

O-122-06

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK REGISTRATIONS
NOs. 2325253 AND 2308256
IN THE NAME OF PHILIP MAITLAND**

AND

**IN THE MATTER OF APPLICATIONS FOR A
DECLARATION OF INVALIDITY NOs. 81656 AND 81657
THERE TO BY O2 LIMITED**

IN THE MATTER OF trade mark registrations Nos. 2325253 and 2308256
in the name of Philip Maitland

AND

IN THE MATTER OF applications for a Declaration of Invalidity
Nos. 81656 and 81657 thereto by O2 Limited

BACKGROUND



1. The trade mark  was applied for on 16 August 2002, has been registered since 28 February 2003 under number 2308256, stands in the name of Philip Maitland and is registered in respect of:

Class 33:
Spirits.



2. The trade mark  was applied for on 3 March 2003, has been registered since 22 August 2003 under number 2325253, stands in the name of Philip Maitland and is registered in respect of:

Class 33:
Flavoured vodka.

3. On 11 March 2004, O2 Limited filed applications for declaration of invalidity of the registrations. The action was filed on Form TM26(I) together with the appropriate fee. The statement of case accompanying the applications set out the grounds of action, which are as follows:

- Under sections 47(2) and 5(4)(a) of the Act as the applicant claims reputation in the trade mark O2 and a wide range of “bubble” imagery used in the telecommunications service and product field since as early as 2001 and that use of the registration would amount to passing off.

- Under sections 47(2) and 5(3) of the Act as the applicant claims reputation and goodwill in the trade mark O2 and a wide range of “bubble” imagery and that use of the registrant’s mark would be use without good cause that would take unfair advantage of or be detrimental to the reputation of the application and/or the distinctive character of the applicant’s trade marks.
- Under sections 47(2) and 5(2)(b) of the Act as the applicant claims that the registrant’s mark contains the prominent element O2 along with a get-up comprising a background of bubbles and covers similar goods to the information service relating to food and restaurants covered by the applicant’s registrations and use of the registrant’s mark is likely to cause confusion on the part of the public with the applicant’s earlier trade marks.

The applicant gave details of its earlier registered trade marks in the statement of case, these were listed as:

Registration Number	Mark	Class(es)
2198460	O2 Zone Device	3, 5, 9, 16, 41, 42
2279371	O2 Device	9, 38
2284423	O2ONLINE	9, 36, 38, 39
2284487	O2 Device and Bubbles	9, 38
2284489	O2 Device and Bubbles	9, 38
2296255	O2	9, 38
2331282	O2 and Bubbles Device	9, 38
E2109627	O2	9, 35, 36, 38, 39
2249386A	O2	26, 35, 36, 37, 39, 41, 42
2249386B	O2	26, 35, 36, 37, 39, 41, 42
2267312	O2 Device	38
2271228	O2	38, 42
E2284818	O2	38, 41
2284482	Bubbles Device	9, 38
2284483	Bubbles Device	9, 38
2284485	Bubbles Device	9, 38
2287748	Bubbles Device	9, 38
2287750	Bubbles and O2 Device	9, 38
2298339	Bubbles Device	9, 35, 36, 38, 39, 41, 42, 43, 44
2298341	Bubbles Device	9, 35, 36, 38, 39, 41, 42, 43, 44
2298342	Bubbles Device	9, 35, 36, 38, 39, 41, 42, 43, 44
2298346	Bubbles Device	9, 35, 36, 38, 39, 41, 42, 43, 44
2298347	Bubbles Device	9, 35, 36, 38, 39, 41, 42, 43, 44

The trade marks that are devices or contain device elements are reproduced as Appendix A.

4. On 19 May 2004 a copy of the application for invalidation and the statement of grounds were sent by recorded delivery to the address for service shown on the register. This was returned on 1 June 2004 marked “not called for”, and re-sent via normal mail. In the event the registered proprietor did not file a counter-statement to

defend his registration. The consequences of failure to defend the registration were set out in the letter dated 19 May 2004, namely that the application for declaration of invalidity could be granted in whole or in part.

5. It does not however follow that the uncontested nature of this action will automatically mean success for the applicant for invalidity and failure for the registered proprietor. The onus in these circumstances is on the applicant for invalidity to prove why it is that the registration should be declared invalid.

6. I am mindful of the decision in the *Firetrace Case* (BL O/278/01) where the Hearing Officer stated:

“. . . . It is not sufficient to simply allege that a registration offends either section 46 or 47 of the Act without doing more to prove that the allegation has substance. That said, when an application for revocation (other than non-use) or invalidation is made and the registered proprietors choose not to respond to such a request, I do not think that it is necessary for the applicants in those circumstances to have to fully substantiate their allegations beyond providing evidence which supports a prima facie case.”

7. The reason that the Hearing Officer arrived at this view is the statutory presumption in Section 72 of the Act which states:

“In all legal proceedings.....the registration of a person as proprietor of a trade mark shall be prima facie evidence of the validity of the original registration and of any subsequent assignment or other transmission of it.”

8. With this in mind, on 16 July 2004, the Registrar wrote to the applicant's representative inviting him to file any evidence or make any submission which he felt would support his client's application to, at the least, establish a prima facie case. He was also invited to state whether he wished to be heard or would accept a decision from the papers filed.

9. On 11 February 2005 the applicant for invalidity completed its evidence detailing the case against the registered proprietor. They also stated that they were content for the decision to be taken on the basis of the papers filed.

10. In each case the evidence and exhibits submitted consist of two witness statements, by Tom Sutton, Head of Advertising of O2 (UK) Limited, the first dated 25 July 2004, with twenty four exhibits, and the second dated 27 January 2005, with three exhibits. Exhibits 5, 12 and 16 of the first witness statement were submitted to proceedings in the High Court and of these 5 and 16 have been withdrawn from these proceedings, exhibit 12 has been replaced by exhibit 25 under cover of the second witness statement. Thus the total number of exhibits is twenty four.

