

O/104/19

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION NO 3283345 BY PSYONIX
INC TO REGISTER ROCKET LEAGUE FOR GOODS IN CLASS 9, 25, 28 AND 41**

AND

IN THE MATTER OF OPPOSITION 412074 THERETO BY Roccat GmbH

Background and pleadings

1. Psyonix Inc (the applicant) applied to register the trade mark No 3283345 ROCKET LEAGUE in the UK on 17th January 2018. It was accepted and published in the Trade Marks Journal on 9th February 2018 in respect of the following goods and services:

Class 09:

Interactive video game software.

Class 25:

Clothing, namely shirts, T-shirts, polo shirts, athletic shirts, short-sleeved shirts, button down shirts, collared shirts, shorts, board shorts, boxer briefs, sweatshirts, jackets, jeans, long-sleeved shirts, skirts, pants, socks, underwear; hats; baseball caps and hats; sports caps and hats.

Class 28:

Toys, namely, electronic action toys, light up toys, mechanical toys, musical toys, modeled plastic toy figurines, action figure toys, fantasy character toys, scale model kits [toys], plastic character toys, push toys, pull toys, plush toys, stuffed toys, rideable toys and accessories therefor; rubber character toys, soft sculpture toys, squeeze toys; baseballs; play balls; snow globes; scale model vehicles; toy models.

Class 41:

Entertainment services; entertainment services, namely, providing online video games.

2. Roccat GmbH (the opponent) partially oppose ¹the trade mark No 3283345 on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (the Act). This is on the basis of the following earlier trade mark: European Union Trade Mark No 1 626 7437 Roccat. The following goods are relied upon in this opposition:

Class 09:

Recorded content; Information technology and audio-visual, multimedia and photographic devices; Media content; Electronic databases recorded on computer media; Electronic publications recorded on computer media; Books recorded on disc; Instruction manuals in electronic format; Digital books downloadable from the Internet; Prerecorded CD-ROMs; Pre-recorded DVDs; Pre-recorded video compact discs; Prerecorded videodiscs; Downloadable image files; Computer documentation in electronic form; E-books; Downloadable comic strips; Downloadable computer graphics; Downloadable digital photos; Downloadable digital music; Digital music downloadable provided from MP3 internet web sites; Downloadable electronic brochures; Downloadable electronic books; Downloadable electronic newsletters; Electronic publications, downloadable; Downloadable electronic publications in the nature of magazines; Electronic publications, downloadable, relating to games and gaming; Downloadable information relating to games and gaming; Downloadable movies; Downloadable podcasts; Downloadable publications; Downloadable video recordings; Downloadable video recordings featuring music; Talking books; Interactive DVDs; Prerecorded video tapes featuring music; Optical discs featuring music; Prerecorded audio tapes featuring music; Pre-recorded DVDs featuring games; Pre-recorded audio tapes featuring games; Pre-recorded video tapes featuring games; Prerecorded motion picture videos; Prerecorded video cassettes featuring cartoons; Multimedia recordings; Multimedia software recorded on CD-ROM; Musical sound recordings; Musical recordings in the form of discs; Downloadable music files; Musical video recordings; Training manuals in the form of a computer program; Audio visual recordings; USB web keys; USB web keys for automatically launching pre-programmed website URLs; Video recordings;

¹ The opposition is against classes 09 and 28 only.

Video tapes with recorded animated cartoons; Video films; Video disks with recorded animated cartoons; Prerecorded non-musical audio tapes; Digital music downloadable provided from a computer database or the internet; Prerecorded digital audio tapes; Databases (electronic); Application software; Application software for televisions; Application software for mobile phones; Application software for wireless devices; Computer software downloaded from the internet; Computer game software downloadable from a global computer network; Computer application software featuring games and gaming; Computer programs for video and computer games; Computer programs for connecting remotely to computers or computer networks; Computer programs for accessing and using the internet; Computer programs for pre-recorded games; Computer programmes for interactive television and for interactive games and/or quizzes; Computer programs for editing images, sound and video; Computer software to enable the provision of electronic media via the Internet; Computer software to enable the provision of electronic media via communications networks; Computer software for use on handheld mobile digital electronic devices and other consumer electronics; Computer software that permits games to be played; Computer software to enhance the audio-visual capabilities of multimedia applications; Programs recorded on electronic circuits for amusement apparatus with liquid crystal screens; Interactive computer software; Interactive computer software enabling exchange of information; Interactive computer game programs; Interactive multimedia computer programs; Interactive multimedia software for playing games; Interactive entertainment software; Interactive entertainment software for use with personal computers; Interactive video software; Children's educational software; Educational software; Multimedia software; Augmented reality software; Augmented reality software for use in mobile devices; Augmented reality software for use in mobile devices for integrating electronic data with real world environments; 3D spectacles; 3D spectacles for television receivers.

