O-289-14

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NUMBER 2549706
BY Jet2.com Limited
TO REGISTER THE FOLLOWING TRADE MARKS IN CLASSES 9, 16, 39, 43:

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Background

1. On 8 June 2010, Jet2.com Limited ('the applicant') applied to register the above mark for a wide range of goods and services as follows:

Class 9: Communications, photographic, measuring, signalling, checking, scientific, optical, nautical, life-saving and surveying apparatus and instruments; computer software, hardware and firmware; parts and fittings for all the aforesaid goods; all the aforesaid goods relating to transport, freight and cargo services and to holidays and holiday air travel.

Class 16: Printed matter and publications; books, manuals, pamphlets, newsletters, albums, newspapers, magazines and periodicals; tickets, vouchers, coupons and travel documents; identity cards, labels and tags; all the aforesaid goods relating to transport, freight and cargo services and to holidays and holiday air travel.

Class 39: Airline services; transportation of passengers and of goods by air; travel agents services; baggage handling services and cargo handling services; freight services; cargo services; freight and cargo services by aviation; freight warehousing; chartering of aircraft; rental and hire of aircraft; advisory and information services relating to airline services and transport services; providing information concerning airline services and transport services online from a computer database or the Internet; arranging of flights; transport of passengers and luggage to and from hotels; transport of goods, passengers and travellers by land, sea and air; arranging, operating and providing facilities for cruises, tours, excursions and holidays; information, advisory and consultancy services relating to all the aforesaid services.

Class 43: Accommodation services; catering services; arranging of holiday accommodation; booking services for holiday accommodation; holiday planning services; providing facilities for holidays; rental of holiday accommodation; services for reserving holiday accommodation; services for the provision of information relating to holiday accommodation; organising and arranging holidays; selling hotel accommodation; accommodation services and catering services provided online from computer databases or the Internet; information, advisory and consultancy services relating to all the aforesaid services.

2. On 18 June 2010, the Intellectual Property Office ('IPO') issued an examination report in response to the application. In that report, an objection was raised under sections 3(1)(b)

and (c) of the Trade Marks Act 1994 ('the Act'), against Class 39 on the basis that the mark consists exclusively of the words 'FRIENDLY LOW FARES', being a sign which may serve in trade to designate the favourable cost of the services e.g. airline services with friendly low fares.

3. An objection was also raised under section 3(1)(b) of the Trade Marks Act 1994, against classes 9, 16 and 43 on the basis that the sign is devoid of any distinctive character, because it would be seen as a promotional statement for the organisation, rather than as an indication that the goods and services come from one particular undertaking. The examiner stated that the term 'friendly low fares' would be seen as an indication that the organisation provides low fares which are favourable for the consumer, rather than as an indication that the goods and services come from one particular undertaking.

4. The examiner also referred to definitions of the word 'friendly' according to The Penguin English Dictionary 2007 which define the word as meaning *inter alia 'inclined to be favourable'*. Reference to Collins English Dictionary was also made where the word 'friendly' is defined as meaning *'tending or disposed to help or support; favourable'*.

5. In response, on 8 July 2010 a hearing was requested where the applicant would be represented by Mr Jason Dainty of Kempner & Partners LLP ('the agent').

6. At the hearing on 14 August 2012, the objection under section 3(1)(c) was waived, but the objection under section 3(1)(b) was maintained against all classes and a period of three months was granted (until 24 November 2013) to allow Mr Dainty time to submit evidence of acquired distinctiveness.

7. On 23 November 2013, Mr Dainty filed a request for an extension of time. This was due to the fact that evidence of acquired distinctiveness was being compiled and additional time was granted until 14 February 2013.

8. On 14 February 2013 evidence of acquired distinctiveness was filed. After assessing the evidence, the hearing officer was not persuaded that it was sufficient to demonstrate acquired distinctiveness. On 23 March 2013, Mr Dainty was advised in writing why the evidence was deemed to be deficient, and was given a period of two months (until 23 May 2013) in which to respond.

9. On 21 May 2013, a further hearing was requested in respect of the evidence of acquired distinctiveness.

10. At the second hearing held on 11 September 2013, I maintained that the evidence was insufficient to demonstrate acquired distinctiveness and on 12 September 2013 the application was refused.

11. I am now asked under section 76 of the Trade Marks Act 1994, and rule 69 of the Trade Marks Rules 2008, to state in writing the grounds of my decision and the materials used in arriving at it.

