

**O-081-16**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO 3003263  
BY  
ALASTAIR SWANWICK**

**TO REGISTER THE TRADE MARK**

**INNOVATE – HELPING INVENTORS**

**IN CLASSES 35, 42 & 45**

**AND**

**THE OPPOSITION THERETO  
UNDER NO 402701  
BY THE TECHNOLOGY STRATEGY BOARD**

## **Background and pleadings**

1) On 23 April 2013 (“the relevant date”), Alastair Swanwick (“the applicant”) applied to register the trade mark INNOVATE – HELPING INVENTORS (“the application”) in the UK. It was accepted and published in the Trade Marks Journal on 16 May 2014 in respect of the following services:

Class 35: Advertising and business management consultancy; Business consultancy services relating to marketing; Business consultancy, advisory, information and research services; Business consultancy to individuals; Business consultancy to individual inventors; Consultancy services regarding business strategies; Marketing of inventions; Marketing, marketing assistance and advertising services in connection with inventions and products.

Class 42: Consumer product design; Design of industrial products; Design of products; New product design; New products (Design of -); Product design; Product design services; Product design and development; Prototype services; Design engineering; Advisory services relating to design; Advisory services relating to inventions.

Class 45: Legal services; security services for the protection of property and individuals; legal advice; legal advice over the internet; legal advice relating to technology, media and intellectual property; monitoring intellectual property rights for legal advisory purposes; Legal services relating to the acquisition of intellectual property; Registration services (legal); Legal services relating to intellectual property rights; Licensing of inventions.

2) On 15 August 2014, The Technology Strategy Board (“the opponent”) opposed the trade mark on the basis of sections 3(1)(b), 3(1)(c) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). In essence, the basis of the claims made are as follows:

- 3(1)(b): the application is devoid of distinctive character when considered in connection with the applicant’s services, i.e. the application will not assist reasonably well informed and the relevant market to understand the sign as meaning anything other than being a statement.
- 3(1)(c): the application does nothing more than generally describe and convey the characteristics of the services provided. Further, there is no discernible alternative meaning or overall impression that would assist the relevant market in appreciating that the mark is anything more than a descriptor of the characteristics of the services claimed.
- 5(4)(a): the opponent alleges earlier rights in INNOVATE UK (“the sign”). It claims to have been providing the same services covered by the application under this sign since 11 October 2007 and it has acquired goodwill under the sign. Use of the application would therefore be a misrepresentation to the public since they may believe the respective signs to be connected and/or licensed by the opponent when they are not. It is claimed that this misrepresentation will result in damage to the opponent’s reputation and goodwill, loss of market sales and dilution of its own mark.

3) The applicant filed a counterstatement denying the claims made and provided commentary on the claims made by the opponent. These comments shall be referred to where necessary. The applicant also claims that the respective parties have co-existed in the market and that there have not been any instances of confusion.

4) Both sides filed evidence in these proceedings. This will be summarised to the extent that it is considered appropriate/necessary. No hearing was requested and so this decision is taken following a careful consideration of the papers.

## **Evidence**

### **Opponent's evidence**

*Witness Statement and exhibits Paul Whittemore TSB1-TSB15*

5) Mr Whittemore is Head of Corporate Communications for the opponent, a position he has held since 2012. Prior to this, and since 29 May 2007, he was Head of Communications.

6) Mr Whittemore states that the opponent registered innovate.org ("the domain") on 13 October 2007<sup>1</sup>. He also evidences<sup>2</sup> a web archive which Mr Whittemore states shows that the domain was "saved" 483 times between 5 January 2008 and 25 March 2015. He goes on to say that the earliest date that the domain "was crawled" by the Wayback Machine was 5 January 2008<sup>3</sup>.

7) The use of evidence acquired from the Wayback Machine has been relied upon without adverse comment in the Courts; for example in the Patents County Court, His Honour Judge Birss, in *National Guild of Removers & Storers Ltd v. Silveria* [2011] F.S.R. 9, said, at paragraph 33:

"Mr Hill submitted and I accept that the fair way to assess the damages appropriate in this case is again to consider the fees due under the rules and use them to gauge an appropriate level of damages. The first question arising is the period of infringing use/passing off. To assess this Mr Sheahan used a website called the "Internet Archive" which is run by a not for profit organisation in the United States. This has a service called the "Wayback Machine" which allows a user to find snapshots of how websites appeared in the past. The Wayback Machine is commonly used in intellectual property cases to see what old websites looked like even when the operators of the websites have changed them or removed them altogether."

