

**O-473-20**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF REGISTRATION NO. 2509542**

**IN THE NAME OF AMPLIFIER GROUP LTD FOR THE TRADE MARK**

**AMPLIFIER**

**IN CLASS 35**

**AND**

**THE APPLICATION FOR REVOCATION THEREOF UNDER NO. 502644**

**BY WITTERSHAM LTD**

## Background and pleadings

1. Amplifier Group Ltd (the proprietor) is the registered proprietor of trade mark registration No 2509542 consisting of AMPLIFIER. The trade mark was filed on 21 Feb 2009 and completed its registration procedure on 21 August 2009. It is registered in respect of the following services:

*Class 35: Advisory services relating to public relations; assistance to management in commercial enterprises in respect of public relations; consultancy relating to public relations; public relations; public relations agency; public relations consultancy; public relations services; public relations studies; preparation of marketing plans; preparation of reports for marketing; product marketing; production of video recordings for marketing purposes; professional consultancy relating to marketing; promotional marketing; provision of advice relating to marketing; provision of information relating to marketing; provision of marketing advisory services for manufacturers; provision of marketing information; provision of marketing reports; video recordings for marketing purposes; advertising; advertising agency services; advertising analysis; advertising material (dissemination of and production of); advertising material (updating of); advertising matter (dissemination of and production of); advertising services provided over the Internet; advertising services provided via a database; advertising services relating to books; advertising services relating to databases; advertising services relating to newspapers; advertising services relating to the provision of business; advertising space (rental of); advertising space (rental of) on the Internet; advisory services relating to advertising; analysis of advertising response; analysis of the public awareness of advertising; arrangement of advertising; arranging for the provision of advertising space in newspapers; arranging of competitions for advertising purposes; arranging of demonstrations for advertising purposes; arranging of displays for advertising purposes; arranging of exhibitions for advertising purposes; arranging of festivals for advertising purposes; arranging presentations for advertising purposes; arranging the distribution of advertising samples; arranging the distribution of*

*advertising samples in response to telephone enquiries; assistance to management in commercial enterprises in respect of advertising; audio visual displays for advertising purposes (preparation or presentations of); business advice relating to advertising; business consultation relating to advertising; classified advertising; collection of information relating to advertising; compilation of statistics relating to advertising; consultations relating to advertising; consultancy relating to advertising; consultations relating to business advertising; direct mail advertising; direct market advertising; direct-mail advertising; dissemination of advertising material; dissemination of data relating to advertising; distribution of advertising announcements; distribution of advertising brochures; distribution of advertising leaflets; distribution of advertising material by post; distribution of advertising material; distribution of advertising matter; distribution of advertising samples; distribution of printed advertising matter; hire of advertising materials; hiring of advertising materials; information services relating to advertising; market research for advertising.*

2. Wittersham Ltd (the applicant) seeks revocation of the trade mark registration on the grounds of non-use based upon Section 46(1)(a) and 46(1)(b) of the Trade Marks Act 1994 (the Act). The proprietor filed a counterstatement denying the claims and stating they will provide proof of genuine use. The proprietor requested that the revocation action be refused in full and that costs are awarded in its favour.
3. Revocation is sought under Section 46(1)(a) of the Act in respect of the 5 year time period following the date of completion of the registration procedure, namely 22 August 2009 – 21 August 2014. Revocation is therefore sought from 22 August 2014 under Section 46(1)(a).
4. Revocation is also sought under Section 46(1)(b) of the Act in respect of the time period 14 June 2014 - 13 June 2019. Revocation is therefore sought from 14 June 2019 under Section 46(1)(b).

5. Only the registered proprietor filed evidence in these proceedings. This will be summarised to the extent that it is considered necessary. Only the applicant filed written submissions, and these will not be summarised but will be referred to as and where appropriate during this decision. No hearing was requested and so this decision is taken following a careful perusal of the papers.
6. The proprietor is represented in these proceedings by Agile IP LLP, and the applicant is represented by Cameron McKenna Nabarro Olswang LLP.

