

# IPOS Cases in 2016 – Selected Issues, Holdings and Comments of Interest

Note: Full Grounds of Decision (and Case Notes where available) accessible at:

<https://www.ipos.gov.sg/manage-ip/resolve-ip-disputes/legal-decisions>

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## IPOS CASES IN 2016

Case Reference	Selected Issues, Holdings and Comments of Interest	Paragraph References
<p><i>Christie Manson &amp; Woods Limited v Chrित्रs Auction Pte. Limited</i> [2016] SGIPOS 1</p>	<p><u>Adverse inferences</u></p> <p>It may be possible to draw an adverse inference against a party whose material witness is required to attend cross-examination but fails to do so without proper justification. (In this case, the witness' absence was all the more significant given that bad faith was one of the grounds of opposition.)</p> <p><u>Foreign decisions</u></p> <p>Related proceedings between parties in other jurisdictions serve, at best, as guides to opposition proceedings here. The relevance of these decisions will hinge upon the similarity of the laws of the particular jurisdiction with those of Singapore and also upon the individual facts of the case. For example, it does not follow that a mark which is well-known in country X is necessarily also well-known in country Y. On the other hand, if a party makes certain factual assertions in one jurisdiction, he should not be permitted to take a completely different position in another jurisdiction.</p> <p><u>UDRP decisions</u></p> <p>Cases decided under the Uniform Domain Name Dispute Resolution Policy (UDRP) are premised on very different considerations from those in trade mark oppositions in Singapore.</p> <p><u>Partial oppositions</u></p> <p>The Trade Marks Act does not expressly confer upon the Registrar the power to order that an opposition partially succeeds in respect of some, but not all of the goods or services. However, in this case, the Hearing Officer examined some of the arguments for and against allowing partial oppositions, but did not decide on the issue as he was not required to do so. Thus the issue is still an open one.</p> <p><u>Pronouncing invented words</u></p>	<p>[180] – [183]</p> <p>[27]</p> <p>[30]</p> <p>[102] – [114]</p>

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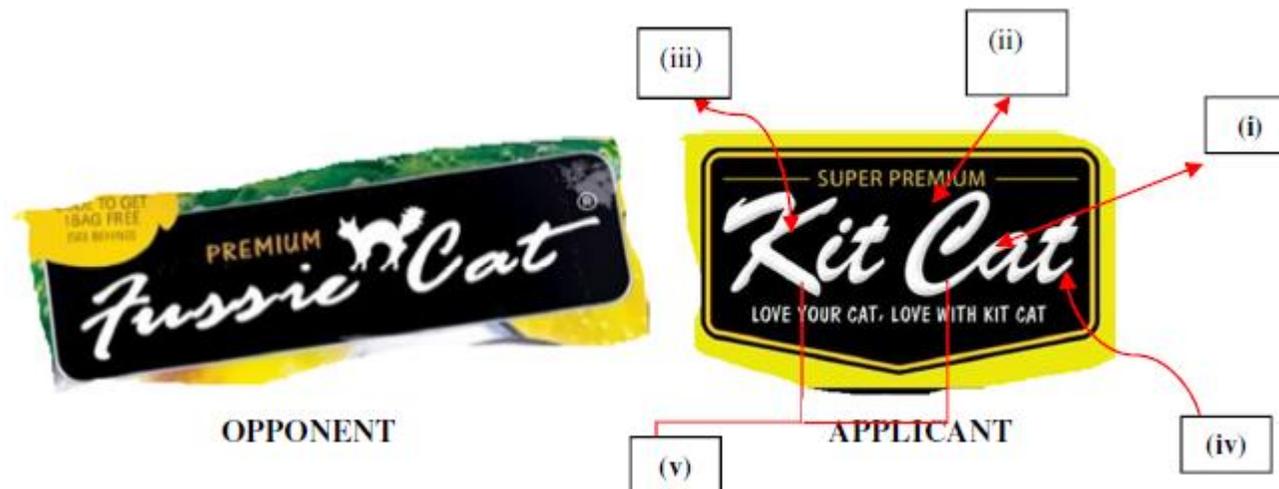
	<p>It is not permissible to take one of several hypothetically plausible pronunciations of a mark, then assert that that specific pronunciation is similar to another mark. (In this case, the Hearing Officer found that there is no aural similarity between the marks “CHRITRS” (held to be unpronounceable) and “CHRISTIE’S”.)</p> <p><u>Disclaimers / Mark Clauses</u></p> <p>Disclaimers apply not only to infringement proceedings but also to infringement proceedings. (In this case, the opponent’s earlier mark was subject to a disclaimer which read: “<i>Registration of this Trade Mark shall give no right to the exclusive use of the word “Christie’s”</i>”. The application of the foregoing principle meant that “Christie’s” element in the earlier mark could not be relied upon as against the application mark “CHRITRS”.)</p>	<p>[75]</p> <p>[62]</p>
<p><i>Arjo Wiggins Fine Papers Limited v Transasia Fine Papers Pvt Ltd</i> [2016] SGIPOS 2</p>	<p><u>Consequence of there being no cross-examination</u></p> <p>Where there is no cross-examination, the Hearing Officer will decide the issue of bad faith based on the documents before him or her, taking care not to draw any adverse inferences against either party unless it is very clear on the face of the documents that such an adverse inference should be drawn.</p> <p><u>Relevance of mark similarity to bad faith</u></p> <p>There is no consistent statement of principle that there must be a striking degree of similarity before a finding of bad faith can be made. After all, bad faith is a distinct and independent concept from the issue of confusing similarity between the marks.</p>	<p>[19]</p> <p>[57]</p>
<p><i>Pets Global Pte Ltd v B2K Pet Products Pte Ltd</i> [2016] SGIPOS 3</p>	<p><u>Mark for mark comparison</u></p> <p>The competing marks were:</p> <div style="text-align: center;">  </div> <p>Application Mark:</p>	