11. The first witness statement commences by explaining the relationship between the holding company, MMO2 Plc, and O2 (UK) Limited and O2 Limited (Exhibit 1); that the applicant company was incorporated on 19 November 2001 following the de-merger of the applicant company from BT Cellnet carrying with it an existing customer base of 10 million persons; that following the de-merger on 15 January 2002

there was a £1 Billion bond issue, on 1 May 2002 the launch of the O2 brand, on 18 June 2002 the launch of the XDA phone and on 18 November 2002 the applicants business broke the then record for text messages (Exhibits 2, 3, 4 and 6); that a new web site was introduced, www.o2.co.uk, with 500,000 customers online; that the applicant sponsored the reality television programme “Big Brother 3” in 2002 (Exhibit 7); that the applicant sponsored the television programme “Pop Stars – The Rivals” in 2002, the final of which generated 500,000 text message votes in one hour (Exhibit 8); that the applicant has, since August 2002, sponsored Arsenal FC (Exhibit 9); that the applicant has, since November 2002, sponsored the England Rugby Union team (Exhibit 10); that many press releases promoting the O2 brand were issued during the year 2002, enumerated below (Exhibit 11); that there was extensive television advertising in the UK promoting the O2 brand (Exhibits 13, 14, 15, 16, 17, 18, 19 and 20); that a large amount of money was expended on advertising the O2 brand (Exhibit 21), totalling over £93 Million in the period April 2002 to June 2004; that studies were commissioned to track “Advertising Awareness” and “Brand Awareness” (Exhibit 22); that the development and progress of the applicant companies O2 brand is detailed in its annual reports and financial statements (Exhibits 23 and 24); the witness goes on to state that he believes the O2 brand along with the blue background and bubble imagery has achieved a reputation as a leading brand in mobile phone services, has a strong association with sporting brands and youth events, and that association with an alcoholic drink will be negative to and take advantage of the O2 brand.

- Exhibit 1 – copies of pages from the Companies House web site relating to MMO2 Plc, O2 (UK) Limited and O2 Limited, also a copy of a page from the web site www.mmo2.com listing the companies comprising the MMO2 group.
- Exhibit 2 – copies of pages from the web site www.mmo2.com detailing “key milestones” in the development of the applicant company, as mentioned above.
- Exhibit 3 – copies of pages from the Media Centre section of the web site www.mmo2.com detailing “key milestones” in the development of the applicant company through press releases issued in 2001, as mentioned above.
- Exhibit 4 – copies of pages from the Media Centre section of the web site www.mmo2.com detailing “key milestones” in the development of the applicant company through press releases issued in 2002, as mentioned above.
- Exhibit 5 – has been withdrawn from these proceedings.
- Exhibit 6 – copy of pages from the Media Centre section of the web site www.mmo2.com being the press release issued in 2002 relating to the launch of the XDA phone, as mentioned above.
- Exhibit 7 – copy of an online article, from the web site www.realitynewsonline.com, dated 8 January 2002 detailing the live final of the reality television programme “Big Brother 3”, there is no mention of O2 in the article.

- Exhibit 8 – copy of pages from the Media Centre section of the web site www.mmo2.com being the press release issued in 2002 relating to the record number of text messages received in the one hour final vote from the viewers of “Popstars – The Rivals”, over 200,000.
- Exhibit 9 – copy of pages from the Media Centre section of the web site www.mmo2.com being the press release issued in 2002 relating to the sponsorship of Arsenal FC, also copies from the web site www.arsenal.com showing the O2 trade mark displayed on the official club web site.
- Exhibit 10 – copy of pages from the Media Centre section of the web site www.mmo2.com being the press release issued in 2002 relating to the sponsorship of the England Rugby Union team.
- Exhibit 11 – copies of pages from the Media Centre section of the web site www.mmo2.com being the press release issued in 2002, first a summary of press releases for the year, also copies of press releases relating to – the roll out of the Blackberry wireless E-mail solution (2 press releases), the growth of contract customers, the partnership agreement with IT companies for a new range of mobile data services, the new policy for radio communications for the Ministry of Defence, the analysts estimate of end of year figures for financial year ending 31 March 2002, the preliminary announcement of end of year figures for financial year ending 31 March 2002, the growth of mobile data services, future developments, growth in customer numbers and mobile data (2 press releases), a report from the BBC web site about the television programme “Big Brother 3” (with no reference to O2 in the report), the release of a games service for mobile phones, the estimate of half year figures for the period ending 30 September 2002, the launch of an interactive service, the first anniversary of the business as an independent company and the announcement of the interim results for period ending 30 September 2002.
- Exhibit 12 – see Exhibit 25.
- Exhibit 13 – a copy of an advert for the XDA product including the trade mark O2 and bubble imagery, dated May 2002.
- Exhibit 14 – copies of adverts used during the Big brother 3 television programme including the trade mark O2 and bubble imagery, May to July 2002.
- Exhibit 15 – copies of eleven adverts shown during the period April to June 2002, all including the trade mark O2.
- Exhibit 16 – has been withdrawn from these proceedings.
- Exhibit 17 - a copy of an advert used for Christmas 2002, promoting the XDA product and including the trade mark O2 and bubble imagery.

- Exhibit 18 – a copy of an advert shown during the period April to June 2003, promoting “bolt-ons” and including the trade mark O2 and bubble imagery.
- Exhibit 19 – a copy of an advert shown during the period April to June 2003, promoting “O2 active” and including the trade mark O2 and bubble imagery.
- Exhibit 20 – copies of adverts detailing sponsorship of the England Rugby Union team, including the trade mark O2 and bubble imagery, dated December 2003.
- Exhibit 21 – a copy of a spreadsheet document detailing advertising expenditure on a month by month basis from April 2002 to Feb 2004:

April 2002	£ 1,716,779
May 2002	£ 6,843,705
June 2002	£ 5,389,472
July 2002	£ 2,581,523
August 2002	£ 1,488,049
September 2002	£ 1,281,495
October 2002	£ 4,003,028
November 2002	£ 4,298,307
December 2002	£ 4,600,839
January 2003	£ 1,164,269
February 2003	£ 1,405,673
March 2003	£ 1,375,612
April 2003	£ 8,457,035
May 2003	£ 3,046,843
June 2003	£ 2,844,671
July 2003	£ 3,002,537
August 2003	£ 1,443,911
September 2003	£ 5,025,196
October 2003	£ 4,656,592
November 2003	£ 3,699,455
December 2003	£ 1,708,190
January 2004	£ 886,911
February 2004	£ 4,742,188
Total	£ 75,662,280

