

**DECISION
of the Fourth Board of Appeal
of 19 December 2018**

In case R 990/2018-4

Beats Electronics, LLC

8600 Hayden Place
90232 Culver City California
United States of America

Opponent / Appellant

represented by D Young & Co LLP, 120 Holborn, London EC1N 2DY, United Kingdom

v

Disashop, S.L.

Icaro, 2
15173 Oleiros
Spain

Applicant / Respondent

represented by Hugo Prieto Robles, Primo de Rivera, 4-3º Ofic. 6, 15006 La Coruña (La Coruña), Spain

APPEAL relating to Opposition Proceedings No B 2 601 261 (European Union trade mark application No 13 877 279)

THE FOURTH BOARD OF APPEAL

composed of D. Schennen (Chairman), R. Ocquet (Rapporteur) and C. Bartos (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 26 March 2015, Disashop, S.L. ('the applicant') sought to register the figurative mark in red and white



as a European Union trade mark ('EUTM') for the following list of goods and services:

Class 9 - Apparatus for recording, transmission or reproduction of sound or images; Magnetic data carriers, recording discs; Data processing equipment, Electronic publications (electronically-downloadable);

Class 35 - Business management, Business administration, Market research services, Export services, Professional business consultancy; Accounting; Telephone answering for unavailable subscribers; Message transcription services; Statistical-information services; Business and commercial reports; Services of efficiency experts; Opinion poll services; Advertising;

Class 38 - Telecommunication services, in particular mobile telephony, Broadcasting of radio and television programmes; Rental of telecommunications apparatus; Transcription of messages and Computer-aided transmission of messages and images; Providing access to a global computer network.

- 2 On 29 October 2015, Beats Electronics, LLC ('the opponent') filed an opposition against all the goods and services applied for.
- 3 The grounds of opposition were those laid down in Article 8(1)(b) and Article 8(5) EUTMR and the opposition was based on five earlier marks, including:

- 1) EUTM No 8 433 195 ('EUTM 1') for the figurative mark



filed on 17 July 2009 and registered on 28 January 2010 for goods and services in Classes 9, 25, 38 and 41, including the following:

Class 9 – Audio and video equipment including audio players, video players, media players, portable media players, DVD players, portable DVD players, CD players, portable CD players, media players for automobiles, DVD players for automobiles, CD players for automobiles, digital audio players, digital video players, portable digital audio players, portable digital video players; digital audio players for automobiles; digital video players for automobiles; MP3 players; MP4 players; protective carrying cases for portable music players; cell phones; personal digital assistants (PDA); smart phones; headsets for mobile phones; speakers; car speakers;

loudspeakers; loudspeaker cabinets; horns for loudspeakers; racks for loudspeakers; electric actuators; floor stands and table tops for loudspeakers; surround sound systems; audio equipment; pre-amplifiers; amplifiers; sound amplifiers; audio amplifiers; racks for amplifiers; high-fidelity stereo systems comprising amplifiers, loudspeakers, receivers and tuners; subwoofers; signal separating distributing, generating and converting circuits all for audio signals, video signals or audio-video signals; electro acoustic transducers; audio mixers; electronic audio mixers; sound mixers; sound mixers with integrated amplifiers; acoustic conduits; acoustic couplers; acoustic coupling devices; acoustic membranes; acoustic meters; acoustic separation units; apparatus for wireless transmission of acoustic information; wave reflectors for acoustic speakers, lighting apparatus, and air flow devices; pickups for use with musical instruments; electronic effects pedals for use with musical instruments; musical juke boxes; musical instrument adaptors; musical instrument amplifiers; musical instrument connectors; metronomes; time clocks being time recording devices; teleprinters; scales; micrometers; signal bells, sound locating instruments, namely, sound alarms, sound level meters; projection screens; automatic switchboards; automatic turnstiles; stereo receivers; stereo tuners; stereo amplifiers; audio equipment components; video equipment; video equipment components; microphones; audio and video electric cables and connectors; power cables and connectors; sound and video recording apparatus; portable telephones and accessories; compact disc players; record players and equipment; stereo players and equipment; eyewear and sunglasses; headphones; laptop computers; computer hardware; computer software; computer accessories; electronic devices, including televisions, radios, MP3 players, MP4 players, video players and audio players, all with sound elements; sound systems and sound elements for televisions, radios, audio equipment, namely, media players, portable media players, DVD players, portable DVD players, CD players, portable CD players, media players for automobiles, DVD players for automobiles, CD players for automobiles, digital audio players, portable digital audio players, digital audio players for automobiles; audio speakers for home theatre systems; audio speakers for computers; audio recordings featuring music; computer software for processing digital music files; digital photo frames for displaying digital pictures, video clips and music; downloadable music via the Internet and wireless devices; downloadable MP3 or MP4 files, MP3 or MP4 recordings and downloadable pod casts featuring music, audio books and news broadcasts; video recordings featuring music; music-composition software; visual recordings and audio visual recordings featuring music; downloadable visual recordings featuring music and musical based entertainment; downloadable cellular phone ringtones; apparatus for recording, transmission or reproduction of sound or images;