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Opponent's earlier mark:

The opponent's written submissions contained a depiction of what it considered to be the competing marks:



In rejecting the above depiction as being an inaccurate reflection of the competing marks, the Hearing Officer reiterated the fundamental principle that the mark-to-mark assessment is an exercise which encompasses a comparison of the marks as registered or applied for.

[18] – [19]

Role of dominant component of the mark(s) in the aural comparison

The Hearing Officer considered *Han's (F & B) Pte Ltd v Gusttimo World Pte Ltd* [2015] SGHC 39 at [137] as standing for the proposition that words (in a mark) which are in much smaller font and in relatively less prominent positions are not to be taken into account in the assessment for aural similarity. Accordingly, the

[37] – [41]

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	<p>assessment was undertaken on the basis of the dominant components “Kit Cat” versus “Fussie Cat”. In the same vein, the words “premium / super premium” and the slogan “LOVE YOUR CAT, LOVE WITH KIT CAT” were not taken into account.</p>	
<p><i>Kiko S.p.A. v Dooyeon Corp</i> [2016] SGIPOS 4</p>	<p><u>Equally dominant components in a mark</u></p> <p>The competing marks were:</p> <div style="text-align: center;">          K I C H O     </div> <p>Application mark:</p> <p>Opponent’s earlier mark: KIKO</p> <p>The Hearing Officer considered the device element and the word element in the application mark to be equally dominant. This meant that one could not simply compare the earlier mark (KIKO) as against the KICHO element. The device element:  could not be disregarded. The marks were ultimately found to be not visually similar.</p> <p><u>Pronunciation of a foreign word element</u></p> <p>A consideration of how the average Singapore consumer would pronounce the mark is apposite. In this context, evidence that an average consumer in Singapore would be aware of the correct Korean pronunciation and is likely to pronounce “KICHO” as “<i>kit-cho</i>” would be relevant. Yet, the Applicants have not established this of the average consumer in Singapore, despite their evidence of audio recordings from Korean radio broadcasts (to demonstrate that the actual pronunciation of “KICHO” is “<i>kit-cho</i>” in Korean).</p> <p><u>Fair degree of care in the selection and purchase of cosmetics and hair products</u></p> <p>Having regard to the nature and purpose of cosmetics and hair products (enhancing consumers’ self-image) and the range of both price points and circumstances of selection and purchase, the Hearing Officer was</p>	<p>[22] – [40]</p> <p>[46] – [47]</p> <p>[76] – [77]</p>

