

**BL/0781/24**

**TRADE MARKS ACT 1994**

**TWO APPLICATIONS BY RAZVAN RADU TO CANCEL 'IPHONE' TRADE MARKS  
OWNED BY APPLE INC. FOR BEING NON-DISTINCTIVE AND DESCRIPTIVE**

**AND**

**APPLE INC'S APPLICATION FOR THE CANCELLATION APPLICATIONS  
TO BE STRUCK OUT AS AN ABUSE OF PROCESS**

1. A case management conference (CMC) was held on 25 July 2024 in respect of an application to strike out cancellation cases 506579 and 506559, by Apple Inc ('Apple'). The cancellations filed by Mr Razvan Radu are made against Apple's 'iPhone' registrations relying on 3(1)(b) and (c) of the Trade Marks Act 1994 ('TMA'),<sup>1</sup> which reads:

**“3. Absolute grounds for refusal of registration**

(1) The following shall not be registered—

(a)...

(b) trade marks which are devoid of any distinctive character,

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,

(d)..."

2. In addition to its strike out request, Apple requested security for costs, case management directions and the admission of a late filed witness statement.

3. Apple filed a skeleton argument and was represented at the hearing by Alaina Newnes of counsel, instructed by CMS Cameron McKenna Nabarro Olswang LLP. Mr Radu filed a skeleton argument and did not attend the hearing, relying instead on the papers he has already filed.

**Evidence and the late witness statement**

4. Apple has provided two witness statements in support of its strike out application. The first statement, by Ben Hitchens, is dated 29 May 2024. The second, by Thomas La Perle, is dated 23 May 2024 ('LaPerle').

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<sup>1</sup> The cancellation cases are part of a larger group of five cases that include three oppositions. The oppositions will not be affected by this decision.

5. The first statement by Mr Hitchens included prints of decided cases and was far longer than the 300-page limit set in Tribunal Practice Notice (TPN) 1/2015. I directed that the same information could be provided much more succinctly if Apple filed a witness statement that provided the case citations, and the relevant paragraphs.

6. On 19 June 2024 Apple filed (and sent to Mr Radu) an updated version of Mr Hitchens' statement ('Hitchens 1') with much shorter exhibits and some updated information regarding the timetable of Mr Radu's registry proceedings.

7. At the CMC, Ms Newnes asked that I admit that statement into these proceedings. I did so because Mr Radu had already seen the longer version of Mr Hitchens' statement and had been sent the later filed shorter statement and therefore was not disadvantaged by the admission, which did not change the substance of the statement.

8. In addition to the two statements referred to above, Apple provided a second witness statement by Ben Hitchens, dated 19 June 2024, in support of its security for costs application ('Hitchens 2').

### **Apple's claims regarding strike out**

9. Apple claims that the cancellation applications are an abuse of process and should be struck out for collateral and improper purpose or in accordance with the Jameel principle.

#### Collateral and Improper purpose

10. Apple makes three claims under this heading:

i) Mr Radu is trying to extract revenue from Apple. This submission is supported by Mr Radu's request in his pleadings for an award of costs to cover his loss of earnings.

ii) Mr Radu seeks to '*vex Apple and put Apple to considerable expense*'. Apple submits that the cancellation applications are part of a concerted attempt by Mr Radu to cancel

a number of Apple's marks in the EU and UK and submits that the tribunal should have regard to these proceedings in considering Mr Radu's purpose. It also claims that the cancellation applications are bound to fail.

iii) Mr Radu intends to improperly acquire Apple's trade marks for his own use and financial benefit. In support of this claim Apple relies on the fact that there is no evidence Mr Radu is using his applied for marks, which incorporate Apple's own trade marks. Further, Mr Radu did not respond to IPO requests concerning his use or intended use of the marks. In addition, Mr Radu has filed numerous applications incorporating Apple trade marks and pursues cancellation actions in multiple jurisdictions of marks that include Apple's trade marks. It submits:

*In combination, these factors suggest that the Mr Radu's intention is to appropriate Apple's trade marks and exploit their fame for his own ends, including (but not limited to) financial gain. It can be inferred that the Cancellation Applications have therefore been brought in the misguided belief that success in these Cancellation Applications will enable Mr Radu to acquire Apple's rights, and that goal is an improper purpose. Of course, even if Apple did not have the benefit of any registered marks, Mr Radu's trade mark applications are all ones that Mr Radu (or a third party licensee) could not possibly use without amounting to passing off in respect of Apple."*<sup>2</sup>

11. In *Goldsmith v Sperrings*<sup>3</sup> Lord Bridge considered whether a litigant bringing proceedings for an improper collateral purpose amounts to an abuse of process. He stated the law to be as follows:

*"Mr. Comyn relied, in support of the submissions which I have summarised in paragraphs 1 and 2 above, on the dictum of Lord Evershed M.R. in In re Majory [1955] Ch. 600, 623:*

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<sup>2</sup> Paragraph 24(3) of Ms Newnes' skeleton argument.

