

**O/0899/26**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF REGISTRATION NO. 917994806**

**IN THE NAME OF EXTREME NETWORKS LIMITED**

**IN RESPECT OF THE FOLLOWING TRADE MARK:**



**EXTREME**

**IN CLASSES 41 AND 43**

**AND**

**AN APPLICATION FOR REVOCATION THEREOF**

**UNDER NO. 508059**

**BY EXTREME E LTD**

## Background and pleadings

1. Extreme Networks Limited (“the proprietor”) is the registered proprietor of the trade mark shown on the front cover of this decision (“the proprietor’s mark”) under registration number 917994806. The mark is a comparable mark, created pursuant to the Withdrawal Agreement. The proprietor’s mark was filed on 30 November 2018 and became registered on 22 May 2019. It stands registered in respect of the following goods and services:

*Class 41: Booking of seats for shows; gambling; games equipment rental; production of music; rental of sports equipment, except vehicles; observation wheels, observation decks and platforms.*

*Class 43: Hotel services; hotel and accommodation reservation services; arranging of holiday accommodation; catering, bar, cafe and restaurant services; services for providing food and drink; catering services; restaurant and café services; bar services; provision of temporary accommodation; resort hotel services; fast-food restaurants; self-service restaurant services; snack-bars; restaurant services incorporating licensed bar facilities; provision of holiday accommodation; booking and reservation services for restaurants and holiday accommodation; providing facilities for conventions, conferences, exhibitions and seminars; provision of exhibition facilities; information, advisory and consultancy services relating to all of the aforesaid services.*

2. On 15 November 2024, EXTREME E LTD (“the applicant”) applied to revoke the contested mark on grounds of non-use in accordance with section 46(1)(a) of the Trade Marks Act 1994 (“the Act”). Revocation is sought in respect of the specification in its entirety.

3. The proprietor filed a counterstatement denying the grounds of revocation.

4. The proprietor is professionally represented by Novagraaf UK, and the applicant is represented by Bird & Bird LLP. Only the proprietor filed evidence in these proceedings. No hearing was requested, and the cancellation applicant filed submissions during the evidence rounds. Only the registered proprietor filed written submissions in lieu of a hearing.

### Preliminary issue: relevant period

5. In the statement of grounds, the applicant states that the date of revocation sought is 23 May 2024. However, in its submissions in lieu, the applicant states that “[t]he relevant five-year period where non-use is claimed is between 15 November 2019 and 14 November 2024 (the “Relevant Period”)”. In its submissions in lieu, the proprietor submits that “[r]evocation is sought with effect from 23 May 2024”, and therefore “the relevant period is 23 May 2019-22 May 2024”.

6. As the applicant indicated on its statement of grounds that it was seeking a revocation date of 23 May 2024, and the proprietor subsequently filed its evidence of use based on this date, it is my view that the period in respect of which non-use is claimed is 23 May 2019 to 22 May 2024, with an effective date of revocation of **23 May 2024**. Furthermore, the revocation is brought under section 46(1)(a) of the Act only. This means that the only period to be considered is the five years following the date of completion of the registration process.

### Evidence and submissions

7. The proprietor filed evidence in chief in the form of a witness statement of Aaron Ronald Wood dated 19 May 2025, which was accompanied by Exhibits ARW1 and ARW2. Mr Wood is a consultant trade mark attorney with Novagraaf UK.

8. Within Exhibit ARW1, there is another witness statement by Alastair Martin Gosling, which is dated 19 April 2021. Mr Gosling is the founder and CEO of Extreme Networks Limited. He provides exhibits to show use of the proprietor’s mark. Exhibit ARW1 also contains Exhibit AMG16. Exhibit ARW2 contains Exhibit AMG17, AMG18, AMG19, AMG22, and AMG23.<sup>1</sup>

## **DECISION**

9. Section 46 of the Act is relevant to the revocation proceedings, which states:

“46. – (1) The registration of a trade mark may be revoked on any of the following grounds-

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<sup>1</sup> The unusual numbering reflects the fact that this evidence was filed for other proceedings in 2021.

- (a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;
- (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;
- (c) [...]
- (d) [...]

(2) For the purpose of subsection (1) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as in referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) [...]

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existing at an earlier date, that date.”

10. Section 100 is also relevant, which reads:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

11. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK’s withdrawal from the EU.

