

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION No. 3231134
IN THE NAMES OF JESSIE TSANG, CAROLYN BALDWIN, CAROLYN LUCAS
GRIFFEY AND LUCAS GRIFFEY**

**AND IN THE MATTER OF INVALIDATION No. 502026 THEREOF
BY BET ST LLC**

**AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON
BY THE APPLICANT
AGAINST A DECISION OF MR CJ BOWEN
DATED 30 JULY 2019**

DECISION

Introduction

1. On 28 March 2018, BET ST LLC, New York, New York, USA (“the Applicant”) applied to invalidate UK Registration number 3231134 standing in the name of Jessie Tsang, Carolyn Baldwin, Carolyn Lucas Griffey and Lucas Griffey, Northampton, Northamptonshire, UK (“the Proprietors”).
2. Registration number 3231134 is for the trade mark Soul Train Records in respect of:

Class 9
Musical sound recordings

Class 35
Merchandising

Class 41
Theatre entertainment
3. The contested trade mark was applied for on 15 May 2017 and entered on the Register on 8 September 2017.
4. The grounds for invalidity were under:
 - 1) Section 47(1) and Section 3(6) of the Trade Marks Act 1994 in that the contested trade mark was applied for in bad faith; and
 - 2) Section 47(2) and Section 5(2)(b) of the Act in that at the filing date of the contested trade mark there was a similar earlier trade mark protected for

identical or similar goods or services and there existed a likelihood of confusion including a likelihood of association with the earlier trade mark.

5. In support of the ground of invalidity under Section 47(2) and Section 5(2)(b) of the Act, the Applicant relied on the following earlier trade marks belonging to the Applicant:

Number	Mark	Filing/registration date	Goods/services
UK 2206036	 <p>Mark Description/Limitation The applicant claims the colours pink, blue and white as an element of the second mark in the series</p>	16.08.99/09.08.02	Classes 9, 16, 41
UK 2205267	SOUL TRAIN	07.08.99/08.03.02	Class 41
EU 1951003	SOUL TRAIN	13.11.00/16.05.02	Class 9, 25, 41

6. There was no dispute that these: (a) qualified as earlier trade marks within the meaning of Section 6(1)(a) of the Act; and (b) were all subject to the proof of use conditions in Section 47(2A) – (2E) of the Act.
7. The Proprietors took issue with the grounds for invalidity in a Notice of defence and counterstatement filed on 11 June 2018, and requested proof of use of the earlier trade marks¹.
8. Both sides filed evidence and the matter came to a hearing before Mr CJ Bowen, acting for the Registrar, on 15 May 2019, where the Applicant was represented by Ms Katherine Cameron of Maucher Jenkins. Mr Aaron Wood of Wood IP Limited represented the Proprietors.
9. The Hearing Officer issued his written decision under reference number BL O/446/19 on 30 July 2019.

¹ There was a discussion of this by the Hearing Officer in his decision (paras. 64 – 66) which was not challenged on appeal.

10. In that decision, the Hearing Officer:
 - 1) rejected the ground for invalidity under Section 47(1) and Section 3(6) of the Act; and
 - 2) found that the Applicant had failed to provide proof of genuine use of its earlier trade marks during the relevant 5-year period. The ground for invalidity under Section 47(2) and Section 5(2)(b) of the Act therefore failed.
11. The present appeal to the Appointed Person brought by the Applicant under Section 76 of the Act and filed on 28 August 2019 is against the Hearing Officer's findings on proof of genuine use and consequently his dismissal of the invalidation under Section 47(2) and Section 5(2)(b).

Proof of genuine use

12. It was accepted that the proof of use period under Section 47(2B) as the legislation stood at the time was 29 March 2013 to 28 March 2018.
13. Further the Applicant limited the goods and services on which it relied in this regard to²:

Class 41

Entertainment services, being television, radio and live shows; theatrical performances

Class 9

Electronic publications; providing electronic publications (downloadable) from the internet

14. The Hearing Officer reviewed the Applicant's evidence including the Applicant's evidence of proof of use of its marks which was contained in and exhibited to a Witness Statement of Donna Blackman (who described the Applicant as "my Company") dated 13 September 2018, at paragraphs 8 to 23 and 43 of the decision. I did not understand the Applicant to challenge the Hearing Officer's description of Ms Blackman's evidence³ as opposed to his findings on proof of genuine use based on that evidence.
15. At paragraphs 77 to 81 of his decision, the Hearing Officer gave an overview of that evidence specifically as it related to the requirement for the Applicant to establish genuine use of its earlier trade marks in the relevant period for the goods and services the Applicant now relied upon:

"77. Although Ms Blackman fails to identify what position she holds in the applicant company, she nonetheless explains the history of the SOUL TRAIN television programme and its broadcast in the United States between 1971 and March 2006. While there appears to be no indication as to when the first Soul

² Para. 4 Applicant's skeleton argument for the hearing below dated 13 May 2019, and at the hearing below.