<sup>3</sup> [1997] 1 WLR 478

*“The so-called ‘rule’ in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused.”*

*For the purpose of Lord Evershed's general rule, what is meant by a ‘collateral advantage’? The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose upon an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land — these are a few obvious examples of such proper settlements. In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain; but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired byproduct of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it. But on the view*

*I take of the facts in this case the question does not arise and it is neither necessary nor desirable to try to lay down a precise criterion in the abstract.”*

12. Apple concludes that if I am satisfied that it should succeed in respect of either of its grounds for striking out the cancellation applications, I must be satisfied that it is correct to exercise the tribunal’s discretion. Ms Newnes drew my attention to the decision in SOCIAL WORK NEWS<sup>4</sup> in which Thomas Mitcheson KC (sitting as an Appointed Person) held:

*“30. Second, it is important to recall that there is a public interest in not allowing invalid marks to remain on the register, particularly where absolute grounds are in issue...In my view the absolute nature of objections under e.g. s.3 of the Act combined with the relatively informal Registry procedure give the public interest point more weight in trade mark matters.*

*31. However, the public interest in not allowing invalid marks to remain registered cannot trump every other interest, otherwise it would always be the case that further proceedings should be allowed, which would not be consistent with Virgin or Arnold. Related to this, third, the tribunal needs to be satisfied before relying on the public interest that the objection to validity which is sought to be raised is at least arguable.”*

## **DECISION**

### **The tribunal’s power to strike out the cancellation applications for being an abuse of process**

13. In *Sherlock Systems v Apple Inc*<sup>5</sup>, Allan James considered the power of this tribunal with regard to striking out proceedings. He said:

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<sup>4</sup> See SOCIAL WORK NEWS, BL O/0050/24 at paragraph 30.

<sup>5</sup> BL O/015/17

*“It is sufficient to recall that in T-Mobile (UK) Ltd v O2 Holdings Ltd,<sup>6</sup> Ms Amanda Michaels as the Appointed Person said that:*

*‘Making an application under section 47 [of the TMA] is not subject to any statutory preconditions. If an applicant is to be denied his statutory right to a fair hearing of such an application, bearing in mind the Court/Tribunal’s obligations under Article 6 ECHR, that denial must flow from a finding that the particular applicant is — on the particular facts of the case — exercising his rights under section 47 in an improper and abusive manner.’”*

14. In addition, Mr James identified that the 2008 Rules established that the Registrar has an inherent power to regulate his own procedures, provided that in doing so he neither creates a substantive jurisdiction where none exists, nor exercises that power in a manner inconsistent with the express provisions conferring jurisdiction on the Registrar.<sup>7</sup> He concluded that he was satisfied that the registrar had the power, in principle, to strike out the proceedings he was asked to consider (revocation in that case), as an abuse of process. I see no reason to deviate from this finding here and conclude, for the same reasons, that the registrar has the power, in principle, to strike out the cancellations that are the subject of Apple’s request in this case.

**i) Mr Radu is trying to extract revenue from Apple**

15. The only evidence Apple has put forward to support this claim is the fact that Mr Radu has requested compensation for loss of earnings, within his statement of case. The evidence provided is, in my view, far too scant to justify a finding that the cancellation applications were filed in order to extract revenue from Apple.

**ii) Mr Radu seeks to ‘vex Apple and put Apple to considerable expense’.**

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<sup>6</sup> BL O/364/07

<sup>7</sup> See Pharmedica’s Trade Mark Application [2000] RPC 536 at 541.

