

O-111-15

TRADE MARKS ACT 1994

**TRADE MARK APPLICATION NO. 3030731
BY CHIJOKE JAMES NWOSU
TO REGISTER THE TRADE MARK**



IN CLASS 42

AND

**THE OPPOSITION THERETO UNDER NO. 402474
BY INFOX GMBH & CO. INFORMATIONSLOGISTIK KG**

Background and pleadings

1. Chijioke James Nwosu applied for the trade mark shown below on 27 March 2014, for a range of computer related services in class 42.



2. The application was published on 4 April 2014. It was subsequently opposed by Infox GmbH & Co. Informationslogistik KG (“the opponent”) on the basis that there is a likelihood of confusion, under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), with the opponent’s earlier Community Trade Mark for the trade mark INFOX (registration number 1858331). The opponent’s mark was filed on 15 September 2000, claims a priority date (from Germany) of 29 March 2000, and completed its registration procedure on 14 December 2005. It is registered for a range of goods and services in classes 16, 35, 37, 38, 39, 41 and 42.

3. The opponent relies upon all of the registered goods and services and has made a statement that it has used the mark in relation to all of the registered goods and services. The statement of use was required because the earlier mark had been registered for more than five years on the date of publication of the opposed application, as per section 6A of the Act. Although relying upon all of the registered goods and services, the opponent only refers to the parties’ class 42 services in claiming that, owing to the similarities between the marks and the high similarity or identity between the parties’ services, there is a likelihood of confusion on the part of the relevant public.

4. Mr Nwosu denies the ground of opposition. I reproduce here what he says in the counterstatement because Mr Nwosu has not filed any further submissions or evidence in support of his defence:

The trademark “INTOXTECH” and not just ‘INTOX’. Being that your argument is that “TECH” is an abbreviated word for technology really has nothing to do with my trademark name.
Your trademark is INFOX whereas mine is INTOXTECH, the TECH is part of the trademark name and all in one word, so do not try and separate them.
I do not see how INFOX and INTOXTECH are similar nor sound the same. And I do not think is possible to mistake INFOX for INTOXTECH.

5. Mr Nwosu ticked the box which says “no” on the statutory form TM8 and counterstatement in response to the question as to whether he wanted the opponent to prove use; i.e. to substantiate its statement that it had used its mark in relation to all of the relied upon goods and services. The consequence of Mr Nwosu choosing not to require the opponent to prove use is that the opponent can rely upon all of its

goods and services, whether or not it has actually used its mark in relation to all (or any) of those goods and services.

5. The opponent is professionally represented, whilst Mr Nwosu represents himself. The opponent filed written submissions, but no evidence. Mr Nwosu filed nothing after filing the counterstatement. The parties were asked if they wished to be heard or for a decision to be made from the papers. Neither replied and neither filed written submissions in lieu of a hearing. I make this decision after a careful reading of all the papers filed by both parties.

Decision

6. Section 5(2)(b) of the Act states that:

“(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.”

7. 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of services

8. The opponent's written reasons supporting its opposition are limited to the class 42 services. I will therefore confine my comparison of services to class 42, bearing in mind also that Mr Nwosu has not denied, or commented upon, the opponent's claim that the parties' services in class 42 are similar or identical. Mr Nwosu's counterstatement denies only that the marks are similar.

9. The parties' competing specifications in class 42 are shown in the table below:

Earlier mark	Application
Engineering services; computer programming, physics (research); providing services for the construction of electronic networks, development, expansion and operation of computer networks, leasing of access time to computer networks, rental of capacity on computer networks for content providers and for manufacturers of goods and providers of services, construction of computer databases, including all the aforesaid services in connection with online services; database operator	Computer advisory services; Computer and information technology consultancy services; Computer and software consultancy services; Computer consultancy; Computer consultancy and advisory services; Computer consultancy services; Computer consultation services; Computer hardware and software consultancy; Computer hardware and software consultancy services; Computer hardware and software consulting services; Computer hardware (Consultancy in the design and development of -