8) Mr Whittemore claims that the records acquired from the Wayback Machine demonstrate consistent use by the opponent, via its domain name, of INNOVATE UK since 5 January 2008. He states that since around 2008 there have been over 3.5m user sessions for the innovate.org.uk website. This is evidenced in a Google analytics

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<sup>1</sup> Exhibit TSB1

<sup>2</sup> Exhibit TSB2

<sup>3</sup> Exhibit TSB3

report.<sup>4</sup> A further Google analytics report shows that the users come from across the UK.<sup>5</sup>

### *Competitions*

9) Mr Whittemore outlines the competitions that the opponent provides. These are described as follows<sup>6</sup>:

“As part of its activities the TSB runs around 70-100 competitions each year. Through these competitions the TSB offers funding for innovation projects. The competitions usually focus on specific areas of technology and innovation where there is a particular opportunity and/or challenges to be met. Areas range widely, from low carbon vehicles to health and care, from marine vessels to nanotechnology. As such they are applicable to companies in almost every sector. Competitions invite applications from companies, groups of companies or consortia of companies and research organisations. Funding on offer per competition can be as much as £10million, often contributions from funding partners. The TSB prints completion briefing documents for those wanting to gain TSB funding. Since on or around 2008 these documents have referenced the TSB’s Domain and since on or around 2011 they have also included the competition’s dedicated email address of ‘competitions:innovate.org.uk’ and/or helpline email address of ‘support@innovateuk.org”

10) He states that between 2010 and 2014 the opponent has registered an average of 1,200 contacts per month for competitions and has over 56,000 registrations logged.

### *Annual conference*

11) Mr Whittemore states that the opponent has funded and held annual conferences and exhibitions since 2007. Evidenced at exhibit TSB15 are print outs which appear to be a copy of a presentation for an exhibition held on 11 – 13 March 2013 and it clearly shows INNOVATE UK.

12) Mr Whittemore provides a list of 19 email addresses that end with @innovateuk.org. It is claimed that these have been created and used since 2010.

### *2<sup>nd</sup> witness statement of Paul Whittemore and exhibits TSB16-TSB29*

13) Mr Whittemore filed a second witness statement which consists of the following exhibits:

- Exhibits TSB16 and TSB17 consist of copies of annual accounts for “The Technology Strategy Board” covering 2007-2008 and 2008-2009. The accounts refer to the website innovateuk.org and a conference called “The Innovate 2007” which was attended by 750 people.

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<sup>4</sup> Exhibit TSB6

<sup>5</sup> Exhibit TSB7

<sup>6</sup> Paragraph 11 of the witness statement

- Exhibit TSB18 consists of examples of articles and advertisements about the opponent which have appeared in newspapers, magazines and books. Mr Whittemore states that these advertisements are in connection with the use and promotion of the mark INNOVATE UK. However, the vast majority of the examples provided are for Technology Strategy Board together with the strap-line DRIVING INNOVATION. The only references to INNOVATE UK are as the website [innovateuk.org](http://innovateuk.org) or an email address [support@innovateuk.org](mailto:support@innovateuk.org)
- Exhibit TSB19 comprises of a selection of print outs from the website “The Manufacturer”. They are dated 7 October 2009, 7 January 2011, 23 October 2012, 4 September 2012 and 29 March 2012. Some of the pages are illegible though there are references to the Technology Strategy Board. The references to INNOVATE UK are only in the email addresses and website links.
- Exhibit TSB20: this relates to the Institute of Directors Convention held on 30 April 2008. It lists the Technology Strategy Board as an exhibitor and makes reference to the opponent’s website. The summary of the opponent does not make reference to INNVOATE UK.
- Exhibit TSB21 consists of an invoice, email exchange, and screen prints from a Guardian supplement which show advertising undertaken by TSB. They are dated November 2008 but do not include INNOVATE UK.
- Mr Whittemore states that the opponent launched its twitter account (@innovate\_uk) around August 2009 at which time it had 5,743 followers and by 25 January 2015 the number reached 25,000<sup>7</sup>. A screen shot of the Twitter account has been supplied at exhibit TSB22.
- Exhibit TSB24 consists of a screenshot from the opponent’s website, acquired from the National Archive. It is headed “Technology Strategy Board investment in new technology Assisted Living”. It is dated 19 March 2010. The exhibit is in very small font and difficult to read, though I can see reference to the website [innovateuk.org](http://innovateuk.org)
- Exhibit TSB25: a report from the opponent’s management information system. Mr Whittemore claims that the exhibit demonstrates that from 31 September 2011 to 31 August 2014, the opponent’s email [support@innovateuk.org](mailto:support@innovateuk.org) received 62,428 emails. After removing spam and other irrelevant email, this resulted in 51,420 genuine enquiries which required responses.
- Exhibit TSB26: website statistics for the domain name. Between the period 16 March 2008 and 28 July 2008 the average sessions per day were 369.47.
- Exhibit TSB27: examples of third party awareness of the opponent, including extracts from the websites Invibo (May 2008), London Knowledge Labs (May 2008) and Simpleware (2009). The font size is so small that I am unable to read the web pages.