**Evidence**

7. The proprietor filed evidence in the form of a witness statement in the name of Paul Spiers. Mr Spiers confirms in his witness statement that he has been the Managing Director of the proprietor since its incorporation in 2015. Mr Spiers states he was also the Managing Director of Amplifier PR Limited (proprietor of the mark between 21 February 2009 – 31 January 2014) from 2005-2014. I note that records show that Mr Spiers himself was the legal owner of the trade mark registration between 1 February 2014 – 31 August 2015, after which it was transferred to the current proprietor on 1 September 2015.
8. The witness statement of Mr Spiers submits that the registration has been put to genuine use in respect of all services in class 35 between 22 August 2009 until 21 August 2014, and again between 14 June 2014 – 13 June 2019, and states the use has been continued until the present day. The witness statement adduces evidence in the form of Exhibits PS-1 – PS-12 as summarised below. At paragraph 6, the witness statement also produces the annual turnover figures for Amplifier PR Limited and Amplifier Group Limited as follows:

**Amplifier PR Ltd**

From	To	Annual turnover for class 35 services (£)

Not specified	30 September 2009	186,520
1 October 2009	30 September 2010	212,574
1 October 2010	30 September 2011	235,936
1 October 2011	30 September 2012	193,922
1 October 2012	30 September 2013	178,047
1 October 2013	31 March 2014	71,663

### **Amplifier Group Ltd**

<b>From</b>	<b>To</b>	<b>Annual turn over for class 35 services (£)</b>
19 March 2015	31 March 2016	9,269
1 April 2016	31 March 2017	19,869
1 April 2017	31 March 2018	92,356
1 April 2018	31 March 2019	102,623

### **Exhibit PS-1**

9. Exhibit PS-1 includes 3 screen shots from the website [www.amplifiedcreativity.com](http://www.amplifiedcreativity.com), which appears to belong to the proprietor, although it is not explicitly stated as such. Screen shots 1 and 3 are undated, and screen shot 2 displays a copyright notice of 2018.
10. Screen shot 1 shows the use of AMPLIFIER in the following format , screen shot 3 includes “the Amplifier® Group” in word format, and screen shot 2 mentions “Amplifier” in word format within the copyright notice only.
11. Screenshot 3 explains “the Amplifier® Group” is “Based in the UK with associates across the world” and that it “brings together experience in marketing communications, organisational behaviour, reputational management and business development.” It goes on to state “We are focused on applied creative thinking at the heart of business culture and strategic

decision making process ...” continuing to explain that it works with companies “to demonstrate that applied creative thinking has a sound commercial base by providing a more formalised, strategic and analytical role for it in a company’s decision-making process.”

12. Screen shot 2 defines “applied creative thinking” in the following terms “formalising the creative thinking process and applying it to real commercial and operational challenges and opportunities ... to get leaders, entrepreneurs and their teams to think differently and approach challenges and opportunities with more innovative and creative perspectives and renewed enthusiasm”

13. Screen shot two also goes on to explain that the proprietor’s “‘Amplified Creative Thinking (ACT) for peak performance’ programmes, workshops and strategic marketing communications and reputation management consultancy services have been specifically developed to deliver exactly this ...”

#### **Exhibit PS-2**

14. Exhibit PS-2 references a quote from Paul Spiers on the website [prmoment.com](http://prmoment.com). The quote is regarding the best employee he has hired. The text is undated and there is no reference to the territory that this webpage is aimed at. The text refers to Paul Spiers as managing director of amplifier and amplifier academy.

#### **Exhibit PS-3**

15. Exhibit PS-3 is a screen shot from [printmonthly.co.uk](http://printmonthly.co.uk) dated 26 April 2019. The page confirms that Paul Spiers, described as the founder of the Amplifier Group is speaking at the Independent Print Industries Association (IPIA) spring conference to “discuss the growing field of commercial creativity”.

#### **Exhibit PS-4**

16. Exhibit PS-4 is a screenshot from [festivalofwork.com](http://festivalofwork.com) referencing a session being run by Paul Spiers, who is described as “Head of Marketing Communications, OrangeDoor and Founder, Amplifier Academy”. The exhibit

header gives a date of June 2019 and Mr Spiers confirms within his witness statement that the event took place on 13 June 2019, although neither of these things is shown on the Exhibit itself. The witness statement explains that this references the CIPD Festival of work conference in which Paul Spiers held a session “on behalf of Amplifier Group Limited”. Neither the location of the event, nor the intended audience is confirmed.

**Exhibit PS-5**

17. Exhibit PS-5 consists of a screen shot of an article featuring on gocompare.com. The date in the domain name indicates the article is from September 2011 which is confirmed by the witness statement of Mr Spiers, and it references Paul Spiers as managing director of “PR Agency Amplifier PR”. Paul Spiers gives a comment on brand value within the text. The article appears to be comparing British attitudes to complaining to attitudes in the US.