16. Mr Hitchens first witness statement outlines the proceedings to date, which I provide in the following timeline, incorporating the relevant dates of correspondence from Mr Radu to Apple's representatives:

- 3 September 2023, Mr Radu filed cancellation actions against one EU registration for 'iPhone' (No. 5341301) and two EU registrations for the Apple logo followed by the word iPhone (Nos. 6530406 and international registration (IR) 975076), all of which are owned by Apple, without giving any prior notice to Apple. These cancellation actions are ongoing.
- Mr Radu describes the Apple logo as, 'descriptive, not distinctive and a *'mysterious nectarine'*.
- On 13 September 2023, Mr Radu sent an email to Apple's representatives.<sup>8</sup> In that email Mr Radu, *'threatened to file cancellation actions against the following five UK registrations for 'iPhone' and owned by Apple (these include the Registrations against which the Applicant subsequently filed the Cancellation Actions on 4 October 2023): WO000000923726, UK00905341301, UK00002460723, UK00810975076 and UK00906530406.'*
- Mr Radu suggested that Apple surrender these registrations as a *'discreet solution'*. Apple did not respond to the email.
- On 4 October 2023, Mr Radu files new trade mark applications, both at the UKIPO and EUIPO, namely UK00003963993, UK00003963994 & UK00003963997 and EU App. Nos. 18933358, 18933400 & 18933361, for the following three marks, which Apple submits *wholly subsume Apple's 'iPhone', 'iPad' and 'iWatch' marks.*

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<sup>8</sup> See exhibit BH1 to Mr Hitchens's statement.



- On 5 October 2023, Mr Radu filed the present cancellation applications.
- On 6 and 7 December 2023, the UKIPO sent Mr Radu three letters concerning each of his applications at the UKIPO. He was asked to submit further information on his use or intended use of each of the marks shown above. The letters were issued in response to third party observations filed by Apple, in which it had asked the UKIPO to re-examine each of the Applicant's Applications on absolute grounds and to issue objections based on bad faith under Section 3(6) of the Act. However, the Applicant did not submit any information concerning his use of the marks by the deadline and indeed failed to respond to the UKIPO's letters.
- Mr Hitchens provides an email<sup>9</sup> from Mr Radu, dated 24 December 2023, in which Mr Radu says that if Apple 'attacks' his applications, competitors such as Samsung would 'copy' Mr Radu and seek to register these terms. Apple did not respond to this email.
- On 11 June 2024, Apple asked the EUIPO to (i) issue an interim decision on Apple's abuse of process claim in respect of the Applicant's cancellation action against EU registration No. 6530406 and (ii) suspend the Applicant's cancellation actions against EU registrations Nos. 5341301 and IR 975076 above, as well as his revocation action against Apple's EU registration for 'iPAD' (No. 4928859) mentioned at paragraph 10 below, pending such interim decision. The EUIPO is currently examining this request.

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<sup>9</sup> See exhibit BH2 to Mr Hitchen's statement.

17. Apple submits that Mr Radu's filings against the Apple marks and his own applications incorporating iPhone, iPad and iWatch, in the UK, show that Mr Radu is attempting to vex Apple and put it to expense.

18. The second point it makes is that Mr Radu must know these cancellations under the section 3 grounds are hopeless. It submits:

*“The Registrations are inherently distinctive. Further, the fame and reputation of “iPhone” in relation to at the very least all of the mobile telephone and computing related goods in classes 9 and 28 for which Apple’s Registrations are registered is arguably an incontrovertible fact. The fame of IPHONE / iPhone has been recognised by numerous UKIPO and EUIPO decisions as listed at Hitchens1 §17(1) and §19. By way of just one example, in ‘iFoneYou’ Case O-489-14 the Hearing Officer said at §10: ‘The fame and recognition attached to Apple’s iPhone, as a mobile telephone, is enormous. I take that to be a notorious fact.’ In relation to any non-mobile telephone / computing / internet related goods, then Mr Radu’s argument that ‘iPhone’ is descriptive for referring to ‘internet + phone’ does not make sense...*

*Accordingly, there can be no good reason for Mr Radu bringing these Cancellation Applications other than to vex Apple and put it to considerable expense and the Tribunal can and should draw that inference from these facts.”*

19. Several cases before the UK and EU make it clear that the iPhone marks are prima facie descriptive for internet phones. Mr Radu bases his cancellations on this point with no further submissions relating to acquired distinctiveness through the use made of the marks, beyond his reliance on the EUIPO's decision of 08/12/2020 (in respect of IR 923726).

20. That decision of the EUIPO concerned a provisional refusal to the registration by Apple of 'iPhone' in relation to goods in classes 9 and 28 pursuant to Article 7(1)(b) and (c) and 7(2) of the EU Trade Mark Rules. The EUIPO maintained its objection and

found that the sign, iPhone, described the kind, quality and intended purpose of the goods and was also devoid of distinctive character.

