IN THE HEARINGS AND MEDIATION DEPARTMENT OF
THE INTELLECTUAL PROPERTY OFFICE OF SINGAPORE
REPUBLIC OF SINGAPORE

Trade Mark No. T1321153J
11 July 2018

IN THE MATTER OF A TRADE MARK APPLICATION BY

MEGAPORT (SERVICES) PTY LTD

AND

OPPOSITION THERETO BY

SINGAPORE TELECOMMUNICATIONS LIMITED

Hearing Officer: Ms Sandy Widjaja
Principal Assistant Registrar of Trade Marks

Representation:

Mr Vignesh Vaerhn (Allen & Gledhill LLP) for the Opponent

Mr Zechariah Chan and Mr Jasper Lim (Lee & Lee) for the Applicant

GROUNDS OF DECISION

1 In today's day and age, it is a common sight to see people glued to their mobile phones, whether it is at traffic junctions, crossing the road or in queues waiting to get their coffee or breakfast. Of late, there have been debates as to whether we are "addicted" to our mobile phones and how they have affected communication and interactions amongst

people, especially the younger generation. It is no surprise then, that the "mobile lingo" has crept into the arena of branding. So how does it affect the function of a trade mark?

2 In the instant dispute, the subject mark, T1321153J " MEGAPORT " ("Application Mark") was sought to be registered by Megaport Pty Ltd (the "Applicant") for the following goods in Class 38:

> Class 38
>
> Telecommunication services; ISP services including Internet access services; web portal services (providing user access to a global computer network); provision of fixed line and mobile communications networks; communication by fibre optic networks; computer network communication services; digital network telecommunications services; voice over Internet Protocol [VoIP] services; electronic transmission of data, text, images, sounds and/or video; telecommunications services for the provision of digital content; telecommunications security (provide secure connections and access including to computers and the global computer network); value-added network (VAN) services; wide area network (WAN) services; local area network (LAN) services; provision of access to the internet via wireless hotspots; metropolitan area network (MAN) services; communication by computer terminals; advisory, consultancy and information services in relation to the aforesaid services, including the provision of the aforesaid services online via a website, the internet or other computer networks and/or accessible by mobile phone and other internet-enabled devices.

3 The Application Mark was accepted and published on 12 June 2015 for opposition purposes. The Opponent filed its Notice of Opposition to oppose the registration of the Application Mark on 11 August 2015. The Applicant filed its Counter-Statement on 9 October 2015. The Opponent filed evidence in support of the opposition on 20 February 2017[1]. The Applicant filed evidence in support of the application on 15 August 2017. The Opponent filed its evidence in reply on 19 April 2018[2]. A Pre-Hearing Review was conducted on 13 February 2018 and the matter was set down for hearing on 11 July 2018.

Grounds of Opposition

4 The Opponent relies on sections 8(2)(b) and 8(7)(a) of the Trade Marks Act (Cap 332, 2005 Rev Ed) (the "Act") in this opposition.

[1] As parties indicated that they wished to negotiate, longer deadlines were given to file their evidence. However, in the end, no settlement was reached. This explains the extended period from the filing of the Counter-Statement to filing of the evidence and ultimately to the hearing date.

[2] The original evidence in reply was filed on 15 January 2018. Following the Registrar's instructions via IPOS' letter of 29 March 2018, the same evidence was re-executed.

Opponent's Evidence

5 The Opponent's evidence comprises the following:

a) statutory declaration of Lee Kwang Yong, Director of Domestic Data, Business Products of the Opponent, dated 20 February 2017 ("Opponent's 1st SD"); and
b) statutory declaration of the same Lee Kwang Yong, dated 12 January 2018 ("Opponent's 2nd SD").
c) supplementary statutory declaration of the same Lee Kwang Yong, dated 24 July 2018 ("Opponent's 3rd SD").

Applicant's Evidence

6 The Applicant's evidence comprises the statutory declaration of Vincent English, Chief Executive Officer of the Applicant, dated 11 August 2017 ("the Applicant's SD").

Applicable Law and Burden of Proof

7 As the applicable law is the Act, there is no overall onus on the Applicant either before the Registrar or in opposition proceedings. The undisputed burden of proof in the present case falls on the Opponent.

Background

8 The Opponent deposed that it was incorporated under the laws of Singapore on 28 March 1992 ([6] of the Opponent's 1st SD). The Opponent is licenced to provide telecommunication services in Singapore and provides a wide range of services including the provision of data networking services to businesses ([7] of the Opponent's 1st SD).

9 The Opponent relies on the following earlier marks (collectively, ***Opponent's Earlier Marks***) ([3] and [4] of the Opponent's Notice of Opposition):

S/N	*Opponent's Earlier Marks*	Class
Opponent's Earlier Meg@POP Marks		
1	**MEG@POP** **meg@pop** **Meg@POP** T0312219E	Class 38 Telecommunication services; telecommunication of information (including web pages), computer programs and any other data; providing user access to a global communication network (service providers); the provision of user access time to the global computer network, being a telecommunications service; providing telecommunications connection to a global communication network or data bases; telecommunication access services; operation of telecommunication systems, telecommunication networks and of pertinent facilities

		and parts; leasing of systems, products and facilities in the field of telecommunication; consultancy in the setting-up and operation of telecommunications networks; telecommunications and transmitting information and data, remote transmission of information or of signals; rental of telecommunications and information technology devices, apparatus, equipment and installations [being telecommunication services]; communications via computer terminals; communication services, namely, providing virtual network intranet connectivity services for others; sending, receiving, processing and communicating messages; processing services for data, sounds, voice, telephone [being telecommunication services] and telematic services; electronic data interchange and exchange services; provision of communications links through apparatuses, software, hardware or a combination thereof for collecting, delivering and analysing encryptic data; communication services by electronic, digital and computer means.
2	**MEG@POP** **meg@pop** **Meg@POP** T0312221G	Class 42 Leasing access time to the global computer network (other than by Internet service providers), being a computer service; computer rental; design, drawing and commissioned writing, all for the compilation of web pages on a global communication network; information (only information under Class 42) provided on-line from a computer data base or from a global communication network; creating and maintaining web sites; hosting the web sites of others; planning, development [computer programming] and project-design of telecommunication and information processing services and facilities, telecommunication networks and pertinent tools; planning, consultancy, testing and technical monitoring in the field of system integration and product integration of telecommunication networks and data processing; development, generation and renting of data processing programs; rental of telecommunications and information technology software
Opponent's Earlier SingTel MEG@POP Marks		
4	**SingTel MEG@POP** **SingTel meg@pop** T0021950C	Class 38 Telecommunication services; telecommunication of information (including web pages), computer programs and any other data; providing user access to a global communication network (service providers); the provision

		of user access time to the global computer network, being a telecommunications service; providing telecommunications connection to a global communication network or data bases; telecommunication access services; operation of telecommunication systems, telecommunication networks and of pertinent facilities and parts; leasing of systems, products and facilities in the field of telecommunication; consultancy in the setting-up and operation of telecommunications networks; telecommunications and transmitting information and data, remote transmission of information or of signals; rental of telecommunications and information technology devices, apparatus, equipment and installations [being telecommunication services]; communications via computer terminals; communication services, namely, providing virtual network intranet connectivity services for others; sending, receiving, processing and communicating messages; processing services for data, sounds, voice, telephone [being telecommunication services] and telematic services; electronic data interchange and exchange services; provision of communications links through apparatuses, software, hardware or a combination thereof for collecting, delivering and analysing encryptic data; communication services by electronic, digital and computer means.
5	**SingTel MEG@POP** **SingTel meg@pop** T0021951A	Class 42 Leasing access time to the global computer network (other than by Internet service providers), being a computer service; computer rental; design, drawing and commissioned writing, all for the compilation of web pages on a global communication network; information (only information under Class 42) provided online from a computer data base or from a global communication network; creating and maintaining web sites; hosting the web sites of others; planning, development [computer programming] and project-design of telecommunication and information processing services and facilities, telecommunication networks and pertinent tools; planning, consultancy, testing and technical monitoring in the field of system integration and product integration of telecommunication networks and data processing; development, generation and renting of data processing programs; rental of telecommunications and information technology software.

10 The Applicant deposed that it is a company incorporated in Australia and is part of the Megaport group of companies founded by internet infrastructure entrepreneur, Bevan Slattery in Australia in 2013. With over 100 connected cloud providers, enterprises and network service providers in Australia, the Applicant improves connectivity for its customers by providing scalable and flexible connectivity options in an on-demand environment. Demonstrating its commitment to expansion into the wider Asia market, the Applicant expanded into Singapore in 2014 ([6] of the Applicant's 1st SD).