The applicant's case for registration

12. Prior to setting out the law in relation to section 3(1)(b) of the Act, I must emphasise that the following decision will set out my reasons for maintaining the objection by reviewing and assessing the mark applied for. Prior to the refusal of the application, the only arguments put forward in support of *prima facie* acceptance were those made orally at the *ex parte* hearing on 14 August 2012. Those arguments focused on the fact that because the mark is simple, that does *not* mean it should be excluded from registration. Mr Dainty submitted that whilst the mark may not be highly distinctive, it is the right side of the line for acceptance. Mr Dainty also submitted that it is not possible to have 'friendly low fares' and whilst fares may be cheap, low or high, he did not consider that consumers would perceive the sign as designating a characteristic of the goods and services.

13. At the second hearing on 11 September 2013, Mr Dainty agreed that whilst the mark may not acceptable *prima facie*, he felt it was only just the wrong side of the line for acceptance. Mr Dainty enquired whether a survey may help the applicant's case for registration. I pointed out that these can often be costly and it is for the applicant to decide what evidence should be submitted in order to demonstrate acquired distinctiveness.

Decision

The *prima facie* case for registration under Section 3(1)(b) of the Act

14. Section 3(1)(b) of the Act reads as follows:

> 3.(1) The following shall not be registered –
>
> (b) trade marks which are devoid of any distinctive character,

15. The Court of Justice of the European Union ('CJEU', formerly 'ECJ') has repeatedly emphasised the need to interpret the grounds of refusal of registration listed in Article 3(1) and Article 7(1), the equivalent provision in Council Regulation 40/94 of 20 December 1993 on the Community Trade Mark, in the light of the general interest underlying each of them (*Bio ID v OHIM*, C-37/03P paragraph 59 and the case law cited there and, more recently, *Celltech R&D Ltd v OHIM*, C-273/05P).

16. The general interest to be taken into account in each case must reflect different considerations according to the ground for refusal in question. In relation to section 3(1)(b) (and the equivalent provision referred to above) the Court has held that *"…the public interest… is, manifestly, indissociable from the essential function of a trade mark"*, *SAT.1 SatellitenFernsehen GmbH v OHIM*, C-329/02P. The essential function thus referred to is that of guaranteeing the identity of the origin of the goods or services offered under the mark to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin (see paragraph 23 of the above-mentioned judgement). Marks which are devoid of any distinctive character are incapable of fulfilling that essential function. Section 3(1)(c), on the other hand, pursues an aim which reflects the public interest in ensuring that descriptive signs or indications may be freely used by all (*Wm Wrigley Jr v OHIM*, *'Doublemint'*, C-191/OP, paragraph 31).

17. Section 3(1)(b) must include within its scope those marks which, whilst not designating a characteristic of the relevant goods and services (i.e. not being necessarily descriptive), will nonetheless fail to serve the essential function of a trade mark in that they will be incapable of designating origin. In terms of assessing distinctiveness under section 3(1)(b), the CJEU provided guidance in *Koninklijke KPN Nederland NV v Benelux-Merkenbureau (Postkantoor)* C-363/99) where, at paragraph 34, it stated:

> *"A trade mark's distinctiveness within the meaning of Article 3(1)(b) of the Directive must be assessed, first, by reference to those goods or services and, second, by reference to the perception of the relevant public, which consists of average consumers of the goods or services in question, who are reasonably well informed and reasonably observant and circumspect (see inter alia Joined Cases C-53/01 to 55/01 Linde and Others [2003] ECR I- 3161, paragraph 41, and C-104/01 Libertel [2003] ECR I-3793, paragraphs 46 and 75)."*

18. So the question of a mark being devoid of distinctive character is answered by reference to the goods and services applied for, and the perception of the average consumer for those goods or services.

19. Furthermore, following on from CJEU guidance on cases such as *Real People Real Solutions*, there has been a tendency to skew assessments of distinctiveness in respect of promotional marks, such as the one applied for. This sort of assessment is based on the assumption that consumers are not in the habit of regarding slogans as designating trade origin, but instead regard them as purely promotional, non-distinctive material. Following the Court's decision on *Audi* we now know that this is only part of the considerations that must be made. In paragraph 44 of that decision, the Court stated:

> *"…while it is true… that a mark possesses distinctive character only in so far as it serves to identify the goods or services in respect of which registration is applied for as originating from a particular undertaking, it must be held that the mere fact that a mark is perceived by the relevant public as a promotional formula, and that, because of its laudatory nature, it could in principle be used by other undertakings, is not sufficient, in itself, to support the conclusion that the mark is devoid of distinctive character."*

20. Given such guidance, I intend to approach this matter from a semantic perspective in order to assess whether or not the phrase is capable of performing the essential function of a trade mark, and whether or not it should therefore be free from objection under section 3(1)(b).