21. In respect of that case Apple submits:

*“29. This case is of no application to the Cancellation Actions. It concerned a refusal to register an application whereas Apple’s registrations in contention in the Cancellation Applications have already been registered for a number of years. Moreover, the primary reason for the Office’s decision was because it required particular evidence such as surveys in order to demonstrate acquired distinctiveness. In the decision, the Office made a distinction between ‘direct proof’ such as surveys and ‘secondary evidence’ such as sales volumes, advertising material and duration of use; and the Office highlighted the absence of opinion polls or survey evidence in Apple’s evidence (see, in particular, page 19). At the time, Apple had made a commercial decision not to incur the significant time and cost of adducing survey evidence for multiple EU member countries, the necessity of which is denied. Had the surveys been conducted, Apple is confident they would have supported Apple’s position. Even aside from survey evidence Apple has significant evidence of enhanced distinctiveness that it can file in these proceedings, as mentioned in Mr Le Perle’s statement.”<sup>10</sup>*

22. The EU and UK offices differ in practice concerning the merits of survey evidence and, as Apple rightly submits, the marks for which Mr Radu seeks cancellation are already registered marks in the UK. I agree with the hearing officer in iFoneYou<sup>11</sup> that *“The fame and recognition attached to Apple’s iPhone, as a mobile telephone, is enormous...”*

23. Whilst being cautious before pre-judging a core issue between the parties without letting these cases run their course, I find the fact to be so clear and well known that there is no room for argument or requirement for evidence, on this specific point. As Mr Radu brings these cases under sections 3(1)(b) and 3(1)(c) it follows that my

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<sup>10</sup> See Hitchens 1 at paragraph 29.

<sup>11</sup> BL O/489/14 at paragraph 10.

conclusion would be that whilst the iPhone marks may be prima facie descriptive/non distinctive for internet phones or smart phones, they easily clear the hurdle of acquired distinctiveness for those goods and other closely related goods, such as phone chargers. For goods that are clearly further away, such as exercise apparatus and toy musical instruments, in class 28, the iPhone marks are prima facie distinctive.

24. In the absence of any explanation from Mr Radu as to why he does not accept that iPhone is factually distinctive for phones and related goods, it follows that I agree with Apple that Mr Radu's cancellation cases have no prospect of success.

25. I bear in mind that there is a public interest in not allowing invalid marks to sit on the register, but as Mr Mitcheson held in *SOCIAL WORK NEWS*, the case being brought must be at least arguable and in this case it is not.

26. The tribunal has an inherent duty to manage its procedures efficiently and in accordance with the overriding objective to deal with cases justly and at proportionate cost.<sup>12</sup> In that context, the cancellation actions filed by Mr Radu against the iPhone trade marks have no prospect of success and to allow them to continue would be a considerable waste of time and resources.

27. For the reasons provided above and relying on the powers of the Registrar to manage proceedings before him, the cancellation applications will be struck out.

28. I will go on to consider Apple's third point.

**iii) Mr Radu intends to improperly acquire Apple's trade marks for his own use and financial benefit**

29. Mr Radu's sent the following email to Apple's representatives on 13 September 2023:

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<sup>12</sup> Civil Procedure Rules, Part 1.1.

*"It's to inform you of my intention to seek invalidation of the registration of the following trade marks in UK based on EUIPO's decision of 08/12/2020:*

*UK00002460723*

*UK00810975076*

*UK00905341301*

*UK00906530406*

*WO0000000923726*

*Your client has the possibility to surrender these trade marks which is a more discreet solution for him.*

*I sent the same message last week to eutrademark@lockelord.com but I saw that your client has changed his representative meanwhile.*

*Hoping you're the last one because I don't plan on sending it again."*

30. Having received no reply to his email, Mr Radu filed the cancellations subject to this strike out request and filed his own three applications which include 'iPhone', 'iPad' and 'iWatch', in addition to 'orange WAVE'. Mr Radu's applications were opposed by Apple, following which Mr Radu wrote to Apple in the following terms (redacted to remove a reference to a third party):

*"I contact you about your Notice of threatened opposition against my UK trademarks 'orange WAVE iPhone', 'orange WAVE iPad', 'orange WAVE iWatch' and I assume also against my EU trademarks.*

*It's for asking what's the point of an opposition. We both know that your client will never be able to stop me using this generic terms because they are descriptive for my goods, which means that they are weak or equal to zero when determining the dominant element of my trademarks.*

*Therefore, your client must accept the fact that these generic terms are no more his property. By the way, iWatch never was his property, see EUIPO's decision of 31/05/2018. [REDACTED]*

[REDACTED]