**Exhibit PS-6**

18. Exhibit PS-6 is a screenshot from mydigitalpublication.co.uk, referencing Paul Spiers as founder of Amplifier Academy discussing the need for the print industry to change its mindset when it comes to understanding its value. No date is provided on the article.

**Exhibit PS-7**

19. Exhibit PS-7 is a photo of a business card in the name of Paul Spiers as Managing Director of amplifier and amplifier academy.

**Exhibit PS-8**

20. Exhibit PS-8 consists of the following invoices:



Invoices issued by the Proprietor, all bearing the mark

Invoice no.	Invoice date	Services referenced	Invoice amount	Invoice recipient
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1491	1 March 2010	“Two day monthly PR Programme as agreed for March 2010”  & “5 Percent Admin Fee”	£1000 exc. VAT £50 exc. VAT	Office 2 Office (AccessPlus) Norwich
1567	1 August 2010	“To time for PR Programme Activities for August as agreed”	£850 exc. VAT	Intutive Ltd Surrey
1542	1 July 2010	“For PR Activity in July as agreed”  & “5 Percent Admin Fee”	£1000 exc. VAT & £50.00 exc. VAT	Office 2 Office (AccessPlus) Norwich
1666	1 April 2011	“Draft writing of Town Crier press release in April”	£450 exc. VAT	Arundel Visitors Strategy Group
1853	31 March 2013	“To costs for PR activities in core PR programme in March as agreed”	£2,500 exc. VAT	Roland DG (UK) North Somerset
104	31 May 2015	“For time to PR activity in May 2015”	Not shown	Roland DG (UK) North Somerset

126	20 November 2017	“Activity – for marketing communications and consultancy services provided”	Not shown	Orange Door, Bromley
130	20 January 2018	“For marketing communications consultancy and services provided”	Not shown	Orange Door, Bromley
153	20 January 2019	“For marketing communications consultancy and services provided”	Not shown	Orange Door, Bromley
159	12 May 2019	“Fee for IPIA Spring Conference presentation”	Not shown	IPIA, Northampton

Invoice issued to ‘amplifier.pr’

Invoice no.	Invoice date	Services referenced	Invoice amount	Recipient
cmk156	2 February 2012	Website development (5 days) And Print costs 30/01 P3 Business Cards	£1000  £99.60	Amplifier.pr, Surrey

### **Exhibit PS-9**

21. Exhibit PS-9 consists of a letter from RW Associates dated 13 August 2019, stating they provided Amplifier PR Limited with accountancy services from September 2006 – March 2014, and were reengaged by Amplifier Group Limited in March 2015, who remain an active client. The letter claims Amplifier Group Limited is still an active, growing, and trading company with end of year accounts filed each year, and that the March 2019 accounts were submitted in May this year.

### **Exhibit PS-10**

22. Exhibit PS-10 consists of a letter signed by Elizabeth Heron, Founder and Managing Director of OrangeDoor dated 9 August 2019 stating that the Amplifier Group has been contracted to OrangeDoor since 2017, and has provided them with “a range of marketing and related services including creative concept development of marketing communications, advertising and PR campaigns and programmes, strategic marketing counsel, brand and reputation management consultancy, new business consultancy and business development strategy and counsel”. The letter comments on the “strong reputation in the market for offering the highest level of strategic and creative marketing services” held by the Amplifier Group.

### **Exhibit PS-11**

23. Exhibit PS-11 consists of a letter signed by Brendan Perring, General Manager of Independent Printing Industries Association (IPIA) dated 11 August 2019, stating that he has worked with the Amplifier Group for over many years, including in his previous capacity of editor-in-chief of market-leading print industry trade publication. The letter comments that the Amplifier brand has “a well-earned respect in the UK printing industry for the delivery of highly creative and strategic marketing communications campaigns”, and that he dealt with Amplifier for many years “as the team managed the PR and Marketing Campaigns for a number of technology manufacturers and resellers in the UK print industry. The letter also confirms Paul Spiers was invited to

give the keynote address at the IPIA annual spring conference (as mentioned in Exhibit PS-4) in May 2019.