21. It is also a well-established principle these days that the Registrar's role in examination will involve a full and stringent examination of the facts, underling the Registrar's frontline role in preventing the granting of undue monopolies, see, to that effect, e.g. CJEU Case C-51/10 P, *Agencja Wydawnicza Technopol sp. z o.o. v. OHIM* [2011] ECR I-1541. Whilst this case was, technically speaking, in relation only to section 3(1)(c) or its equivalent in European law, the principle about the 'prevention of undue monopolies' must hold good whether section 3(1)(b) and/or (c) applies.

Application of legal principles – section 3(1)(b).

22. Given the breadth of goods and services listed in this application, it is hard to categorise precisely who the average consumer would be. However, I am proceeding on the basis that the relevant public consists not only of the general public, but also - in relation to some of the terms such as 'freight services and cargo handling services', - those in business with a more detailed understanding of the products intended for protection. As such, when purchasing goods and services of the sort listed in the application, I consider that a moderate to high level of attention will be paid.

23. I must then, consider the effect upon the perceptions of the average consumer on seeing the words 'FRIENDLY LOW FARES' in normal and fair use in relation to the goods and services of the application. This process starts with a linguistic analysis of the words in the combination presented. Although it is paramount that any assessment of distinctiveness takes into account the mark's totality, it is also useful to first analyse the mark by reference to its constituent parts.

24. The mark applied for consists of the expression 'FRIENDLY LOW FARES'. The individual words within the mark are defined in Collins English Dictionary as meaning:

> **Friendly**; a*djective* tending or disposed to help or support; favourable.
>
> **Low;** *adjective* of relatively small price or monetary value: low cost.
>
> **Fare**; *noun* the sum charged or paid for conveyance in a bus, train, aeroplane, etc

25. I consider that the sign comprises an easy to understand and grammatically correct narrative. The words 'low fares' are plainly and objectively descriptive of low cost fares. The word 'friendly' has some informality about it, but nonetheless merely qualifies that the low cost fares are favourable to consumers. In terms of the phrase's inherent linguistic characteristics, in my opinion it is difficult to see exactly what about it as a whole could ever conceivably perform the essential function of a trade mark in the *prima facie* case. It is, to coin a well known phrase in trade mark circles in the UK, entirely 'origin neutral'.

26. In assessing the distinctiveness of the sign, it is important I am convinced that the objection applies to all the goods and services applied for. If there are goods or services specified which are free of objection under section 3(1)(b) then they must be allowed to proceed. In the CJEU case C-239/05 *BVBA Management, Training en Consultancy v Benelux-Merkenbureau,* the question being referred to the Court was whether the Directive, on which the Act is based of course, must be interpreted as meaning that the competent authority is required to state its conclusion separately for each of the individual goods and services specified in the application. The Court answered, stating (in paragraph 38) that the competent authority was required to assess the application by reference to individual goods and services. However, where the same ground of refusal is given for a category or group of goods or services, the competent authority may use only general reasoning for all the goods and services concerned. It is plain from this judgment that the Court had in mind purely practical considerations which had to be balanced against a legal provision in the Trade

Marks Directive which allowed refusal only in relation to goods and services where objection applied. Put simply, the proper functioning of the trade mark registration system at large had to be safeguarded which, if any relevant authority was compelled to give reasons for refusal against each individual item of goods and services, would very quickly grind to a halt.

27. In my view, the approach taken by the Appointed Person in BL O/185/12 '*FEEDBACKMATTERS*' is indicative of a general proposition. Even if it is not, and was never intended as, a general proposition *per se*, it is certainly indicative of the inherent problems in handling a sign which may be considered 'devoid' in relation to certain goods and services but not others. The fact that, in that case, the Appointed Person was limited in the application of the proposition to consideration of services in class 36 does nothing to undermine the practical or theoretical soundness of approach. The consideration that 'FEEDBACKMATTERS' is a generic phrase does not detract from it being an expression of potentially wider application. Put simply, once a view is taken that, linguistically, a phrase is 'devoid', that is to say 'unpossessed of distinctive character' or 'origin neutral' for my purposes, it is hard to contend that such words are magically transformed, *prima facie*, from being 'devoid' into being 'origin specific', in relation to certain (only) goods and services. This is not, emphatically, to suggest that, of necessity, a section 3(1)(b) objection against a word mark will bite against all goods and services, *but it is to admit that it theoretically could, in any given instance.* The phrase, 'any given instance', allows me opportunity to take into account not just the inherent linguistic qualities of the sign itself, but also takes into consideration the fact that the specifications in Classes 9 and 16 all relate to transport, freight and cargo services and to holidays and holiday air travel. Similarly in respect of the services, for example transport, travel, accommodation, booking and holiday services, these are all services where low fares are a key consideration in the selection and purchasing processes.