## **RELEVANT CASE LAW**

12. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 *P Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and*

*Designs*) [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I 9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*

at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].

13. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*,<sup>2</sup> Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person stated that:

“22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

14. What I take from this case law is that there is no requirement to produce any specific form of evidence, but that I must consider what the evidence as a whole shows me, and whether on this basis I can reasonably be satisfied that there has been genuine use of the contested mark. Moreover, the trade mark proprietor bears the burden of proving genuine use of its trade mark: see section 100 of the 1994 Act and *Ferrari* at [73]-[83]. The General Court of the European Union (“the GC”) has repeatedly held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned: see e.g. Case T-78/19 *Lidl Stiftung & Co KG v European Union Intellectual Property Office* [EU:C:2020:166] at [25]. It has also repeatedly held that the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the proprietor to produce additional evidence to dispel any doubts as to the genuineness of its use: see e.g. *Lidl* at [33].

## **EVIDENCE OF USE**

### Evidence in chief – witness statement of Mr Wood for the proprietor

15. Mr Wood is a consultant trade mark attorney with Novagraaf UK, a role which he has held since April 2024. He states that he has been authorised by the registered proprietor to give his witness statement.

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<sup>2</sup> Case BL O/404/13

## Evidence summary

16. Exhibit ARW1 contains a witness statement by Alastair Martin Gosling, which is dated 19 April 2021. Mr Gosling is the founder and CEO of Extreme Networks Limited. He said this company forms part of a group of companies owned by Mr Gosling. He states that the company focusses on “serving the needs and interests of the action adventure and motorsports community”. He said that his company focusses on, inter alia, destinations and events. He submits that the applicant has commenced proceedings against his mark in retaliation for the proprietor’s opposition to the applicant’s trade mark application. He states that the mark has been used in relation to various goods and services such as electronic devices, applications, software, telecommunication services, destinations, and events.

17. In his witness statement, Mr Gosling states the following in relation to destination and events:

“32. My Company has used the mark in designing, developing and building a market for branded destinations under the mark which comprises sports facilities, retail, food and beverage, work space and accommodation. My Company has also used the EXTREME mark in relation to the creation, design, promotion and delivery of temporary accommodation around events. We also offer business to business strategic consultancy services under the brand in relation to destination development.

33. Insofar as relates to the design, development and opening of permanent facilities, the development of sites is complex and work done to promote destinations has occurred now with a view to destinations opening in the future. There have been two particular locations which have dominated My Company's activities in this field, namely a site in Sheffield (UK) and another in Portugal. Each of these is a significant investment requirement and alongside the work done with commercial partners to develop the plans, there are two sets of people who must be marketed to:

- a. The end consumer, who will be the people who will visit the destinations; and

b. Professionals and stakeholders (including local government and investors — both private and public), who must appreciate that there is a market for the offer.”

18. On pages 6 and 7 of its submissions in lieu, the applicant submits that Mr Gosling’s witness statement (within Exhibit ARW1) should be disregarded on the basis that it was written in 2021 in relation to the proprietor’s other mark, UK00904844148 EXTREME. The applicant highlights that “Gosling’s Witness Statement has been prepared to prove use of a different mark and regarding proceedings in a different jurisdiction”. As stated previously, within the relevant period, the relevant territory is the EU for 23 May 2019 to 31 December 2020 and the UK for 1 January 2021 to 22 May 2024. I note that some of the exhibits within the evidence relate only to the UK during the period when the EU was the relevant territory. However, I remind myself that sales in one Member State may be sufficient for showing use during the period in which the EU is the relevant territory.<sup>3</sup> This applies even where there are no special factors, such as the market for the goods and/or services being limited to that area of the Union.

19. Within ARG1 along with Mr Gosling’s witness statement is AMG16, which is an exhibit showing a variety of screenshots of various press articles. These articles all cover the same topic, namely Sheffield City Council’s intention to sign a 150-year leasing agreement with the opponent’s company, Extreme Destinations Ltd for a new sport and leisure destination. The articles refer to the scheme attracting investment of over £60m, creating over 400 new jobs, and attracting a million new visitors to Sheffield each year. They also refer to the work being set to begin in 2020. Several articles contain a quotation from Councillor Mazner Iqbal (cabinet member for business and Investment at Sheffield City Council), who stated that “Bringing Sheffield Ski Village and the surrounding area back into use as part of a truly global package of sports facilities, hotels and other leisure pursuits is a fantastic outcome for the team at Sheffield Council that has worked to secure a preferred developer With Extreme’s experience in delivering leisure based schemes many years”. According to Mr Gosling’s assertions in his witness statement, the project in Sheffield would result in

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<sup>3</sup> For example, *Leno Merken BV v Hagelkruis Beheer BV* Case C-149/11 and *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited* [2016] EWHC 52

the proprietor providing services relating “to the design, development and opening of permanent facilities”.