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	inclined to believe that consumers would exercise a fair degree of care in the selection and purchase of the goods. This factor is in the Applicants' favour when considering the likelihood of confusion.	
<i>PT Industri Karet Deli v Qingdao Sentury Tire Co. Ltd</i> [2016] SGIPOS 5	<p><u>Specialist nature of the goods</u></p> <p>The Hearing Officer considered that the specialist nature of the goods in this case (tyres) meant that the relevant segment of the public is more heavily weighted towards members of the trade (e.g. wholesalers, distributors, retailers) although it would include members of the public as well. However, tyres generally require an intermediary familiar with tyres to assist in the selection and installation. Having regard to the specialist knowledge entailed in the circumstances of the trade of the goods, the Hearing Officer considered that the likelihood of confusion would be lower.</p> <p><u>Price of goods</u></p> <p>Tyres are not low-cost goods and more than a modicum of attention would be paid in their selection and purchase at every stage of the chain of sale.</p> <p><u>Discretion in the award of costs</u></p> <p>In this case, the applicant's conduct left much to be desired. It failed to attend a case management conference and did not inform either the Registrar or the opponent beforehand. The applicant also did not attend the pre-hearing review and did not give any prior notice to the Registrar of its intention not to attend. The applicant only informed the opponent 2 days before the deadline for written submissions that it would not participate in the hearing (without informing the Registrar of the same). Thus, although the opposition was unsuccessful, the Hearing Officer awarded the Applicant only 25% of its costs.</p>	<p>[66]</p> <p>[68]</p> <p>[110] – [111]</p>
<i>Abercrombie &amp; Fitch Europe SAGL v MMC International Services Pte Ltd</i> [2016] SGIPOS 6	<p><u>Bad faith</u></p> <p>The competing marks were:</p>  <p>A &amp; F</p> <p>Application mark:</p>	

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	<p style="text-align: center;">  </p> <p>Opponent's earlier trade marks: and A&amp;F (registered separately but not as a composite whole).</p> <p>Amongst the many reasons, the opponent, Abercrombie &amp; Fitch, had evidence relating to the origins of "A&amp;F" and the moose device. On the other hand, the applicant did not proffer any reasons as to its choice of A&amp;F and the moose device. Further, having regard to the evidence of the expansion route of clothing retailers and how the Applicants intend to use the Application Mark on the goods (which is simply the moose device without the letters "A&amp;F"), the ground of bad faith was made out.</p> <p><u>Similarity of goods</u></p> <p>The application mark was sought to be registered in class 9 for spectacles and related goods. Although Abercrombie &amp; Fitch did not have a registration in class 9, its registrations for "A&amp;F" and the moose device were both protected in class 14 in respect of jewelry and in class 25 for clothing and footwear. In <i>Festina Lotus SA v Romanson Co Ltd</i> [2010] 4 SLR 552, the High Court found necklaces, rings, bracelets, earrings, medals and brooches (in class 14) to be similar to clothing and footwear (in class 25) and spectacles (in class 9). Abercrombie &amp; Fitch argued that the competing goods in this case were the same as those in <i>Festina</i>. The hearing officer agreed, and found the goods to be similar.</p>	<p>[50], [59] [65] and [67]</p> <p>[128] – [133]</p>
<p><i>Application to cure irregularity in evidence filed in a trade mark opposition by The Faceshop Co. Ltd and Objection thereto by Consolidated Artists B.V.</i></p>	<p>This was an interlocutory application to cure certain irregularities in evidence filed by the applicant. The application was allowed, with costs to the other party.</p> <p>This case illustrates:</p> <ol style="list-style-type: none"> <li>(1) An important consideration is whether by allowing the document(s) into evidence the counter party will suffer any loss that cannot be compensated by an award of costs; and</li> <li>(2) In an appropriate case where the successful application necessitates leave being given to the counter party to file further evidence, the counter party may be allowed its costs of such further evidence.</li> </ol>	<p>[33]</p> <p>[35(iii)]</p>