Class 38 – Providing online bulletin boards in the fields of media, music, video, film, book and television for the transmission of messages among users; streaming of video content via a global computer network; streaming of audio content via a global computer network;

Class 41 - Nightclub services; dance club services; provision of live entertainment and recorded entertainment, namely, live musical performances by musical bands and DJs; non-downloadable ringtones, pre-recorded music, video and graphics to mobile communications devices via a global computer network and wireless network; music studios, namely, sound recording studios; publishing services in the nature of music publishing; musical entertainment in the nature of live visual and audio performances by musical groups and DJs; exhibitions, namely, exhibitions concerning music; providing online music services, namely, providing pre-recorded music; entertainment services, namely, providing a web site featuring musical performances, musical videos, related film clips, photographs, and other multimedia materials, providing on-line reviews, providing pre-recorded music, information in the field of music, and commentary and articles about music, all on-line via a global computer network, providing podcasts in the field of music, providing web-casts in the field of music and other multimedia materials.

2) EUTM No 12 739 942 ('EUTM 2') for the figurative mark in red, purple and white



filed on 28 March 2014 and registered on 27 November 2016 for goods and services in Classes 9, 16, 38, 41 and 42, including the following:

Class 9 - Audio recordings featuring music; video recordings featuring music; downloadable audio and video recordings featuring music, music performances, and music videos; prerecorded music, namely, digital downloads; user interface for television and video on demand communications equipment; Computer software for use in the delivery, distribution and transmission of digital music and entertainment-related audio, video, text and multimedia content; computer software for enabling transmission, storage, sharing, collection, editing, organizing and modifying audio, video, messages, images and other data for use in social networking, online chats and interactive gaming, for use in creating social networking databases and for use in social networking database management; computer software for creating searchable databases of information and data for peer-to-peer social networking databases; Gift cards, namely, magnetically encoded gift cards;

Class 38 - Audio and audiovisual broadcasting and transmission of data and of information via electronic communication networks, local and global computer networks and wireless communication networks; streaming of audio and audiovisual content via electronic communication networks, local and global computer networks and wireless communication networks; webcasting services; providing on-line chat rooms and discussion forums for transmission of messages, audio, video, and digital pictures among users in the field of general interest; telecommunications on the Internet, namely, audio and video transmission; Streaming of music, films, television programs, current events news, entertainment news, and sports programs to users online via a communication network;

Class 41 - Entertainment services, namely, providing online radio and television programs featuring music and entertainment, current event news, entertainment news, entertainment-related programs in the nature of videos of musical performances, and online computer games, all delivered to users via a communication network; providing an online database via a communication network featuring music, film, television programs, current event news, entertainment news, sports, entertainment-related programs and games; music production; providing online computer games; rental of films, video and computer games and music recordings via a communication network;

Class 42 - Providing an interactive online network website, via electronic communication networks, local and global computer networks and wireless communication devices, featuring technology to enable users to program audio, video, movies, text and other multimedia content; providing a website featuring non-downloadable software to enable users to program audio, video, movies, text and other multimedia content in the field of music, video, online radio, entertainment and cultural events; providing search engines and search platforms for obtaining data and content via electronic communication networks, local and global computer networks and wireless communication devices; computer services, namely, creating computer network-based indexes of information, websites and resources available on electronic communication networks, local and global computer networks and wireless communication devices; searching, browsing and retrieving, information, sites, and other resources available on electronic communication networks, local and global computer networks and wireless communication devices.