28. In saying this, I am of course familiar with and bound by the application of 'partial refusal', based upon Art 13 of the Trade Marks Directive, namely that refusal can only be based on those goods and services in respect of which the objection is effective, and by definition, for other goods and services, the application can be accepted. I will simply observe at this stage, however, that this is a somewhat easier principle to apply where the objection is based only on section 3(1) (c), where objective characteristics such as *types* and *kinds* are at play, rather than signs or marks which are simply 'devoid' under section 3(1)(b) only.

29. At the second hearing on 11 September 2013, Mr Dainty accepted that whilst the mark may not acceptable *prima facie*, he felt it was only just the wrong side of the line for acceptance. He did *not* submit that the sign was *prima facie* distinctive for any of the goods or services. As such, even if there is no obvious connection between the sign 'FRIENDLY LOW FARES' and e.g. life saving or surveying apparatus relating to transport, freight and cargo services, holidays, and holiday air travel, this would not, of itself, have the effect of rendering the sign free from objection under section 3(1)(b). In other words, the average consumer would not necessarily reach the conclusion that, because, say, life saving or surveying apparatus have no literal connection with 'low fares', the phrase must, or at least is apt to, function as a trade mark.

30. The common sense approach to this starts with the inherent linguistic analysis that I have already conducted, but also factors in, for example, recognised patterns of trade and commerce. The point here is that, more so than ever before, undertakings find themselves operating in a highly competitive commercial sphere where it is not uncommon for consumers to be subjected to narratives such as 'love our low fares', 'legendary low fares' 'super low fares' etc. In view of this, I consider that consumers would pay little attention to the fact that one undertaking purports to offer something better or cheaper than its competitors. All the phrase would indicate is that the undertaking offers consumers favourable low cost fares. Insofar as the average consumer may see the words as possibly connected to an undertaking in the field of transport, the words are not denominative of the name of such a concern, but rather the objective of *any* such undertaking offering friendly low fares.

31. In my view, this mark provides the consumer with nothing more than information about positive aspects of the goods and services on offer. I have considered the judgement of the CJEU in *Audi* cited above, which states:

> *"41. It must be held that, even though the General Court stated in paragraph 36 of the judgment under appeal that it is clear from the case-law that registration of a mark cannot be excluded because of that mark's laudatory or advertising use, it went on to explain that the reason for its finding that the mark applied for lacks distinctive character was, in essence, the fact that that mark is perceived as a promotional formula: that is to say, its finding was made precisely on the basis of the mark's laudatory or advertising use.*
>
> *...*
>
> *44. However, while it is true – as was pointed out in paragraph 33 of the present judgment – that a mark possesses distinctive character only in so far as it serves to identify the goods or services in respect of which registration is applied for as originating from a particular undertaking, it must be held that the mere fact that a mark is perceived by the relevant public as a promotional formula, and that, because of its laudatory nature, it could in principle be used by other undertakings, is not sufficient, in itself, to support the conclusion that that mark is devoid of distinctive character.*
>
> *45. On that point, it should be noted that the laudatory connotation of a word mark does not mean that it cannot be appropriate for the purposes of guaranteeing to consumers the origin of the goods or services which it covers. Thus, such a mark can be perceived by the relevant public both as a promotional formula and as an indication of the commercial origin of goods or services. It follows that, in so far as the public perceives the mark as an indication of that origin, the fact that the mark is at the same time understood – perhaps even primarily understood – as a promotional formula has no bearing on its distinctive character.*
>
> *46. However, by the line of reasoning set out in paragraphs 42 and 43 of the present judgment, the General Court did not substantiate its finding to the effect that the mark applied for will not be perceived by the relevant public as an indication of the*

commercial origin of the goods and services in question; in essence, rather, it merely highlighted the fact that that mark consists of, and is understood as, a promotional formula.

