

BL O/1203/24

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NUMBER 3,880,587 IN THE NAME OF PERATECH IP LTD (FORMERLY IN THE NAME OF PERATECH HOLDCO LTD)

AND IN THE MATTER OF THE OPPOSITION UNDER NUMBER 442,477 IN THE NAME OF MPDV MIKROLAB GMBH

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF CASSIE IRELAND (O/772/24) DATED 14 AUGUST 2024

DECISION

Introduction

1. This is an appeal from the decision of Cassie Ireland, for the Registrar, dated 14 August 2024 (O/772/24). MPDV Mikrolab Gmbh opposed the trade mark application of Peratech Holdco Ltd (No 3,880,587) under section 5(2)(b) of the Trade Marks Act 1994.
2. On 21 February 2023, Pereatech Holdco Ltd applied to register the mark HYDRA in relation to the following goods:

Class 9

Software for controlling inputs from peripheral devices, namely keyboards, touchpads, game controllers; computer control software, namely control software for force enabled keyboards; software for force enabled computer peripheral devices; computer software for controlling force sensing devices; excluding software for use in manufacturing processes and software for use in manufacture execution systems; excluding software for use in blockchain processes.

Class 28

Game controllers for computers; controllers for computer games; gaming keypads; gaming keyboards.

3. MPDV Mikrolab Gmbh opposed the application based on its earlier international trade mark (UK) for the word mark HYDRA X (No 1,665,363) which is protected in relation to goods and services in Classes 9 and 42.
4. The application for the mark HYDRA was assigned by Pereatech Holdco Ltd to Peratech IP Ltd on 12 August 2024. Nothing turns on the change of ownership.

Standard of appeal

5. The standard of appeal is by way of review. Neither surprise at a Hearing Officer's conclusion nor a belief that the Hearing Officer has reached the wrong decision will

suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer's findings were rationally insupportable. The principles to be applied were summarised by Joanna Smith J in *Axogen Corporation v Aviv Scientific Ltd* [2022] EWHC 95 (Ch), [24] and in relation to findings of fact this should now be read in light of the summary of Arnold LJ in *Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA Civ 262, [110] and in terms of evaluative decisions the Supreme Court's guidance in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8, [49] where it stated that:

...on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.

6. When considering this appeal, and applying these principles, it is important to remember the high bar set.

Grounds of appeal

7. The Appellant appeals the Hearing Officer's decision on three grounds. The first is that the Hearing Officer erred by not taking into account the Explanatory Notes and General Remarks to the different classes in the Nice Agreement Concerning the International Classification of Goods and Services when determining the similarity of the goods. The second is that the Hearing Officer was wrong when she found that the relevant public were members of the general public who pay only an average degree of attention to the purchase. The third ground of appeal is that the Hearing Officer erred when she dismissed the Appellant's evidence regarding the use of the mark HYDRA by third parties when considering the distinctiveness of the marks,

Ground 1: Failure to take account of Explanatory Note in Nice Classification

8. Ms Moss McGrath submits that the Hearing Officer erred in her assessment of the similarity of the goods because she failed to take into account the General Remarks and Explanatory Notes in the Nice Classification. This aspect of the appeal arises from the Hearing Officer's comparison of the goods "computers and computer hardware" in Class 9; and "Game controllers for computers; controllers for computer games; gaming keypads; gaming keyboards" in Class 28. The Hearing Officer found these goods to be highly similar: Decision, [21].

9. Ms Moss McGrath suggests this finding did not take account of the Explanatory Note to Class 9 that provides that the class includes:

joysticks for use with computers, other than for video games, virtual reality headsets, smartglasses;

But that the class does not include:

joysticks being parts of machines, other than for game machines (Cl. 7), vehicle joysticks (Cl. 12), joysticks for video games, controllers for toys and game consoles (Cl. 28)

10. Ms Moss McGrath says that because of the Explanatory Note it would be wrong to conclude that "computer hardware" in Class 9 includes gaming controllers.

11. The idea that the Explanatory Note can be used to interpret the meaning of the words describing the goods and services covered by the specification is not controversial (and Ms Veitch, for the Respondent, does not dispute it): see *Pathway IP Sarl v Easygroup Ltd* [2018] EWHC 3608 (Ch); *Multi-Access Ltd v Guangzhou Wong Lo Kat Great Health Business Development Co Ltd* [2019] EWHC 3357 (Ch), [2020] ETMR 22, [66] to [86].
12. Further, Ms Veitch concedes that “computer hardware” in Class 9 does not include gaming controllers in Class 28. But she submits that this does not affect the Hearing Officer’s finding that the goods are *similar* (rather than identical) to each other.
13. The Hearing Officer rightly points out in paragraph 18 of her Decision that section 60A of the Trade Marks Act 1994 provides that goods and services 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 and are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.
14. Accordingly, the Hearing Officer was right to compare the user, physical nature, nature of use and trade channels of the relevant goods to determine whether they were similar or not. Indeed, I entirely agree with her analysis and her conclusion that “computers and computer hardware” are highly similar to “Game controllers for computers; controllers for computer games; gaming keypads; gaming keyboards”.
15. I therefore dismiss the first ground of appeal.