- 4 Reputation was claimed in the European Union for all the earlier marks in relation to all the goods and services on which the opposition was based.

- 5 Within the time limit set by the Office to that effect, the opponent filed extensive evidence in support of its claims regarding the earlier marks' enhanced distinctiveness and reputation.
- 6 By decision of 29 March 2018 ('the contested decision'), the Opposition Division rejected the opposition in its entirety and ordered the opponent to bear the costs. It gave the following grounds for its decision:
- Comparing the contested goods and services with those of both EUTM 1) and 2), it found that: the contested 'apparatus for recording, transmission or reproduction of sound or images' in **Class 9**, as a broader category, are identical to the earlier 'audio and video equipment including audio players, video players, media players, portable media players, DVD players, portable DVD players, CD players, portable CD players, media players for automobiles, DVD players for automobiles, CD players for automobiles, digital audio players, digital video players, portable digital audio players, portable digital video players' in the same class.
 - The contested 'data processing equipment' includes, as broader category, the earlier 'laptop computers' in Class 9. They are identical.
 - The contested 'magnetic data carriers, recording discs' are similar to a high degree to the earlier 'apparatus for transmission or reproduction of sound or images' in Class 9.
 - The contested 'electronic publications (electronically-downloadable)' are similar to earlier 'computer software' in Class 9.
 - The contested 'telephone answering for unavailable subscribers' in **Class 35** are similar to the earlier 'providing on-line chat rooms and discussion forums for transmission of messages, audio, video, and digital pictures among users in the field of general interest' in Class 38.
 - The contested 'business management, business administration, market research services, export services, professional business consultancy; accounting; message transcription services; statistical-information services; business and commercial reports; services of efficiency experts; opinion poll services; advertising' are dissimilar.
 - The contested 'telecommunication services, in particular mobile telephony, broadcasting of radio and television programmes' in **Class 38** include, as a broader category, the earlier 'telecommunications on the Internet, namely, audio and video transmission' in Class 38. They are identical.
 - The contested 'rental of telecommunications apparatus; providing access to a global computer network' are similar to the earlier 'audio and audiovisual broadcasting and transmission of data and of information via electronic communication networks, local and global computer networks and wireless communication networks' in Class 38.
 - The contested 'computer-aided transmission of messages and images' are included in the broad category of the earlier 'transmission of data and of

information via electronic communication networks, local and global computer networks and wireless communication networks' in Class 38. The services are identical.