47. As regards the General Court's finding in paragraph 41 of the judgment under appeal that the mark Vorsprung durch Technik can have a number of meanings, or constitute a play on words or be perceived as imaginative, surprising and unexpected and, in that way, be easily remembered, it should be noted that, although the existence of such characteristics is not a necessary condition for establishing that an advertising slogan has distinctive character, as is apparent from paragraph 39 of the present judgment, the fact remains that, as a rule, the presence of those characteristics is likely to endow that mark with distinctive character.

...

56. In that regard, it must be stated that all marks made up of signs or indications that are also used as advertising slogans, indications of quality or incitements to purchase the goods or services covered by those marks convey by definition, to a greater or lesser extent, an objective message. It is clear, however, from the case-law set out in paragraphs 35 and 36 of the present judgment that those marks are not, by virtue of that fact alone, devoid of distinctive character.

57. Thus, in so far as those marks are not descriptive for the purposes of Article 7(1)(c) of Regulation No 40/94, they can express an objective message, even a simple one, and still be capable of indicating to the consumer the commercial origin of the goods or services in question. That can be the position, in particular, where those marks are not merely an ordinary advertising message, but possess a certain originality or resonance, requiring little in the way of interpretation by the relevant public, or setting off a cognitive process in the minds of that public.

58. Even if it were to be supposed that the slogan 'Vorsprung durch Technik' conveys an objective message to the effect that technological superiority enables the manufacture and supply of better goods and services, that fact would not support the conclusion that the mark applied for is devoid of any inherently distinctive character. However simple such a message may be, it cannot be categorised as ordinary to the point of excluding, from the outset and without any further analysis, the possibility that that mark is capable of indicating to the consumer the commercial origin of the goods or services in question.

59. In that context, it should be pointed out that that message does not follow obviously from the slogan in question. As Audi observed, the combination of words 'Vorsprung durch Technik' (meaning, inter alia, advance or advantage through technology) suggests, at first glance, only a casual link and accordingly requires a measure of interpretation on the part of the public. Furthermore, that slogan exhibits a certain originality and resonance which makes it easy to remember. Lastly, in as much as it is a widely known slogan which has been used by Audi for many years, it cannot be excluded that the fact that members of the relevant public are used to establishing the link between that slogan and the motor vehicles manufactured by

that company also makes it easier for that public to identify the commercial origin of the goods or services covered."

32. The important message to be taken from such comments is, I think, that one should avoid deeming a trade mark as being necessarily devoid of any distinctive character by virtue of an assertion that it would be seen entirely, or even primarily, as a 'promotional message' as far as the average consumer is concerned. Moreover, the comments also imply that trade marks which convey objective and simple messages may also *not* necessarily be devoid of any distinctive character solely by virtue of that characteristic. The issue for the Court seems to be that, where such marks possess 'originality' and 'resonance' capable of being remembered (qualities which may result from the presence of word-play, imagination, creativity or 'unexpectedness'), then they are unlikely to be devoid of any distinctive character. The impact of the Judgement is, therefore, to urge relevant authorities to undertake a full semantic analysis of the mark in question, without preconception or pre-emption, and also taking into account all known and relevant surrounding circumstances. Having done just this, I only add the comments made by the Appointed Person in BL-O-353-10, *BRING THE WORLD CLOSER*, page 15:

"The expression... is caught by the exclusion from registration in section 3(1)(b) because it is liable to be perceived and remembered by the relevant average consumer as nothing more than an origin-neutral statement about the [goods] concerned. It appears to me to involve no verbal manipulation or engineering of the kind which, in other cases, has been recognised as sufficient to turn explanatory phraseology into a sign possessed of a distinctive character."

33. In this case, I have sought to limit my analysis to the mark's semantic content - largely by considering the dictionary defined (and generally accepted) meanings for the words which are found in the mark applied for, and assessing their collective impact as a phrase in its totality, by reference to the goods and services applied for. In doing so, I have not identified any of those characteristics or qualities mentioned by the CJEU as being contributory to a finding of a *prima facie* distinctiveness.

34. I have assessed the mark as applied for, and must conclude that as a whole, the sign cannot lay claim to any linguistic imperfection, peculiarity, inventiveness or other creative element which might endow it with the necessary capability to function as an indicator of trade origin. Applying the CJEU's guidance in *Audi* as well as those cases which have preceded it, I therefore have no hesitation in maintaining the objection under section 3(1)(b) of the Act.