Also a spreadsheet detailing the expenditure by media during the period April 2002 to June 2004

Cinema	£ 2,446,340
Direct Mail	£ 5,937,379
Internet	£ 3,250,733
Outdoor	£ 16,344,967
Press	£ 22,713,474
Radio	£ 5,499,244
TV	£ 36,821,076
Total	£ 93,013,213

- Exhibit 22 – a copy of a PowerPoint display detailing the results of mobile phone user surveys relating to “Advertising Awareness”, showing that at the end of the period studied the O2 brand is second only to the ORANGE brand, and “Brand Awareness”, showing that at the end of the period studied the O2 brand is third behind the ORANGE and VODAFONE brands.
- Exhibit 23 – copies of the Annual Review 2003 and Annual Report and Financial Statement 2003, which shows that total revenue for the financial year 02/03 reached £ 3,025 Million and the customer base had risen to over 12 Million.
- Exhibit 24 – a copy of the Annual Report and Financial Statement 2002.

12. The second witness statement commences by explaining that proceedings are taking place in the High Court between the applicant company and Hutchinson 3G UK Limited and Exhibits 5, 12 and 16 have been submitted in those proceedings, as a result of the court proceedings Exhibits 5 and 16 have been withdrawn from these proceedings; that Exhibit 25, a CD-ROM containing copies of 16 television advertisements and 82 other advertisement media, includes the television advertisement previously submitted as Exhibit 12; that Exhibit 26 consists of paper copies of advertisements and other promotional material also found on the CD-ROM constituting Exhibit 25 and that Exhibit 27 contains copies of representations of nine of the trade marks used as the basis of these proceedings with a variety of representations of the bubble imagery in actual use.

- Exhibit 25 – a CD-ROM containing copies of 16 television advertisements and pictures of 82 other advertising media, including posters, billboards, point of sale displays and beer mats. The television advertisement, previously referred to as Exhibit 12, is a copy of an advert including the trade mark O2 and bubble imagery, dated May 2002.
- Exhibit 26 – hard copies of fourteen of the pictorial advertisements contained on the CD-ROM which comprises Exhibit 25, these all being used between April 2002 and November 2002 inclusive.
- Exhibit 27 – copies of the images which constitute trade marks 2284482, 2284483, 2284485, 2287748, 2298339, 2298341, 2298342, 2298346 and 2298347, the Bubble device marks, and examples of the marks in use on advertising material.

13. Acting on behalf of the Registrar and after a careful study of the papers before me I give the following decision.

DECISION

14. The applicant claims that the registration should be declared invalid as per section 47 of the Act on the basis of the provisions of sections 3(6), 5(2)(a) and/or (b), 5(3) and 5(4)(a). The relevant parts of section 47 of the Act are as follows:

“47. - (1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

(2) The registration of a trade mark may be declared invalid on the ground-

- (a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or
- (b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.”

15. First I will set aside registration number 2331282 as this has a filing date later than the registrations in suit. The relevant section of the Act is as follows:

“6. - (1) In this Act an “earlier trade mark” means –

- (a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,
- (b) a Community trade mark which has a valid claim to seniority from an earlier registered trade mark or international trade mark (UK), or
- (c) a trade mark which, at the date of application for registration of the trade mark in question or (where appropriate) of the priority claimed in respect of the application, was entitled to protection under the Paris Convention or the WTO agreement as a well known trade mark.

(2)

(3)”

The date of application of registration 2331282 is 6 May 2003, whilst the date of application of the marks in suit is 16 August 2002 for registration 2308256 and 3

March 2003 for registration 2325253. It is therefore a later filed mark than either of those in suit and cannot be used as the basis for action under section 5 of the Act.

16. In considering the application of the principles of law under each of the sections below I also bear in mind the written submissions filed under cover of a letter dated 9 March 2005 by Boulton Wade Tenant on behalf of the applicant.

Section 5(2)(b)

17. This reads:

“5.- (2) A trade mark shall not be registered if because -

(a)

(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, which includes the likelihood of association with the earlier trade mark.”

18. I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel BV v Puma AG* [1998] E.T.M.R. 1, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG* [2000] E.T.M.R. 723.

19. In essence, the test is whether there are similarities in marks and goods which would combine to create a likelihood of confusion. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those differing elements, taking into account the degree of identity/similarity of the goods/services and how they are marketed. In comparing the marks I must have regard to the distinctive character of each and assume normal and fair use of the marks across the full range of the goods and services within their respective specifications. The matter must be considered from the perspective of the average consumer who is deemed to be reasonably well informed and reasonably circumspect and observant.

20. The essential element of the marks in suit is the letter and numeral “O₂” on a roughly rectangular background; in the first mark there are the additional elements “VODKA” in a stylised form above the rectangle and the words “Premium Sparkling Vodka” below the rectangle; in the second mark there are the additional elements “VODKA” in a stylised form above the rectangle and the word “RUSH” below the rectangle.

21. With regard to the following marks cited by the applicant, 2198460, 2279371, 2284423, 2284487, 2284489, 2296255, E2109627, 2249386A, 2249386B, 2267312, 2271228, E2284818 and 2287750, the essential element of the marks are the letter and

numeral “O2”, generally represented in the form “O₂”, either solus or on a dark rectangular background.

22. In the case of 2279371, 2296255, E2109627, 2249386A, 2249386B, 2271228 and E2284818 the mark is generally “O₂”, or sometimes in the form “O2”, solus either in normal typescript form or stylised form. In the case of 2284487, 2284489, 2267312 and 2287750 the mark is “O₂” solus either in normal typescript form or stylised form on a rectangular background, in the case of 2284487, 2284489 and 2287750 with accompanying “bubble devices”. In the case of 2198460 the mark is “O2” with the additional word “ZONE” on the bottom stroke of the numeral and in the case of 2284423 the mark is the letter and numeral combination “O2ONLINE”.