- The remaining services are dissimilar.
 - The relevant goods and services are directed at the public at large and at business customers. Their degree of attention varies from average to high.
 - **Visually**, the signs consist of a circular device on which a white element, resembling a lower-case letter, is positioned in the centre of the circle. The main difference is in the way the vertical lines, in the two letters, curve. Also in the case of the earlier marks, the vertical line flows into the border of the circle. The 'play' symbol of earlier EUTM 2) (if perceived as such), will be seen as referring to the press 'play' action, and as such is nondistinctive for at least some of the goods in Class 9. The signs differ in their overall layouts, in their proportions, shapes and colours. They are similar at most to a low degree. **Aurally**, the contested sign will be pronounced as the letter 'd'. The signs are not similar for the part of the public who will perceive in the earlier marks the letter 'b'. For the public who perceives the earlier marks as a figurative device, an aural comparison is not possible. **Conceptually**, the signs are not similar.
 - The inherent distinctiveness of the earlier marks is normal despite the presence of a non-distinctive element in earlier EUTM 2). The opponent's enhanced distinctiveness claim fails as it did not prove the degree of recognition of the earlier marks independently of the word 'beats'.
 - The signs taken as a whole create sufficiently different impressions, dominated mainly by their differing features. There is no likelihood of confusion under Article 8(1)(b) EUTMR.
 - The outcome does not change on the basis of the other earlier marks as the signs are either identical or less similar to the ones that have been compared and cover the same or a narrower scope of goods and services.
 - The opposition based on Article 8(5) EUTMR does not succeed either since the evidence is insufficient to prove the reputation of any of the earlier marks.
- 7 On 29 May 2018, the opponent filed an appeal against the contested decision as regards the goods and services which were found identical or similar. The statement of grounds was received on 23 July 2018 and the arguments raised therein may be summarised as follows:
- The earlier mark is used in the colours red and white, as shown in the evidence filed. The signs compared consist of a circle inside which a letter formed of a vertical line with a rounded base is placed. The letters 'd' and 'b' are mirror reflections of each other and do not include any distinguishing additional features.

- The signs will be pronounced as ‘bee’ and ‘dee’ by the English-speaking consumer. They are closely similar and the differences may go unnoticed in the absence of any other verbal elements.
- Young learners frequently confuse the letters ‘b’ and ‘d’. Since the letters ‘b’ and ‘d’ are mirror reflections of each other, when consumers view products bearing the marks from different angles, they may confuse them. The likelihood of confusion between the marks as a whole is high.
- Based on the principle of imperfect recollection, consumers will recollect a letter with a rounded base within a circle but may not be able to recall whether the letter is a lower-case ‘d’ or ‘b’.
- In opposition proceedings B 2 748 815 the Opposition Division already acknowledged the reputation of the earlier mark  at least in the United Kingdom for ‘headphones’ in Class 9 based on similar evidence, as is evident from the copy attached to the statement of grounds.
- All the requirements under Article 8(5) EUTMR are in place. The conflicting signs are similar, the reputation of the earlier marks has been proven, consumers will recall the opponent’s marks when presented with the applicant’s mark and the applicant will free-ride on the opponent’s goodwill and reputation. The applicant did not claim to have a good cause for using the contested mark.

8 The applicant did not file any observations in reply.

Reasons

- 9 The appeal is well founded. There is a likelihood of confusion under Article 8(1) (b) EUTMR for all the contested goods and services in Classes 9, 35 and 38 subject to the appeal.
- 10 It follows from Article 71(1) EUTMR that, as a result of the appeal before it, the Board of Appeal is called upon to carry out a new, full examination of the substance of the case, both in law and in fact (08/09/2015, C-62/15 P, Generia / Generalia Generacion Renovable, EU:C:2015:568, § 35). The criteria for applying a relative ground for refusal or any other provision relied on in support of arguments put forward by the parties are naturally part of the matters of law submitted for examination by the Office, even when it has not been raised by the parties, if it is necessary to resolve that matter in order to ensure a correct application of the EUTMR having regard to the facts, evidence and arguments provided by the parties (01/02/2005, T-57/03, Hooligan, EU:T:2005:29, § 21).
- 11 The opponent based its opposition on several earlier marks and grounds. The Board will start with the examination of the two earlier EUTMs referred to above in paragraph 3 under 1) and 2).

Article 8(1)(b) EUTMR

- 12 According to Article 8(1)(b) EUTMR, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for must not be registered if, because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. The likelihood of confusion includes the likelihood of association with the earlier trade mark. A likelihood of confusion lies in the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 29; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 17).