*How more your client attacks my trademarks, how faster his current competitors will hear about it and how faster they will copy me and register these generic terms too. If for example Samsung registers the trademark 'Samsung iPhone' for goods in class 9 like smartphones, what can your client do to stop it? He will say that 'iPhone' is the dominant element of Samsung's trademark? Let's be serious."*

31. In his skeleton argument filed in advance of this CMC, Mr Radu submitted:

*"13...Once my trade marks are successfully registered in the UK and EU, I will contact Mr Jeff Bezos to propose him a partnership. Since the failure of the Fire Phone in 2014, Mr Bezos is still looking for an innovative idea for trying to enter again on the smartphone market. I will not only offer him innovative ideas to enter on even more markets but I will also offer him one of the most beautiful and eye-catching logo ever made in the consumer electronics industry: Orange WAVE.*

*And if for any reason Mr Bezos is not interested, the lists of billionaires and business investors that could be interested in Orange WAVE are very long.*

*Therefore, Apple should stop with its negativisms about the future of Orange WAVE."*

32. Whilst Mr Radu refers to his three applications as 'Orange WAVE', it should be noted that each of the marks also includes iPhone, iPad or iWatch in addition to the words Orange and WAVE. Mr Radu says:

*2. The dominant element of my trade mark applications is the word WAVE. The little descriptive elements like "iPhone" or "iWatch" don't change anything about the dominant element...*

*3...And because the generic term "iPhone" is descriptive for my goods, it doesn't change anything for me if Apple's "iPhone" marks are cancelled or not.*

33. Mr Radu has sought to force Apple to surrender its trade marks in what he calls, 'a discreet solution' in order to avoid his cancellation applications. Having received no response, he then filed the cancellation cases against the iPhone trade marks and applications for his own marks incorporating iPhone, iPad and iWatch. In his skeleton argument, Mr Radu has submitted that he intends to go into partnership with a billionaire to use his marks, which incorporate the Apple trade marks, 'on the smartphone market'.

34. Overall, the nature of Mr Radu's pattern of filings, correspondence with Apple and submissions before this tribunal points to an attempt to coerce Apple into surrendering its iPhone marks to clear the way for his own trade mark registrations, which include within them, at least, the iPhone trade mark.

35. Does this mean that the applications for cancellation are an abuse of process? I remind myself the test is whether it has been shown:

*"...that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all."*

36. I find that the cancellation applications were brought for an ulterior purpose without which these proceedings would not have been commenced. Further, the ulterior purpose is an improper purpose, at least in the sense that it is improper purpose for these proceedings, in other words, they are an abuse of process.

37. The cancellation applications will be struck out.

### **The Jameel principle**

38. In the alternative to its abuse of process claim, Apple relies on the decision in *Jameel v Dow Jones & Co Inc.*,<sup>13</sup> which, in civil litigation, allows proceedings to be

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<sup>13</sup> [2005] QB 946.

struck out where they are pointless and wasteful and the cost of defending them and determining the claim would be out of proportion to any likely benefit to the claimant. In that case Lord Phillips MR stated:

“An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play on it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.”

39. The principle derived from this case arises from the Court’s position as a public authority under section 6(3)(a) of the Human Rights Act 1998. Its application to this tribunal was considered in *Sherlock Systems CV v Apple Inc*<sup>14</sup> and was held not to apply to cancellation proceedings brought under s.46 of the Act. It has not been tested in respect of cancellation proceedings brought on absolute grounds and having found for Apple on its first ground for strike out, I see no need to decide this point.

### **Security for costs**

40. Prior to the CMC Apple requested security for costs due to the fact that Mr Radu’s UK address for service has many hundreds of companies registered at the location and Mr Radu had not provided his own address.

41. In his skeleton argument, Mr Radu provided an address in Romania. As a result, Ms Newnes, counsel for Apple, informed me that Apple was content to adjourn its request for security for costs at this point.

### **Costs**

42. Costs were not discussed at the CMC as Mr Radu was not present.

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<sup>14</sup> [2017] FSR 30

43. Apple has 14 days from the date shown below to make written submissions about appropriate costs for responding to the cancellation applications and this CMC with the associated paperwork. I will permit Mr Radu 14 days from the date of receipt of Apple's submissions to respond to those submissions.

**Status of this decision**

44 . This is a provisional decision. I will issue a final decision after deciding on costs. The period for appeal against my decision to strike out the applications and whatever decision I make on costs, will run from the date of my final decision.

**Dated this 15<sup>th</sup> day of August 2024**

**Al Skilton**

**For the Registrar,**

**the Comptroller General**