20. Exhibit ARW2 contains Exhibits AMG17, AMG18, AMG19, AMG22, and AMG23.<sup>4</sup>

21. In the witness statement, Mr Gosling refers to AMG17 states that “[w]e have promoted the brand to the industry with the purpose of creating a range of hotels and other destinations”. Exhibit AMG17 shows the proprietor’s pitch document. In his witness statement, Mr Gosling states that AMG17 also contains “a list of the companies to whom that document has been sent and/or we have approached or with whom we have had commercial discussions”. However, I am unable to see this list within AMG17, as it appears to have been omitted. The pitch document contains a copyright reference with the year “2020” each page. The document shows use of an acceptable variant of the proprietor’s mark in conjunction with a variety of services. These are as follows:

- Action sports (such as, inter alia, skateboarding, BMX, surfing, and karting) and adventure experience services (such as, inter alia, hiking, paddleboarding, paragliding, and zip lines), as shown on pages 50 and 58
- Accommodation such as lodges, pods, tents, treehouses, and hotels (pages 52 to 54).
- Food and drink services (page 63).
- Development services, such as ideation planning and project execution (page 71)
- Management services, such as pre-opening management and operations (page 72).

22. Exhibit AMG18 shows an agreement in relation to hotel accommodation with a UK-based firm. The letter is dated 17 May 2019 (page 76) and was signed on 27 May

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<sup>4</sup> As stated previously, the unusual numbering reflects the fact that this evidence was filed for other proceedings in 2021.

2019 (page 77). In his witness statement, Mr Gosling states that this agreement “relates to the provision of hotel accommodation under the mark in question”.

23. Exhibit AMG19 shows an agreement dated 7 July 2020 in relation to adventure accommodation with a US-based firm. In his witness statement, Mr Gosling states that it “relates to the provision of adventure accommodation offerings, which are accommodation in more remote or adventurous settings to complement the events work we undertake in relation to activities in more adventurous settings”. However, it does not specify the location of the services, so it is unclear whether they are offered within the relevant territory.

24. In his witness statement, Mr Gosling states that his company has worked with “a significant range of parties in relation to the creation of destinations in the UK and across the EU”. In support of this, Exhibit AMG 22 shows a list of projects and locations. There are no dates given for projects, although he states that this list is from “the relevant 5 year period”. He states that “[o]n each occasion, we have needed to approach the location or commercial partners and provide credentials and presentation to move the development on, to seek funding or to seek our role in helping to develop a location”. The projects listed include descriptions such as “stadium, leisure & 700 units”, “Extreme Quarry Holiday Destination”, “5 Ski slopes/ice rinks & 150 bed hotel”, “70 Acres Land Movie studio”, and “30,000 sq ft ex Office to resi plus new”.

25. In his witness statement, Mr Gosling explains that Exhibit AMG 23 shows an example of an internal presentation for Liverpool City Council. In its submissions in lieu, the proprietor submits that this shows that it was “active in the period from its UK base pitching, proposing and creating commercial opportunities of various sales in the UK and Europe”.

#### Forms of the mark

26. Before I move on to assess whether the proprietor has shown genuine use, I shall first consider if I find the use of the mark as shown in the evidence to be use of the mark as registered.

27. Section 46(2) of the Act states that:

“...use of a trade mark includes use in a form (“the variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it is registered.”

28. The mark is used as registered, such as on page 86 of Exhibit ARW2 (page 1 of AMG19) which is dated 7 July 2020 and appears in an internal agreement with a US-based firm:



29. The mark is used in the following manner, such as on pages 97 to 132 of Exhibit ARW2 (Exhibit AMG23) which is dated 2000:



30. As this version of the logo uses the same figurative and verbal elements but in a slightly different placement, I find that this is an acceptable variant of the proprietor’s mark.