Relevant public / territory

- 13 The opposition is based on earlier EUTMs. Therefore, the relevant territory in respect of which the likelihood of confusion must be assessed is the European Union as a whole.
- 14 The relevant public of the goods in Classes 9, 35 and 38 consists of both the general public and business customers. Whereas part of the relevant goods in Class 9, in particular ‘apparatus for recording, transmission or reproduction of sound or images’, although being technical, do not necessarily require particular technical knowledge and may be of relatively little monetary value, and the average consumer’s level of attentiveness will be average (03/12/2015, T-105/14, iDrive, EU:T:2015:924, § 34-38; 27/03/2014, T-554/12, Aava Mobile, EU:T:2014:158, § 27), for another part of the goods in Class 9, insofar as they are expensive or aim to meet a particular technological need, the consumer’s level of attention will be higher. The relevant public for communications and broadcasting services in Classes 35 and 38 is likely to display a heightened degree of attention (01/03/2016, T-61/15, 1e1, EU:T:2016:115, § 26-27; 05/05/2015, T-184/13, Skype, EU:T:2015:258, § 22).

Comparison of the goods and services

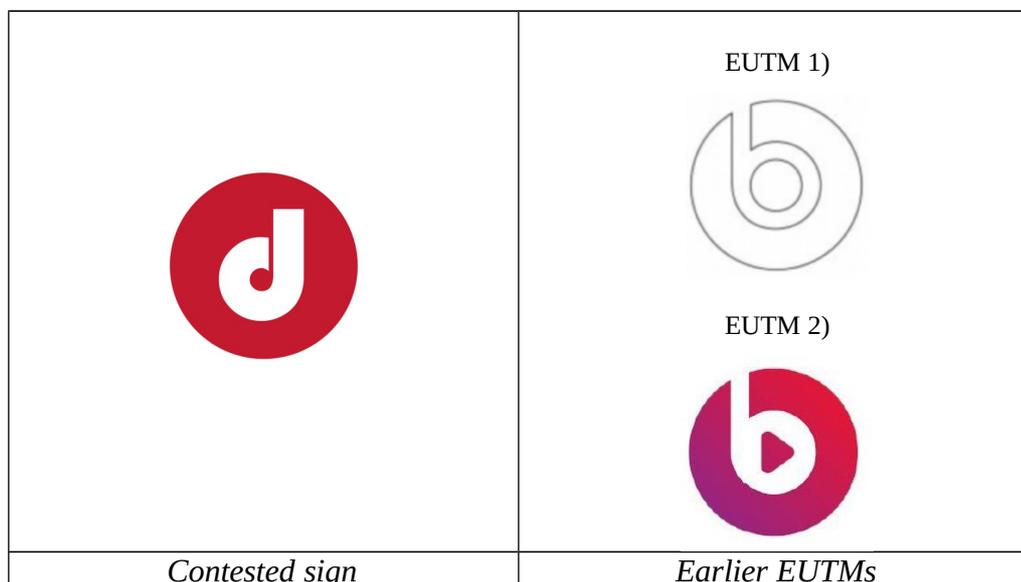
- 15 The opponent appealed the contested decision to the extent that the contested sign was refused for those goods and services found identical or similar to the earlier goods and services (see notice of appeal and statement of grounds, paragraph 7). Therefore, the contested decision insofar as it rejected the opposition for the services found dissimilar has become final.
- 16 In view of the absence of any arguments of the parties regarding the goods and services found identical, highly similar and similar, the Board refers to, and confirms, the conclusions in the contested decision for the reasons given therein, which thus make up an integral part of the reasons for the Board’s own decision (13/09/2010, T-292/08, Often, EU:T:2010:399, § 48; 11/09/2014, T-450/11, Galileo, EU:T:2014:771, § 35).

Comparison of the signs

- 17 The global appreciation of the similarity between the signs includes an examination of whether the two signs concerned are visually, aurally or conceptually similar, which must be carried out on the basis of the overall impression created by them

and bearing in mind, in particular, their distinctive and dominant components (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 25, 27; 06/10/2005, C-120/04, Thomson Life, EU:C:2005:594, § 28).