³ At paras. 8 – 21.

Train Awards Show was held, it appears that all the Soul Train Awards Shows have taken place in the United States. Ms Blackman states that the Soul Train Awards Show has been shown in the European Union on the applicant's BET channel. Air dates for the Soul Train Awards Show in France (from December 2015) and the UK (from May 2017) are provided, as are the times the programmes were broadcast and their duration. However, as Mr Wood pointed out, no indication is provided of the viewing figures these programmes achieved. Nonetheless, I note that all but one of the 20 occasions on which the Soul Train Awards Show was broadcast in France occurred within the relevant period as did all but three of the 42 occasions within the UK. Since 2016, it has also been possible for those in the UK to stream the Soul Train Awards Show via the applicant's BET Play App, although no figures in this regard are provided.

78. References to, inter alia, The Soul Train Awards have appeared in the press and on the applicant's various web and social media sites. As of 12 December 2012, the applicant's Soul Train Facebook page had 55,963 "likes" with the figure in June 2018 increasing to 472,424 "likes" and 464,423 "followers" worldwide. Although no corroborative evidence is provided in support, it is stated that as of 13 September 2018, there were the following number of "fans" in the countries mentioned: 12,134 (UK), 8,912 (France), 4,945 (Germany) and 3,614 (Italy). Soul Train and the Soul Train Awards have been promoted on the applicant's BET International Facebook page and on the "official Soul Train" Instagram page, the latter of which had 17.1k followers as of 28 June 2018, of which it is said 4% are located in the UK and 1% in Germany; once again, no corroborative evidence is provided in support of the percentage figures provided.

79. As of 21 December 2016, the applicant's Soul Train Twitter page had 16.9k followers worldwide. The words Soul Train have also appeared on BET International's Twitter page and on BET Network's YouTube page. In her evidence, Ms Blackman stated:

"17. The applicant has invested considerable sums and creative effort in developing and promoting the SOUL TRAIN marks in the United Kingdom and European Union..."

However, not even estimates of the sums referred to have been provided.

80. Insofar as the trade marks relied upon are concerned, the evidence shows use in a range of formats including: "SOUL TRAIN AWARDS" (stylised) ... "Soul Train", "#SoulTrainAwards", "SoulTrain Awards", "SOUL TRAIN", "soultrainofficial", "SOUL TRAIN" (stylised), "@soultrain" and "soultrain.com".

16. Having earlier instructed himself: (1) generally with regard to the law on genuine use by reference to the decision of Arnold J in *Walton International Ltd v. Verweij Fashion BV* [2018] EWHC 1608 (Ch), paragraphs 114 – 115; (2) specifically in relation to EUTM number 1951003, proof of use in the EU by reference to Case C-149/11, *Leno Merken BV v Hagelkruis Beheer BV* EU:C:2012:816, paragraphs 36, 50,

55 and 59, *The London Taxi Corporation Ltd v. Frazer-Nash Research Ltd* [2016] EWHC 52 (Ch), Arnold J at paragraphs 228 – 230 and Case T-398/13, *TVR Automotive Ltd v. OHIM* EU:T:2015:503, paragraph 57; and (3) on the evaluation of evidence of use in satisfying the burden of proof on the Applicant by reference to *PLYMOUTH LIFE CENTRE Trade Mark*, BL O/236/13, paragraph 22 and *CATWALK Trade Mark*, BL O/404/13, paragraph 21, the Hearing Officer concluded as set out below in relation to the remainder of registered goods and services relied on by the Applicant.

17. First, no genuine use had been shown by the Applicant in relation to its Class 9 goods – *Electronic publications; providing electronic publications (downloadable) from the internet*:

“82. In relation to this class the applicant relies upon its stylised trade mark UK no. 2206036 and plain word EUTM no.1951003. In her statement, Ms Blackman argues:

“16...The use of the SOUL TRAIN Marks through these social media platforms also amounts to use during the Relevant Period in respect of "electronic publications" and "providing on-online electronic publications (downloadable) from the Internet" in Class 9.”