31. The evidence also shows the mark used in the following manner, such as on page 43 (dated 2020):



32. This logo uses the same figurative and verbal elements as the mark as registered, but with the black and white inverted. The Court of Appeal has stated on two occasions following the judgment of the Court of Justice of the European Union (“CJEU”) in *Specsavers*, (see paragraph 5 of the judgment of the Court of Appeal in *Specsavers*<sup>5</sup> and *J.W. Spear & Sons Ltd v Zynga, Inc.*<sup>6</sup> at paragraph 47) that registration of a trade

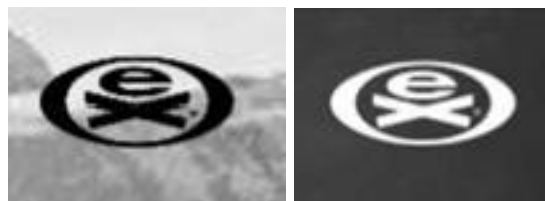
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<sup>5</sup> [2014] EWCA Civ 1294

<sup>6</sup> [2015] EWCA Civ 290

mark in black and white covers use of the mark in colour. This is because colour is an implicit component of a trade mark registered in black and white (as opposed to extraneous matter). The registration of a mark in black/white allows it to be notionally used in any (non-complex) colour, and therefore the difference in the background colour between the competing marks is not significant. It is my view that this applies to the current mark in that the registration of a black logo on a white background will also cover use of the mark as a white logo on a black background. I therefore find that this is an acceptable variant of the proprietor's mark.

33. The evidence also shows use of just the figurative 'e' element, which is shown both in black (dated 2020 on page 47) and white (dated 2020 on page 47):



34. It is not sufficient to prove use of one distinctive element where a mark comprises two or more distinctive elements.<sup>7</sup> It is my view that the word 'EXTREME' and the figurative E element are both distinctive in relation to the services, as neither is descriptive or non-distinctive in relation to the class 41 and 43 services. Consequently, taking into account the guidance in *Lactalis*, the use of the distinctive figurative E element as shown above is not sufficient to prove use of the proprietor's mark.

35. In the news articles (Pages 12 to 40 of Exhibit AMG 16) and also in Exhibit ARW2 (such as on page 53), there are references to "Extreme". Whilst I appreciate that newspaper articles are unlikely to refer to the figurative elements within the mark, it is my view that the articles not featuring the proprietor's mark in totality are not sufficient for showing use of the proprietor's mark as registered. This is on the basis that the use of one of the distinctive elements without the other distinctive element is not acceptable for showing use of the proprietor's mark, as per *Lactalis*.

36. On page 12 of Exhibit ARW16, the article dated 11 July 2019 shows a photo of the mark as follows:

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<sup>7</sup> *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22 at [16].



37. As the figurative E device in white is placed as a separate element to the word 'EXTREME' on the poster, it is my view that this is not sufficient to demonstrate use of the proprietor's mark in totality. This is on the basis that the word 'EXTREME' falls within a sentence rather than as part of a logo, and therefore it would be understood by the average consumer as being separate from the figurative E device.

#### Press coverage

38. As stated previously, pages 12 to 40 of Exhibit AMG 16 contain screenshots of nine news articles covering an intended leasing agreement between Sheffield City Council and the proprietor's company, Extreme Destinations Ltd for a new sport and leisure destination.

39. Pages 15 and 16 show an article in an untitled publication<sup>8</sup> which is dated 29 November 2017. Pages 18 and 19 show an article in Bdaily News which is dated 29 November 2017. Pages 20 and 21 show an article in Adventure Herald which is dated 29 November 2017. Pages 30 to 33 show an article in bloolooop which is dated 15 February 2018. As these articles fall outside of the relevant period, I have disregarded them.

40. There are also a number of articles that only refer to 'Extreme' without showing the proprietor's full mark. Pages 12 to 14 of Exhibit AMG16 show a screenshot of an article from 11 July 2019 on the Planning News website (<https://planningnews.online/Sheffield-propose-60m-extreme-sports-facility/>). Pages 22 and 23 show a screenshot of an article from 10 July 2019 on the Sheffield City Council website

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<sup>8</sup> There is no title or website address to confirm the origin of the news story

(<https://sheffnews.com/news/critical-milestone-for-40m-parkwood-springs-leisure-destination>). Page 17 shows a screenshot of an article from 11 July 2019 on the NewStart website but without any reference to the mark. Likewise, on pages 24 to 29, the screenshots of an article published on 28 November 2017 on the BBC News website do not feature the proprietor's mark. Pages 34 to 40 show screenshots of an article dated 16 February 2021 on The Star website. Although the figurative E device is shown on page 35, it appears in isolation.