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[2016] SGIPOS 7		
<i>Beats Electronics, LLC v LG Electronics Inc.</i> [2016] SGIPOS 8	<p><u>Reliance on EU cases</u></p> <p>Parties should be mindful of the need to exercise caution in the use of authorities from the EU given the significant differences in the law in certain respects, as well as the different circumstances. (For instance, a sign may have no meaning in respect of the relevant goods and/or services to non-English speakers, but such a finding would be irrelevant to the Singapore context.)</p> <p><u>Inherent distinctiveness</u></p> <p>The extent to which the earlier mark is inherently distinctive in relation to the goods for which it is registered is not a factor which may be taken into account in the marks-similarity stage. Instead, the technical distinctiveness of the competing marks must be considered in the abstract at the first stage, without reference to the actual goods/services in issue.</p>	<p>[27], footnote 1</p> <p>[21] – [22]</p>
<i>Application for Cross-Examination by FMTM Distribution Ltd and Objection thereto by Tan Jee Liang trading as Yong Yew Trading Company</i> [2016] SGIPOS 9	<p>This was an interlocutory application for leave to cross-examine. The application was allowed, but cross-examination was limited to certain specific issues only, and the time allotted was limited to 60 minutes per witness.</p> <p><u>Points of interest</u></p> <ul style="list-style-type: none"> <li>• A holding in an earlier IPOS decision is persuasive, but not binding, on a later IPOS tribunal.</li> <li>• Although he did not need to decide the issue, the Hearing Officer gave his provisional view on two points: <ul style="list-style-type: none"> <li>(1) The Rules of Court do not apply to IPOS proceedings generally, although parties may mutually agree to their application.</li> <li>(2) Parts I, II and III of the Evidence Act do not apply to statutory declarations filed for the purposes of IPOS proceedings. However, where oral evidence is given in lieu of or in addition to a statutory declaration, or elicited during cross-examination, the Evidence Act should apply to such oral evidence.</li> </ul> </li> </ul>	<p>[40]</p> <p>[31] – [56]</p>

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	<ul style="list-style-type: none"><li>• Preliminary views of the Registrar</li></ul> <p>The term Preliminary View (“PV”) refers to the Registrar’s provisional (as opposed to final) decision or direction.</p> <p>A PV may be issued in the context of any interlocutory dispute <i>other than</i> an application for extension of time made within the relevant prescribed period.</p> <p>A brief sketch of the salient points relating to PVs is set out below.</p> <ol style="list-style-type: none"><li>(1) When interlocutory disputes arise, the Registrar typically does not issue any PV at the outset.</li><li>(2) Instead, the first step is to allow parties to explore the possibility of resolution via consent.</li><li>(3) However, if parties are unable to resolve their differences by a certain time, or at any appropriate juncture, the Registrar will put forth a PV and parties will be given an opportunity to respond by way of letter.</li><li>(4) If no objections are received to the Preliminary View by the stipulated date, the tentative decision or directions set out in the Preliminary View become final and parties are to abide by them.</li><li>(5) In the event objections are received to the Preliminary View, the Registrar may adopt one of the following approaches:<ol style="list-style-type: none"><li>a. Issue a fresh PV and give parties a further opportunity to respond. The Registrar may adopt this approach in cases where there is new information that was not previously considered and/or after due consideration of the parties’ submissions.</li><li>b. Indicate that notwithstanding the objections the Registrar is not inclined to deviate from the earlier Preliminary View and at the request of a party or on his own initiative, allow the parties to be heard either (at their election) by way of a formal oral interlocutory hearing or only by further written submissions (if any) in lieu of an in-person interlocutory hearing.</li></ol></li></ol>	[26]
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	(6) The Registrar will either issue a final decision at the conclusion of, or after, the interlocutory hearing or after receiving the parties' written submissions in lieu of an in-person interlocutory hearing (as the case may be).	
<i>Leonid Kovalkov v Tan Siew Keng, Angeline</i> [2016] SGIPOS 10	<p>This was an unusual case in that two trade marks were sought to be invalidated on the sole ground of bad faith (Section 7(6)). The invalidation action failed in relation to the earlier mark  but succeeded in relation to the later  due to the unique circumstances of this case.</p> <p><u>Points of interest</u></p> <ul style="list-style-type: none"> <li>• A claim of trade mark rights is not based on who created or coined the trade mark. Therefore, it is not necessary to make a finding as to who created the mark prior to the registration of the mark in question. Instead, the focus of the inquiry on the circumstances leading to the registration in question with a view to assessing whether: (1) the conduct of the registrant in applying for the registration fell short of the normally accepted standards of commercial behaviour; and (2) whether the registrant knew of facts which an ordinary honest person would have regarded as breaching those standards.</li> <li>• <i>Obiter</i>: the Registrar does not have the jurisdiction to make a finding of a constructive trust.</li> </ul>	<p>[24] – [55]</p> <p>[84]</p>
<i>Bentley Motors Limited v Aucera S.A.</i> [2016] SGIPOS 11	<p><u>Evidence of genuine use</u></p> <p>In a non-use revocation case, it is incumbent on the proprietor (seeking to prove genuine use) to put forth the best evidence in support of its case. The fact that evidence for something which could easily be obtained is not forthcoming from the proprietor is an indication that the evidence is insufficiently solid. (In this case, the proprietor had two tax invoices which were issued from a local wholesaler to two local retailers. In the invoices, the goods were referred to as BENTLEY. However, it was not clear whether the goods in question actually bore the BENTLEY mark. The Hearing Officer considered that the proprietor could have easily proven that the goods did bear the BENTLEY mark by, for example, calling representatives from the wholesaler and/or the retailers to give evidence. But it did not do so nor did it have any other evidence to show that goods bearing the BENTLEY mark even existed during the relevant period.)</p>	[34] – 40]