23. In the marks in suit the words “VODKA” and “Premium Sparkling Vodka” are descriptive of the goods and therefore non-distinctive. The word “RUSH” may be characterised as the effect that the drinker of the “flavoured vodka” drink might get, but is represented in a smaller typescript below the “O₂” forming the body of the mark, whilst it cannot be regarded as non-distinctive it does not detract from the essential nature of the mark as an “O₂” mark.

24. In chemical notation “O” is oxygen, “H₂O” is Hydrogen Oxide, or water, and the association with oxygen and water is made by the applicants marks 2284487, 2284489 and 2287750 which associate the mark “O₂” with gas, air or oxygen bubbles in water. The use of the marks in the form “O₂” will suggest to the public a chemical notation for a form of oxygen, and there is therefore a conceptual similarity.

25. Essentially the marks in suit and the marks cited above are all “O₂” marks and as such are visually, orally and conceptually similar.

26. However, the following cited marks raised by the applicant are purely device marks consisting of “bubble” arrangements, gas, air or oxygen in water, the relevant marks are 2284482, 2284483, 2284485, 2287748, 2298339, 2298341, 2298342, 2298346 and 2298347. The marks in suit appear to be on plain rectangular backgrounds with no similar representation of bubbles. In their submission the applicants assert that there are bubbles in the background to the marks suit, I cannot identify these bubbles and as such there cannot be any similarity between the marks.

27. There is therefore a similarity between the marks in suit and the applicants cited marks 2198460, 2279371, 2284423, 2284487, 2284489, 2296255, E2109627, 2249386A, 2249386B, 2267312, 2271228, E2284818 and 2287750.

28. I must now go on to consider the goods and services of the specifications. The specification of the marks in suit are “Spirits”, in the case of 2308256, and “Flavoured vodka”, in the case of 2325253, both being in Class 33 of the International Classification system. No Class 33 goods appear in any of the specifications of the earlier trade marks. The specifications of the earlier marks claimed by the applicant are displayed at Appendix B.

29. I therefore have to consider if any of the elements of the specifications are similar to the goods “Spirits” and “Flavoured vodka” despite being in different classes in the

International Classification system. If there are no similar goods and/or services I cannot consider the ground in relation to Section 5(2).

30. In their submissions the applicant argues that the services “Information and advisory services in respect of food and restaurants” contained within the Class 43 specification of registrations 2298339, 2298341, 2298342, 2298346 and 2298347 are similar to the goods “Spirits” and “Flavoured vodka”. They submit that the terms “food” and “restaurants” must be similar to the nature of goods such as “alcohol”. However, in this comparison we are considering “goods” against an “information and advisory service” and the similarity between the two. I also take into account that there is no similarity between the marks in suit and the cited marks which have this specification, see paragraph 26 above.

31. In *Daimlerchrysler AG v Office for Harmonization In the Internal Market (Trade Marks and Designs)* [2003] E.T.M.R. 61 the Court of First Instance (CFI) stated:

“46 However, contrary to what the Office argues, the Court finds that a sign's descriptiveness must be assessed individually by reference to each of the categories of goods or service listed in the application for registration. For the purposes of assessing a sign's descriptiveness in respect of a particular category of goods or service, whether the applicant for the trade mark in question is contemplating using or is actually using a particular marketing concept involving goods and services in other categories in addition to the goods and services within that category is immaterial. Whether or not there is a marketing concept is of no consequence to the right conferred by the Community trade mark. Furthermore, since a marketing concept is purely a matter of choice for the undertaking concerned, it may change after a sign has been registered as a Community trade mark and it cannot therefore have any bearing on the assessment of the sign's registrability.”

In *Devinlec Développement Innovation Leclerc SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T- 147/03 the CFI held:

“104 Consideration of the objective circumstances in which the goods covered by the marks are marketed is fully justified. The examination of the likelihood of confusion which the OHIM authorities are called on to carry out is a prospective examination. Since the particular circumstances in which the goods covered by the marks are marketed may vary in time and depending on the wishes of the proprietors of the trade marks, the prospective analysis of the likelihood of confusion between two marks, which pursues an aim in the general interest, that is, the aim that the relevant public may not be exposed to the risk of being misled as to the commercial origin of the goods in question, cannot be dependent on the commercial intentions, whether carried out or not, and naturally subjective, of the trade mark proprietors.....

107 It follows that by taking into consideration in the assessment of the likelihood of confusion between the marks the particular circumstances in which the goods covered by the earlier mark are marketed, the temporal effect of which is bound to be limited and necessarily dependent solely on the

business strategy of the proprietor of the mark, the Board of Appeal erred in law.”

Geoffrey Hobbs QC, sitting as the appointed person, in *Croom’s Trade Mark Application* [2005] R.P.C. 2, stated:

“31 When assessing the objections to registration in the present case, it is necessary to assume normal and fair use of the marks for which registered trade mark protection has been claimed. The context and manner in which the marks have actually been used by the applicant and the opponent in relation to goods of the kind specified may be treated as illustrative (not definitive) of the normal and fair use that must be taken into account. However, the protection claimed by the opponent independently of registration (*i.e.* under s.5(4)(a) of the Act) must relate to the actual and anticipated use of the rival marks.”

The effect of the above authorities is that in considering goods or services in specifications it is necessary to consider them across the entire gamut of normal and fair use. In their submission the applicant invites me to consider a variety of potentially hypothetical scenarios which might lead the public to confusion, e.g. where the applicants’ web site, clearly displaying the “O₂” and bubble brand, links to a sponsorship web site that endorses vodka drinks or has cocktail recipes. I have no evidence that the public could, or would, make that connection and it is outwith anything in my experience. I cannot accept this therefore as an extension of normal and fair use of the cited marks for the goods and services for which they are registered.

32. Taking all these factors into account I have come to the view that the similarities between the marks are offset by the complete lack of similarity between the goods and services for there to be a likelihood of confusion. The opposition fails under Section 5(2)(b).