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<sup>7</sup> This is evidenced at exhibit TSB23

- Exhibit TSB28: photographs for an Innovate UK event held at the Business Design Centre in London. The event was conducted between 11 and 13 March 2013. Over the three days the total number of attendees was 5,174 with ticket sales revenue in the region of £151,070<sup>8</sup>.

## **Applicant's evidence**

### *Witness Statement of Alastair Swanwick and exhibits AS1-AS4*

14) Mr Swanwick is Director and founder of Innovate Product Design Limited, a position he has held since 8 April 2009. Mr Swanwick states that prior to the aforementioned company being formed he used the "trade marks" INNOVATE, INNOVATE DESIGN and INNOVATE PRODUCT DESIGN since 2002.

15) He states that the application has been used since at least 2010 and was adopted to add a slogan to his existing INNOVATE brand which he claims to have become known "in the UK for assisting inventors realise and protect their ideas through professional product design services and related Intellectual Property assistance"<sup>9</sup>.

16) Exhibit AS1 consists of the following:

- Daily Mirror problem and answer articles from Alan Sugar's section dated 6 May 2002 and 14 July 2003. The article includes a question from Mr Swanwick and refers to him being from Innovate Product Design.
- The exhibit also includes an article from ED engineering designer dated May/June 2010 and refers to Innovate Product Design Ltd.
- A report headed "Reporting runs from May-April as analytics figures commence from May 2008". The report appears to include the opponent's annual google spend which goes from £23,823.62 in 2008 up to £113,753.34 in 2012. No explanation on how the report or figures assist the applicant opponent have been provided.
- A letter from business Link to Mr Swanwick of Innovate Product Design. It is headed "National Business Link Consultant Register – Register Re-assessment".
- Various website advertisements including the Sun online newspaper, Misterwhat, Kompass, Cylex, London Online. They are all dated 6 June 2015 (after the date the application was filed) and headed "Innovate – Helping Inventors" with the exception of MisterWhat which is headed "Innovate-helping inventors in London".
- An invoice dated 11 December 2009 with a receipt headed Innovate Ltd. The invoice description of the services provided is "2<sup>nd</sup> Instalment (of 2) for the creation of prototype(s)". It is for £3588. Further invoices are dated 2 September (no year), 23 May 2008, 7 October 2008, 13 June 2008, 16 April 2008, 14 July 2008, 17 October 2008, 15 September 2008, 19 June 2009, 3 October 2008, 12 September 2007, 22 May 2007.
- Invoices from Yell relating to the opponent being classified as "patent agents"
- Agreements and correspondence between various inventors and Mr Swanwick.

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<sup>8</sup> Exhibit TSB29

<sup>9</sup> Paragraph 3 of the witness statement

- From the Wayback machine, Mr Swanwick exhibits a copy of the applicant's website dated 5 June 2002, referring to "Innovate – helping inventors". Further print outs are dated 23 June 2003, 5 September 2004, 29 December 2005, 16 November 2006, 8 August 2007 and 12 February 2008. These are the only examples of use of "Innovate – helping inventors" prior to the application date.

17) When the application was filed it was initially refused registration. Following a hearing before another hearing officer the objection was waived. Mr Swanwick evidences a copy of the hearing report<sup>10</sup>.