41. As per my findings in relation to variant forms above, these articles do not show use of the opponent's mark. Whilst I accept that newspaper articles generally do not refer to the figurative elements of a mark when writing an article, there is nothing before me that clearly demonstrates use of the proprietor's mark as registered, as all the exhibits either fall outside of the relevant period or do not show the whole mark in use. I therefore cannot determine with any certainty that the proprietor was using the mark as registered during the relevant period based on the evidence in Exhibit AMG16.

42. Moreover, even if the examples demonstrated use of the mark as registered, the news articles within Exhibit ARW1 are nevertheless of limited assistance in determining the degree to which the relevant public have been exposed to the proprietor's mark. In his witness statement, Mr Gosling states "I believe that these reports will have come to the attention of a significant number of people – both end consumers and those in the "trade"". However, there is no information as to level of readership of these publications or the articles. It would therefore not be possible to ascertain the degree to which the relevant public has been exposed to the proprietor's mark via these news articles.

#### Other exhibits

43. As stated previously, Exhibit AMG17 shows the proprietor's pitch document with a copyright reference with the year "2020" each page. The document shows use of an acceptable variant of the proprietor's mark in conjunction with a variety of services.

44. In its submission in lieu, the applicant argues the following:

"The exhibit contains a presentation deck dated 2020 which does not show any actual use of the Mark in relation to the Relevant Services. The Proprietor has

not provided a list of companies it has approached or any indication of any pitch outcomes. In any event, pitches are limited to a group of investors and would not be public facing. This evidence is purely speculative and does not show any genuine use of the Mark in relation to the Relevant Services.”

45. It is my view that the information in Exhibit AMG17 does not sufficiently show use of the proprietor’s mark. Whilst I acknowledge that the proprietor’s mark is featured in conjunction with information relating to the class 43 services, there is no accompanying information (such as when presentations were given and to whom) to demonstrate the scale of use. I therefore find that this exhibit is not sufficient for showing use of the proprietor’s mark.

46. As stated previously, Exhibit AMG19 does not specify the location of the services, so it is unclear whether they are offered within the relevant territory. It is therefore not sufficient for showing genuine use of the proprietor’s mark as registered in the relevant territory during the relevant period.

47. As stated previously, there are no dates given for the list of projects and locations in Exhibit AMG 22, although he states that this list is from “the relevant 5 year period”. In its submissions in lieu, the applicant argues that “[t]he evidence is purely speculative, does not show any actual use of the Mark and should therefore be disregarded”.

48. It is my view that Exhibits AMG22 and AMG23 are not sufficient for demonstrating use of the proprietor’s mark. This is on the basis that the relevant five-year period referred to in Mr Gosling’s witness statement is not the one at issue in this case; it is the five-year period for the 2021 opposition. On this basis, it is not possible for me to determine whether the activities shown within Exhibit AMG 22 fell within the relevant period for this revocation or not. Moreover, the presentation in Exhibit AMG23 is undated. Moreover, the previous projects described in the presentation relate to 2015 (e.g. on pages 104 and 106) or 2016 (e.g. on pages 114 and 119). I cannot see any dates given (either for the presentation or the projects described within it) that demonstrate that it relates to the relevant period. Furthermore, it is not clear how all of the project descriptions relate to the proprietor’s services in classes 41 and 43. For example, there is nothing to demonstrate the link between projects described as, for

example, “30,000 sq ft ex Office to resi plus new” and the services for which the mark is registered. It is my view that the services for which the mark is registered, for the most part, are on-going services (such as *hotel services* and *provision of temporary accommodation*), and would be supplied after the completion of a project to build the accommodation. It is not clear who would be supplying the class 41 and 43 services within the specification based on the project description terms.

49. Taking these factors into account, I do not consider that Exhibits AMG22 and AMG23 demonstrate genuine use of the opponent's mark.