83. I begin by noting the web and social media information relied upon by the applicant which I have commented upon above. As I mentioned earlier, no indication has been provided of the “considerable sums” the applicant states it has invested in promoting its SOUL TRAIN trade mark, nor, I note, have even estimates been provided of any income generated under this trade mark in relation to the goods now being relied upon. Regardless, simply using a trade mark on a web or social media platform does not, in my view, constitute creating or maintaining a market for electronic publications, whether those publications are, or are not, downloadable. As a consequence, the applicant is not, in my view, entitled to rely upon the goods it has identified in class 9 in these proceedings.”

18. Second, the evidence before him did not enable the Hearing Officer to determine whether the use shown by the Applicant in relation to the Applicant’s services in Class 41 would be viewed as warranted in the economic sector concerned to maintain or create market for the services in question either in the UK or the EU:

“84. In relation to this class, the applicant relies upon all three earlier trade marks. I note that the specifications of UK no. 2205267 and EUTM no. 1951003 are identical, whereas the specification of UK no. 2206036 includes the term “entertainment services” at large which is, of course, broad enough to include all the services upon which the applicant relies. For present purposes, I shall focus on UK no. 2205267 for the plain words SOUL TRAIN which, at the hearing, Ms Cameron agreed represented the applicant’s strongest case. In her statement, Ms Blackman argued:

“6... use of the SOUL TRAIN Marks has been made by the Applicant in France since 6 December 2015 and in the UK since 21 May 2017

through the broadcast of the Awards, as set out... Such use amounts to use during the Relevant Period in respect of all the Class 41 services covered by the SOUL TRAIN Marks and, in particular, "entertainment services, being television, radio and live shows; theatrical and motion picture performances."

And:

"16... Further, given that many of the posts on the aforementioned social media platforms contain video clips of or about the Programme and Awards, these posts also amount to use of the SOUL TRAIN Marks during the Relevant Period in respect of the Class 41 services covered by the SOUL TRAIN Marks."

85. While the evidence shows that within the relevant period the Soul Train Awards show has been broadcast in the UK on 39 occasions, as I mentioned above, no indication is provided of the number of viewers those broadcasts enjoyed. As I also mentioned above, the applicant has not provided any evidence of either the sums it has invested in promoting its SOUL TRAIN trade mark in, inter alia, the UK nor have even estimates been provided of, for example, any income generated by the broadcast of these programmes.

86. In reaching a conclusion, I also note the social media information mentioned above and that the applicant relies upon, inter alia, the video clips which appeared on these social media platforms in support of its claim to genuine use in relation to class 41.

87. At this point, I remind myself of the comments of Mr Alexander Q.C., in *Awareness Limited v Plymouth City Council* [PLYMOUTH LIFE CENTRE] which are shown above.

88. In light of those comments it ought, in my view, to have been relatively straightforward for the applicant to provide the sort of evidence to which I have referred above, for example, income generated, marketing spend, viewer numbers, number of downloads/streams etc. Without such information, I am unable to conclude that its use is sufficient to create or maintain a market in the services upon which it relies. In addition, insofar as the applicant's social media activity is concerned, in my view, the mere fact that, for example, a person views a website or expresses an interest on a social media platform falls some way short of establishing that the applicant has been creating or maintaining a market in the UK in relation to the services being relied upon.

89. Even though the applicant's use in the UK assists it in relation to its EUTM, its position is no better, with its evidence suffering from the same defects I have already identified. Although the evidence shows that in addition to its use in the UK the Soul Train Awards show has also been shown on BET France since 2015, it was only shown on 20 occasions. Similarly, although the applicant is said to have 17,471 Facebook fans in Europe (in addition to those in the UK) and 171 Instagram followers (in addition to the

UK), that evidence does not assist the applicant for the reasons I have already explained.”

Grounds of appeal

19. As I said the Notice of appeal and statement of grounds was filed by the Applicant on 28 August 2019.
20. The grounds of appeal were essentially that the Hearing Officer erred as a matter of law in ruling that the use shown by the Applicant failed to establish genuine use of the earlier trade marks in relation to the goods and services finally relied on by the Applicant in Classes 9 and 41.
21. On 3 September 2019, the proprietors filed “Submissions of the Respondent” in reply to the appeal.
22. Both sides filed skeleton arguments (in the case of the Proprietors referring back to the submissions mentioned in para. 21 above). At the appeal hearing, the Applicant was again represented by Ms Cameron of Maucher Jenkins and the Proprietors by Mr Wood, now of Keystone Law.