Applicant's claim to distinctiveness acquired through use

35. The evidence of use submitted on 18 February 2013 consists of one witness statement, dated 13 February 2013 from Mr Jonathan Alcock, general manager of marketing for Jet2.com Limited, together with supporting exhibits. The witness statement includes background information relating to the business of Jet2.com and how the undertaking was formed. Details are also provided of airports in the UK where the applicant operates from. These include The Channel Islands, Ireland, Newcastle, Blackpool, Leeds, Bradford, Manchester, East Midlands, Jersey, Glasgow, Edinburgh and Belfast.

36. The witness statement confirms that the Jet2.com began offering products and services under the 'FRIENDLY LOW FARES' mark in November 2008 (date of first use) across all of its operations.

• Turnover figures for Jet2.com 'as a whole' for the period 2008 to 2010 are set out below:

Year	**Jet2.com**
2010	£312.0m
2009	£326.4m
From Nov 2008	£30.8m

• Advertising figures:

Medium	**2008**	**2009**	**2010 to 8 June**
Television	£700,430	£1,301,169	£910,766
Radio	£44,691	£89,206	£12,699
Online	£1,020,011	£1,890,053	£861,457
Newspapers	£1,657,188	£2,130,709	£714,135
Other	£1,600,546	£1,269,113	£291,742

37. The exhibits submitted with the witness statement are summarised and assessed below;

• JA-1: This exhibit is an extract from 'Centre for Asia Pacific Aviation News (CAPA) news report dated 12 November 2008 detailing the launch of the mark, and an Airport Information Blog posting dated 5 November 2008 reporting an interview with Philip Mason, CEO, of Dart Group PLC where he talked about Jet2.com's reposition from 'the North's low-cost airline' to 'the Friendly Low Fares airline'. CAPA is an aviation information consultancy; however there is no information in the witness statement detailing the exposure the news report and blog would have received.

• JA-2: This exhibit is a posting from an aviation enthusiasts' blog with a picture taken on 7 May 2009 of one of the jets which had been noted for sporting 'Friendly low fares' on the side of the fuselage. Whilst this demonstrates that the sign is shown on the fuselage of the plane, there is no indication of the exposure this photograph has received.

• JA-3: This exhibit is an example from 'Flight Simulator World' dated 2 October 2009, which shows the sign in flight simulator software. I understand that 'Flight Sim World' is a website resource for flight simulator fans. In view of this, I am unsure of the relevance of this exhibit. I do not believe that it carries much weight in demonstrating that the applicant has educated consumers that the sign is a trade mark in relation to the goods and services covered by the application.

• JA-4: This exhibit is a picture showing the sign displayed on the side of the fuselage of a plane. Whilst this confirms that the sign was used on the applicant's aircraft in Dublin in

December 2009, regrettably there is no information detailing the wider exposure this has received.

• JA-5: This exhibit shows use of the sign on the applicant's aircraft. At paragraph eight of the witness statement the following is stated, "I exhibit examples of the use of the sides of our jets for promotional messages. These read '22kg bag allowance'/ 'All allocated seats', 'Points for free', 'Great flight times', 'Friendly low fares', 'Scotland', 'Yorkshire' and 'Manchester'. Again, this confirms that the applicant has used the sign applied for on the side of its aircraft, but I do not consider that this use demonstrates use of the sign *as a trade mark*. If consumers are familiar with the applicant's practices of brandishing non-distinctive promotional signs such as '22kg bag allowances' on the fuselages of their aircraft, there is nothing in the evidence to suggest that consumers would perceive the mark any differently to a sign such as 'great flight times'.

• JA-6: This exhibit is an extract from 'Business Traveller' dated August 2012 and relates to an interview with the applicant's managing director Ian Doubtfire. The article makes reference to the applicant's *"friendly low fares ethos which includes allocated seating and a respectable 22kg baggage allowance"*. In my view, this not only reinforces the *prima facie* objection, but also clearly fails to show use of the sign as a trade mark. Circulation figures relating to the publication have not been provided and as such it is not possible to determine the level of exposure the sign has received through this publication.

• JA-7: This exhibit confirms that the mark has also been used as a secondary trade mark and this exhibit shows the composite mark 'Jet2.com-Friendly Low fares' logo which is reproduced below.