MAIN DECISION

Ground of Opposition under Section 8(2)(b)

11 Section 8(2)(b) provides as follows:

> **8.** (2) A trade mark shall not be registered if because…
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,
>
> there exists a likelihood of confusion on the part of the public.

Decision on Section 8(2)(b)

Step-by-step approach

12 In ***Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc*** [2014] 1 SLR 911 ("***Staywell***"), the Court of Appeal re-affirmed the 3-step test approach in relation to an objection under section 8(2)(b) (see [15] and [55]):

a) The first two elements - namely similarity or identity of the marks and similarity or identity of the goods / services - are assessed individually before the final element which is assessed in the round.

b) Once the two threshold requirements have been met, the issue of the likelihood of confusion arises and the tribunal / court is directed to look at (a) *how* similar the marks are, (b) *how* similar the goods / services are, and (c) given this, how likely the relevant segment of the public will be confused.

Similarity of Marks

13 The law in relation to this issue is as follows (***Staywell*** at [15] to [30]):

a) The similarity of marks is ultimately and inevitably a matter of impression rather than one that can be resolved as a quantitative or mechanistic exercise. The court must ultimately conclude whether the marks, when observed in their totality, are similar or dissimilar.

b) The three aspects of similarity (i.e. visual, aural and conceptual similarities) are meant to guide the court's inquiry. Trade-offs can occur among the three aspects of similarity.

c) A productive and appropriate application of the step-by-step approach necessitates that the court reaches a meaningful conclusion at each stage of the inquiry.

d) The assessment of marks similarity is mark-for-mark without consideration of any external matter.

e) Technical distinctiveness is an integral factor in the marks-similarity inquiry. A mark which has greater technical distinctiveness enjoys a high threshold before a competing sign will be considered dissimilar to it.

f) While the components of a mark may be inherently technically distinctive, ultimately the ability of the mark to function as a strong badge of origin must be assessed by looking at the mark as a whole. Conversely, the components of a mark may not be inherently distinctive, but the sum of its parts may have sufficient technical distinctiveness.

g) When speaking of the assessment of a mark as a whole, the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components.

14 Further, the Court of Appeal provided in ***Hai Tong Co (Pte) Ltd v Ventree Singapore Pte Ltd and another and another appeal*** [2013] 2 SLR 941 at [40(c)] and [40(d)] ("***Hai Tong***"):

> [40(c)] The relevant viewpoint is that of the average consumer who would exercise some care and a measure of good sense in making his or her purchases, not that of an unthinking person in a hurry.
>
> [40(d)] It is assumed that the average consumer has "imperfect recollection" such that the two contesting marks are not to be compared or assessed side by side (and examined in detail). Instead, the court will consider the general impression that will

likely be left by the essential or dominant features of the marks on the average consumer.

Distinctiveness

15 I am mindful of the Court of Appeal's guidance in ***Staywell*** (above) that distinctiveness is a factor integrated into the visual, aural and conceptual analysis as to whether the competing marks are similar and it is not a separate step within the marks-similarity inquiry. However, for ease of analysis, I will summarise my findings on distinctiveness first, before applying them within the context of the mark-similarity analysis (see ***Hai Tong*** at [26]).

16 Before proceeding any further, while the Opponent relied on 4 marks above (see [9] above) it is clear that the mark which is closest to the Application Mark is the **Opponent's Earlier Meg@POP Mark**[3] ([8] OWS1). Thus the analysis below will only focus on this **Opponent's Earlier Meg@POP Mark.**

17 For ease of reference only, the marks are:

Opponent's Earlier Meg@POP Mark	Application Mark
MEG@POP **meg@pop** **Meg@POP**	MEGAPORT

18 Both parties did not make any substantial arguments about this issue. Nonetheless, as mentioned above, I am of the view that it is conceptually clearer to consider the issue first, before applying my findings within the context of the mark-similarity analysis.

19 The Opponent submitted briefly in the context of aural similarity, at [22] of the Opponent's written submissions filed on 11 June 2018 ("OWS1"):

> [22] With respect to the dominant components of the marks, it is submitted that the dominant component for both marks is the shared starting syllables "ME-GA", making the marks aurally similar.[4]

20 On the other hand, the Applicants submitted in the context of visual similarity, at [19(1) and (2)] of the Applicant's written submissions filed on 11 June 2018 ("AWS"):

> [19(1)] The symbol "@" forms the prominent and distinctive element of the [**Opponent's Earlier Meg@POP Mark**]. The same is conspicuously absent from

[3] The marks for T0312219E and T0312221G are identical.
[4] See analysis for aural similarity below.

the Application Mark. In fact, the Application Mark is a plain word mark devoid of any symbols or any other form of embellishment.

[19(2)] The "@" symbol in MEG@POP is unusual and would stand out...The "@" symbol in MEG@POP also has the effect of dividing the word MEG@POP into two halves…

21 I am of the view that the symbol "@" is *a* distinctive element of the **Opponent's Earlier Meg@POP Mark.** This is so having regard to its position (it is right in the centre of the **Opponent's Earlier Meg@POP Mark**, splitting it into more or less equal portions) and the fact that it is the only symbol in the **Opponent's Earlier Meg@POP Mark**. The rest of the **Opponent's Earlier Meg@POP Mark** are made up of letters of the alphabet.

22 However, the symbol "@" is not such that it overwhelms and renders the rest of the **Opponent's Earlier Meg@POP Mark** negligible. Rather, it is simply one of the elements which stands out. In addition, the *interplay* of the various components of the mark bestows on the **Opponent's Earlier Meg@POP Mark** a distinctiveness quality as a whole. In this regard, I disagree with the Opponent that "ME-GA[5]" is the distinctive component (more below under the aural similarity analysis).

23 Further, I am also of the view that the **Opponent's Earlier Meg@POP Mark** sits in the middle of the technical distinctiveness spectrum.

24 Before I delve into the different facets of similarity, it is observed that the Opponent relies heavily on its evidence to bolster its arguments as to how the the **Opponent's Earlier Meg@POP Mark** is to be assessed visually, aurally and conceptually.

25 Putting aside issues such as the date of the evidence (the evidence must be dated *before* the date of application of the Application Mark, namely, 27 December 2013 ("***Relevant Date***"), there is a question as to whether such evidence can be taken into account at this mark similarity stage. It is to be recalled that ***Staywell*** provided at [20]:

[20] Finally…we reiterate that the assessment of marks similarity is mark-for-mark *without consideration of any external matter*…

[Emphasis in italics mine]

This point was not argued by the parties and I shall go no further.[6] In any event, it will become apparent that it is moot for the purposes of this case.

[5] That is, the symbol "@" being indicative of the letter "a"; see above [22] OWS1.

[6] This issue was recently considered in *Monster Energy Company v NBA Properties, Inc* [2018] SGIPOS 16 at [41] – [48]. See also footnote 5 of the same decision where the learned IP Adjudicator referred to *Monster Energy Company v Tencent Holdings Limited* [2018] SGIPOS 9 at [36] - [37] and *Apple Inc. v Swatch AG* [2018] SGIPOS 15 at [28].

Visual Similarity

26 Again, for ease of reference, the marks are as follows[7]:

Opponent's Earlier Meg@POP Mark[8]	Application Mark
MEG@POP **meg@pop** **Meg@POP**	MEGAPORT

27 As submitted by the Applicant above, it is apparent that while the Application Mark is purely a plain word mark, the same cannot be said of the **Opponent's Earlier Meg@POP Mark.** Having regard to the "@" symbol, I am of the view that the **Opponent's Earlier Meg@POP Mark** can be regarded as a composite mark.

28 At the oral hearing, the Applicant sought to bolster its argument that the "@" symbol is to be viewed as a device by submitting copies of printouts relating to **Opponent's Earlier Meg@POP Mark**[9] from the Register and higlighted the following:

> Mark Index
>
> Words in Mark: megapop
> *Device description: at*

[Emphasis in italics mine]

29 The Applicant explained that the device "@" can be understood in a variety of ways, including ([20] and [21] AWS):

(i) as a keyboard key, as well as in email addresses and/or when another user is tagged in a social media post; in these occurrences, "@" would be understood as "AT" ([20(3)] AWS);[10] and
(ii) popular lingo often used to substitute the words "at" or "at the rate of" ([21(1)] AWS).[11]

[7] See above as to the focus of the analysis.
[8] The **Opponent's Earlier Meg@POP Mark** is registered as a series of marks. To qualify as a series of marks, the marks within the series must not be different in any material particular.
[9] A copy in relation to T0312219E and a copy in relation to T0312221G.
[10] Albeit in the context of aural similarity.
[11] Albeit in the context of conceptual similarity.