### **Exhibit PS-12**

24. Exhibit PS-12 consists of an undated headed paper topped with the mark **amplifier )))**.

### **Legislation**

25. Section 46 of the Act states:

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

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

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) .....

(d) .....

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

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

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

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that -

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

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

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

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

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

26. The onus is on the holder to show use because Section 100 of the Act states:

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

what use has been made of it.”

27. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversammlung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

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

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

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. 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: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the

economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

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

28. The burden is on the proprietor to show genuine use of its mark within the UK, within the time frames of each ground, in respect of the services as registered.

### **Preliminary issues**

29. Within its written submissions, the applicant has addressed (amongst other concerns) two key issues it has with the proprietor’s evidence of use filed. The

first of these relates specifically to the letter from RW Associates<sup>1</sup>, the letter from OrangeDoor<sup>2</sup> and the letter from the IPIA<sup>3</sup>. The first of the issues raised in relation to these letters is that they are hearsay, and that they therefore hold “little to no evidentiary value”.

30. The second issue the applicant has raised relates to the letter from OrangeDoor, and in part to the invoices from this party<sup>4</sup>. The concern raised is that Paul Spiers is described as “Head of Marketing Communications” at OrangeDoor (as well as “Founder of Amplifier Academy”) within PS-4 of the evidence adduced by the proprietor itself, and that OrangeDoor is therefore not an independent third party. As such, it is the applicant’s submission that the letter signed by Elizabeth Heron, Founder and Managing Director of OrangeDoor is not only hearsay but also not independent, and that the invoices directed to OrangeDoor are not evidence of external use of the mark.

31. Section 4 of the Civil Evidence Act 1995 permits hearsay evidence in civil proceedings but provides the following guidance as to the weight to be accorded to such evidence:

“Considerations relevant to weighing of hearsay evidence.

(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

(2) Regard may be had, in particular, to the following -

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<sup>1</sup> Exhibit PS-9

<sup>2</sup> Exhibit PS-10

<sup>3</sup> Exhibit PS-11

<sup>4</sup> Filed as part of Exhibit PS-8

(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay;

(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.”

32. It is my view, judging from the dates shown on the letters produced, and the contents of the same, that these documents have been written contemporaneously with these proceedings, and very likely with the guidance of, or following a request from, Paul Spiers (or his colleague or legal representative) for the purpose of adducing them as evidence that the proprietors mark has been used within these proceedings. I find that RW Associates and IPIA had no reason to conceal or misrepresent matters, although I note it is in their interest to be obliging for the sake of a client or professional relationship. I find it would have been preferable and reasonable for these statements to have at least been submitted in the form of witness

statements by the parties themselves rather than adduced as exhibits to the witness statement of Mr Spiers, but I do not find that I must completely disregard the statements made in the format filed solely on the basis that they are hearsay, other than in respect of the assertions of respect or reputation held by the proprietor, opinions which I do find hold no weight in this format. There was no challenge to the evidence filed by the applicant at the time it was produced, and there has been no request for a hearing or for cross examination on this evidence.

33. However, I do note the applicant's concerns about the apparent relationship between Paul Spiers and OrangeDoor, and I also share these concerns. As no hearing was requested in these proceedings the question of the nature of the relationship between OrangeDoor, Paul Spiers and the proprietor that has arisen (not simply the applicant's submissions but from the proprietor's evidence) has not been put to the proprietor, and I consider this question to be an additional factor for consideration when assessing the weight given to the letter from OrangeDoor, and the invoices directed at this party. Considering all of the factors set out under Section 4 of the Civil Evidence Act 1995, I find the letters from RW Associates and the IPIA may be considered with a reasonable level of caution in context of these proceedings, but that the letter from OrangeDoor holds very little weight in the circumstances, as it is not clear that that this use is truly external. Further, without additional information regarding the relationship between the proprietor and OrangeDoor, I am inclined not to rely on the invoices issued between the parties.

### **Form of the mark**

34. Prior to conducting an analysis of the evidence filed in order to determine if there has been genuine use of the registered mark, it is necessary to review the instances where the proprietor has used the mark in conjunction with additional elements, or in a varying form to the mark as shown on the register, in order to determine if these instances should be classed as use 'of the mark'

for the purpose of the assessment. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the CJEU found that:

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, ‘use’ within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish ‘use’ within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestle*, the ‘use’ of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition of a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35. Nevertheless, as pointed out by the German Government, the United

Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1)". (emphasis added)

35. In *Nirvana Trade Mark*, BL O/262/06, Mr Richard Arnold Q.C. (as he then was), sitting as the Appointed Person, summarised the test under section 46(2) of the Act as follows:

"33. ...The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter's distinctive character. As can be seen from the discussion above, this second question breaks down in the sub questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all."