18) Exhibit AS3 is an email dated 17 October 2014 from Mr Philip Ingham of Wayfair Group to Mr Swanwick. Mr Ingham is forwarding an email he had received from [newsletter@engage.innovateuk.org](mailto:newsletter@engage.innovateuk.org) headed Innovate UK Technology Strategy Board. Mr Ingham comments in his email "I assume that you are aware of this? I though[t] it was from you."

19) Exhibit AS4 to the witness statement consists of an extract from the opponent's website.

*Turnover*

20) Mr Swanwick states that the annual turnover of the services sold under "INNOVATE – HELPING INVENTORS", "INNOVATE", "INNOVATE DESIGN" and "INNOVATE PRODUCT DESIGN" are as follows:

<i>Dates</i>	<i>Amount</i>
2008/2009	£784,973
2009/2010	£1,541,825
2010/2011	£1,434,041
2011/2012	£1,462,529

**Opponent's evidence in reply**

*Witness Statement of Paul Whittemore and exhibit TSB-R1*

21) Mr Whittemore's witness statement mainly comprises of commentary and criticism of the applicant's evidence. The witness statement shall be taken into consideration where necessary.

22) Attached to the witness statement is exhibit TSB-R1 which consists of a print out from Whois (domain name registration). It states that the domain name [innovate-design.co.uk](http://innovate-design.co.uk) "is owned by a non-trading individual named as Ms B. Bouffard and not the Applicant"<sup>11</sup>.

**Section 3(1)(b)**

23) The relevant section of the Act states:

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<sup>10</sup> Exhibit AS2

<sup>11</sup> Paragraph 7(c) of the witness statement

“3(1) The following shall not be registered –

(a)...

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

(c)...

(d) ...

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

### ***Prima facie* registration**

24) The public interest role underlying section 3(1)(b) is about what the average consumer thinks. Does the mark have the capacity to identify the origin of the services thereby enabling the average consumer to repeat the purchasing experience or to avoid repeating it? Whether the trade mark performs this essential function will be a matter of first impression because the average consumer does not analyse trade marks beyond what is usual for a reasonably well-informed and reasonably observant and circumspect person in the ordinary course of purchasing the relevant services.

### *Relevant public*

25) In order to determine if the application is objectionable under section 3(1)(b) of the Act, I must firstly assess the position through the perception of the relevant public. In *Matratzen Concord AG v Hukla Germany SA*, Case C-421/04 the Court of Justice of the European Union (“CJEU”) has examined the question of the relevant public for the purposes of trade mark law. The court found that:

“In fact, to assess whether a national trade mark is devoid of distinctive character or is descriptive of the goods or services in respect of which its registration is sought, it is necessary to take into account the perception of the relevant parties, that is to say in trade and or amongst average consumers of the said goods or services, reasonably well-informed and reasonably observant and circumspect, in the territory in respect of which registration is applied for.”  
(emphasis added)

26) In this instance the applied for services cover 3 classes and generally include class 35 advertising, business management, marketing, class 42 product and prototype design services, and class 45 legal services. In essence the services are intended to provide businesses or individuals with assistance on creating and developing an idea or product. Once the product or idea has been developed, the applicant provides services to assist with the marketing and promotion thereof, and legal advice in order to protect the product and/or business. Therefore, the relevant consumers are likely



to be new or existing businesses, though I also take into account individuals. These consumers are reasonably well-informed and reasonably observant and circumspect.

### *General principles*

27) The principles to be applied under article 7(1)(b) of the CTM Regulation (which is identical to article 3(1)(b) of the Trade Marks Directive and s.3(1)(b) of the Act) were conveniently summarised by the CJEU at paragraphs 29 to 33 in *OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG* (C-265/09 P) as follows:

“..... the fact that a sign is, in general, capable of constituting a trade mark does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific product or service (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 32).

Under that provision, marks which are devoid of any distinctive character are not to be registered.

According to settled case-law, for a trade mark to possess distinctive character for the purposes of that provision, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (*Henkel v OHIM*, paragraph 34; Case C-304/06 P *Eurohypo v OHIM* [2008] ECR I-3297, paragraph 66; and Case C-398/08 P *Audi v OHIM* [2010] ECR I-0000, paragraph 33).