Section 5(3)

33. I go on to consider the ground under Section 5(3). As a result of regulation 7 of The Trade Marks (Proof of Use etc) Regulation 2004 Section 5(3) now reads:

“5.-(3) A trade mark which -

(a) is identical with or similar to an earlier trade mark,

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark, in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

34. The scope of the Section has been considered in a number of cases notably *General Motors Corp v Yplon SA (Chevy)* [1999] E.T.M.R. 122 and [2000] R.P.C. 572, *Premier Brands UK Limited v Typhoon Europe Limited (Typhoon)* [2000] R.P.C. 767, *Daimler Chrysler v Alavi (Merc)* [2001] R.P.C. 42, *C A Sheimer (M) Sdn Bhd’s*

Trade Mark Application (Visa) [2000] R.P.C. 484, *Mastercard International Inc and Hitachi Credit (UK) Plc* [2004] E.W.H.C. 1623 (Ch) and *Electrocoin Automatics Limited and Coinworld Limited & others* [2004] E.W.H.C. 1498 (Ch).

35. The Section was also considered in a recent case for opposition, *Intel Corp Inc v Sihra* [2003] R.P.C. 44, at paragraph 19:

“I consider that a fair view of the evidence is that by July 1995 the INTEL mark was widely known and recognised as a mark distinctive in its own right, with an established reputation in the eyes of the consumer in relation to computers and computer-linked products. . . .”

36. There are parallels with this case in as far as within a short space of time the applicant has established a reputation for its mobile phone and telecommunications service, and I think this is well established by the evidence enumerated above. However, the reputation is only within that narrow sphere and in my view the issue is whether it is strong enough to support a ‘Chevy reputation’ in relation to a wider range of goods.

37. Following the ECJ’s judgments in *Davidoff & Cie SA and Zino Davidoff SA v Gofkid Ltd*, Case C-292/00, and *Adidas-Salomon AG and Adidas Benelux BV v Fitness World Trading Ltd*, Case C-408/01, it is clear that Section 5(3) also applies to goods or services which are similar or identical as well as those which are not similar. Hence the amended version of Section 5(3) set out above. Dissimilarity, like similarity, is a matter of degree and the relative proximity or distance between parties’ goods and services is a factor that is likely to bear firstly on whether consumers will make an association between them in the light of the reputation attaching to an applicant for invalidity’s earlier trade mark and secondly on whether one of the adverse consequences envisaged by Section 5(3) is made out.

38. It will be convenient at this point to set out the nature of the test to be applied in determining whether there is unfair advantage or detriment and the standard of proof that is called for.

39. In the *Chevy* case, the Advocate General said:

“43. It is to be noted in particular that Article 5(2), in contrast to Article 5(1)(b), does not refer to a mere risk or likelihood of its conditions being fulfilled. The wording is more positive: “takes unfair advantage of, or is detrimental to” (emphasis added). Moreover, the taking of unfair advantage or the suffering of detriment must be properly substantiated, that is to say, properly established to the satisfaction of the national court: the national court must be satisfied by evidence of actual detriment, or of unfair advantage. The precise method of adducing such proof should in my view be a matter for national rules of evidence and procedure, as in the case of establishing likelihood of confusion see the tenth recital of the preamble.”

40. More recently in *Mastercard International Incorporated and Hitachi Credit (UK) Plc* Mr Justice Smith dealt with a submission by Counsel for the Appellant (on appeal from a Registry opposition decision) that Section 5(3) was concerned with

possibilities rather than actualities. Commencing with the above passage from *Chevy*, the judge reviewed the leading cases dealing with the point including observations by Pumfrey J in the *Merc* case and Patten J in *Sihra*. He concluded that the Registry Hearing Officer had been right to conclude that there must be “real, as opposed to theoretical, evidence” that detriment will occur and that the Registry Hearing Officer was “right to conclude that there must be real possibilities as opposed to theoretical possibilities”.

41. I should just add that, whilst the above extract refers to real evidence of the claimed form of damage, this cannot mean that there must be actual evidence of damage having occurred. In many cases that come before the Trade Marks Registry, the mark under attack is either unused or there has been only small scale and recent use. No evidence of actual damage is possible in such circumstances. I, therefore, interpret the above reference to mean that the tribunal must be possessed of sufficient evidence about the use of the earlier trade mark, the qualities and values associated with it and the characteristics of the trade etc that it is a reasonably foreseeable consequence that use of the other side’s mark will have the claimed adverse consequence(s).

42. On the other hand, even if it is accepted that there will be damage, it must be more than simply of trivial extent as is evident from the following passage from *Oasis Stores Ltd’s Trade Mark Application* [1998] R.P.C. 631:

“It appears to me that where an earlier trade mark enjoys a reputation, and another trader proposes to use the same or similar mark on dissimilar goods or services with the result that the reputation of the earlier mark is likely to be damaged or tarnished in some significant way, the registration of the later mark is liable to be prohibited under section 5(3) of the Act. By ‘damaged or tarnished’ I mean affected in such a way so that the value added to the goods sold under the earlier trade mark because of its repute is, or is likely to be, reduced on scale that is more than *de minimis*”.

43. I note too the following from Mr Geoffrey Hobbs QC (sitting as a Deputy Judge) in *Electrocoin Automatics and Coinworld*:

“102. I think it is clear that in order to be productive of advantage or detriment of the kind prescribed, ‘the link’ established in the minds of people in the market place needs to have an effect on their economic behaviour. The presence in the market place of marks and signs which call each other to mind is not, of itself, sufficient for that purpose.” (footnotes omitted).

44. I now turn to the applicant’s case on unfair advantage or detriment. The evidence provided only went as far as establishing the scale of use and reputation of the registered marks. In the applicant’s submission they refer to the marks in suit as having a bubble imagery, which is not apparent from the marks as held on the Trade Marks Registry image database and reproduced at paragraphs 1 and 2 above, and the similarity is, in my view, purely between the dominant element “O₂”. The submission asserts that there is likely to be negative connotations from association with alcoholic drinks and the drinks industry in general; that the use of the similar “O₂” mark will cause the public to believe that there is a connection with the applicant; that with the

public knowledge of the sponsorship agreements of the applicant, with sports clubs and sporting organisations, they will draw the conclusion that the use is licensed by the applicant; that the applicant's reputation could be damaged by the use of the marks in suit on poor quality goods over which the applicant has no control; that the marks in suit have been selected specifically to trade off the brand values that the applicant seeks to establish for their own products and services, stated as "bold, clear, open and trusted"; that the brand values of the applicant are not those one would associate with alcoholic products, citing existing advertisements for another alcoholic product as emphasising "wickedness", encouragement to "lie" and appearing "seedy".