30 The Applicant contended at [19] AWS (as alluded above):

> [19(1)] The symbol "@" forms the prominent and distinctive element of the [**Opponent's Earlier Meg@POP Mark**]. The same is conspicuously absent from the Application Mark. In fact, the Application Mark is a plain word mark devoid of any symbols or any other form of embellishment.
>
> [19(2)] The "@" symbol in MEG@POP is unusual and would stand out in the average consumer's imperfect recollection. The "@" symbol in MEG@POP also has the effect of dividing the word MEG@POP into two halves. In contrast, the Application Mark is a single word which does not contain the "@" symbol.

31 On the other hand, the Opponent argued at [25]:

> [25] …The two marks are similar in length – "MEG@POP" has 7 letters while "MEGAPORT" has 8 letters. Structurally, both marks are single-word portmanteaus of two English words…

32 At the hearing, the Opponent argued that the Applicant did not tender any evidence to support its submissions that "@" stands out. In contrast, the Opponent had tendered evidence which shows that ([27] OWS1):

> [27] … the average consumer views the "@" symbol as interchangeable with the letter "a", given that they often refer to the Opponent's mark as "MEGAPOP/megapop/MegaPOP" in the said emails…it can be observed that in all instances where the Opponent's mark is referred to in the said mails…the Opponent's customers express the mark as a single word.

33 The emails in LKY-6 of the Opponent's 2nd SD are summarised as follows:

LKY-6 of the Opponent's 2nd SD			
S/N	**Description**	**Writer of Email**	**Page**
1	Email dated 4 January 2017 *Re […[12] Pte Ltd] - Quote and Fibre Availability of SingNet Evolve Broadband* at […][13]	Writer (purported potential customer) of the email made reference to the ceasing of "MegaPOP" line.	12
2	Email dated 14 December 2016 *Re Urgent Approval Require[d] to change from MegaPOP eLite to iLink* – […][14]	Writer is the Associate Director of ("MegaPOP") Business Products	13

34 As alluded to above, reliance on the evidence is problematic; following ***Staywell***'s guidance above, it is unclear if evidence can be taken into account at this stage. In any

[12] Redacted.
[13] Redacted.
[14] Redacted.

event, the emails above are clearly dated *after* the ***Relevant Date*** and thus cannot be taken into account.

35 Nonetheless, I accept that the proposed interpretation is *one* of the possible ways to construe the symbol "@" (that is, as indicative of the letter "a") and thus the **Opponent's Earlier Meg@POP Mark** (more on this under the issue of conceptual similarity).

36 For the purposes of visual perception, *Ozone Community Corp v Advance Magazine Publishers Inc* [2010] SGHC 16 is instructive.[15] The High Court provided at [49]:

> [49] In the case of word marks, a determination of visual similarity typically involves looking at the…:
>
> (a) length of the marks;
> (b) structure of the marks[16]…; and
> (c) whether the same letters are used in the marks.

37 Applying the above guidelines, in terms of the length of the marks, while I agree with the Opponent that "MEGAPORT" has eight letters" ([25] OWS1, above), I do not agree that the **Opponent's Earlier Meg@POP Mark** can be construed as having seven letters. This is because *regardless* of how the symbol "@" is *construed*, it is and remains as a symbol and not a letter of the alphabet. Thus "MEG@POP" has six letters and one symbol. In addition, the marks do share identical letters, namely, "MEG" and "PO". The similarity ends here.

38 I agree with the Applicant ([19] AWS, above) that:

(i) the symbol "@" is of some significance[17] and it is "absent from the Application Mark";
(ii) "[t]he "@" symbol in MEG@POP also has the effect of dividing the word MEG@POP into two halves";
(iii) The above is in contrast to "[t]he Application Mark [which] is a plain word mark *devoid*[18] of any symbols or any other form of embellishment".

39 Finally, I agree with the Applicant that ""MEG@POP conveys the idea of something trendy due to the use of the "@" symbol". While the Applicant's submission was made in the context of conceptual similarity ([21(1)] AWS below), having regard to the Court of Appeal's comments in *Caesarstone Sdot-Yam Ltd v Ceramiche Caesar SpA* [2017] 2 SLR

[15] This case was relied on by the Opponent at [19] of OWS1 (in the context of aural similarity) and [88] of OWS1 (in the context of the likelihood of damage under section 8(7)(a)).
[16] For the avoidance of doubt, based on the plain meaning of the word "structure", in addition to "number of words", as espoused by the case, I am of the view that the word "structure" can be also be taken to refer to the "constitution" of a mark.
[17] For clarity, the absence of evidence to support the above interpretation (in particular item (i)) is not fatal. As alluded to above, it is unclear if evidence can be taken into account at this stage. What is required at this point is a mark-to-mark comparison from the viewpoint of the average consumer (more below).
[18] Emphasis mine.

308 at [54], the issue of design (choice of symbol in this instant) is more relevant under the issue of visual rather than conceptual similarity, and it is apt to consider it here.

40 In light of all of the above, the **Opponent's Earlier Meg@POP Mark** is clearly visually different from the Application Mark. The immediate and direct visual impact foisted by the **Opponent's Earlier Meg@POP Mark** on the eye is in contrast to the Application Mark, which is a plain word mark *sans* any form of ornamentation.

Conclusion

41 Having regard to the above, I am of the view that the marks are visually more dissimilar than similar.

Aural Similarity

42 With regard to aural similarity, the Court of Appeal in ***Staywell*** stated at [31] and [32] that there are two approaches. One approach is to consider the dominant component of the mark ("Dominant Component Approach") and the other is to undertake a quantitative assessment as to whether the competing marks have more syllables in common than not ("Quantitative Assessment Approach").

43 In relation to this aspect, the Opponent forcefully argued ([14] - [18] OWS1):

> [14] The Applicant has argued that MEG@POP may be pronounced in a variety of ways like "MEG-AT-POP", "MEG-A-POP" and "MEG-at the rate of-POP", depending on how consumers characterize the "@" symbol…
>
> [15] The Opponent humbly submits that MEG@POP is pronounced only as "ME-GA-POP". This is the manner in which the Opponent pronounces MEG@POP in plain English. The [**Opponent's Earlier Meg@POP Mark** has] been actively advertised and promoted in Singapore with this pronunciation.[19]
>
> [16] Furthermore, "ME-GA-POP" is the pronunciation used by the Opponent's customers in Singapore. In the course of business relating to the services covered by [the **Opponent's Earlier Meg@POP Mark**], the Opponent's customers have referred to MEG@POP as "MEGAPOP/megapop/MegaPOP".[20] This evinces the fact that the public pronounces the "@" symbol as if it were the letter "a".
>
> [17] The Applicant has provided no evidential basis for suggesting that the public pronounces the word MEG@POP as anything but "ME-GA-POP". The best the Applicant offers in support of this assertion is a self-serving statement by the Applicant's declarant, such deponent not being the Opponent's customer to begin with, and more importantly, from someone domiciled in Australia.

[19] See see LKY-3 of the Opponent's 1st SD.
[20] As referred to above, see LKY-6 of the Opponent's 2nd SD.

> [18] Given the weight of the evidence, on the balance of probabilities, the Opponent submits that the public will pronounce the word MEG@POP as a three syllable word "ME-GA-POP." It is therefore submitted that the aural similarity of the marks "MEG@POP" and "MEGAPORT" should be assessed with their respective pronunciations as "ME-GA-POP" and "ME-GA-PORT".

44 In addition to Exhibit LKY-6 of the Opponent's 2nd SD referred to above, the Opponent also drew attention to the Opponent's 1st SD at Exhibit LKY-3 which contains a copy of the film advertisement promoting the **Opponent's Earlier Meg@POP Mark**. The Opponent deposed at [29] of the Opponent's 2nd SD (in relation to Exhibit LKY-3 of the Opponent's 1st SD):

> [29]…it can be seen that the Opponent pronounces [the **Opponent's Earlier Meg@POP Mark]** in plain English as "ME-GA-POP"…I believe the pronounciation of [the **Opponent's Earlier Meg@POP Mark]** has been actively advertised and promoted in Singapore and that this very pronounciation has caught on with the Opponent's customers and the general public in Singapore.