36. Although this case was decided before the judgment of the CJEU in *Colloseum*, it remains sound law so far as the question is whether the use of a mark in a different form constitutes genuine use of the mark as registered. The later judgment of the CJEU must also be taken into account where the mark is used as registered, but as part of a composite mark.

37. Within the evidence filed, the proprietor's mark appears in the following variants:

Variant 1



Variant 2



Variant 3, 4 & 5

the Amplifier® Group / The Amplifier Academy / Amplifier PR Limited

38. Both in respect of variant 1 and variant 2 above, the mark is used in conjunction with additional elements. In the case of variant 1 this appears to be use with a symbol identifying sound (particularly when considered in relation to the word 'amplifier'), and in the case of variant 2 this is used within the with the red rectangle and with the three words 'think', 'create' and 'communicate' next to what appear to be angled and compressed 'o' shapes made of two crescents. Further, the two marks themselves appear in lowercase in a slightly stylised form.

39. The distinctive element of the mark as registered is held within the word 'AMPLIFIER'. It is well established that notional and fair use of a word mark registration allows for the use of the same in both uppercase and lowercase, and the change to lowercase text in this instance does not alter the distinctive character of the mark. I find in both variants 1 & 2 that the word 'amplifier' maintains an independent distinctive role, and it is clearly the identifier of origin within the same. In addition, both variants use only a very simple stylised format on the text itself that does not alter the distinctive character of the earlier mark. I therefore find both variant 1 and variant 2 to be acceptable variants of the proprietor's mark.

40. Within the proprietor's evidence there is also reference to the proprietor under various names, including 'the amplifier group', 'the amplifier academy' and 'amplifier PR limited', namely variants 3, 4 & 5. I find the additions added to the mark in these instances to be of little distinctiveness, and that the word Amplifier remains the distinctive element that would be used by the consumer to identify the origin of the services. I therefore find this use to be acceptable.

## **Decision**

41. Having reviewed the evidence, I find that several of the exhibits filed by the proprietor add little to its case. The proprietor has, at Exhibits PS-2, PS-5 and PS-6, provided screenshots from websites where Paul Spiers has been quoted on various topics, which make reference to his position with amplifier (be it amplifier 'academy', 'group' or 'PR'). Exhibit PS-2 and PS-6 are undated and so offer little assistance to the proprietor regardless of the content, as they cannot show use within the relevant time period. Exhibit PS-5 is a quote from Paul Spiers as "managing director of PR Agency Amplifier PR". Exhibit PS-5 needs some analysis and a little assumption to determine that it is aimed at the UK consumer. There is a lot of reference to 'we' in the article, which, when combined with the domain which reads "why-are-the-British-so-bad-at-complaining", makes it appear to be aimed at a British consumer. However, even if we can presume from the reference to the British consumer the article is aimed at UK consumers, the use of Amplifier in this context is to identify the company to which Paul Spiers belongs, not to identify the origin of any services offered.

42. In respect of Exhibit PS-5, the use of Amplifier name is simply to identify the company for which the man commenting on a topic, namely Paul Spiers, originates.

43. Further, I find the undated headed paper<sup>5</sup> and undated business cards<sup>6</sup> lack the necessary context to offer any assistance to the proprietor's case for

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<sup>5</sup> Exhibits PS-7

<sup>6</sup> Exhibit PS-12

genuine use. Paul Spier’s witness statement confirms that Exhibit PS-7 “shows a photograph of my business card that I provide to client’s in relation to providing services in class 35”, but no further context is provided as to who they were given to, or where, when and how many have been distributed. The same comments apply in respect of the headed paper, and so I find neither of these exhibits assist the proprietor in demonstrating genuine use of the mark.

44. The remaining Exhibits filed by the proprietor include Exhibits PS-1, PS-3, PS-4, PS-8, PS-9, PS-10 and PS-11. I will assess the evidence provided for each period separately.