45. The first matter to be considered is whether the link referred to in these submissions exists or is reasonably likely to exist.

46. In the *Sihra* case Mr Justice Patten accepted:

"22 the general proposition that s.5(3) is not intended to prevent the registration of any mark whatsoever which is similar to a trade mark with the necessary character and reputation, even if the use of the similar mark will lead to an association in the mind of the consumer between the two marks."

But without that link or association one does not get to a consideration of unfair advantage or detriment.

47. The link or association does not have to be one that establishes confusion (*Premier Brands UK Ltd v Typhoon Europe Ltd*) and, as also noted in that case, it will generally be less hard to establish a link or association between a sign and a mark than to establish confusion. Unlike the *Sihra* case, where survey evidence was filed showing the public's reaction to the mark in issue when presented in the context of toy construction blocks, I have no survey or other independent evidence before me in this case dealing with whether association exists or, if established, the degree, strength and nature of the association. I must, therefore, make up my own mind on the matter having regard to the marks themselves, the extent of the applicant's reputation and the scope of the registered proprietor's specification.

48. There is simply no information on the companies involved in this dispute to say whether their existence and trading activities has had any discernible impact on the relevant public's perception of and approach to the mark "O2", although the applicant has provided evidence relating to their position within the mobile telecommunications market.

49. The issue before me is the degree of connection or association, if any, in the minds of the public between the "O₂" signs used in relation to mobile and data telecommunications related products and services on the one hand and as used in relation to spirits and flavoured vodka products on the other. The applicant's case, as laid out in paragraph 44 above, is that the public perspective would be affected through negative connotations, primarily, from the association with alcoholic drinks. Thereby the applicant's marks being adversely affected as this association will take unfair advantage of their reputation and be detrimental to their goodwill and reputation in the UK.

50. I have not, therefore, found the issue of connection or association to be a straightforward one to decide. The marks in these proceedings are essentially “O₂” marks and I am prepared to accept that customers for the services offered by the applicant would be reminded of their brand because of the widespread knowledge and repute of that brand. However, I also have to conclude whether that association would be other than a fleeting and shallow one because of the separation of the products and services.

51. The applicant claims in their submission that both unfair advantage and detriment will flow from any association that is made. The Act clearly places the onus on the applicant for invalidity to establish an association leading to one or more of the adverse consequences of unfair advantage or detriment.

52. Considering unfair advantage first, there have been a number of cases that have pointed to the need for an applicant for invalidity or opponent to establish his case to a more than trivial extent. Thus in the *Visa* case, the Appointed Person held that:

“I think it is clear that Sheimer [the applicant for registration] would gain attention for its products by feeding on the fame of the earlier trade mark. Whether it would gain anything more by way of a marketing advantage than that is a matter for conjecture on the basis of the evidence before me. Since I regard it as quite likely that the distinctive character or reputation of Visa International’s earlier trade mark would need to increase the marketability of Sheimer’s products more substantially than that in order to provide Sheimer with an unfair advantage of the kind contemplated by section 5(3) I am not prepared to say that requirement (iv) is satisfied.”

53. In the *Sihra* case Intel had based its case partly on unfair advantage but Mr Justice Patten in finding in favour of Intel on Section 5(3) grounds expressed himself in cautious terms in relation to unfair advantage:

“24 It seems to me very likely that the use of the mark INTEL-PLAY will feed on the earlier mark and lead to greater sales of the applicant’s products than could be achieved using the existing LOXOL mark. But there is understandably no evidence of likely scale. I am therefore content to base my decision on the detriment

54. In accepting an association based on the presence of the element “O₂”, I have to decide whether the marks in suit would gain any marketing or other advantage in their favour. The fact that the applicant’s brand brings with it a very strong reputation for high quality and technologically advanced products and services does not, on its own, mean that consumers will respond more favourably upon seeing a bottle of alcoholic drink bearing the same brand. However, the extension of that reputation through sponsorship with sports clubs and sporting organisations brings the “O₂” brand squarely into popular culture where alcoholic drinks seem to be an essential part of a lifestyle associated with those clubs and organisations. Thus the marks in suit may gain a marketing advantage, with higher levels of sales, through the association of their marks with the brand of the applicant. I, therefore, find that the applicant succeeds under the unfair advantage head.

55. Detriment to distinctive character or repute can take the form of blurring or tarnishing – see *Premier Brands* for a discussion of the circumstances in which these forms of damage can arise. The applicant has largely pleaded its case in terms of generalised assertions. However, it is possible to discern two strands of thinking in the way it has presented its case. Firstly, that the distinctiveness will be damaged as a result of use of “O₂” for the goods in respect of which it is registered through a lack of quality of those goods; and secondly, that there are negative connotations associated with those products that would adversely affect their brand.

56. With regard to these submissions the applicant cannot provide evidence as to the quality of the alcoholic products which may have been traded under the marks in suit and they also cannot provide evidence upon which to base the conclusion that there will be any material damage to the applicant’s marks as a result of adverse association with use of a similar mark for alcoholic products.

57. Nevertheless, considerable care is needed where marks enjoy the sizeable reputation that the applicant’s do, that reputation has strength in depth rather than breadth. It is not, in my view, comparable to, say, the Virgin brand which has been deployed across a very wide range of unconnected goods and services. I am not prepared to say that “O₂” cannot bridge any gap but there is considerable distance between the respective areas of business.

58. In *Oasis Stores Ltd’s Trade Mark Application* [1998] R.P.C. 631 the Hearing Officer said:

“Any use of the same or a similar mark for dissimilar goods or services is liable, to some extent, to dilute the distinctiveness of the earlier mark. The provision is clearly not intended to have the sweeping effect of preventing the registration of any mark which is the same as, or similar to, a trade mark with a reputation. It therefore appears to be a matter of degree.”

That decision was referred to with approval in *Premier Brands*.