Class 28:

Protective carrying cases specially adapted for handheld video games; Battery-powered computer game with LCD screen; Computer game apparatus; Hand-held electronic video games; Hand-held electronic games; Electronic hand-held game units; Electronic amusement apparatus incorporating a liquid crystal display; Gaming mice; Handheld computer games; Hand held units for playing video games; Hand-held units for playing electronic games; Home video game machines; Joysticks for video games; LCD game machines; Coin-operated video amusement apparatus; Token-operated video game machines; Protective cases for video game device remote controls; Protective films adapted for screens for portable games; Protective films for video game device remote controls; Bags specially adapted for handheld video games; Video output game machines for use with televisions; Games adapted for use with television receivers; Apparatus for games adapted for use with television receivers; Game consoles; Controllers for game consoles; Hand-held games with liquid crystal displays; Gaming keypads; Portable games with liquid crystal displays; Amusement apparatus adapted for use with television receivers only; Arcade video game machines.

3. The opponent argues that the respective goods are identical or similar and that the marks are similar. In particular, it argues “ROCKET LEAGUE” is composed of “ROCKET” and “LEAGUE”, but “ROCKET” has the dominant role. It is the first word, and the second word “LEAGUE” has no distinctiveness of its own with which to assume dominance.
4. The applicant acknowledges that certain goods included in Class 9 of the “ROCCAT” mark are identical or highly similar to the “Interactive Video game software” included in the application for “ROCKET LEAGUE”. Other than this admission, the applicant filed a counterstatement denying the claims made.

5. Both sides filed written submissions, which will not be summarised but will be referred to as and where appropriate during this decision. Neither sides filed evidence.
6. A Hearing took place on 12th December 2018, with the opponent represented by Mr Nicholas Pointon of Counsel, instructed by Stephens Scown LLP and the applicant by Mr Ben Mooneapillay of J A Kemp.

DECISION

Section 5(2)(b)

7. Section 5(2)(b) of the Act is 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”.

Comparison of goods

8. The applicant has accepted that the contested goods i.e. interactive video game software in Class 09 are identical to the goods on which the opposition is based. For reasons of procedural economy, the Tribunal will not undertake a full comparison of the goods listed above. The examination of the opposition will proceed on the basis that the contested goods are identical to those covered by the earlier trade mark. If the opposition fails, even where the goods are identical, it follows that the opposition will also fail where the goods are only similar.

Comparison of marks

9. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union 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.”

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

11. The respective trade marks are shown below:

Roccat	ROCKET LEAGUE
Earlier trade mark	Contested trade mark

12. At the hearing, the opponent argued that the dominant and distinctive part of the later trade mark is ROCKET. Despite the assertion of the opponent that it is “Rocket” that is dominant and distinctive in the contested trade mark, it is considered that neither of the marks contain any particular stand out dominant and distinctive feature. They must therefore be compared as wholes.

13. Visually, it is noted that the marks coincide in respect of the letters “RO” at the start of the marks and the letter “T” at the end of the sole element of the earlier mark and the end of the first element in the later trade mark. They differ in all other respects. They are considered to be similar only to a very low degree.

14. Aurally, the earlier trade mark may be referred to as “roh-kat”, or “raw-kat”. The first element in the later trade mark is likely to be pronounced as “raw-ket”. There is therefore, at least some potential for the marks to coincide in the event the earlier trade mark is articulated as “raw-kat”. That said, the later trade mark also includes “league” which has no counterpart and adds an additional syllable. The overall degree of similarity is pitched as being low to medium.

15. Conceptually, the opponent argued that the earlier trade mark will be understood as meaning “rocket”. There is no evidence to support this assertion. Further, “Roccat” is in no way an obvious misspelling of “rocket” (and again there is no evidence either way on the point). It is considered to be

overwhelmingly likely that the earlier trade mark will be viewed either as an invented word or otherwise as a word of non-English origin and so, is meaningless.

16. The later trade mark includes “ROCKET” which will be most likely understood as referring to a space vehicle²; “LEAGUE” will likely be understood as referring to a group of people, clubs or countries that have joined together for a particular purpose (or share a common interest) and also as referring to a group of teams that play the same sport or activity against each other³. The opponent contends that “ROCKET LEAGUE” as a whole, has no sensible conceptual meaning, and thereby compounds the likelihood of confusion with “Roccat”. It is considered that the meaning of the later trade mark may evoke an idea of, for example, a group of people with a shared interest in space vehicles. Alternatively, it may be understood as referring to a competitive activity involving space vehicles. Irrespective of the exact meaning of the later trade mark, the important point is that any potential meaning will not lead to a conceptual conflict with the earlier trade mark, which will have no meaning and will not be understood as “rocket”. As such, it is considered that the later trade mark will not create a conceptual similarity with the earlier trade mark.

Average consumer and the purchasing act

17. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, 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: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

18. In *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), Birss J. described the average consumer in these terms:

² Collins dictionary (www.collinsdictionary.com)

³ As above.

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

19. The average consumer for the relevant goods will be the public at large, including those with a more focussed and interest in video gaming. The purchasing act is likely to be reasonably considered with a consumer displaying at least a medium degree of attention. This is because a potential consumer in relation to video games is likely to want to be sure of suitability (for age ranges for example). The selection of such goods may follow a period of research and/or word of mouth recommendations, so both visual and aural considerations are important.

Distinctive character of the earlier trade mark

20. 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).”