Ground 2: Composition of the general public

16. The Appellant argues that the Hearing Officer was wrong to conclude that the relevant public for Appellant’s goods would be members of the general public who would pay an average degree of attention to the purchase: Decision, [26].
17. First, Ms Moss-McGrath criticises the Hearing Officer for rejecting her submission below and concluding that “Software for controller inputs from peripheral devices, namely keyboards, touchpads and game controllers” were “general” goods, rather than goods aimed at a specialised public: Decision, [23]. I entirely agree with the Hearing Officer’s assessment. The claim is for (essentially) software drivers which are used for running hardware. These are incredibly commonplace and included in every computer. I do not see them as particularly specialised. I therefore reject this criticism by the Appellant.
18. Second, the Hearing Officer was criticised for rejecting an exhibit (RMM3), which comprises a press release (both the original and its repetition as a news article by a third party), when determining the notional use of the mark. I cannot see how this press release assists in determining what the words in the trade mark specification mean. Accordingly, I reject this criticism by the Appellant.

19. Finally, the Hearing Officer was criticised for finding that “software” and “application software” in the Respondent’s specification can include software for a wide range of goods, such as smartphones; and so, the words might include reasonably casual, frequent, and inexpensive purchases: Decision, [25]. While Ms Moss-McGrath is right that “software” can include niche goods, and indeed those sold at a very high price, that does not mean the term does not also include cheap and cheerful (even free) software. I therefore think the Hearing Officer was right in her findings and I reject this criticism as well.

20. I therefore reject the second ground of appeal.

Ground 3: Failure to consider evidence of use of HYDRA by third parties

21. Ms Moss-McGrath submits that the Hearing Officer erred in concluding that the various screenshots, showing the sign HYDRA being used by third parties, was “state of the register evidence”. She further submits that this evidence should have been taken into account and that it shows that the sign HYDRA is of low or weak distinctiveness due to widespread use in the marketplace.

22. The Hearing Officer dealt with the submission at paragraphs 46 and 47 of her Decision (footnotes omitted):

46. This rationale also applies to Mrs Moss McGrath’s evidence at Exhibit RMM5 which is presented as examples of the use of ‘HYDRA’ in the marketplace through screenshots from various software-related websites. The screenshots provide extremely limited information regarding use of the marks and, from the evidence provided, it’s not possible to determine the full context of their use. For example, information which could account for their coexistence. Further, as pointed out by Ms Veitch during oral submissions, a number of these examples either do not clearly relate to the UK market (which, despite the applicant’s suggestions, must be the relevant market for this assessment), are unclear regarding what they are used on, or fall beyond the relevant date. Even for the examples which do not fall foul of these factors, for the same reasons presented by *Zero Industry Srl v OHIM* above, these examples are not sufficient to establish that the distinctiveness of the word ‘HYDRA’ is weakened because of the popularity and (potentially) frequent online use of the word in the UK for the goods and services. There is nothing in the evidence provided which suggests ‘HYDRA’ has any particular meaning in relation to software and computer hardware or that it has become synonymous for these goods and services.

47. The applicant identified in its skeleton arguments and quoted at the hearing previous caselaw relating to marks consisting of elements with a low or weak inherent distinctiveness including where this points towards a finding of no likelihood of confusion. However, bearing in mind the finding I’ve already made at paragraph 39 regarding ‘HYDRA’ having at least an average (normal) distinctiveness, and the rationale provided above that this is not weakened by “state of the register” evidence or that provided regarding use of the term in the marketplace, these cases are clearly not on all fours with this opposition.

23. While I agree that the Hearing Officer’s suggestion that this evidence was “state of the register” is unhelpful (as it is not), I otherwise agree with her reasoning. The various screenshots exhibited in RMM5 have little or no context, no indication of how long the websites were visible, and no indication of the number (or the characteristics) of the people viewing the screenshots, and only limited evidence of the goods or services sold by the third parties under the mark HYDRA. So, in common with the Hearing Officer,

I find the evidence was insufficient to establish that the mark HYDRA has had its distinctiveness lowered through use by third parties.

24. I therefore reject this ground of appeal as well.

Conclusion

25. I have rejected all the grounds of appeal and upheld the Hearing Officer's decision in full.

26. As the Respondent was successful, it is entitled to a contribution of £1,500 towards its costs from the Appellant (in addition to the £1,750 ordered by the Hearing Officer below). The Appellant must therefore pay the Respondent £3,250 by 4pm on 15 January 2025.

PHILLIP JOHNSON
THE APPOINTED PERSON
18 December 2024

Representation

For the Appellant: Rigel Moss McGrath of HGF Limited

For the Respondent: Karen Veitch of Lincoln IP