59. As already stated above, at paragraph 54, through the sponsorship of sports clubs and sporting organisations the applicant will gain an association with the alcohol drinking sporting culture and any alcoholic product carrying a similar, almost identical, mark may act to be detrimental to their reputation and character. Whilst they will wish to be associated with sporting excellence of the clubs and organisations they sponsor, on the sports field, they will want to avoid association with the negative aspects of the surrounding culture, and this will include the drinking of alcohol.

60. Weighing the above factors in the balance I come to the conclusion that there is a likelihood that there could be material damage to the distinctiveness or singularity of the applicant’s brand if the marks in suit are used in a normal and fair manner in relation to the goods in question. The application for a declaration of invalidity succeeds under the detriment to distinctive character or repute head.

61. I go on to consider if there is a ‘due cause’ defence. Guidance on this aspect of Section 5(3) can be found in *Premier Brands* (page 1096 et seq) which in turn

referred with approval to the views of the Benelux Court on comparable wording in *Lucas Bols* [1976] I.I.C. 420 at 425:

“What this requires, as a rule, is that the user (of the mark) is under such a compulsion to use this very mark that he cannot honestly be asked to refrain from doing so regardless of the damages the owner of the mark would suffer from such use, or that the user is entitled to the use of the mark in his own right and does not have to yield this right to that of the owner of the mark ...”.

On the same page, the court went on to suggest that a “justifiable reason” may be “if the user can assert an older right than that of the [registered proprietor]” but went on to emphasise that whether the alleged infringer can establish a “justifiable reason” must be “resolved by the trial judge according to the particular facts of each case”.

62. The example quoted above relates to the position where a party has an ‘older right’ but taken in context does not appear to rule out the possibility of due cause being considered where a junior but concurrent right of sufficient extent and duration has been established.

63. I have no evidence from the registered proprietor to establish whether his marks are in use and if so from what date and what reputation they may have established. There is also no evidence from the registered proprietor to establish why he chose such a similar mark if not to trade off the reputation of the applicant. I am therefore not persuaded that, in all the circumstances, the registered proprietor should be entitled to claim the benefit of a ‘due cause’ defence in relation to the subject marks.

64. The application for a declaration of invalidity on the basis of section 5(3), therefore, succeeds.

Section 5(4)(a)

65. Finally I consider the ground under Section 5(4)(a), which reads:

(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom 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, or

(b)

66. The requirements for this ground of action have been restated many times and can be found in the decision of Mr Geoffrey Hobbs QC, sitting as the Appointed Person, in *Wild Child* trade mark [1998] R.P.C. 455. Adapted to these proceedings, the three elements that must be present can be summarised as follows:

(1) that the applicant’s goods and services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(2) that there is a misrepresentation by the registered proprietor (whether or not intentional) leading or likely to lead the public to believe that goods offered by the registered proprietor are goods of the applicant, and

(3) that the applicant has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the registered proprietor's misrepresentation.

67. In their submissions the applicant accepts that there is no common field of activity between the parties but nevertheless reassert the arguments already raised under section 5(3) above. Additionally they assert that “. . . the applicant is likely to suffer damage by the injury which is inherently likely to be suffered by it when on the frequent occasions it is confused by customers or potential customers with a business owned by another proprietor, or is wrongly regarded as being connected with the business. We submit that this will potentially injure the trade reputation of the applicant if there were any failings in the products offered for sale by the registered proprietor.” This appears to be a general assertion that could be made in virtually all cases and requires an element of evidential substantiation.

68. I believe that there is sufficient evidence to justify the applicant's claim to a reputation under this head. However, in this instance no evidence has been directed to any of the other elements which must be present, only assertions by the applicant, and there is therefore nothing to substantiate this ground of action. Therefore, I dismiss the application in so far as it is based upon section 5(4)(a) of the Act.

Result

69. I find that the respective trade marks are similar but are not registered for goods or services which will result in confusion on the part of the public, which includes association with the earlier trade marks, therefore this action has failed on the Section 5(2)(b) ground. There is insufficient evidence to establish the applicant's claim under the Section 5(4)(a) ground and that fails also.

70. However, the applicant has succeeded under the Section 5(3) ground and the registered proprietor's trade marks should be removed from the register.

Costs

71. The applicant has been successful and is entitled to a contribution towards its costs. In all the circumstances I order the registered proprietor to pay the applicant the sum of £800. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 11th day of May 2006

**Graham Attfield
For the Registrar
the Comptroller General**

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Appendix A



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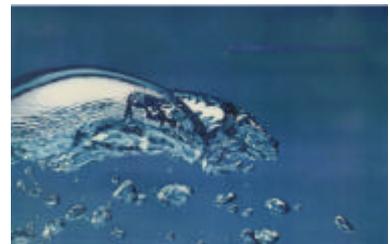
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2298346



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Appendix B

Registration Number	Mark	Class(es) and Specification(s)
2198460	O2 Zone Device	<p>Class 03: Soaps, perfumery, essential oils, cosmetics, hair lotions, dentifrices, plant and flower remedies.</p> <p>Class 05: Pharmaceutical and plant-based preparations and dietetic substances adapted for medical use, plasters, materials for dressings, first-aid preparations, dental preparations, disinfectants, fungicides and herbicides, homeopathic preparations, plant-based healing creams and ointments, first-aid preparations.</p> <p>Class 09: Photographic, cinematographic and teaching apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; recording discs; downloadable electronic publications.</p> <p>Class 16: Paper, cardboard and goods made from cardboard; magazines, newspapers and periodicals; stationery; photographs; adhesives for stationery; plastic materials and natural fibres for packaging; printers' type, printing blocks.</p> <p>Class 41: Education, providing of training, entertainment; all relating to alternative medicine and/or health; sporting and cultural activities; providing on-line electronic publications.</p> <p>Class 42: Providing information on health; medical, hygienic and beauty care; scientific research; computer programming, veterinary and agricultural services; provision of information relating to alternative medicine.</p>