**Evidence under Section 46(1)(b)**

45. The relevant time period during which the proprietor must prove genuine use of the mark for the services registered in the UK under this ground is 14 June 2014 - 13 June 2019. The proprietor of the mark was Paul Spiers from the beginning of the relevant timeframe until the 1 September 2015, the date on which the legal ownership of the mark was transferred to the proprietor, which remained the owner of the mark for the rest of the relevant period.

46. The evidence filed by the proprietor falling within the relevant time frame under this ground includes the website screenshots<sup>7</sup>, an article on printmonthly.co.uk confirming Paul Spiers, founder of the Amplifier Group and Amplifier Academy is to speak at the IPIA spring conference<sup>8</sup> and the five invoices below<sup>9</sup>:

104	31 May 2015	Yes	“For time to PR activity in May 2015”	Not shown	Roland DG (UK) North Somerset
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<sup>7</sup> Exhibits PS-1

<sup>8</sup> Exhibit PS-3

<sup>9</sup> Part of Exhibit PS-8

126	20 November 2017	Yes	“Activity – for marketing communications and consultancy services provided”	Not shown	Orange Door, Bromley
130	20 January 2018	Yes	“For marketing communications consultancy and services provided”	Not shown	Orange Door, Bromley
153	20 January 2019	Yes	“For marketing communications consultancy and services provided”	Not shown	Orange Door, Bromley
159	12 May 2019	Yes	“Fee for IPIA Spring Conference presentation”	Not shown	IPIA, Northampton

47. Further, it is stated within the witness statement of the proprietor that the screenshot showing an article on festivalofwork.com referring to a session during the CIPD Festival of Work will be run by Paul Spiers “Head of Marketing Communications, OrangeDoor and Founder, Amplifier Academy”<sup>10</sup> falls within this timeframe, with the session run on 13 June 2019, although this isn’t referenced within the exhibit itself. Although the letters from RW Associates<sup>11</sup>, OrangeDoor<sup>12</sup> and the IPIA<sup>13</sup> are dated outside of the relevant

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<sup>10</sup> Exhibit PS-4

<sup>11</sup> Exhibit PS-9

<sup>12</sup> Exhibit PS-10

<sup>13</sup> Exhibit PS-11

time period, the content of the same references the periods within the relevant time frame, and may therefore be considered under this ground.

48. The website screenshots<sup>14</sup> appear to show that the proprietor has a website on which it advertises the offering of services related to the implementation of “applied creative thinking” to “leaders, businesses and entrepreneurs”. The website clearly uses the trade mark AMPLIFIER in forms which I have found to be acceptable variants of the registered mark. I note in its table at 4.4 of its submissions, the applicant has agreed that use of the registration is shown on this exhibit. However, the applicant states its view that it is not clear which of the goods and services are offered under the mark. I acknowledge the applicant’s criticism that the programmes described on the proprietor’s website are offered under the trade mark AMPLIFIED CREATIVE THINKING as indicated by the small ‘TM’, and I agree with the applicant that this is not an acceptable variant of the mark. However, I find the use of AMPLIFIER on the website homepage and on the “who we are” page makes it clear that the services described in this section sit under the AMPLIFIER brand.

49. I note the website describes a process in which the proprietor works with the identified consumer to help them achieve and implement applied creative thinking in their businesses. The proprietor describes offering “programmes, workshops and strategic marketing communications and reputation management consultancy services” designed to deliver the applied creative thinking process<sup>15</sup>. I find the services that appear to be offered may fall broadly within the following description within the proprietor’s class 35, depending on the content of the same:

*Advisory services relating to public relations; assistance to management in commercial enterprises in respect of public relations; consultancy relating to public relations; public relations consultancy; professional consultancy relating to marketing; provision of advice relating to marketing; provision of information relating to marketing; provision of marketing information; assistance to*

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<sup>14</sup> Exhibit PS-1

<sup>15</sup> Applied creative thinking is defined by the proprietor as “formalising the creative thinking process and applying it to real commercial and operational challenges and opportunities ... to get leaders, entrepreneurs and their teams to think differently and approach challenges and opportunities with more innovative and creative perspectives and renewed enthusiasm”

*management in commercial enterprises in respect of advertising; business advice relating to advertising; business consultation relating to advertising; consultations relating to advertising; consultancy relating to advertising; consultations relating to business advertising; information services relating to advertising.*