45 On the other hand, the Applicant argued at [20] AWS:

> [20(1)] While the Application Mark and [the **Opponent's Earlier Meg@POP Mark]** have three syllables, only one syllable "MEG" is similar. The other two syllables ("AT" and "POP") of [the **Opponent's Earlier Meg@POP Mark]** are dissimilar to the other two syllables ("A" and "PORT") of the Application Mark.
>
> [20(2)] MEG@POP may be pronounced in a variety of ways depending on how consumers characterize the "@" symbol: "MEG-AT-POP", "MEG-A-POP" or "MEG-at the rate of- POP". The "@" symbol is commonly pronounced as "AT", as seen in other marks in Class 38 such as "CHEF@HOME" and "WIRELESS@SG".
>
> [20(3)] Furthermore, it is likely that in Singapore, the "@" key would be frequently encountered by the average consumer as a keyboard key, such as in email addresses and/or when another user is tagged in a social media post. In these occurrences, "@" would be understood as "AT". Therefore, an average user would associate class 38 (telecommunications services) as a related technological sector and would be likely to pronounce "@" as "AT" instead of "A".

46 At the oral hearing, while conceding that the possible pronunciations of "@" include "at" or "a", the Applicant stressed that it depends very much on who the average consumer is. The Applicant contended, where the average consumer is a person from the Class 38 industry, "@" will be pronounced as "at". On the other hand, if the average consumer is a lay person, "@" will be pronounced as "a".

47 As alluded to above, the Opponent relied on its evidence as to how the consumer will process the mark visually and aurally (above) without elaborating further as to who the consumer is at the *mark similarity stage*. The issues in relation to the evidence sought to

be relied upon by the Opponent has been discussed above and the same issues which plagued Exhibit LKY-6 of the Opponent's 2nd SD also beleaguer Exhibit LKY-3 of the Opponent's 1st SD:

(i) Firstly, it is unclear if any evidence can be taken into account at this stage;
(ii) Secondly and crucially, the commercial is undated.

Thus Exhibit LKY-3 of the Opponent's 1st SD cannot be taken into account.

48 It is necessary to have a brief word as to who the average consumer is, since the Applicant submitted that the pronunciation will depend on this factor. The Court of Appeal commented in ***Hai Tong*** at [40(c)][21]:

> [40(c)] Although the focus of this part of the inquiry is on the marks in question, it is necessary to set out the viewpoint the court should assume. This viewpoint is that of the average consumer who would exercise some care and a measure of good sense in making his or her purchases, not that of an unthinking person in a hurry (see *Polo (CA)* ([16] *supra*) at [34]). Would such a person consider the marks similar? We pause to note that despite the differing expressions that are sometimes used, this viewpoint is, for all intents and purposes, the *same* as that which is assumed when assessing the separate but related question of whether there is a sufficient likelihood of confusion. This is unsurprising given that there will be some inevitable overlap in the factual assessment of both elements.

[Emphasis in italics mine]

49 Subsequently, Justice George Wei clarified in *Allergan, Inc and another v Ferlandz Nutra Pte Ltd* [2016] SGHC 131 ("***Allergan***") that "it would not be appropriate to delve into the detailed characteristics and perceptions of the actual consumers in the similarity of marks inquiry" ([35] ***Allergan***).

50 I am mindful that parties did not have an opportunity to comment on both cases in relation to this issue. Suffice to say that for the purposes of this case, the average consumer will be the same both at the mark similarity as well as the likelihood of confusion stage. Specifically, it will be the layperson on the street.[22] My reasons will become apparent later.

51 In their rebuttal submissions filed on 11 July 2018 (OWS2), the Opponent highlighted the case of *Apptitude Pte Ltd v MGG Software Pte Ltd* 2016 SGIPOS 15 ("***Apptitude***"). The learned Principal Assistant Registrar ("PAR") opined at [46] and [47] of ***Apptitude***:

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[21] ***Hai Tong*** was relied on by the Applicant at [14] AWS (for the proposition that "the fact that any one similarity is made out does not necessarily mandate a finding that the two marks are similar") and [51] AWS (in the context of alleged misrepresentation under section 8(7)(a)).
[22] The Opponent submitted that this is the average consumer for the 3rd element of the likelihood of confusion.

> [46] There is much to commend about the approach taken by the Hearing Officer in ***ROOX***. It is one which accords with plain common sense…[t]he approach in ***ROOX*** is one of general application. *When one seeks to pronounce "SNAC", one would naturally reach for the closest familiar word, which is "snack".* After all, in the English language, the letters "c" and "k", especially at the end of words, often have the same sound. (Some words, such as "trafficking" and "mimicking" have both the letters "c" and "k".)
>
> [47] *…all things considered, I find that "SNAC" is more likely than not to be pronounced either simply as is, i.e. "snac"* (without the plosive 'k' sound), or in the alternative, as "snack" (with the 'k', although it is likely to be slurred such that the 'k' sound is not as prominent).

[Emphasis in italics mine]

52 Applying ***Apptitude***, the Opponent argued that "ME-GA-POP" is the word most similar to the unfamiliar structure of the **Opponent's Earlier Meg@POP Mark** such that it is the pronounciation which would be applied ([4] OWS2). I agree[23]. As submitted by the Opponent at the hearing, to pronounce it otherwise (that is, Meg-at-POP / Meg-at-the-rate-of POP) would render the Application Mark a tongue twister. I stress that in coming to this conclusion, I am not relying on the evidence tendered by the Opponent above.

53 Further, the PAR commented at [52] of ***Apptitude***:

> [52] …*The proprietor's intentions as to how its mark should be pronounced may be relevant but are not determinative*. Even if the Opponent was marketing its app as "S-N-A-C", I am still entitled to arrive at the conclusion that average consumers would aurally regard the mark as "snac" or "snack".

[Emphasis in italics mine]

54 Accordingly, the aural comparison will be made between "ME-GA-POP" and "ME-GA-PORT". In this regard, the PAR's comments at [56] of ***Apptitude*** is apposite:

> [56] …Because "SNAC" and "snaapp" are each one word, the ***London Lubricant*** principle should apply. *Having regard to the tendency of speakers (especially in Singapore) to slur the endings of words in the English language,* the respective marks would be pronounced…("snap" versus "snac" or "snack") with *the same identical…starting sound* ("SNA-"). To that extent, there would be *some aural similarity* between the marks.

[Emphasis in italics mine]

[23] I am of the view that the principle is broad enough to apply here even though in the current case, "MEGAPOP" is not a dictionary word, in contrast to "snack".

55 Similarly, in this case, I am of the view that there is a tendency for speakers in the local context to slur the ending of the both marks such that they will start with the same sound "ME-GA". To that extent, there would be some aural similarity between the marks.[24]

Conclusion

56 In light of the above, the marks are aurally more similar than dissimilar.

Conceptual Similarity

57 The Court of Appeal in ***Staywell*** expounded at [35] as follows:

> [35] …Unlike the aural analysis, which involves the utterance of the syllables without exploring the composite meaning embodied by the words, the conceptual analysis seeks to uncover the ideas that lie behind and inform the understanding of the mark as a whole…Greater care is therefore needed in considering what the conceptually dominant component of a composite mark is, because *the idea connoted by each component might be very different from the sum of its parts*…

[Emphasis in italics mine]

58 Further, the learned Assistant Registrar in *Carolina Herrera, Ltd v Lacoste* [2014] SGIPOS 3 ("***Carolina Herrera***") provided at [56]:

> [56] From the dicta above, it can be understood that the conceptual analysis of two competing signs is an analysis of the concepts that can be derived from the elements present in the sign *at surface value*. It does not matter, for example, that "Mobis" was derived from "mobile" and "system" – taken at surface value, "Mobis" is simply an invented word.

[Emphasis in italics mine]

59 The Opponent argued at [29] and [30] OWS1:

> [29] …The Opponent submits that both marks begin with the prefix "MEGA", which connotes the idea of something being very large. The suffixes of both marks, "POP" and "PORT", are terms commonly linked to the concept of computer networking. As admitted by the Applicant [in the Applicant's SD at [19(d)]], "POP" is an acronym for point-of-presence which refers to an access point from one place to the rest of the internet. The Opponent submits that it is known that "PORT" refers to the endpoint

[24] In this regard, I agree with the Opponent's submission at the oral hearing that the printout from the Registry (above), confirms that this is so:

> Mark Index
> *Words in Mark: megapop*
> Device description: at
> [Emphasis in italics mine]

> of communication in an operating system which identifies a type of network service running on the system...
>
> [30] The use of the "@" symbol in "MEG@POP" is unlikely to change the similar overall impression the consumer will feel toward both marks. The "@" symbol is typically understood to be used in email addresses, and connotes the same concept of computer networking.