Standard of review

23. Despite the way in which the appeal was worded, I did not understand the Applicant to say that the Hearing Officer got the law wrong on the meaning of genuine use⁴.
24. Instead the Applicant’s challenge appeared to be against the Hearing Officer’s evaluation of the facts, there being no suggestion that the Hearing Officer misdescribed the evidence or wrongly took account of or failed to take account of any material evidence/fact.
25. In *Actavis Group PTC EHF v. ICOS Corporation* [2019] UKSC 15, Lord Hodge made clear that an error of principle justifying interference by the appellate tribunal was not confined to errors of law but extended also to evaluative errors in the application of a legal standard to the facts. Lord Hodge continued:

“80. What is a question of principle in this context? An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. What is the nature of such an evaluative error? In this case we are not concerned with any challenge to the trial judge’s conclusions of primary fact but with the correctness of the judge’s evaluation of the facts which he has found, in which he weighs a number of different factors against each other. This evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge’s conclusion is outside the bounds within which reasonable disagreement is possible: *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642; [2003] 1 WLR

⁴ Subject to a possible exception in relation to Class 9 explored below.

577, paras 14-17 per Clarke LJ, a statement which the House of Lords approved in *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325, para 46 per Lord Mance.

81. Thus, in the absence of a legal error by the trial judge, which might be asking the wrong question, failing to take account of relevant matters, or taking into account irrelevant matters, the Court of Appeal would be justified in differing from a trial judge's assessment of obviousness if the appellate court were to reach the view that the judge's conclusion was outside the bounds within which reasonable disagreement is possible. It must be satisfied that the trial judge was wrong: see, by way of analogy, *In re B (A Child) (Care Proceedings Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911, paras 90-93 per Lord Neuberger, para 203 per Lady Hale."

26. I have borne this guidance in mind.

General principles on the meaning of genuine use

27. As to that evaluative process carried out by the Hearing Officer in this case, I find it useful at this point to recall the summary set out by Arnold J in *Walton* (without references):

“(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark ...

(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 ...

(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 ... Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality ...

(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 ... Internal use by the proprietor does not suffice ... Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter ... But use by a non-profit making association can constitute genuine use ...

(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 ...

(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 ...

(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 ...

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use ...”

Class 9

28. Ms Cameron’s first point was that the Hearing Officer was wrong in law (herewith the exception mentioned at footnote 4 above) to say that using a mark on a web site or social media could not constitute genuine use in relation to electronic publications.
29. Ms Cameron referred me to the definition of “publication” in the Cambridge Dictionary online as: “*the act of making information or stories available to people in a printed or electronic form ...*”.
30. She also referred me to the EUIPO decisions in Opposition No B 3 021 998, *BeSweet Creations LLC v. PLT Group sp. Z o. o.*, page 12, and Case R 1202/2018-2, *Capitol Records LLC v. Susanne Dickert*, paragraph 53 recognising respectively: (a) the use by companies of social media and celebrity endorsement to advertise their products; and (b) the possibility of establishing genuine use without solid sales figures. However, both of those cases were decided on the basis of significantly different facts/evidence, and neither concerned whether postings on social media etc. constituted genuine use in relation to electronic publications.
31. I would agree with Ms Cameron that the situation may be more nuanced had the Hearing Officer intended his comment to be taken as a statement of general principle, which in my view he did not. Read in context, what he actually said with reference to the Applicant’s claim to have genuinely used its earlier marks in respect of electronic publications, was:

“83. I begin by noting the web and social media information relied upon by the applicant which I have commented upon above. As I mentioned earlier, no indication has been provided of the “considerable sums” the applicant

states it has invested in promoting its SOUL TRAIN trade mark, nor, I note, have even estimates been provided of any income generated under this trade mark in relation to the goods [electronic publications] now being relied upon. Regardless, simply using a trade mark on a web or social media platform does not, in my view, constitute creating or maintaining a market for electronic publications, whether those publications are, or are not, downloadable.”