services, applications-related technical consultancy with regard to the secure, protected transmission and storage of data, in particular the use of encoding software and the use of protective mechanisms (firewalls); control of access to databases, in particular by generating passwords or using keys; all the aforesaid services in particular both on intranets and on the Internet; webhosting, Internet publishing, creating webpages, in particular interactive webpages, for others; development, creation, further development and maintenance (improving and updating) of computer programs, computer program systems, program libraries and databases and the rental or leasing thereof, subject to special contractual conditions (leasing by licence); application support services and planning of computer solutions; computer systems analysis and testing of computer systems; providing of expert opinion; technical consultancy; providing expertise, reservation and booking of rooms, apartments, flats, houses and similar accommodation, including by electronic means via a database; recording, acquisition, transmission, storage, processing and/or reproduction of messages, images, text, speech, signals and data, in particular in digital form; operator services, including the installation, maintenance and management of computer installations, computer programs and databases, for others; operating and providing access to computer and/or data networks, for others.

);Computer hardware (consultancy in the field of-);Computer programming;Computer programming and maintenance of computer programs;Computer programming and software design;Computer programming for the internet;Computer services;Computer site design;Computer software advisory services;Computer software consultancy;Computer software consultancy services;Computer software consultation;Computer software consulting;Computer software consulting services;Computer software design;Computer software design and development;Computer software design and updating;Computer software design for others;Computer software (design of -);Computer software design services;Computer software development;Computer software development for others;Computer software (installation of-);Computer software (Installation of -);Computer software maintenance;Computer software (maintenance of-);Computer software (Maintenance of -);Computer software maintenance services;Computer software programming services;Computer software (updating of-);Computer software (Updating of -);Computer virus protection services;Computer website design;Repair (maintenance, updating) of software;Repair of computer software;Repair of damaged computer programs;Repair of software [maintenance, updating];Research, development, design and upgrading of computer software;Web page design services;Web site design;Web site design and creation services;Webpage design services;Website design services;Website development for others;Website development services;Advice relating to the design of computer hardware;Advisory and consultancy services relating to computer hardware;Clothing design services;Component testing;Computer advisory services;Computer aided design services;Computer and computer software rental;Computer and information technology consultancy services;Computer and software consultancy services;Computer consultancy;Computer consultancy and advisory services;Computer consultancy services;Computer consultation;Computer consultation services;Computer consulting services;Computer design;Computer design and programming services;Computer graphics services;Computer hardware and software consultancy;Computer hardware and software consultancy services;Computer hardware and software consulting services;Computer hardware (Consultancy in the design and development of -);Computer hardware (consultancy in the field of-);Computer hardware (design of -);Computer hardware leasing;Computer hardware rental;Computer hire;Computer leasing;Computer network configuration services;Computer network design for others;Computer network services;Computer program advisory services;Computer program maintenance services;Computer program updating services;Computer programming;Computer programming and maintenance of computer programs;Computer programming and software design;Computer programming consultancy;Computer programming for others;Computer programming for telecommunications;Computer programming for the internet;Computer programming of computer games;Computer programming of video and computer games;Computer programming of video games;Computer programming services;Computer programs (Duplication of -);Computer project management services;Computer rental;Computer rental and updating of computer software;Computer rental services;Computer research services;Computer security consultancy;Computer security system monitoring services;Computer