• JA-8: This exhibit shows use of the composite mark in TV advertisements, YouTube videos, promotional letters, advertisements in national and local newspapers, posters, advertising screens, advertisements displayed on the sides of buses, and advertisements displayed on the applicant's web site. This exhibit contains 279 pages showing use of the composite mark shown in the paragraph above. Whilst some of the exhibits show use of the composite mark in national newspapers, the majority of advertising and use is limited to the geographical area north of the Midlands. It is also unclear where some of the exhibits have been used. For example, at page 3, the exhibit states 'Press Cuttings' but it is unclear where this advertisement was actually placed. Similarly at page 40, whilst the exhibit is dated 21 December 2009, the exhibit is marked as 'Paper not known'. Again at page 39, there is no indication of *where* the advert was placed. This is unhelpful in terms of determining the geographical extent of exposure the sign has received. There is no doubt that the applicant has undertaken to advertise the mark in some national newspapers, but the frequency of these advertisements equates to about one fifth of the total number. The majority of advertisements relate to use in Yorkshire and Lancashire.

This exhibit also shows use of the composite mark on the applicant's website, and details of the number of hits to the website have been provided and reproduced below.

Year	Website Visitors	Active Customers
2008	21,352,883	511,631
2009	21,091,902	445,997
2010 to 8 June	10,927,060	500,166

Paragraph 12 of the witness statement confirms that the mark features prominently on the applicant's website and 40% of the customers are repeat bookers with two or more bookings. There is no indication of where in the UK these hits have come from and as such whilst this is helpful in determining that the applicant's website has received a high number of hits, it does not assist in demonstrating the geographical exposure the mark has received.

The witness statement at paragraph 20 confirms that 2 million leaflets were produced in 2008, 3 million in 2009 and 2 million in 2010 to 8 June. An example of the flyer has been provided at page 15 of JA-8. These were distributed to named customers and also customers within the vicinity of the applicant's airports. Leaflets were also distributed in newspapers to houses within a 60 minute drive of the applicant's airports.

• JA-9: This is a copy of the applicant's in flight magazine, where the composite mark is featured on the front of the magazine. The witness statement confirms that in 2008, 240,000 copies were printed, 240,000 again in 2009 and 105,000 in 2010 to 8 June 2010.

• JA-10: This exhibit is a screen shot of the Applicant's Facebook page from 9 July 2009. Again, this use is of the composite mark.

• JA-11: This exhibit refers to the television marketing campaigns carried out by the Applicant. Paragraph 14 of the witness statement provides a summary of the campaigns including the channels on which the advertisements were aired, the numbers of viewers reached. Whilst the number of consumers reached is undoubtedly high, all of the television channels are northern and as such their reach is limited geographically.

• JA12: This exhibit sets out the marketing cost and number radio listeners reached. Paragraph 17 provides a summary of the radio stations where the advertisements were broadcast and again these are all in the north of the UK, the majority being in Yorkshire. The exhibit also provides a script of the advertisement and this in my view is clearly not trade mark use, nor does this assist in educating consumers that the sign is a trade mark. In my view consumers would merely perceive the sign in the context of the script as merely promoting favourable fares of Jet2.com.

• JA13: This exhibit shows use of the composite mark appearing on the sides of lorries which are part of the Dart Group and which provide distribution throughout the UK. This use has been since June 2010.

38. The question to be determined is whether, through the use made of it, the sign applied for has acquired a distinctive character in respect of the goods for which registration is sought. In doing so, this question must be asked through the eyes of the average consumer

who is reasonably well informed, observant, and circumspect (*Lloyd Schufabrik Meyer & Co. GmbH v. Klijsen Handel BV*, C-342/97[1999] ECR I-3830 para.26). In this case, at paragraph 22, we have identified the average consumer as being the general public.

39. The key authority for acquired distinctiveness is *Windsurfing Chiemsee Produktions Und Vertriebs GMBH v. Boots-Und Segelzubehor Wlater Huber,* C109/97 (*Windsurfing);* the relevant test being set out in paragraph 55:

> *"… the first sentence of Article 3(3) of the First Directive 89/104/EEC is to be interpreted as meaning that:*
>
> *- a trade mark acquires distinctive character following the use which has been made of it where the mark has come to identify the product in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish that product from goods of other undertakings;*
>
> *- in determining whether a trade mark has acquired distinctive character following the use which has been made of it, the competent authority must make an overall assessment of the evidence that the mark has come to identify the product concerned as originating from a particular undertaking and thus to distinguish that product from goods of other undertakings;*
>
> *- If the competent authority finds that a significant proportion of the relevant class of persons identify goods as originating from a particular undertaking because of the trade mark, it must hold the requirement for registering the mark to be satisfied;*
>
> *- where the competent authority has particular difficulty in assessing the distinctive character of the mark in respect of which registration is applied for, Community law does not preclude it from having recourse, under the conditions laid down by its national law, to an opinion poll as guidance for its judgment."*

40. I am also mindful of the CJEU decision in *Bovemj Verzekeringen NV v Benelux Merkenbureau* (*Europolis*) C-108/05, where it was held that a trade mark may be registered on the basis of acquired distinctiveness *"…only if it is proven that the trade mark has acquired distinctive character through use throughout the territory of a member state"*.