60 Further, at the oral hearing, the Opponent also submitted that there is a possibility that POP is construed as a "POP" server. This is defined in WIKIPEDIA as follows:[25]

> In computing, the POP is an application-layer Internet standard protocol used by e-mail clients to retrieve e-mail from a server in an Internet Protocol network.

61 On the other hand, the Applicant submitted at [21] OWS1:

> [21(1)] MEG@POP conveys the idea of something trendy due to the use of the "@" symbol, which is popular lingo often used to substitute the words "at" or "at the rate of".[26]
>
> [21(2)] The word "POP" is an acronym for "point-of-presence" in the telecommunication services industry which refers to an access point from one place to the rest of the internet (which necessarily has a unique Internet Protocol (IP) address). The word "PORT", on the other hand, refers to a socket in a computer network into which a device can be plugged (e.g. an Ethernet port and/or a USB port on a computer). Therefore, "POP" and "PORT" are clearly conceptually dissimilar.
>
> [21(3)] If MEG@POP is understood as "MEGA-POP", it could convey the idea of a loud sound. In contrast, the Application Mark conveys the idea of a large port, which would refer to a socket in a computer network which a device can be plugged.

62 At the conceptual similarity stage, it is necessary to have regard to the meaning of the marks. Where the "@" symbol is understood to be indicative of the letter "a", as argued by the Opponent above,[27] "both marks begin with the prefix *"MEGA",* which connotes the idea of something being very large ([29] OWS1 above).

63 The next stage would be to consider the meaning of "POP" and "PORT". As alluded to above, it is not in dispute that "POP" is the acronym for "point of presence". Further, "POP" may also be understood as "POP server" (above).

64 However, parties diverged as to what "PORT" stands for, whether it is "the endpoint of communication in an operating system which identifies a type of network service

[25] Accessed on 22 August 2018.
[26] While I agree with the Applicant that ""MEG@POP conveys the idea of something trendy due to the use of the "@" symbol" this issue is to be, and has been, considered in the context of visual similarity above.
[27] This interpretation is reached without regard to the Opponent's evidence (see above).

running on the system" ([29] OWS1) or "to a socket in a computer network into which a device can be plugged" ([21(2)] AWS). My understanding is that both are correct. One refers to "port" in the context of computer networking (Opponent's definition) while the other is in the context of computer hardware (Applicant's definition).

65 At the hearing, the Opponent vehemently opposed the Applicant introducing other possible interpretations of "port," on the basis that it has prepared its documents based on the meaning of "port" as provided in the Applicant's SD at [19(d)] only.

66 While I agree with the basis of the Opponent's argument (i.e. that the proposed dictionary excerpt cannot be included as it was not introduced by way of evidence at the hearing), the Registrar can in this instance, take judicial notice of *common* constructions of the word "port". This is because it is entirely possible, having regard to the relevant consumer, that "port" is construed *at surface value* ([59] ***Carolina Herrera*** above) to refer to, for example, "a harbour".

67 In fact, it is in the same vein that judicial notice is taken of the fact that "POP" is commonly known to stand for "POP server"[28] even though there was no evidence tendered to support the same.[29]

68 Separately, I also agree with the Applicant that there is the possibility that "POP" is understood as "a sound", such that the **Opponent's Earlier Meg@POP Mark** is inferred to be conveying the idea of a loud sound.

69 Last but not least, where the "@" symbol is perceived as "at" or "at the rate of", the **Opponent's Earlier Meg@POP Mark** is meaningless, since it is unclear what "MEG" stands for.[30] The Opponent's submission that "[t]he "@" symbol is typically understood to be used in email addresses…" ([30] OWS1, above) gels with the above interpretation (that the symbol "@" could be understood as "at").

70 In summary, the *plethora of ideas* conveyed by the **Opponent's Earlier Meg@POP Mark** includes:

(i) Where the "@" symbol is emblematic of the letter "a":

(a) A large point-of-presence;
(b) A large POP server;
(c) A large sound.

(ii) Where the "@" symbol is taken to refer to is taken to be indicative of "at" or "at the rate of"[31], it will be perceived as:

[28] I am of the view that "surface value" is broad enough to include common meanings as per the dictionary as well as commonly known acronyms.
[29] The Applicant did not object to this construction at the hearing.
[30] Regardless of what "POP" denotes.
[31] These are common constructs for the symbol "@", including where "@" is indicative of the letter "a", of course (see above on visual similarity).

(a) "MEG" "at" point-of-presence;
(b) "MEG" "at the rate of" point-of-presence;
(c) "MEG" "at" POP server;
(d) "MEG" "at the rate of" POP server;
(e) "MEG" "at" a large sound;
(f) "MEG" "at the rate of" a large sound.

As indicated above, where the second interpretation of "@" is adopted, the **Opponent's Earlier Meg@POP Mark** is meaningless.

71 The above is in contrast to the Application Mark, which conveys the following ideas:

(i) A large "endpoint of communication in an operating system which identifies a type of network service running on the system";
(ii) A large "socket in a computer network into which a device can be plugged";
(iii) A large "harbour".

72 Having regard to all the *different* connotations which may be conjured up by the marks, I am of the view that the marks are conceptually more dissimilar than similar. It is to be recalled that, the conclusion which is required to be drawn at the end of the day is whether the marks are *more* dissimilar than similar.[32]

Conclusion on the similarity of marks

73 As indicated above:

(i) The court must ultimately conclude whether the marks, when observed in their totality, are similar rather than dissimilar. In this regard, trade-offs can occur between the three aspects of similarity.

(ii) The average consumer:

(a) has an "imperfect recollection" and there is a need to consider the general impression that will likely be left by the dominant features of the marks.
(b) Is one who would exercise some care and a measure of good sense in making his or her purchases, not that of an unthinking person in a hurry.

74 I have concluded that the **Opponent's Earlier Meg@POP Mark** in comparison to the Application Mark is visually and conceptually more dissimilar than similar while there is some aural similarity. Overall, I am of the view that the marks are more dissimilar than similar.

75 Having regard to the 3-step test, my conclusion above ends the inquiry with regard to the objection under section 8(2)(b). Nonetheless, in the event that I am wrong, I will proceed to assess the other elements of the objection.

[32] See ***Staywell*** at [17] where the Court of Appeal rejected the minimal threshold approach.

Similarity of Services

76 For ease of reference, the relevant goods and services are as follows:

Opponent's Earlier Meg@POP Mark[33]	**Application Mark**
Class 38 ***Telecommunication services***; telecommunication of information (including web pages), computer programs and any other data; providing user access to a global communication network (service providers); the provision of user access time to the global computer network, being a telecommunications service; providing telecommunications connection to a global communication network or data bases; telecommunication access services; operation of telecommunication systems, telecommunication networks and of pertinent facilities and parts; leasing of systems, products and facilities in the field of telecommunication; consultancy in the setting-up and operation of telecommunications networks; telecommunications and transmitting information and data, remote transmission of information or of signals; rental of telecommunications and information technology devices, apparatus, equipment and installations [being telecommunication services]; communications via computer terminals; communication services, namely, providing virtual network intranet connectivity services for others; sending, receiving, processing and communicating messages; processing services for data, sounds, voice, telephone [being telecommunication services] and telematic services; electronic data interchange and exchange services; provision of communications links through apparatuses, software, hardware or a	Class 38 ***Telecommunication services***; ISP services including Internet access services; web portal services (providing user access to a global computer network); *provision of fixed line and mobile communications networks*; communication by fibre optic networks; computer network communication services; *digital network telecommunications services*; voice over Internet Protocol [VoIP] services; electronic transmission of data, text, images, sounds and/or video; telecommunications services for the provision of digital content; telecommunications security (provide secure connections and access including to computers and the global computer network); value-added network (VAN) services; wide area network (WAN) services; local area network (LAN) services; provision of access to the internet via wireless hotspots; metropolitan area network (MAN) services; communication by computer terminals; advisory, consultancy and information services in relation to the aforesaid services, including the provision of the aforesaid services online via a website, the internet or other computer networks and/or accessible by mobile phone and other internet-enabled devices.

[33] In relation to T0312219E.

combination thereof for collecting, delivering and analysing encryptic data; communication services by electronic, digital and computer means.	

77 The Court of Appeal in ***Staywell*** provided at [40] "that registration in the same specification within a class establishes a *prima facie* case for *identity*". The identical service is highlighted above (italicised and in bold), namely, "telecommunication services". As this element has been satisfied, there is no need to consider T0312221G (registered for Class 42).