### Marketing

50. In his witness statement, Mr Gosling states the following in relation to social media:

“My Company benefits from 11.7M fans globally of the brand's social media accounts, of which many are surfers, skaters and sportspeople who regularly travel overseas to encounter new experiences or to practice their pastimes and has a direct mailing list. We have typically not used direct mailing because that is not reflective of the usual relationship between the brand and its fans. 30. The breakdown is 10.9M on Facebook, 460k on TikTok, 268k on Instagram and 2800 on Twitter. I have been provided with these details from a promotional "deck" produced in 2020 and I am aware from a check online of our account that the number of TikTok followers has increased to 805k with 12.8M likes, whilst the followers of the Instagram account has increased to 343k.

51. In its submissions in lieu, the applicant highlights that “no supporting evidence has been submitted to corroborate the number of followers the Proprietor has on social media”, and that “no further information or supporting documents has been provided to show that these followers are based in the UK or the EU” in the relevant period. I agree with the applicant on this issue, as I have nothing before me to demonstrate how many consumers in the UK or EU have been exposed to the proprietor's mark via social media, or that the proprietor uses an acceptable variant of the mark in question on their social media sites. I therefore do not consider Mr Gosling's statement in relation to the proprietor's social media presence to be sufficient for demonstrating use of the proprietor's mark within the relevant period.

## Sales figures

52. The evidence does not contain any references to sales figures or turnover. In its submissions in lieu, the applicant highlights that the proprietor's evidence "has not provided any information on the size of the UK market for the Relevant Services or their share of this market; nor has it provided any sales figures, turnover or revenue or marketing/advertising spend". In its submissions in lieu, the proprietor argues that "[a]lthough the evidence may be perceived to be unconventional in some respects insofar as turnover is lacking, that is not always the sole indicator of activity". Instead, it submits that the evidence "shows a consistent attempt to create or maintain a market in a way which is appropriate to the kinds of services in question". It cites the AP decision O/0177/26 *Marcos Trade Mark*, and argues that the services are comparable to the car development services in *Marcos* in that they are "are complex and... have a long development cycle". The proprietor submits that the project in Sheffield "shows a very significant project in the UK". Moreover, it also argues that having "no provision of firm turnover for those services is not determinative".

53. In its submissions in lieu, the applicant argues this on the basis that the information in relation to the project in Sheffield does not prove actual commercial use of the proprietor's mark in that "despite the fact that an application was submitted in 2021, there has been no further update on this project. In the circumstances it is inferred the project didn't take place." In its submissions in lieu, the proprietor submits that it was "a very significant project in the UK" and that "large development projects may have a very significant timeline and may be worked on for a very long period without necessarily coming into effect".

54. In *Polfarmex S.A. v European Union Intellectual Property Office (EUIPO)*,<sup>9</sup> the GC upheld a decision by the EUIPO Board of Appeal that, despite there being no sales in the relevant period, there had been genuine use in relation to racing cars. The court noted that unlike 'sports cars', the market for racing cars is a small and specialist one. After reviewing the evidence (including cooperation and co-existence agreements, presentation of the cars at sporting events, press articles, brochures, correspondence

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<sup>9</sup> Case T-677/19, EU:T:2020:424

from a company seeking to purchase a particular model and evidence of orders which were placed but later cancelled), the GC said:

“69. Moreover, the content of all those documents is not disputed by the applicant. Likewise, it should be noted that, in the light of the observations in paragraphs 63 to 68 above, the applicant is not justified in claiming that the goods covered by the contested mark were never actually placed on the market or were never about to be placed on the market. It should be specified that the placing on the market of goods or services also includes circumstances in which that product or service is actually offered for sale, even if it has not yet been sold.

70. It must also be stated that the Board of Appeal, in paragraph 48 of the contested decision, relied on the Court’s case-law, which it was fully entitled to consider relevant in the present case. As is apparent from the case-law, it is common knowledge that the market for high-end sports cars with technical specifications that are not intended for normal, everyday road use and the price of which exceeds that of most private use cars is often characterised by relatively low demand, by production to specific order and by the sale of a limited number of vehicles. The Court held that, in such circumstances, the provision of accounting documents setting out sales figures or invoices is not necessary for the purposes of establishing genuine use of the mark in question. Further, the Court noted that publications demonstrated that the mark in question was the subject matter of public discussion in anticipation of a revival of production and sale of a car model bearing the mark in question (see, to that effect, judgment of 15 July 2015, *TVR ITALIA*, T-398/13, EU:T:2015:503, paragraph 57.)