	<p>services;Computer site design;Computer software advisory services;Computer software consultancy;Computer software consultancy services;Computer software consultancy services;Computer software consulting;Computer software consulting services;Computer software design;Computer software design and development;Computer software design and updating;Computer software design for others;Computer software (design of -);Computer software design services;Computer software development;Computer software development for others;Computer software installation and maintenance;Computer software (installation of-);Computer software (Installation of -);Computer software integration;Computer software maintenance;Computer software (maintenance of-);Computer software (Maintenance of -);Computer software maintenance services;Computer software programming services;Computer software rental;Computer software (rental of -);Computer software rental services;Computer software technical support services;Computer software (updating of-);Computer software (Updating of -);Computer system analysis;Computer system design;Computer system integration services;Computer testing;Computer virus protection services;Computer website design;Computing consultancy;Hire of computer programs;Hire of computer software;Hire of computers;Hiring of computer programs;Hiring of computer software;Homepage and webpage design;Hosting computer sites [web sites];Hosting computer sites [websites];Hosting of internet sites;Hosting of web sites;Hosting of websites;Hosting the computer sites (web sites) of others;Hosting the web sites of others;Hosting the web sites of others on a computer server for a global computer network;Hosting the websites of others;Hosting the web-sites of others;Hosting web sites;Hosting web sites for others;Hosting web sites of others;Hosting websites of others;Hosting websites on the Internet;Information services relating to information technology;Information services relating to the application of computer networks;Information services relating to the application of computer systems;Information services relating to the development of computer networks;Information technology consultancy;Information technology consulting;Installation and customisation of computer applications software;Installation and maintenance of computer programs;Installation and maintenance of computer software;Installation and maintenance of Internet access software;Installation and maintenance services for software;Installation, maintenance and repair of computer software;Installation, maintenance and repair of software for computer systems;Installation, maintenance and updating of computer software;Installation, maintenance, repair and servicing of computer software;Installation of computer programs;Installation of computer software;Installation of firmware;Installation of software;Installation, repair and maintenance of computer software;Installation, setting up and maintenance of computer software;Installation, updating and maintenance of computer software;Installing computer programs;Installing web pages on the internet for others;Installing webpages on the internet for others;Interior design services;Software as a service;Software consultancy services;Software consulting services;Software creation;Software customisation services;Software design;Software design and development;Software design (computer-);Software design (Computer -);Software design for others;Software development;Software development services;Software installation;Software maintenance services;Software (rental of computer-);Software (Rental of computer -</p>
--	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

);Software (updating of computer-);Software (Updating of computer -);Web hosting services;Web page design services;Web site design;Web site design and creation services;Web site hosting services;Webhosting;Webpage design services;Website design services;Website development for others;Website development services;Website hosting services;Website usability testing services;Writing and updating computer software;Writing of computer programs;Writing of computer software.
--	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

10. In comparing the respective specifications, all relevant factors should be considered, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* where the CJEU stated at paragraph 23 of its judgment:

“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.”

11. ‘Complementary’ was defined by the General Court (“GC”) in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-325/06*:

“82 It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking...”

12. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited (“Treat”)* [1996] R.P.C. 281 for assessing similarity between goods and services also include an assessment of the channels of trade of the respective goods or services.

13. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J said:

“... 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.”

14. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-33/05, the General Court (“GC”) stated that:

“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 trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

15. Mr Nwosu’s specification is very repetitive. The services are all internet and computer services (apart from his interior design services). They are identical to the opponent’s computer and online services or, where not identical, share (at least) the same users, uses and channels of trade and are in many cases complementary. Since (i) Mr Nwosu has not denied that there is identity or similarity¹ and (ii) for reasons of procedural economy, I will base this decision on a finding that the class 42 services are either identical or highly similar.

Average consumer

16. 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 or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

17. 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:

“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.”

18. The opponent submits:

“The purchaser of services covered by the application will in most cases be normal members of the public perhaps in a business environment. The services provided under the trade mark are generally considered standard consumer services. There is nothing to suggest when comparing the specifications that there is anything beyond the comprehension of a 21st century tech-savvy consumer. The services are therefore such that a low to moderate degree of care would be exercised.”

¹ See the comments of Mr Iain Purvis, QC, sitting as the Appointed Person in BL O/500/14 *Harlequin Shellac*, paragraphs 39 and 40, available for viewing on the Intellectual Property Office’s website.