50. The screenshots of the website provided includes a copyright notice dating to 2018. In respect of the territory to which the website is targeted, there is a reference on screenshot 3 provided stating that the Amplifier group is based in the UK, but that it also has associates around the world. There is little else to indicate that the site itself (being a .com) is actually aimed at the UK consumer, as there is nothing additional within this evidence that may help establish this, such as a reference to a currency, a telephone number, or a national domain, and the proprietor has provided no information about the number of UK consumers to visit the site<sup>16</sup>. However, on balance, due to the fact that the party claims to be based in the UK, and the fact that English is used, it does seem likely the intention is to aim the website at the UK consumer. In summary, I find the screenshots provided at Exhibit PS-1 individually fall short of showing that the proprietor's services were offered to and purchased by consumers within the UK within the relevant timeframe, but I note this exhibit may contribute towards an overall picture of genuine use for some of the proprietor's class 35 services, depending on the case built by the remainder of the evidence filed.

51. The article shown on printmonthly.co.uk<sup>17</sup> explaining that Paul Spiers, described both as founder of Amplifier group and Amplifier Academy, was to speak at the IPIA event in Spring 2019 appears aimed at the UK consumer on the basis the website is a .co.uk domain. It states Paul Spiers would "discuss the growing field of commercial creativity". The letter produced from the IPIA<sup>18</sup> confirmed Paul Spiers was the keynote speaker at the event in May 2019, and I find this sufficient to corroborate that the event fell within the relevant timeframe. Further, I find the invoice provided in respect of this at Exhibit PS-8 and issued under the Amplifier variant clearly shows that the services were

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<sup>16</sup> See paragraph 17. (ii) & (iii) of *Warner Music UK Ltd v TuneIn Inc.* [2019] EWHC 2923

<sup>17</sup> Exhibit PS-3

<sup>18</sup> Exhibit PS-11

offered under the Amplifier mark. Mr Spiers states within his witness statement “As founder of Amplifier, I provided advice in relation to advertising, PR and marketing”. However, despite this description, it is my view that Paul Spiers speaking as keynote speaker in his position as founder of the Amplifier Group and Amplifier Academy, at an event which was described externally as to “discuss the growing field of commercial creativity” does not evidence genuine use of the Amplifier trade mark within the natural meaning of advisory services, or the provision of advice in relation to advertising, marketing or PR that is protected by the proprietor within class 35. Whilst a party who engages in offering advice and advisory services in this field may also engage in speaking opportunities as keynote speakers, I do not find these services to be one and the same.

52. Of the invoices falling within this time period<sup>19</sup>, none of them show the monetary amounts invoiced. The second, third and fourth of these invoices are all directed at OrangeDoor, a party which, as highlighted by the evidence, Paul Spiers is (or was) the Head of Marketing Communications, in addition to the Managing Director of the Proprietor. As mentioned, without further clarification of the relationship between these parties, and combined with the lack of information regarding the actual financial transaction taking place between the two, I am inclined to treat this use as internal, and in turn to look elsewhere for the confirmation of the genuine use made of the mark.

53. The first invoice provided references “PR Activity” and was issued whilst Paul Spiers was the legal owner of the mark. I consider it obvious that the use in this context would be with the consent of Mr Spiers as the owner of the mark. However, I agree with the applicant’s criticism within 4.4 of its written submissions that the actual services rendered is unclear. It is impossible to deduce from the invoice alone which services have been undertaken within this “PR Activity”. Further, there is nothing I can turn to within the evidence to piece together clarification as to which of the class 35 services, are being invoiced under the AMPLIFIER mark as shown.

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<sup>19</sup> Exhibit PS-8 in part

54. The fifth invoice provided is clearer, and is also backed up with additional evidence<sup>20</sup> that Paul Spiers, on behalf the Amplifier Group and Amplifier Academy gave the keynote address at the IPIA Spring Conference in May 2019, however as previously mentioned, I do not find this use falls within the proprietor's class 35 services.

55. The turnover figures provided in the Witness Statement of Paul Spiers attest to the following amounts:

Period from	Period to	Annual turnover for class 35 services (£)
19 March 2015	31 March 2016	9,269
1 April 2016	31 March 2017	19,869
1 April 2017	31 March 2018	92,356
1 April 2018	31 March 2019	102,623

56. These figures have not been broken down further than into the class 35 services. Mr Spiers states within his witness statement that the mark has been used in respect of all of the class 35 services, and so I cannot reliably allocate an accurate proportion of the turnover to any service in particular.