78 Following the above, for the purposes of the analysis for the last element below, the focus will be on "telecommunication services".

Likelihood of Confusion

79 The relevant principles for assessing likelihood of confusion have been expounded by the Court of Appeal in ***Staywell*** at [60], [64], [83] and [96]. In summary, they are as follows:

(i) In opposition proceedings, the inquiry must take into account the full range of the competing monopoly rights that are already enjoyed on the one hand, namely the *actual and notional fair uses* to which the incumbent proprietor has or might fairly put his registered trade mark, and compare this against the *full range of such rights* sought by the applicant *by reference to any actual use by the applicant (assuming there has been prior use) as well as notional fair uses* to which the applicant may put his mark should registration be granted.

(ii) Once similarity between the competing marks and goods or services has been established, the *impact* of these similarities on the relevant consumers' ability to understand where those goods and services originate from falls to be considered. The only relevant confusion is that which results from the similarity between marks and goods or services. However, the plain words of section 8(2) do *not* have the effect of making a finding of confusion automatic upon the establishment of similarity of marks and goods or services.

(iii) On the effect of the foregoing (i.e. similarity of marks and goods or services) on the relevant segment of the public – *extraneous* factors may be considered to the extent that they inform the court as to how the *similarity of marks and goods* will likely *affect* the consumer's perception as to the source of the goods.

(iv) The following represents a non-exhaustive list of factors which are regarded as admissible in the confusion inquiry:[34]

[34] The Opponent submitted that the reference by the Applicant to [94] of ***Staywell*** at [27] AWS is erroneous ([9] and [10] OWS2). The Opponent submitted that the factors as listed in [27] of the AWS, namely (i) the nature of a typical purchasing process, including whether it is generally attended by sales personnel; and (ii)

(a) Factors relating to the impact of *marks-similarity* on consumer perception:

(1) the *degree of similarity* of the marks themselves;
(2) the *reputation* of the marks (a strong reputation does *not* necessarily equate to a higher likelihood of confusion, and could in fact have the contrary effect);
(3) the *impression* given by the marks; and
(4) the *possibility of imperfect recollection* of the marks.

(b) Factors relating to the impact of *goods-similarity* on consumer perception (factors concerning the very nature of the goods without implicating any steps that are taken by the trader to differentiate the goods).

(1) The *normal way in, or the circumstances under which, consumers would purchase goods of that type*;
(2) Whether the products are *expensive or inexpensive items*;
(3) Whether they would tend to *command a greater or lesser degree of fastidiousness and attention* on the part of prospective purchasers; and
(4) The *likely characteristics of the relevant consumers* and whether the relevant consumers would or would not tend to apply care or have *specialist knowledge* in making the purchase.

[Emphasis as underlined mine]

80 In relation to mark similarity, I have concluded above that the **Opponent's Earlier Meg@POP Mark** in comparison to the Application Mark is visually and conceptually more dissimilar than similar while there is some aural similarity. Having regard to the services in contention, it is the visual and conceptual facets which are more important.

81 With regard to the overall impression of the mark, I have already opined above that the "@" symbol colours the **Opponent's Earlier Meg@POP Mark** with a sense of à la mode which is obviously missing from the Application Mark. Thus even taking into

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whether the transactions are routine or infrequent, were excluded from the list in [96] of ***Staywell.*** The Opponent submitted at [9] OWS2:

> [9] Close examination of [94] of ***Staywell*** shows that it serves only to summarise a number of factors listed in…"Trademarks, Consumer Psychology and the Sophisticated Customer" that *might* have a bearing on the likelihood of confusion…*[t]hey are not factors explicitly endorsed* by the Court of Appeal as the legal test for the likelihood of confusion under Section 8(2) of the Act.

[Emphasis mine]

While it would be ideal to refer to [96] of ***Staywell,*** it is not wrong to refer to [94] of ***Staywell***. This is because it is clear that the Court of Appeal had relied on the above article as a *basis* from which to provide the list of *non-exhaustive* factors at [96] of ***Staywell***.

account the possibility of imperfect recollection, the marks are more dissimilar than similar.

82 With regard to reputation, the Opponent argued at [46], [49] and [50] OWS1:

> [46] In ***Polo/Lauren Co, LP v Shop-In Department Store Pte Ltd***, and later *endorsed* in ***Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc,*** the Singapore Court of Appeal held that the greater the reputation of a registered mark, the greater the protection that will be afforded to it with respect to the likelihood of confusion enquiry in section 8(2)(b) of the Act…
>
> [49] The Opponent submits that unlike the [Application Mark], [the **Opponent's Earlier Meg@POP Mark** has] been given substantial exposure through sustained use targeted at the general public in Singapore since their respective dates of registration…[the **Opponent's Earlier Meg@POP Mark** has] been also used, advertised and promoted through various mediums in Singapore...
>
> [50] Therefore, it is submitted that [the **Opponent's Earlier Meg@POP Mark** has] a high degree of use and exposure in association with the Opponent, and therefore enjoy a high degree of reputation in Singapore. Consequently, a greater degree of protection ought to be given to [the **Opponent's Earlier Meg@POP Mark**]…

[Emphasis in italics mine]

83 Specifically, the Opponent referred to [96] of ***Staywell*** (see page 13 OWS1). However, I do not think that was what the Court of Appeal said (see [96] ***Staywell***):

> [96]…As to the reputation of the mark, *Mobil Petroleum Co, Inc v Hyundai Mobis* [2010] 1 SLR 512 ("*Mobil*") at [74] makes it clear that a strong reputation *does not necessarily* equate to a higher likelihood of confusion, and could in fact have the contrary effect as in *McDonald's Corp v Future Enterprises Pte Ltd* [2005] 1 SLR(R) 177 (see at [64]).

[Emphasis in italics mine]

84 Of course, the actual effect of one's reputation is very much dependent on the facts of each case. Nonetheless, in the current case, I am of the view that the reputation of the Opponent would, to the contrary, *reduce* the likelihood of confusion.

85 With regard to the factors relating to similarity of goods/services, in accordance with the Court of Appeal's guidelines in ***Staywell*** above, there is a need to consider *all notional uses* of the specifications of both parties. As indicated above, of particular interest here is "telecommunication services". It is obviously a very wide specification and includes a multitude of services of varying degrees of technicality and prices. In fact, it is the class heading for Class 38.[35]

[35] The **Explanatory Note** reads:

86 The Applicant argued extensively as follows at [31] – [34] AWS:

> [31] Evidence provided by the Opponent clearly shows that consumers of such telecommunications services do not purchase such services "off the shelf" (as they are generally attended to by sales personnel, through discussions or negotiations) and would require a degree of inquiry and/or education:
>
> (1) Customers of telecommunication services select their service providers only after extensive and careful consideration..
>
> (2) Consumers of telecommunication services select their service providers only after some consultation with the potential service provider…
>
> (3) There is also evidence that the telecommunication services are only procured after trials / pilot deployment..
>
> (4) An article adduced by the Opponent indicates that there is a high degree of customisation required for customers..
>
> (5) Finally, it is clear that technical understanding is required for the purchase of the telecommunication services…
>
> [32] The Applicant submits that it may also be inferred from the extended purchase process (*i.e.* the careful consideration and trials required), that telecommunication services are purchased infrequently rather than routinely, and therefore, consumers will typically pay more attention and care to the purchase.
>
> [33] The nature of the telecommunications services would tend to command a greater degree of fastidiousness and attention on the part of the prospective purchasers.
>
> (1) The telecommunications services are technical in nature and would require much attention from the potential purchasers…
>
> (2) Telecommunication services may have organisation-wide usage and therefore may require a great degree of fastidiousness and attention on the part of prospective purchasers…
> (3) Telecommunications services may also critically affect the customer's baseline and may therefore be given careful consideration…

> Class 38 includes mainly services allowing at least one person to *communicate* with another by a sensory means. Such services include those which: 1. allow one person to talk to another, 2. transmit messages from one person to another, and 3. place a person in oral or visual communication with another (radio and television).

[Emphasis in italics mine]

(4) There is also evidence that confidential information is transferred using telecommunication services, commanding a great degree of close attention from potential purchasers…

[34] As regards whether such customers would tend to apply care or have specialist knowledge, the Applicant refers to the evidence above in relation to the importance of selecting a telecommunications provider and the technical nature of the same.

87 It is unsurprising that the Applicant made the above submissions for they relied on the Opponent's 1st SD and it would appear that the Opponent had only engaged medium / large corporations thus far. Examples include Zuji [36] and Giordano. [37] However, as indicated above, in addition to actual use, there is a need to look into the *notional uses* of the specifications as well.