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<p><i>Stora Enso Oyj v PT Purinusa Ekaperada and PT Pabrik Kertas Tjiwi Kimia TBK Ltd</i> [2016] SGIPOS 12</p>	<p><u>Evidence improperly tendered at the hearing</u></p> <p>In this case the Hearing Officer did not take into account certain documents and materials (in the nature of evidence) that were improperly introduced by way of written submissions at the hearing. (These documents and materials should have been (but were not) tendered with leave by way of statutory declaration, and should have been verified or attested to by an authorised representative.)</p>	<p>[119] – [122]</p>
<p><i>Cambrian Engineering Corporation Pte Ltd v Fosta Pte Ltd</i> [2016] SGIPOS 13</p>	<p><u>Surrender held in abeyance pending outcome of revocation proceedings</u></p> <p>This was a patent revocation case with an interesting factual matrix. The proprietor essentially did not defend its patent grant against the revocation action and instead sought to surrender the patent. However, the applicant for revocation objected, arguing that this would suggest that the patent was still valid before its surrender. The surrender request was held in abeyance pending the outcome of the revocation proceedings.</p> <p><u>Non-filing of counter-statement</u></p> <p>The proprietor of the patent did not file any counter-statement, and did not seek to amend the specification of the patent in response to the revocation action. The consequence of the proprietor not filing a counter-statement was that it “<i>shall not be allowed to take part in the subsequent proceedings, and the application for revocation shall be considered by the Registrar as if each specific fact set out in the statement were conceded, except in so far as it is contradicted by other document in the possession of the Registrar</i>” (Rule 80(4) Patents Rules). This case turned on the foregoing “deeming” provision and the applicant eventually succeeded (as summarised further below).</p> <p><u>Comments on applicant’s grounds of revocation</u></p> <p>The Hearing Officer expected the grounds of revocation alleging non-patentability to contain a clear discussion of what technical aspects of the cited documents directly correspond to the invention defined in the claims of the patent. However, this was generally lacking here. The applicant also did not make representations on who the person skilled in the art nor what the common general knowledge would be.</p> <p><u>Grounds of revocation</u></p>	<p>[6]</p> <p>[5]</p> <p>[14] – [15], [27], [29]</p>

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	<p>The grounds on which revocation was sought were: (1) lack of novelty and inventive step; (2) amendments to the claims went beyond the disclosure as filed; (3) amendments to the claims should not have been allowed; and (4) that the patent was obtained fraudulently or on misrepresentation.</p> <p>Although the action for revocation failed in respect of (1), (2) and (3), it succeeded on the misrepresentation aspect of (4).</p> <p>The essence of the applicant’s case on misrepresentation was that the inventor had filed for the patent in his own name (and subsequently assigned it to the proprietor) when the patent should have rightfully been filed in the name of the inventor’s employer instead. The invention related to structural health monitoring (“SHM”) and fibre optic sensors. The applicant submitted that the inventor was involved in SHM and his then-employer was involved in SHM projects in Singapore. There was therefore a likelihood that the invention was developed as part of the inventor’s duties during his employment. The Hearing Officer noted that there were no arguments to counter the applicant’s assertions in this regard nor documents contradicting the latter. In the circumstances, the Hearing Officer applied Rule 80(4) and held that the filing for the invention in the inventor’s name meant that the inventor misrepresented himself to the Registrar as the owner of the invention, leading the Registrar to grant the patent to a person to whom the invention did not belong.</p>	[88] – [98]
<p><i>Application for Extension of time to file evidence by GSP International Enterprise and Objection Thereto by A.T.X. International Inc. [2016] SGIPOS 14</i></p>	<p>This was an interlocutory application (in the context of trade mark opposition proceedings) for an extension of time to file evidence, where the application for extension of time was deficient in several respects. The application was allowed, in part, on the specific facts.</p> <p><u>Reliance on decisions relating to the discretion of the court to extend time</u></p> <p>The applicant relied heavily on the Court of Appeal’s decision in the <i>Tokai Maru</i> [1998] 2 SLR(R) 626 and in particular the following principles:</p> <ol style="list-style-type: none"> <li>(1) The rules of civil procedure guide the courts and litigants towards the just resolution of the case and should of course be adhered to. Nonetheless, a litigant should not be deprived of his opportunity to dispute the plaintiff’s claims and have a determination of the issues on the merits as a punishment for a breach of these rules unless the other party has been made to suffer prejudice which cannot be compensated for by an appropriate order as to cost.</li> <li>(2) Save in special cases or exceptional circumstances, it can rarely be appropriate then, on an overall assessment of what justice requires, to deny a defendant an extension of time where the denial would</li> </ol>	

