermined and it is common to find the letter “s” replaced by the letter “z” such that the public have become inured to the practice. Despite the word having a very clear and obvious meaning for the goods for which it is registered in class 9 the fact that it is registered **means that it must be regarded as having a degree of inherent distinctiveness albeit very low**. I note from the evidence that the opponent has an approximate 20% share of the UK market in respect of batteries, and so it must be regarded as having **an enhanced degree of distinctiveness, albeit from a very low starting point, in respect of batteries**.

Likelihood of confusion

31) In determining whether there is a likelihood of confusion, 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 and services and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent’s trade mark as the more distinctive this trade mark is, the greater the likelihood of confusion. I must also

keep in mind the average consumer for the goods and services, the nature of the purchasing process and 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 he has retained in his mind. Earlier in this decision, I concluded that:

- the average consumer is a member of the general public (including businesses), who will select the goods by predominantly visual means, although not discounting aural considerations and that they will pay a medium degree of attention to the selection of electric fencing goods.
- the opponent's marks have a very low degree of inherent distinctiveness, but can benefit from an enhanced distinctiveness through use on batteries.
- The marks are similar to a low to medium degree.
- The class 9 goods of the two parties are identical.

32) When considering the question of whether there is a likelihood of confusion I take into account *L'Oréal SA v OHIM*, Case C-235/05 P, where the Court of Justice of the European Union found that:

“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.”

33) I can easily conceive of a situation where the average consumer is selecting the goods (primarily visually) and notes the difference in that the applicant’s mark has the letters at the beginning, but in the case of many consumers, simply believes them to indicate that the item is controllable via the internet. Taking all of the above conclusions into account and allowing for the concept of imperfect recollection there is a likelihood of consumers being confused into believing that the applicant’s goods are those of the opponent or provided by some undertaking linked to it. The ground of invalidity under section 5(2)(b) succeeds in relation to the goods in the applicant’s specification.

34) Given the strength of the above finding I do not need to continue to consider the ground of opposition under section 5(3).

CONCLUSION

35) The opposition is wholly successful under section 5(2)(b).

COSTS

36) The opponent has been successful and as such it is entitled to a contribution to its costs.

Preparing a statement and considering the other side’s statement	£200
Preparing evidence and considering the evidence of the other side	£300
Submissions	£200
Expenses	£200
TOTAL	£900

37) I order Pakton Developments Pty Limited to pay Energizer Brands LLC the sum of £900. This sum to be paid within fourteen days of the expiry of the appeal period or within

fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 9th day of May 2018

**George W Salthouse
For the Registrar,
the Comptroller-General**