18 The signs to be compared are the following:



- 19 The earlier marks are figurative marks composed of a circle ('the outer circle') inside of which a circular device is positioned centrally, from which on its left-hand side a vertical line points upwards and flows into the outer circle ('the central circular device with vertical line'). In earlier EUTM 1), another smaller circle is placed inside the circular device ('the inner smaller circle'). It concerns a mark in black and white. In earlier EUTM 2), the outer circle is coloured in flowing red and purple colours, whereas the central circular device is white. Within the latter, a triangle device is placed in the same colour as the outer circle.
- 20 The contested sign is composed of a circle ('the outer circle') inside of which a circular device is positioned centrally, from which on its right-hand side a vertical line points upwards, which does not reach the outer circle ('the central circular device with vertical line'). The outer circle is coloured in red. Another smaller circle is placed inside the central circular device ('the inner smaller circle') in the same colour as the outer circle.
- 21 The essential characteristics of the earlier marks are reproduced in the contested figurative sign, leaving the overall impressions by the signs as being mirror images of one another: the contested sign reproduces the outer circle (in a red colour), the central circular device with vertical line (albeit on the right-hand side and without it reaching the outer circle), and the inner smaller circle or device in the same colour as the outer circle.
- 22 As reasoned by the Opposition Division and argued by the opponent, part of the relevant public may indeed perceive the respective central circular devices with a vertical line as the lower-case round-based letters 'b' and 'd'. Even in this event, the signs share the essential similarities as indicated above, and the contested sign in its overall impression is a mirror image of the earlier marks.

- 23 However, another part of the public may perceive the elements concerned as entirely graphic elements without any text elements. For the purposes of the present analysis, the Board will focus on the perception of that part of the public that perceives both signs as pure device marks.
- 24 **Visually**, the signs show the clear coincidences described in paragraph 21. They have an identical structure and composition and a highly similar graphic representation and stylisation. Furthermore, since earlier EUTM 1) does not designate any particular colour, its protection also extends to colour combinations including the combination of red and white (18/06/2009, T-418/07, LiBRO, EU:T:2009:208, § 65). The similarity between the contested sign and earlier EUTM 2) is all the more so in view of their highly similar colour combinations.
- 25 The difference between the signs lies in the fact that in the earlier marks the vertical line is placed on the left-hand side and flows into the outer circle, while in the contested sign it is placed on the right-hand side and does not flow into the outer circle. Also the smaller device inside the central circular device has a circular form in the case of the contested sign and earlier EUTM 1), while it has a triangular shape in earlier EUTM 2), which is however of less importance given its reduced size in the entire composition of the signs.
- 26 The differences between the signs are relatively minor in comparison to their coincidences. The signs are represented in a nearly identical fashion, which gives the impression of a certain symmetry, which is a factor of similarity between two signs (07/02/2018, T-775/16, Crabs / Device of a Crawfish, EU:T:2018:74, § 45; 26/04/2016, T-21/15, Dino / Device of a Dinosaur, EU:T:2016:241, § 70; 18/09/2014, T-265/13, Boy on bike with mallet, EU:T:2014:779, § 26). Indeed, the signs can be considered mirror images of one another.
- 27 Although the differing elements of the respective signs obviously have to be taken into account, they are insufficient to counterbalance the high visual similarity created by the common features described above, particularly bearing in mind that a consumer normally perceives a mark as a whole and does not proceed to analyse its various details.
- 28 Consequently, visually the signs are similar to an average degree.
- 29 **Aurally**, purely figurative signs are not subject to a phonetic assessment as they cannot be pronounced. The aural comparison between the signs is not possible for that part of the public who perceives the signs as device only marks (07/02/2012, T-424/10, Eléphants dans un rectangle, EU:T:2012:58, § 45-46).
- 30 **Conceptually**, neither of the signs as a whole has any meaning. Thus the conceptual comparison remains neutral.

Distinctiveness of the earlier marks

- 31 The opponent claimed that its earlier marks, including earlier EUTMs 1) and 2), enjoy an enhanced level of distinctive character acquired by virtue of intensive use and reputation. In support of that claim, before the Opposition Division, the opponent submitted extensive evidence.