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	<p>have the effect of depriving him of his defence because of the procedural default which, even if unjustified, has caused the plaintiff no prejudice for which he cannot be compensated by an award of costs.</p> <p>In addressing the applicant's reliance on the <i>Tokai Maru</i>, the Hearing Officer reiterated the observation in <i>MGG Software Pte Ltd v Aptitude Pte Ltd</i> [2015] SGIPOS 8 that there is a basic distinction between court proceedings and proceedings before the Registrar of Trade Marks. In the former, suits are subject to time bars beyond which rights generally cannot be asserted; and non-compliance with deadlines can potentially lead to judgment in default. Hence, court authorities may tend to disclose a more open approach towards allowing the "overstepping of time limits". On the other hand, in proceedings before the Registrar, it is generally open to disputants to re-file their application to register a trade mark or to institute fresh action against a trade mark. The consequences of adhering to the prescribed rules relating to time limits are usually not as severe in Registry proceedings as opposed to court proceedings. Hence, the Registrar tends to take a more circumspect stance on the issue and has a disposition towards the adherence to time limits. Exceptional circumstances would be needed to justify deviation from these time limits. Parties should therefore not expect the Registrar, being part of a low cost administrative tribunal with an interest in transparency and certainty to, as a matter of course, adopt more liberal court authorities when dealing with breaches of procedure.</p>	[12], [20]
<p><i>Aptitude Pte Ltd v MGG Software Pte Ltd</i> [2016] SGIPOS 15</p>	<p><u>Relevance of colour to the similarity of marks comparison</u></p> <p>Colour is a relevant consideration to be taken into account in considering visual similarity. The extent to which colours play a role would vary depending on each case and their impact on the eye of the average consumer.</p> <p>In this case, the competing marks were:</p> <div style="text-align: center;">  <p>SNAC and snadapp SCHOOL NOTIFICATION &amp; ATTENDANCE APP</p> </div> <p>Based on visual impression alone, the colours were very different and the Hearing Officer considered that this pointed towards the conclusion that, viewed through the lens of imperfect recollection, consumers would consider the marks to be different.</p>	[20] – [27]

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	<p>The colours ultimately reinforced the conclusion that the marks are, as a whole, visually substantially dissimilar.</p> <p><u>Pronouncing invented words</u></p> <p>In <i>Seiko Kabushiki Kaisha (trading as Seiko Corporation) v Montres Rolex S.A.</i> [2004] SGIPOS 8 it was stated (at [30]) that:</p> <p>“When a person is faced with an unfamiliar word, there is a tendency for that person to reach within his own vocabulary of words and mentally look for words that have the same structure in the sense that the chronology of the alphabets [sic] is the same as the unfamiliar word. Having identified the similar word or words; he would apply the way in which those words are pronounced to the unfamiliar word. In this case, that person would apply the pronunciation of very normal English words like “roof”, “room” and “root” which look the most identical to the word “ROOX”. The mark “ROOX” would be pronounced phonetically as “rooks”, the letter “X” at the end of a word as most of us have been taught, being enunciated with a “-ks” or “-cs” sound. It would be quite a stretch to consider the word “ROOX” as a dual-syllable word; it is clearly a single-syllable word.”</p> <p>Applying this principle, the Hearing Officer found that “SNAC” would be more likely than not pronounced as “snac” or in the alternative as “snack”.</p> <p><u>Whether applying to register in respect of identical goods and services amounts to bad faith</u></p> <p>The fact that one trader has applied to register its trade mark for the same goods or services as another trader cannot, without more, amount to bad faith. There is nothing proprietary about the specification of goods or services in the classes applied for. The specification indicates to the Registrar and the public that the claimed goods/services are those which the applicant/proprietor intends to apply its trade mark to.</p>	<p>[34(e)]</p> <p>[124]</p>
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