I do not agree. The services of both parties are technical, potentially expensive, potentially with long-term important applications (e.g. web design, computer programming and construction of electronic networks), and will be purchased only after exercising an above average degree of care and attention to detail to ensure e.g. compatibility, price, service-level agreements etc. In some cases, considerable care will be taken, such as bespoke website and software design. The perception of the marks during the selection process will be primarily visual, on the basis of e.g. advertisements, company literature and websites, but I do not ignore the possibility of oral use of the marks during the purchasing process.


Comparison of marks

20. 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.”

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.

21. The respective marks are:

Opponent	Applicant
<p style="text-align: center;">INFOX</p>	

22. Mr Nwosu states in his counterstatement that TECH is part of his trade mark and should not be separated from INTOX. The opponent submits that whilst the

comparison should be between marks as wholes and that they should not be broken down to their constituent parts, non-distinctive elements add very little to the overall impression and should be given very little weight in the comparison. It is for this reason, submits the opponent, that:

“[t]he proper comparison to be made is between the words INFOX and intox which differ visually only by a single (visually similar) letter contained within the middle of the word. Phonetically, the marks are also highly similar sharing an identical opening and closing sound. The words do not lend themselves to a conceptual comparison in this instance.”

22. Neither party’s submissions reflect the correct approach. Whilst Mr Nwosu is correct that his mark contains TECH as well as INTOX, these are undoubtedly presented as separate elements within the mark. And whilst the opponent is correct in stating that some elements may carry more weight than others in the overall impression, the opponent has reduced the comparison to INFOX and INTOX, ignoring all other elements. This is contrary to the guidance from the CJEU; in particular, 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 (*Shaker di L. Laudato & C. Sas v OHIM*).

23. The opponent’s mark consists of a single word, INFOX, so it is this single element which provides the dominant, distinctive element and the overall impression of the earlier mark. Mr Nwosu’s mark is complex. Intox is an invented word (albeit with connotations which I discuss below) and tech is an abbreviation for technology, which is weak in relation to the services in class 42 and therefore carries less weight in the overall impression of the mark. Intox and tech are proportionately small in comparison with the black circle and the stylised ‘IT’, and this also affects the weight in the overall impression. The most striking part of Mr Nwosu’s mark is the stylised IT superimposed over a black circle. These elements dominate the overall impression, although I bear in mind that the letters IT (per se) are weak in relation to information technology, whilst also recognising that the letters are stylised in Mr Nwosu’s mark.

24. There is a single point of visual and aural similarity between the marks, which the opponent identifies in its submissions: INFOX and INTOX. These elements are visually and phonetically similar to a reasonably high degree. However, taking into account the other aspects of Mr Nwosu’s mark, the overall levels of visual and aural similarity are low.

25. The opponent submits that there can be no conceptual comparison, presumably because they are both invented words. That is true up to a point, although invented words can be evocative of known concepts, as per *Usinor SA v OHIM*, Case T-189/05, in which the General Court stated:

“62. In the third place, as regards the conceptual comparison, it must be noted that while the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*Lloyd Schuhfabrik Meyer*, paragraph 25), he will nevertheless, perceiving a verbal sign, break it down into verbal elements which, for him, suggest a concrete meaning or which resemble

words known to him (Case T-356/02 *Vitakraft-Werke Wührmann v OHIM – Krafft (VITAKRAFT)* [2004] ECR II-3445, paragraph 51, and Case T-256/04 *Mundipharma v OHIM – Altana Pharma (RESPICUR)* [2007] ECR II-0000, paragraph 57).

63. In the present case, the Board of Appeal correctly found that the signs at issue have a common prefix, 'galva', which evokes the technique of galvanisation, that is, the act of fixing an electrolytic layer to a metal to protect it from oxidation.

64. By contrast, the Board of Appeal incorrectly took the view that a conceptual comparison of the second part of the signs was not possible, because the suffixes 'llia' and 'lloy' were meaningless.