- 32 However, for the purposes of these proceedings, it is not necessary to assess the enhanced distinctiveness of the earlier marks above as claimed, since this will not impact on the outcome. Taking into consideration that the earlier marks have no apparent meaning in relation to the relevant goods and services, the Board considers that inherently they have a normal degree of distinctive character.

Global assessment

- 33 The appreciation of likelihood of confusion on the part of the public depends on numerous elements and, in particular, on the recognition of the earlier mark on the market, the association which can be made with the registered mark, the degree of similarity between the marks and between the goods or services identified. It must be appreciated globally, taking into account all factors relevant to the circumstances of the case (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 18; 11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22).
- 34 Such a global assessment of a likelihood of confusion implies some interdependence between the relevant factors, and in particular, the similarity between the trade marks and between the goods or services. Accordingly, a greater degree of similarity between the goods or services may be offset by a lower degree of similarity between the marks, and vice versa (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 19; 11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 24; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17). The more distinctive the earlier mark, the greater the risk of confusion, and marks with a highly distinctive character, either per se or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 18).
- 35 Part of the public will only perceive the signs as being devices. Keeping in mind that consumers usually tend to focus on the similarities rather than on the differences, the minor differences in the signs, being mirror images of one another, are not sufficient to outweigh their visual similarities, whereas for the same part of the public, a phonetic comparison is not possible and the signs do not have any conceptual meaning that could help to distinguish between them. The respective goods and services in Classes 9, 35 and 38 are identical or similar at least to an average degree.
- 36 In light of the foregoing considerations and taking into account the notion of imperfect recollection and the interdependence of the various factors, the earlier marks' normal degree of distinctiveness for the public concerned, even taking into account an enhanced degree of attention, it must be held that there is a likelihood of confusion on the part of the relevant public in the European Union within the meaning of Article 8(1)(b) EUTMR for all the contested goods and services.
- 37 Even for a public with a higher level of attentiveness, the fact remains that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his/her trust in the imperfect picture of them that he/she has kept in his/her mind (16/07/2014, T-324/13, Femivia, EU:T:2014:672, § 48).

- 38 Taking into consideration that the opposition succeeds on the basis of earlier EUTMs No 8 433 195 and No 12 739 942 and their inherent distinctiveness, there is no need to review the other earlier marks and grounds invoked, including the claimed enhanced level of distinctiveness and reputation of the earlier marks.
- 39 As a result, the appeal is successful and the contested decision must be annulled in the part that was appealed.

Costs

- 40 Since the applicant (respondent) is the losing party within the meaning of Article 109(1) EUTMR, it must be ordered to bear the representation costs incurred by the opponent (appellant) in the appeal proceedings. As regards the opposition proceedings, each party succeeds in part and shall be ordered to bear its own fees and costs.

Fixing of costs

- 41 In accordance with Article 109(7) EUTMR and Article 18(1)(c)(iii) EUTMIR, the Board fixes the amount of representation costs to be paid by the applicant (respondent) to the opponent (appellant) with respect to the appeal proceedings at EUR 550. In addition the applicant (respondent) shall reimburse the opponent (appellant) the appeal fee of EUR 720. The total amount is EUR 1 270.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision in part;**
- 2. Upholds the opposition and rejects the application for the following goods and services:**

Class 9 - Apparatus for recording, transmission or reproduction of sound or images; Magnetic data carriers, recording discs; Data processing equipment, Electronic publications (electronically-downloadable);

Class 35 - Telephone answering for unavailable subscribers;

Class 38 - Telecommunication services, In particular mobile telephony, Broadcasting of radio and television programmes; Rental of telecommunications apparatus; Computer-aided transmission of messages and images; Providing access to a global computer network.

- 3. Orders each party to bear its own costs in the opposition proceedings;**
- 4. Orders the respondent to bear the costs of the appeal proceedings;**
- 5. Fixes the amount of the costs to be paid by the respondent to the appellant for the appeal proceedings at EUR 1 270.**

Signed

D. Schennen

Signed

R. Ocquet

Signed

C. Bartos

Registrar:

Signed

p.o. N. Granado Carpenter