88 The Opponent countered as follows at [52] and [53] OWS1:

[52] The claim by the Applicant that corporate enterprises are more knowledgeable and discerning than the "man on the street consumer"…[t]he Applicant has provided no evidence to even suggest that this is the case. Corporate enterprises are ultimately managed by employees, who might be as undiscerning as the average consumer for the services in question.

[53] The Applicant's claim also conveniently ignores the fact that the Opposed Services include services that are consumed by the general public – for example, "*telecommunication service*s"…Therefore, the average consumer of services associated with the [Application Mark] would include the general public…

89 The Opponent continued their line of attack in OWS2 at [14] and [17]:

[14] …The anecdotal evidence describing the experience of purchasing this specie of telecommunication services cannot amount to a general sweeping statement on the purchase process involved in all telecommunication services covered by the opposed specification…

[17] The Applicant deliberately ignores that the actual and potential purchasers of the services would be the general public, those with technical understanding being a small part of this group. Practically anyone and everyone can purchase and use telecommunication services and the Application Mark's specifications do not preclude the sale to individual consumers.

90 I agree with the Opponent to the extent that having regard to the specification "telecommunication services" it is possible that the potential consumers include "the general public". However, I do not agree that "the general public…are…likely to be confused..." ([53] OWS1).

[36] See AWS at [31(1)] and LKY-2 of the Opponent's 1st SD at page 32.
[37] See AWS at [31(1)] and LKY-2 of the Opponent's 1st SD at page 55.

91 I disagree with the Opponent that "[c]orporate enterprises are ultimately managed by employees, who might be as undiscerning as the average consumer for the services in question" ([52] OWS1). Employees are hired by the corporations precisely for their expertise. An employee in the relevant department[38] would naturally be in a position to assess a company's needs before making a decision whether to purchase a service. In this regard, I agree with the Applicant that the relevant employee "would tend to apply care or have specialist knowledge" ([34] AWS) having regard to "the importance of selecting a telecommunications provider and the technical nature of the same" ([34] AWS).

92 Further, it is also common for procurement departments to consult their colleagues in the relevant department as to the specifications of the items before going ahead with any purchase. This is especially so having regard to, as the Applicant submitted above, the fact that such services "may have organisation-wide usage" ([33(2)] AWS above) and "may also critically affect the customer's baseline" ([33(3)] AWS above).

93 The Opponent continued at [12] and [15] OWS2:

> [12]…the Applicant at [31] of its submissions also draws the self-serving inference that an extended purchase process is required and that telecommunication services are purchased infrequently rather than routinely, hence making the conclusion that consumers will typically pay more attention and care to the purchase, However, the evidence cited does not support the conclusion that this applies to telecommunication services as a whole…
>
> [15] Furthermore, it is also erroneous for the Applicant at [31(5)] of its submissions to suggest that technical understanding is required for the purchase of the services as this is clearly not supported by the evidence on record…it would be a gross generalisation to conclude that all of the Opponent's customers share that same degree of technical understanding, much more to suggest that they could not have made the purchase without possessing the same level of technical understanding.

94 As the Court of Appeal explained in ***Staywell*** at [96]:

> [96(b)]…[f]actors relating to the impact of goods-similarity on consumer perception…includes the *normal way* in or the circumstances under which consumers would purchase *goods of that type*….

[Emphasis in italics mine]

The fact that *notional uses* are to be taken into account necessarily means there is no requirement for evidence to be tendered.[39] Thus, while supporting evidence is helpful,[40]

[38] One example would be the Information Technology Department; it is obvious that information technology is intertwined with telecommunication services.
[39] Of course, to the extent that there is evidence proving actual uses of the services, they can and should be taken into account.
[40] See [52] OWS1.

the absence of the same does not mean that all is lost. Further, my conclusion above as to the goods/services similarity factors for "telecommunication services" is drawn on the basis of the *typical* purchasing process within a commercial entity.[41] Such an analysis, at least in this instance, does not require evidence to support the same.

95 The above apply with equal force to my analysis in relation to the purchasing process for "telecommunication services" by a sole proprietorship, as well as the "man on the street" below.

96 At the oral hearing, the Opponent argued that a sole proprietorship, which is one mode of commercial enterprise, may not have specialist departments or personnel when making such decisions.[42] Perhaps that is the case. However, there are also other factors relating to similarity of goods/services which would apply. As alluded to by the Applicant above, these include the fact that such a sole proprietorship would "select [its] service providers only after extensive and careful consideration" ([31(1)] AWS above) since such a service "may have organisation-wide usage" ([33(2)] AWS above) and "critically affect [its] baseline" ([33(3)] AWS above).

97 The next category of consumers for discussion is the "man on the street". One of the most common form of telecommunication services consumed by a layperson is mobile services.

98 Given the widespread penetration of mobile services in today's market, a consumer would be savvy as to the mobile deals that he / she is getting. A high level of attention will be accorded to the selection and purchasing process. This is enhanced by the *typical* mode of sale of such telecommunication services where consumers are attended to by sales personnel. Further, as submitted by the Applicant, "telecommunication services are purchased infrequently rather than routinely" ([32] AWS above). Last but certainly not least, while the price of a typical mobile plan is not as hefty as the price of a car, as the Applicant puts it at the hearing, it is clearly not the price of a candy bar.[43]

99 Therefore, while I agree with the Opponent that it is not sufficient to simply argue on the basis that the Opponent's clients (as reflected by the Opponent's evidence) were / are corporations seeking to purchase expensive and technical products thus diminishing the likelihood of confusion, having regard to the nature of "telecommunication services", there is nonetheless *no* likelihood of confusion even though the potential consumer includes the "man on the street".

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[41] See ***Staywell*** at [96] where the Court of Appeal explained that "[f]actors relating to the impact of goods-similarity on consumer perception…includes the normal way in or the circumstances under which consumers would purchase goods of that type…".

[42] The Opponent made specific reference to LKY-3 of the Opponent's 1st SD which is a copy of a commercial film advertisement. However, as indicated above, it cannot be taken into account as it is undated.

[43] Again, at the oral hearing, the Opponent argued that there was no evidence tendered as to pricing. But all that is needed is the *typical* price of the relevant service at issue (which is mobile services in this case (above)).

100 For the avoidance of doubt, I came to the above conclusion without regard to the case of *Premier Brands UK Ltd v. Typhoon Europe Ltd* [2000] F.S.R. 767. I agree with the Opponent that it can be distinguished on the basis that in that case, "[t]he two words…were that of TY.PHOO, an invented word, and TYPHOON, a…word used in common parlance" (see [20] OWS2). In contrast, in the current case, both marks are non-dictionary words (see [21] OWS2).

Conclusion

101 In light of all of the above, the objection under section 8(2)(b) fails.

Ground of Opposition under Section 8(7)(a)

102 Section 8(7)(a) of the Act reads:

> **8.** —(7) A trade mark shall not be registered if, or to the extent that, its use in Singapore is liable to be prevented —
>
> (a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade.

Decision on Section 8(7)(a)

103 In relation to this ground, there are three elements to be established:

(i) Goodwill;
(ii) Misrepresentation; and
(iii) Damage.

104 The law in relation to goodwill can be summarised as follows:

(i) Goodwill is "the benefit and advantage of the good name, reputation, and connection of a business…the attractive force which brings in custom" (*The Commissioners of Inland Revenue* v *Muller & Co's Margarine, Limited* [1901] AC 217).

(ii) The position in Singapore is still the "hardline" approach, albeit having been softened to include pre-trading activity (***Staywell*** at [136]).

(iii) The Opponent must establish that they have acquired goodwill as at the *relevant date*, that is, the date on which the defendant's conduct complained of started. Applying this principle, it is the Relevant Date in this instance (*Law of Intellectual Property of Singapore (Sweet & Maxwell, 2014 Rev Ed)* by Professor Ng-Loy Wee Loon ("***Law of Intellectual Property of Singapore***") at [17.2.5]).

(iv) Goodwill, in the context of passing off, is concerned with goodwill in the *business as a whole*, and not specifically in its constituent elements. The issue of *whether a mark or get-up is distinctive* of a plaintiff's products or services is a question best dealt with in the context of the inquiry as to whether the defendant has made a misrepresentation (*Singsung Pte Ltd v LG 26 Electronics Pte Ltd (trading as L S Electrical Trading* [2016] 4 SLR 86 ("***Singsung***")).

(v) Evidence of sales and income of the business are a "proxy for the attractive force of the business" (***Singsung*** at [58]).