41. Taking into account all the information in the witness statements and exhibits, I do not consider that, at the time of application, the evidence shows that the mark has become distinctive because of the use made of it. In particular, in the context of the guidance set out in case law, I am not convinced that a significant proportion of the relevant class of persons identify goods as originating from the applicant.

42. In reaching my decision, I have also considered that distinctiveness can, in principle, be acquired as a result of use of the mark applied for in conjunction with another mark. In the decision of the CJEU, Case C-353/03 *Societe des Produits Nestle v Mars UK Ltd*, the Court confirmed that use as part of another mark may, in certain circumstances, be sufficient to establish that the mark applied for has acquired distinctiveness. It is a question of fact as to whether the mark filed has become distinctive itself. The Court stated;

26. In regard to acquisition of distinctive character through use, the identification, by the relevant class of persons, of the product or service as originating from a given undertaking must be as a result of the use of the mark as a trade mark (judgment in Philips, paragraph 64).

27. In order for the latter condition, which is at issue in the dispute in the main proceedings, to be satisfied, the mark in respect of which registration is sought need not necessarily have been used independently.

28. In fact Article 3(3) of the directive contains no restriction in that regard, referring solely to the 'use which has been made' of the mark.

29. The expression 'use of the mark as a trade mark' must therefore be understood as referring solely to use of the mark for the purposes of the identification, by the relevant class of persons, of the product or service as originating from a given undertaking.

30.Yet, such identification, and thus acquisition of distinctive character, may be as a result both of the use, as part of a registered trade mark, of a component thereof and of the use of a separate mark in conjunction with a registered trade mark. In both cases it is sufficient that, in consequence of such use, the relevant class of persons actually perceive the product or service, designated exclusively by the mark applied for, as originating from a given undertaking.

43. I do not consider that in this case the evidence shows that consumers actually perceive the goods and services, designated exclusively by the mark applied for, as originating from a given undertaking. In my view the 'use of the mark as a trade mark' would not be understood as referring solely to use of the mark for the purposes of the identification, by the relevant class of persons, of the product or service as originating from a given undertaking.

44. I must also bear in mind Morritt LJ's observation in *Bach and Bach Flower Remedies Trade Mark* [2000] RPC 513 at paragraph 49, where it was stated that:

"…use of a mark does not prove that the mark is distinctive. Increased use, of itself, does not do so either. The use and increased use must be in a distinctive sense to have any materiality."

45. The question therefore is not just the amount of use made by the applicant, but also whether that use generates customer recognition of the sign *as an indicator of trade origin*.

46. With regard to the geographical exposure the sign has received, as stated in the second hearing report, the use is limited to an area of the UK north of the Midlands, and whilst not determinative, this is also a factor I have taken into consideration in reaching my decision.

47. I have also taken into consideration that the turnover figures are high, but these figures relate to turnover for the company Jet2.com 'as a whole' and not in relation to the mark

applied for. As such I consider that these figures are not helpful in demonstrating that the applicant has educated consumers that the sign is a trade mark belonging to the applicant.

49. I must take into account all the information provided when considering whether or not the evidence is sufficient to indicate that the mark has become distinctive because of the use made of it. I have taken into account the fact that the expression 'Friendly Low Fares' has principally been used as part of a composite sign, and also the fact that this manner of use is not in my view, trade mark use. Taking into account both the advice given in relevant case law such as *Windsurfing* and *Europolis*, and all the documents and exhibits filed, I consider the evidence has failed to show that, at the date of application, the average consumer had been educated that the sign is indicating the trade origin of the goods and services. The mark is therefore excluded from acceptance under the proviso to section 3(1) of the Act.

Conclusion

51. In this decision I have considered all the papers filed and submissions made. For the reasons given above, the application is refused under section 3(1)(b) in relation to all goods and services.

Dated this 1st day of July 2014

Linda Smith
For the Registrar
The Comptroller-General