It is settled case-law that that distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public (*Storck v OHIM*, paragraph 25; *Henkel v OHIM*, paragraph 35; and *Eurohypo v OHIM*, paragraph 67). Furthermore, the Court has held, as *OHIM* points out in its appeal, that that method of assessment is also applicable to an analysis of the distinctive character of signs consisting solely of a colour per se, three-dimensional marks and slogans (see, to that effect, respectively, Case C-447/02 P *KWS Saat v OHIM* [2004] ECR I-10107, paragraph 78; *Storck v OHIM*, paragraph 26; and *Audi v OHIM*, paragraphs 35 and 36).

However, while the criteria for the assessment of distinctive character are the same for different categories of marks, it may be that, for the purposes of applying those criteria, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (see Joined Cases C-473/01 P and C-474/01 P *Proctor & Gamble v OHIM* [2004] ECR I-5173, paragraph 36; Case C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 34; *Henkel v OHIM*, paragraphs 36 and 38; and *Audi v OHIM*, paragraph 37).”

28) Having considered who the relevant public are, I must consider the effect and impression that the application (INNOVATE – HELPING INVENTORS), in normal and fair use in relation to the applied for services has on them.

29) The word INNOVATE is defined by the Collins English dictionary as a verb which is “to invent or begin to apply (methods, ideas, etc.). It is a word that would be easily understood by the relevant consumer as an active exhortation to inventors to do something, i.e. innovate. With regard to the second element of the mark (- HELPING INVENTORS), this will be viewed as a promotional slogan. Slogans were considered in *Audi AG v OHIM*, Case C-398/08 P, the European Court of Justice held that slogans can be distinctive if they are not caught by s.3(1)(c) and their capacity to identify trade origin is discernible, even if secondary to a promotional function. The court stated at paragraphs 44 to 47 that:

“However, while it is true – as was pointed out in paragraph 33 of the present judgment – that a mark possesses distinctive character only in so far as it serves to identify the goods or services in respect of which registration is applied for as originating from a particular undertaking, it must be held that the mere fact that a mark is perceived by the relevant public as a promotional formula, and that, because of its laudatory nature, it could in principle be used by other undertakings, is not sufficient, in itself, to support the conclusion that that mark is devoid of distinctive character.

On that point, it should be noted that the laudatory connotation of a word mark does not mean that it cannot be appropriate for the purposes of guaranteeing to consumers the origin of the goods or services which it covers. Thus, such a mark can be perceived by the relevant public both as a promotional formula and as an indication of the commercial origin of goods or services. It follows that, in so far as the public perceives the mark as an indication of that origin, the fact that the mark is at the same time understood – perhaps even primarily understood – as a promotional formula has no bearing on its distinctive character.

However, by the line of reasoning set out in paragraphs 42 and 43 of the present judgment, the General Court did not substantiate its finding to the effect that the mark applied for will not be perceived by the relevant public as an indication of the commercial origin of the goods and services in question; in essence, rather, it merely highlighted the fact that that mark consists of, and is understood as, a promotional formula.

As regards the General Court’s finding in paragraph 41 of the judgment under appeal that the mark *Vorsprung durch Technik* can have a number of meanings, or constitute a play on words or be perceived as imaginative, surprising and unexpected and, in that way, be easily remembered, it should be noted that, although the existence of such characteristics is not a necessary condition for establishing that an advertising slogan has distinctive character, as is apparent from paragraph 39 of the present judgment, the fact remains that, as a rule, the presence of those characteristics is likely to endow that mark with distinctive character.”

30) The opponent’s statement of claim states:

“The applicant’s trade mark is devoid character because, INNVOATE – HELPING INVENTORS when considered in connection with the applicant’s services as specified in relation to classes 35, 42 and 45 will not assist the reasonably well informed and relevant market in understanding that the sign (merely a statement) is anything other than an offer to assist and help inventors. The mark does not offer the relevant market anything unusual or particular to the services being offered. As such there is nothing to encourage the relevant market to make a natural association with the applicant, rather only in connection with the very services specified. It is further considered that the applicant’s trade mark has not since before the date of application acquired distinctive character as a result of any use made of it.”

31) In its counterstatement, the applicant denies the claims made relying on the fact that the application was accepted following an ex-parte hearing before a different hearing officer. It claims that the reasons provided by the hearing officer are a correct interpretation and analysis of the law. In particular, the applicant quotes the following from the post-hearing report:

“...based on the linguistic characteristics of this sign alone [INNOVATE – HELPING INVENTORS] I feel able to waive the objection. Taken literally, in other words, the collection of words and in the order presented make no sense. The only way, as the attorney submits, the words would make sense is if the word ‘INNOVATE’ actually indicates the name of the undertaking providing the goods or services.”