(vi) The "get up" can include various aspects of the business, *including* a mark (***Law of Intellectual Property of Singapore*** at [17.2.10] – [17.2.11]).

(vii) Section 8(7)(*a*) of the Act at the very least requires an opponent to adduce sufficient evidence to establish a *prima facie* case on goodwill, misrepresentation, and damage (*Rovio Entertainment Ltd v Kimanis Food Industries Sdn Bhd* [2015] SGHC 216 ("***Rovio***") at [164]).

105 The figures provided via Exhibit LKY-7 of the the Opponent's 3rd SD, which pertain to the Opponent's revenue in Singapore from sales of services with the **Opponent's Earlier Meg@POP Mark** are as follows:[44]

S/N	Year	Revenue
1	FY[45] 05/06	25,469,089.36
2	FY 06/07	31,963,654.54
3	FY 07/08	43,773,297.56
4	FY 08/09	56,392,270.16
5	FY 09/10	65,835,486.04
6	FY 10/11	77,080,356.62
7	FY 11/12	79,127,307.63
8	FY 12/13	84,935,620.75
9	FY13/14[46]	*69,122,143.05*

106 I am prepared to take the figures at face value and if so, the Opponent has the relevant goodwill in Singapore.

[44] At the oral hearing, the Registrar informed the Opponent that Exhibit LKY-5 of the Opponent's 1st SD (which pertains to the Opponent's revenue in Singapore from sales of the services for which the **Opponent's Earlier Meg@POP Mark** was registered) is illegible and that should the Opponent still wish to rely on the same, it is to re-file an enlarged version within 2 weeks from the date of the hearing. The Opponent duly filed the Opponent's 3rd SD on 25 July 2018.

[45] The financial year in the local context is such that FY 2005 – 2006 would be for the period 1 April 2005 – 31 Mar 2006.

[46] This financial year is for the period 1April 2013 – 31 March 2014. Thus only about ¾ of the period can be taken into account; that is (¾ x 92,162,868.14) = *69,122,143.05*, having regard to the ***Relevant Date***.

Misrepresentation

107 As alluded to above, in an action in passing off, it is permissible for the Opponent to rely on their *get-up* (which includes the **Opponent's Earlier Meg@POP Mark**). A perusal of Exhibit LKY-2[47] of the Opponent's 1st SD shows that the Opponent used both the **Opponent's Earlier Meg@POP Mark,** the **Opponent's Earlier SingTel MEG@POP Mark** as well as  (**Opponent's Composite Mark**) for their promotional material.

108 I have concluded above that the marks, that is, the **Opponent's Earlier Meg@POP Mark** versus the Application Mark are more dissimilar than similar. Following this line of thought, it is clear that the **Opponent's Earlier SingTel MEG@POP Mark** is even more dissimilar than similar (when compared to the Application Mark), having regard to the house mark SINGTEL.[48] [49]

109 Further, it is observed that the use of the **Opponent's Earlier Meg@POP Mark** is almost always in the *vicinity* of the housemark SINGTEL and / or the **Opponent's Earlier SingTel MEG@POP Mark**.[50] The examples below are from Exhibit LKY-2 of the Opponent's 1st SD:[51]

(i) Page 25 consists of an advertisement dated 18 January 2005.[52] The **Opponent's Earlier Meg@POP Mark** can be found at the top right hand side as well as the bottom left hand side of the advertisement. The **Opponent's Composite Mark** is depicted in a much larger font and potrayed at the bottom right of the same advertisement.

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[47] It is observed that some of the promotional material in LKY-2 of the Opponent's 1st SD cannot be taken into account as (i) they are dated after the ***Relevant Date*** (see for example, page 109 – 114, dated 2015); (ii) they do not pertain to the ***Opponent's Earlier Marks*** (see for example page 102; it pertains to the Opponent's i-PhoneNet service).

[48] It is obvious that the O**pponent's Composite Mark** is dissimilar to the Application Mark.

[49] The Opponent argued at [75] OWS1 that "the "MEG@POP" brand is identified exclusively with the Opponent and no other in Singapore", having regard to the extensive use of the "MEG@POP" brand in Singapore ([12] – [15] of the Opponent's 1st SD). The Opponent concluded that in light of the above, the Opponent's "MEG@POP" brand is "ingrained" in the minds of the average consumer such that there is a likelihood of confusion having regard to the similarity of the Application Mark versus the get-ups ([76] OWS1). I agree with the Opponent to the extent that the Opponent's "MEG@POP" brand is "ingrained" in the minds of the average consumer having regard to the use of the Opponent's "MEG@POP" brand. However, I am of the view that, in light of the dissimilarity between the ***Opponent's Earlier Marks*** (as well as the **Opponent's Composite Mark**) versus the Application Mark, this phenomenon simply *reduces* the likelihood of misrepresentation.

[50] For clarity, where the word appears as *Singtel Meg@POP* i.e., italicised as a whole, it is regarded as the **Opponent's Earlier SingTel MEG@POP Mark**. In constrast, where only Meg@POP is italicised (i.e. (Singtel *Meg@POP*) then it is treated as a reference to the **Opponent's Earlier Meg@POP Mark**, prefaced by the housemark SINGTEL.

[51] The exhibits attached to the Opponent's 1st SD are not paginated at all. Nonetheless I have tried to identify the relevant promotional material as far as possible.

[52] At the top left hand corner of the advertisement.

(ii) Page 33[53] consists of an article from a magazine *Keyline* entitled *Meg@POP adapting to business dynamics*. Reference to the **Opponent's Earlier Meg@POP Mark** can be found throughout the article in bold. Similarly, references to the housemark SINGTEL, can also be found scattered throughout the article. The most conspicuous reference is at the top, as a short summary of the article *Be it retail shops or transport companies, **SingTel**[54] Meg@POP provides the most extensive network to support their communications needs. Bossini and SBS Transit are two satisfied customers who use Meg@POP*.

(iii) Page 46 is an article in relation to *PriceBreaker* entitled *PriceBreaker & Singtel, Riding Tourism Waves with New Confidence*. There is reference to the the **Opponent's Earlier SingTel MEG@POP Mark** in the short summary upfront *Travel services company, PriceBreaker revs up for tourism growth with SingTel Meg@POP eLite,* while there are references to the **Opponent's Earlier Meg@POP Mark,** the **Opponent's Earlier SingTel MEG@POP Mark** as well as the housemark SINGTEL throughout the article. Last but not least, the **Opponent's Composite Mark** is again depicted in a much larger font at the bottom right of the article.

(iv) Page 101 is an article entitled *A super(high-speed) market*. Again, the header reads *The broadband connectivity provided by **Singtel**[55] Meg@POP has allowed NTUC FairPrice to have real-time replenishment, a connected workforce and high-speed efficiency for its supermarket operations.* The first line of the article also made reference to the **Opponent's Earlier Meg@POP Mark** prefaced by the housemark SINGTEL, while references to the **Opponent's Earlier Meg@POP Mark** are dispersed throughout the article.

(v) Last but not least, page 106 is a short write up about Sumitomo Construction. There are three references to the **Opponent's Earlier Meg@POP Mark** in the article, two of which are prefaced by the housemark, SINGTEL.

Having regard to all of the above, there is no room for confusion.

110 In light of all of the above, I am of the view that, on a balance of probabilities, there is no likelihood of misrepresentation that the Applicant and the Opponent are one and the same or that they are economically linked.

Damage

111 As I have found that the element of misrepresentation has not been made out, there is no need for me to look into the element of damage.

[53] There appears to be a repeat of the same article at page 94.
[54] Emphasis in bold mine.
[55] A reference to the house mark SINGTEL.

Conclusion

112 The ground of opposition under section 8(7)(b) therefore fails.

Conclusion

113 Having considered all the pleadings and evidence filed and the submissions made in writing and orally, I find that the opposition fails on all grounds. Accordingly, the Application Mark shall proceed to registration. The Applicant is also entitled to costs to be taxed, if not agreed.

114 So coming back to the original question, "how does [mobile lingo] affect the function of a trade mark"? While each case will depend on its factual matrix, in this case, as indicated above, the "@" symbol is "*a* distinctive element of the **Opponent's Earlier Meg@POP Mark"** which plays an important role in imparting the **Opponent's Earlier Meg@POP Mark** with a distinctiveness quality as a whole. Consequently, the presence of the "@" symbol also impacts on my finding that the marks "MEG@POP" and "MEGAPORT" are more dissimilar than similar overall.

Date of Issue: 8 October 2018