21. There is no evidence filed, and the opponent has not claimed that its mark enjoys an enhanced degree of distinctive character. As such, I will assess the marks on a prima facie basis.
22. The earlier mark “Roccat” has no dictionary definition. It has the appearance of an invented word or one that looks non-English in origin. It has no meaning. Therefore, the mark is considered to be distinctive to an above average degree.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

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

The principles

(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.

24. The goods are notionally assumed to be identical. This is important as the interdependency principle is in full operation. The marks are similar visually to only a very low degree. It is accepted that aurally, there is, at least potentially, a low to medium degree of similarity. Conceptually, there is no similarity. The relevant consumer will pay at least a medium degree of attention. It is noted that the opponent relies upon the decision in *Medion* as support for its position as to the likelihood of confusion. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. considered the impact of the CJEU's judgment in *Bimbo*, Case C-591/12P, on the court's earlier judgment in *Medion v Thomson*. The judge said:

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

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and

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

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

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

25. It is considered that the opponent does not even clear the first hurdle in this regard as for the principle in *Medion* to bite, its earlier trade mark would need to be identical or similar to an element in the later trade mark and to achieve that, it would need to be seen and understood as meaning “rocket”. As already stated, there is no evidence to support that, merely assertion. Even on a normal reading of “roccat” it is not a typical misspelling of “rocket” and there is nothing else in this particular arrangement of letters that would obviously lead the reader to conclude that roccat is and means rocket. The principles in *Medion* therefore are considered to be irrelevant to these proceedings as “roccat” and “rocket” are not considered to be either identical or similar due to

the failure of the earlier trade mark to be understood as “rocket”. This in turn also leads to a lack of conceptual similarity. In this regard I am reminded of the decision in *The Picasso Estate v OHIM*, Case C-361/04 P, where the Court of Justice of the European Union found that:

“20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences observed between those signs may counteract the visual and phonetic similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law.”

26. In considering whether or not there is a likelihood of confusion, I bear in mind the principle listed above and also the guidance in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, where Mr Iain Purvis Q.C., as the Appointed Person, explained that:

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

27. To be clear, it is considered that the marks in question here are visually similar to only a very low degree. The real high point for the opponent is in respect of aural similarity. Even then, there is not a high degree of aural similarity. Rather, it is pitched as being low to medium. In any event, it is

considered that the clear conceptual gap between the marks negates any potential aural effect. Bearing in mind all of the aforesaid, it is considered that the trade marks will not be mistaken for one another as the differences are significant. Further, there is nothing to provide a coincidental hook in the mind of the consumer to lead to the later trade mark being considered to be a brand extension of the earlier trade mark or to otherwise have emanated from the same source.

Final Remarks

28. The opponent relied upon a number of earlier decisions in support of its position. These will be considered and commented upon in turn:

- a) *Aveda Corp v Dabur India Ltd* (2013) EWHC 589 where the registration of DABUR UVEDA was rejected because of opposition by the earlier trade mark AVEDA. It is noted that the similar element here is an invented word, as is the earlier trade mark relied upon. Neither have any meaning and so the conceptual impact is neutral. As such, there is no impact on the clear visual and aural similarities. These factors set it apart from the trade marks which are the subject of these proceedings and so it is considered that this decision is not on a par with the issues to be decided here.
- b) *Roccat GmbH v Rocket Europe Ltd* (Opposition No B 2 089 441, decision dated 14th October 2013). Here, the EUIPO upheld an opposition on the basis that “roccat” and “rocket” were visually and aurally similar such that there was a likelihood of confusion. In the current proceedings, the relevant consumer is the general public of the UK, that is, the English speaking consumer. Such a consumer will instantly understand the meaning of the word “rocket”. This factor sets it apart from the earlier EUIPO decision as it differs in context. The EUIPO considers the position from the relevant consumers, bearing in mind all of the relevant languages. Many of the relevant consumers will not speak English and so will not understand the meaning of “rocket”. In this context, “rocket” is likely to be seen as an invented word and so there will be no conceptual impact on the issue of likelihood of confusion. That is not the

position in respect of the current proceedings and so it is considered that this factor sets it apart from the earlier EUIPO proceedings.

- c) *L'Oreal v OHIM* (T-21/07) 2009 ETMR 48 where “SPA” and “SPA THERAPY” were considered to be confusingly similar. The opponent relies on this decision to argue that the addition of “LEAGUE” in the later trade mark is insufficient to avoid confusion. Here, it is noted that each of the marks contain a coincidental element. This is not the case in the current proceedings and so this earlier decision is considered to not be on a par.

29. The opposition under Section 5(2)(b) therefore fails in its entirety. It is noted that the goods and services in Classes 25 and 41 were unopposed and can therefore proceed directly to registration.

COSTS

30. The applicant has been successful and is entitled to a contribution towards its costs. In the circumstances I award the applicant the sum of £800 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Preparing a statement and considering the other side's statement - £300

Preparing for and attending a hearing - £500

31. I therefore order Roccat GmbH to pay Psyonix Inc the sum of £800. The above sum should be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

Dated this 21st day of February 2019

Louise White

For the Registrar