65. That conclusion is based on an artificial division of the signs at issue, which fails to have regard to the overall perception of those signs. As stated in paragraph 59 above, the relevant public, which is French-speaking but has knowledge of the English language, will recognise in the mark applied for the presence of the English word 'alloy', corresponding to 'alliage' in French, even if the first letter of that word ('a') has merged with the last letter of the prefix 'galva', according to the usual process of haplology. That mark will therefore be perceived as referring to the concepts of galvanisation and alloy.

66. As far as the earlier mark is concerned, the suffix 'allia' is combined with the prefix 'galva' in the same way. The evocative force of the suffix 'allia' will enable the relevant public – on account of its knowledge and experience – to understand that that is a reference to the word 'alliage'. That process of identification is facilitated still further by the association of the idea of 'alliage' (alloy) with that of galvanisation, the suffix 'allia' being attached to the prefix 'galva'.

67. By breaking down the signs at issue, the relevant public will therefore interpret both signs as referring to the concepts of galvanisation and alloy.

68. Consequently, the conclusion to be drawn is, as the applicant correctly maintains, that the signs at issue are conceptually very similar, inasmuch as they both evoke the idea of galvanisation and of an alloy of metals, although that idea is conveyed more directly by the mark applied for than by the earlier mark".

26. Whilst the earlier mark has no concept, Mr Nwosu's mark contains concepts connected with IT, technology and an invented word, Intox, which is evocative of 'intoxicating/intoxicated'. The marks are conceptually dissimilar.

27. Overall, there is little similarity between the marks.

Distinctive character of the earlier marks

28. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*² 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. The opponent has not filed evidence, so has not shown that any use it might have made of its mark has increased its inherent distinctive character. INFOX is an invented word with no descriptive or allusive qualities in relation to the opponent's goods and services. The mark has a high degree of distinctive character for the goods and services of the earlier mark.

Likelihood of confusion

30. Deciding whether there is a likelihood of confusion is not scientific; it is a matter of considering all the factors, weighing them and looking at their combined effect, in accordance with the authorities set out earlier in this decision. This includes keeping in mind the whole mark comparison, because the average consumer perceives trade marks as wholes and rarely has the opportunity to compare marks side by side, relying instead upon the imperfect picture he has of them in his mind. One of the principles in the authorities states that a lesser degree of similarity between goods and services may be offset by a greater degree of similarity between the trade marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*). I have found that the services are identical and highly similar. Nevertheless, even assuming that all the services are identical, there is no likelihood of confusion. This is because although the earlier mark is highly distinctive, there are other factors in the global assessment which point strongly away from confusion. There are concepts operating in Mr Nwosu's mark which help to offset the low level of visual

² Case C-342/97.

and aural similarities between the marks, and the overall impression of Mr Nwosu's mark is dominated by elements which find no counterpart in the earlier mark and which have a strong visual impact in a market in which the marks will be perceived primarily visually. Furthermore, the services will be bought after a higher than average, and in some cases a close, degree of attention has been paid in the selection process. This, and the differences between the marks, will combine to militate against imperfect recollection. There is no likelihood of confusion.

Outcome

30. The opposition fails.

Costs

31. Mr Nwosu has been successful and is entitled to a contribution (rather than compensation) towards his costs, according to the published scale in Tribunal Practice Notice 4/2007. Mr Nwosu has not been professionally represented in the proceedings so has not had the costs of legal representation. The defence and counterstatement contained the briefest of comments. As neither party filed evidence or submissions, so there was no time (and therefore money) spent by Mr Nwosu in either filing or considering evidence. Consequently, the award will be half of the amount which would have been appropriate had a legal representative been engaged. This would have been £200 on the scale for considering the notice of opposition and filing the defence and counterstatement, so I will award Mr Nwosu £100 for this work.

32. I order Infox GmbH & Co. Informationslogistik KG to pay Chijioke James Nwosu the sum of £100 which, in the absence of an appeal, should be paid within seven days of the expiry of the appeal period.

Dated this 16th day of March 2015

**Judi Pike
For the Registrar,
the Comptroller-General**