32) Whilst I agree with the hearing officer that the way in which the words are presented do not result in them having a literal meaning this does not result in the words being distinctive and not subject to refusal under section 3(1)(b). The application consists of two elements, “INNOVATE” and “- HELPING INNOVATORS”, which when considered together, and from the perspective of the relevant consumer, it is not distinctive or denote trade origin.

33) As previously stated, the word INNOVATE means “to invent or begin to apply (methods, ideas, etc.). In the context of the applied for services, this would be easily understood as will “HELPING INVENTORS”. Taken as a whole I do not consider the application, in the minds of the relevant public, to be origin specific. Of course, in this instance the two elements are separated by a hyphen which I believe contributed to the application being initially accepted. However, this does not overcome the fact that the application would be viewed as an active exhortation to inventors to do something together with a promotional statement. Accordingly, it is devoid of distinctive character and should be refused under section 3(1)(b) of the Act.

### **Distinctive character acquired from use**

34) The proviso to Section 3(1) of the Act provides that, if a trader can demonstrate that, through the use made of its mark, it has become sufficiently distinctive so that it serves as an indication of origin in the minds of the relevant public or a significant proportion thereof (see *Windsurfing Chiemsee*, Case C-108/97), registration may be granted. This has not been specifically pleaded by the applicant. However, since it

has filed evidence of use and commented thereon, it appears appropriate to consider whether it has demonstrated sufficient use.

35) The correct approach with regard to the assessment of the acquisition of distinctive character through use was outlined in paragraphs 51 to 53 by the CJEU in *Windsurfing Chiemsee*, (joined cases C-108 & C-109/97), about. The guidance is as follows:

“In assessing the distinctive character of a mark in respect of which registration has been applied for, the following may also be taken into account: 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 class of persons who, because of the mark, identify goods as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations.

If, on the basis of those factors, the competent authority finds that the relevant class of persons, or at least a significant proportion thereof, identify goods as originating from a particular undertaking because of the trade mark, it must hold that the requirement for registering the mark laid down in Article 3(3) of the Directive is satisfied. However, the circumstances in which that requirement may be regarded as satisfied cannot be shown to exist solely by reference to general, abstract data such as predetermined percentages.

As regards the method to be used to assess the distinctive character of a mark in respect of which registration is applied for, Community law does not preclude the competent authority, where it has particular difficulty in that connection, from having recourse, under the conditions laid down by its own national law, to an opinion poll as guidance for its judgment (see, to that effect, Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 37).”

36) Having considered the evidence filed by the applicant, it is clear that a significant proportion of the relevant public have not been educated into recognising that the services offered under the application are those of the applicant. The applicant states that the application has been used since 2010, i.e. four years prior to the relevant date. The applicant does provide turnover figures which are £784,973 for 2008/2009, and up to around £1.4m to £1.5m per year from 2009 to 2012. However, Mr Whittemore states that the turnover relates to services sold under the signs “INNOVATE – HELPING INVENTORS”, “INNOVATE”, “INNOVATE DESIGN” and “INNOVATE PRODUCT DESIGN”. It is not clear how much of the turnover relates solely to the application. Further, no advertising figures have been provided nor any indication of the market share.

37) In view of the above, if the applicant had claimed to have acquired distinctive character from the use made of the application, it would not have succeeded.

### **The section 3(1)(c) and 5(4)(a) claims**

38) Since I have already found that the opposition succeeds under section 3(1)(b) of the Act, I am not required to consider the remaining grounds of opposition.

## **OVERALL OUTCOME**

39) The opposition succeeds. Subject to appeal, the application shall be refused for all of the applied for services.

## **COSTS**

40) The opponent has been successful and is entitled to a contribution towards its costs. In the circumstances I award the opponent the sum of £1100 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official fee	£200
Preparing a statement and considering the other side's statement	£300
Preparing evidence and commenting on the other side's evidence	£600
<b>TOTAL</b>	<b>£1100</b>

41) I therefore order Alastair Swanwick to pay The Technology Strategy Board the sum of £1100. The above sum should be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 12<sup>th</sup> day of February 2016**

**Mark King  
For the Registrar,  
the Comptroller-General**