32. In support of the Applicant’s argument that there had been genuine use in the period in relation to electronic publications Ms Cameron referred me to Exhibit DB3 which Ms Blackman said was a copy screen shot of a web page from the BET International UK web site. Ms Blackman explained that BT International was responsible for all content broadcast outside of the United States. The copy screen shot showed popular shows including SOUL TRAIN AWARDS. The web page bore a copyright notice for 2015. Ms Cameron also relied in support on the Applicant’s social media evidence at DB5 – DB12. These, Ms Cameron pointed out, and I accept, contained not only information about the Applicant’s programmes but also information about the artists themselves, for example, birthday wishes.
33. I agree that semantically these posts on the Applicant’s Soul Train social media pages constitute “publications” as defined above. However, that masks the real question to be addressed which was whether the Applicant had traded under its SOUL TRAIN marks in electronic publications in the UK/EU during the relevant period. As the Hearing Officer noted no figures were given for either the Applicant’s turnover in/or promotional expenditure for electronic publications, and there was no supporting evidence of any promotion/sales by the Applicant in the UK or the EU of electronic publications.
34. I have carefully reviewed the social media pages and would agree with Mr Wood’s observation that the social media posts appear instead to be promoting the Applicant’s award shows and broadcasting services. Mr Wood referred me in that regard to *Claridge’s Hotel Limited v. Claridge Candles Limited* [2019] EWHC 2003 (IPEC) where the use of CLARIDGE’S in relation to room toiletries was not genuine use of the mark for toiletries (because the claimant never marketed toiletries) but use of the mark in promoting the claimant’s hotel services.
35. Furthermore, the Hearing Officer correctly in my view identified significant deficiencies with the social media evidence including that parts did not fall within the relevant period and the whole, subject to a few exceptions⁵, was not obviously UK/EU (as opposed to international) facing. Thus, the only estimations of UK/EU users were in Ms Blackman’s evidence to the effect that the official SOUL TRAIN: (1) Facebook page, on 13 September 2018, had 12,134 fans in the UK, 8,912 in France, 4,945 in Germany and 3,614 in Italy (para. 11); and (2) Instagram page, on 28 June 2018 had 17,100 followers worldwide of which 4% were located in the UK and 1% in Germany (para. 13)⁶. However, Ms Blackman gave no indication at how these figures/percentages of UK/EU users were arrived at, nor was any corroborative documentation supplied.

⁵ Referring to programme times in GMT being shown on UK providers, e.g., Sky.

⁶ Both dates being outside the relevant period of 29 March 2013 to 28 March 2018 by around six and three months respectively.

36. In sum, I agree with the Hearing Officer that the Applicant failed to establish genuine use in the relevant period for the Class 9 goods relied on namely: *Electronic publications; providing electronic publications (downloadable) from the internet.*

Class 41

37. When it came to the services relied on by the Opponent in Class 41: *Entertainment services, being television, radio and live shows; theatrical performances*, the evidence of use comprised essentially Ms Blackman's statement that the Applicant's SOUL TRAIN Awards Show taking place in the USA had been broadcast in the relevant period on 19 occasions in France and 39 occasions in the UK. Ms Blackman exhibited at DB2 a list of air dates, times and durations of programmes. In France, the broadcasts commenced in May 2016 and covered the SOUL TRAIN Awards 2014 – 2017 inclusive. In the UK, the broadcasts commenced in May 2017 and covered the SOUL TRAIN Awards 2016 – 2017.
38. Ms Cameron emphasised that the list at DB2 showed multiple airings of the annual SOUL TRAIN Award programmes which she contended should have sufficed before the Hearing Officer to establish that a market had been created and maintained by the Applicant in the Class 41 services under the SOUL TRAIN marks.
39. Ms Cameron additionally referred to Ms Blackman's evidence that the awards could be streamed via the BET Play App, which Ms Blackman said was available to UK users from 2016. However, as the Hearing Officer noted no figures were provided for the UK, or indeed the EU, as to downloading of the App and/or streaming of the Awards by users in those territories.
40. Ms Cameron further re-emphasised the social media evidence particularly the fact that video clips of the SOUL TRAIN Awards Shows were posted by the Applicant on their YouTube and other social media accounts. Mr Wood, prompted by his client, reminded me of the "internationality" of the Applicant's social media material, and that there was no evidence of UK/EU users other than Ms Blackman's estimations that I have already referred to, at paragraph 35 above.
41. To be fair to the Applicant there were posts on the Applicant's historic Facebook pages at DB7 referring to broadcasts of the SOUL TRAIN Awards on BET at times stated in GMT. Ms Blackman identified two such posts at paragraph 12 of her Witness Statement but both of these derived from 2012, which was not only before the relevant use period but also prior to when Ms Blackman stated that the Awards were first available in the UK in May 2017.
42. The third Facebook post identified by Ms. Blackman was dated 25 November 2017 and stated:

"Get ready for BET Presents: The 2017 #SoulTrainAwards premiere on BET International Friday 9pm! Sky 187, Virgin 184, Freesat 140".