2279371	O2 Device	Class 09: Mobile telecommunications apparatus; mobile telecommunications headsets. Class 38: Mobile telecommunications services; telecommunications portal services; Internet portal services; mobile telecommunications network services; Internet access services; applications services provision.
2284423	O2ONLINE	Class 09: Mobile communications apparatus and instruments. Class 36: Information services in respect of finance; financial sponsorship services. Class 38: Telecommunications services; telecommunications portal services; Internet portal services; Internet access services. Class 39: Information services in respect of travel.
2284487	O2 Device and Bubbles	Class 09: Mobile communications goods and parts and fittings therefor. Class 38: Mobile communications services; Internet portal services.
2284489	O2 Device and Bubbles	Classes 09 and 38 as 2284487 above.
2296255	O2	Class 09: Mobile communications apparatus; mobile communications handsets; mobile communications headsets; parts and fittings for the aforesaid goods. Class 38: Telecommunication and data communication services provided by a mobile telephone company; operation of a digitalized media platform for the exchange of messages and information; WAP

		(wireless application protocol) services; electronic postal services, namely transmission and forwarding of electronic mail, SMS (short message services), facsimiles, WAP (wireless application protocol) services; collection and delivery of news and general information; transmission of information in the field of entertainment, general information, economy and finance, sport and cultural activities in digital networks; monitoring, processing, sending and receiving data, sounds, images and/or signals and information processed by computers or by telecommunication apparatus and instruments.
2331282	O2 and Bubbles Device	Class 09: Mobile communication apparatus and parts and fittings therefor. Class 38: Mobile communications services; telecommunications network services; telecommunications payment plans and tariffs.
E2109627	O2	Class 09: Telecommunications apparatus and instruments. Class 35: Provision of advertising services to enable others to view and purchase goods over a global computer network. Class 36: Information services relating to finance. Class 38: Telecommunications services; telecommunication of information; provision of telecommunications access and links to computer databases and to the global computer network; electronic transmission services. Class 39: Provision of information relating to transport and travel

2249386A	O2	<p>Class 25: Clothing, footwear, headgear.</p> <p>Class 35: Direct mail advertising; dissemination of advertising and promotional materials; compilation of mailing lists; manufacturers' representative services; preparation and issuing of publicity materials; market research; distribution and demonstration of goods and samples; business management advisory and consulting services, business services relating to the operation and management of business premises, stores, shops, stalls and markets; the bringing together for the benefit of others, of a variety of retail outlets, entertainment venues, shopping mall and shopping centre facilities and restaurants, enabling customers to conveniently view and purchase goods and make use of the services provided in a shopping centre or shopping mall.</p> <p>Class 36: Real estate agency services; real estate management and brokerage services; rental of commercial premises; property leasing services.</p> <p>Class 37: Real estate development services; shop fitting services; property maintenance services; interior refurbishment of buildings; maintenance, repair and renovation of buildings, facilities and parts and fittings thereof; cleaning of buildings (interior and exterior services) and facilities; consultancy and advisory services relating to the aforesaid.</p> <p>Class 39: Rental of garage and of parking places; provision of vehicle parking facilities; vehicle park services; delivery of goods by road; arranging the delivery of goods by road, air and by rail.</p>
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		<p>Class 41: Education and training services in respect of staff recruitment and replacement, catering, estate agency, advertising, business management and interior design services; sporting and cultural activities; cinema, night club; amusement arcade services, but not including computer games; entertainment production and management services; theatre services; organisation of games, competitions and quizzes; bingo hall, snooker hall, night club, discotheque, dance hall and concert services.</p> <p>Class 42: Advisory and consultancy services in relation to the operation of retail outlets; kitchen, bedroom, bathroom, garden, conservatory and home design services; interior design services.</p>
2249386B	O2	Classes 25, 35, 36, 37, 39, 41 and 42 as 2249386A above.
2267312	O2 Device	Class 38: Telecommunications services; telecommunication of information (including web pages).
2271228	O2	<p>Class 38: Internet portal services and telecommunications portal services.</p> <p>Class 41: News and current affairs information services.</p> <p>Class 42: Weather forecasting.</p> <p>Class 45: Fashion information services; horoscope forecasting.</p>
E2284818	O2	Class 38: Internet portal services; telecommunications portal services; provision of telecommunications access and links to computer databases and to the Internet; electronic mail services;

		telecommunication of information; delivery of multimedia content over electronic communications networks. Class 41: Information services relating to entertainment and sport.
2284482	Bubbles Device	Class 09: Mobile communications apparatus and instruments and parts and fittings therefor. Class 38: Mobile communications services; Internet portal services.
2284483	Bubbles Device	Classes 09 and 38 as 2284482 above.
2284485	Bubbles Device	Classes 09 and 38 as 2284482 above.
2287748	Bubbles Device	Classes 09 and 38 as 2284482 above.
2287750	Bubbles and Device O2	Classes 09 and 38 as 2284482 above.
2298339	Bubbles Device	Class 09: Telecommunications apparatus and instruments; mobile communications apparatus and instruments and parts and fittings therefor; headsets; earpieces. Class 35: Marketing, promotional and advertising services; business advisory, consultancy and information services. Class 36: Information services and interactive database information services all relating to finance, insurance, shares and share dealing. Class 38: Telecommunications services; Internet access services; Internet portal services; telecommunications portal services. Class 39: Information services relating to travel and transport; booking and ticketing services relating to travel and transport.

		<p>Class 41: Information and advisory services relating to education, training, entertainment, sport, recreation, theatre, television, music, news and publishing; electronic game services and competitions provided by means of telecommunication and the Internet; entertainment services provided online via the Internet.</p> <p>Class 42: Information and advisory services relating to the weather.</p> <p>Class 43: Information and advisory services in respect of food and restaurants; booking and reservation services for restaurants.</p> <p>Class 44: Information and advisory services in respect of hygiene, beauty care and health care.</p>
2298341	Bubbles Device	Classes 09, 35, 36, 38, 39, 41, 42, 43 and 44 as 2298339 above.
2298342	Bubbles Device	Classes 09, 35, 36, 38, 39, 41, 42, 43 and 44 as 2298339 above.
2298346	Bubbles Device	Classes 09, 35, 36, 38, 39, 41, 42, 43 and 44 as 2298339 above.
2298347	Bubbles Device	Classes 09, 35, 36, 38, 39, 41, 42, 43 and 44 as 2298339 above.