71. It follows that, having regard to the specific features of the relevant market, duly taken into account by the Board of Appeal when it relied on the case-law cited in paragraph 70 above, the evidence produced by the intervener shows the existence of various preparatory tasks and advertising efforts in relation to the SYRENA Meluzyna R model. Moreover, it shows, as contended by EUIPO, not only that the car was about to be marketed, but also that it was available to order.

72. Moreover, it should be borne in mind that, contrary to the applicant's claims, it is apparent from the case-law cited in paragraph 41 above that use of the mark can be shown by evidence that the goods at issue are about to be marketed.

73. Accordingly, the Board of Appeal was fully entitled to consider that genuine use of the contested mark had been shown in respect of sports cars. That finding cannot be called into question by the applicant's other arguments."

55. I have considered the statements in Mr Gosling's witness statement in relation to the proprietor's lease in Sheffield (as cited earlier in this decision). However, it is my view that the lease referred to does not demonstrate use of the mark as registered. Whilst I accept that a lack of sales or turnover figures do not preclude a finding of use, paragraph 70 of *Polfarmex* clearly refers to the goods "bearing the mark in question". It was therefore found that, notwithstanding the lack of sales figures, the party had managed to demonstrate that the goods were about to be marketed and featured the mark at issue. In my view, this differentiates from the immediate case, as I do not have anything before me to demonstrate how or if the mark was used in relation to the lease in Sheffield. I therefore find Mr Gosling's statement regarding the project in Sheffield does not show use of the proprietor's mark.

#### Genuine use

56. With regard to the evidence of use submitted, I must now consider if it sufficiently demonstrates genuine use, whilst reminding myself that use does not have to be quantitatively significant to be genuine. The burden is on the proprietor to prove that it has used its mark within the relevant periods. Whether the evidence is sufficient for this purpose will depend on whether it demonstrates that there has been real commercial exploitation of the mark, in the course of trade, sufficient to create or maintain a market for the services at issue in the UK during the relevant five-year periods. In making this assessment, I am required to consider all relevant factors, including:

- The scale and frequency of the use shown;
- The nature of the use shown;

- The services for which use has been shown;
- The nature of those services and the market(s) for them; and
- The geographical extent of the use shown.

57. I have carefully considered the evidence provided by the proprietor and whether this meets the requirements for genuine use as per *easyGroup* (set out earlier in this decision). I am also mindful of the guidance from the *Dosenbach-Ochsner* case.<sup>10</sup>

58. There are significant issues with the evidence filed. As stated previously, there are a number of pieces of evidence which predate the relevant period. The articles in AMG16 either fall outside of the relevant period or the use demonstrated does not comply with the principles within *Lactalis*. In addition to this, there are also no details in relation to the size of the relevant market or the share of that market held by goods bearing the opponent's mark. I also have no details at all regarding the intensity of use, or what, if any, amount spent on advertising or promotion, and it is not clear how many consumers in the relevant territories have been exposed to the social media marketing activities. I also have no details before me regarding any turnover figures, although I accept that these are not necessarily determinative on the question of use. Whilst the proprietor discusses a 120-year lease signed with Sheffield City Council, I have nothing before me to demonstrate how its mark was used in relation to this. Notwithstanding the principle that there is no de minimis rule regarding evidence, taking all of the above into account, I find the evidence filed by the proprietor falls short of the standard required to prove use.

## CONCLUSION

59. I find that the proprietor has failed to show that it has made genuine use of its mark within the relevant period set out under Section 46(1)(a), and as such, the cancellation application succeeds. Subject to a successful appeal, Trade Mark No. 917994806 will be revoked with effect from 23 May 2024.

## COSTS

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<sup>10</sup> Along with *Awareness Limited v Plymouth City Council*, Case BL O/236/13, emphasising the need to consider what the evidence fails to “show”, and what might reasonably have been conclusively shown.

60. The applicant has been successful and is entitled to a contribution towards its costs. In the circumstances, I award the applicant the sum of £1,050 as a contribution towards the cost of the proceedings, in accordance with Tribunal Practice Notice 1/2023. The sum is calculated as follows:

Official fees £200

Preparing a statement £250

Considering and commenting on the other side's evidence £600

TOTAL £1,050

61. I therefore order Extreme Networks Limited to pay EXTREME E LTD the sum of £1,050. The above sum should be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 30<sup>th</sup> day of September 2026.**

**K LEWIS**

**For the Registrar**