43. Ms Blackman had in the same vein earlier in her Witness Statement (para. 9) referred to an article on the Soul Train Awards 2016 published on www.premiERGospel.org.uk dated 24 November 2016 exhibited at DB4 that culminated:

“Catch all this and more on the Soul Train Awards 2016 premiere Friday 2nd December @ 9pm only on BET – Sky 187 / Virgin 184 / Freesat 140.”

44. Ms Cameron suggested that the SOUL TRAIN Awards Show was additionally broadcast on Sky, Virgin, and Freesat and that the Hearing Officer failed to take account of DB4 (skeleton argument, para. 8). First, my reading of DB4/DB7 is that the BET broadcasts were available for viewing through the Sky, Virgin and Freesat platforms. Second, in any event, the Hearing Officer noted the caption at DB4 at paragraph 12 of his decision.
45. Finally, the Applicant contended that the Proprietors had admitted at paragraphs 35 – 36 of their skeleton argument for the hearing below that the Applicant had used its SOUL TRAIN marks for “televised award shows”. I accept Mr Wood’s riposte that the Proprietors were at that point putting forward a fall back position on the question of partial use were the Hearing Officer to find contrary to the Proprietors’ primary argument that genuine use by the Applicant in Class 41 had been shown.
46. I have found this part of the appeal challenging not least because it appeared to me that the Applicant was in effect seeking a re-evaluation on the evidence. As I have said, there was no suggestion on the part of the Applicant that the evidence had been distorted by the Hearing Officer in any way.
47. On the one hand, there is no prescription regarding the kind of evidence required to prove genuine use. It is well established that a proprietor’s evidence of use must be assessed for what it shows overall (see, e.g., Case T-380/18, *Intas Pharmaceuticals Ltd v. EUIPO* EU:T:2019:782, para. 57). On the other hand, it is not the case that all commercial uses necessarily amount to genuine use (see, e.g., BL O/528/15, *STRADA Trade Mark*). Moreover genuine use cannot be established through suppositions; *Intas*, para. 58).
48. The Hearing Officer took account of the fact that the Applicant had broadcast its SOUL TRAIN Awards Show on 39 occasions in the UK and 19 occasions in France in the relevant period. Against that, however, he noted the complete absence of evidence as to viewing numbers in the UK/EU, turnover for the services relied on in the UK/EU, advertising spends (even estimations) on promoting the Applicant’s SOUL TRAIN Awards Show in the UK/EU, UK/EU visitor numbers to/users of the Applicant’s website and social media platforms under the SOUL TRAIN marks, UK/EU download/streaming numbers.
49. I have carefully reviewed the Hearing Officer’s decision in the light of the evidence and the arguments of the parties. I have particularly looked at whether the Hearing Officer could be said to have focussed unduly on what items were missing rather than the evidence of use the Applicant presented. I recalled that in sum the evidence of use specific to the UK/EU comprised the lists of broadcasts in France/the UK of the SOUL TRAIN Awards Show exhibited at DB2, plus the supporting references in Premier Gospel (DB4) and on Facebook (DB7) mentioned at paragraphs 42 and 43

above. There was in fact no evidence that anyone in the UK had viewed the Awards although I accept Ms Cameron's comment that why otherwise would the Applicant have re-broadcast the Awards in those territories.

50. Nevertheless in the absence of the missing items identified by the Hearing Officer – which one would presume as did the Hearing Officer were within easy reach of the Applicant to produce – in my judgment the Hearing Officer was entitled to conclude that the Applicant's evidence was insufficient to allow him to determine whether the use shown in the UK/EU would be viewed as warranted in the entertainment/entertainment awards sector concerned to maintain or create a share in the market in the Applicant's services relied on (i.e., as satisfying the test for genuine use).

Conclusion and costs

51. For the above reasons the appeal has failed.
52. The Hearing Officer ordered the Applicant to pay to the Proprietors costs of the opposition in the sum of £1,431. I will order the Applicant to pay to the Proprietors the sum of £800 as a contribution to the costs incurred by the Proprietors in relation to this appeal; the total sum of £2,231 to be paid within 28 days of the date of this decision.

Professor Ruth Annand, 2 March 2020

Ms Katherine Cameron of Maucher Jenkins appeared for the Applicant/Appellant

Mr Aaron Wood of Keystone Law appeared for the Proprietors/Respondents