57. As previously discussed, I give little weight to the letter from OrangeDoor<sup>21</sup> due to the apparent relationship between this party and the proprietor. In respect of the letter from RW Associates and the IPIA, I find they have their own shortfalls. The letter from RW Associates, the proprietor's accountant, simply confirms that the Amplifier Group Ltd has been filing accounts each year. This offers nothing in the way of confirmation that the trade mark AMPLIFIER has been used in the UK in respect of the services as registered, but this may contribute towards a picture of genuine use in the context of the evidence as a whole, should the gaps be satisfied elsewhere.

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<sup>20</sup> See Exhibit PS-3 & PS-11

<sup>21</sup> Exhibit PS-10

58. The letter from the IPIA again confirms that Paul Spiers delivered a keynote address at an event, the relevance of which I have already discussed, and also states “As editor-in-chief I dealt with Amplifier over many years, as the team managed the PR and marketing campaigns for a number of technology manufacturers and resellers in the UK print industry”. There is nothing to confirm this work was carried out within the relevant time period. The letter also states “I continue to work with Amplifier Group in various capacities today, including the provision of ongoing strategic marketing communications advice in my role as General Manager of the IPIA”. It is unclear from this statement exactly who is offering the services to who, but the witness statement of Paul Spiers clarifies “Exhibit PS-11 shows a letter from the General Manager of the IPIA who are an industry association that I have been providing strategic communications advice to over the last few years”. Whilst there is no further evidence such as invoices to confirm the exchange of these services, and the ‘today’ referred to by the General Manager for the IPIA falls outside of the relevant time period (with the letter dated 11 August 2019) on balance it seems likely the proprietor has offered “strategic marketing communications advice” to this party within the relevant timeframe.

59. The letter from OrangeDoor is the most descriptive of the services offered by the proprietor, but it is also the evidence to which I have attributed the very little weight to due to the obvious but unclarified relationship between proprietor and OrangeDoor.

#### **Evidence under Section 46(1)(a)**

60. The evidence under Section 46(1)(a) requires the opponent to show genuine use of the mark between 22 August 2009 and 21 August 2014. The proprietor of the registration within the relevant time period was Amplifier PR Ltd until the legal ownership was assigned to Paul Spiers on 01 February 2014. Paul Spiers remained the owner of the registration for the remainder of the relevant time period.

61. The evidence provided falling within this timeframe (or with reference to this timeframe) includes the article on gocompare.com<sup>22</sup> which I have previously established does not assist the proprietors case, the letter from RW Associates<sup>23</sup>, and the following invoices<sup>24</sup>:

<b>Invoice no.</b>	<b>Invoice date</b>	<b>'Amplifier' used?</b>	<b>Services referenced</b>	<b>Invoice amount</b>	<b>Invoice recipient</b>
1491	1 March 2010	Yes	"Two day monthly PR Programme as agreed for March 2010" & "5 Percent Admin Fee"	£1000 exc. VAT £50 exc. VAT	Office 2 Office (AccessPlus) Norwich
1567	1 August 2010	Yes	"To time for PR Programme Activities for August as agreed"	£850 exc. VAT	Intutive Ltd Surrey
1542	1 July 2010	Yes	"For PR Activity in July as agreed" & "5 Percent Admin Fee"	£1000 exc. VAT & £50.00 exc. VAT	Office 2 Office (AccessPlus) Norwich
1666	1 April 2011	Yes	"Draft writing of Town Crier press release in April"	£450 exc. VAT	Arundel Visitors Strategy Group

<sup>22</sup> Exhibit PS-5

<sup>23</sup> Exhibit PS-9

<sup>24</sup> Part of Exhibit PS-8

1853	31 March 2013	Yes	"To costs for PR activities in core PR programme in March as agreed"	£2,500 exc. VAT	Roland DG (UK) North Somerset
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Invoice issued to Proprietor

Invoice no.	Invoice date	"Amplifier" shown	Services referenced	Invoice amount	Recipient
cmk156	2 February 2012	Yes	Website development (5 days) And Print costs 30/01 P3 Business Cards	£1000  £99.60	Amplifier.pr, Surrey

62. In addition, the proprietor has provided the following turnover figures within its witness statement:

Period from	Period to	Annual turn over for class 35 services (£)
Not specified	30 September 2009	186,520
1 October 2009	30 September 2010	212,574
1 October 2010	30 September 2011	235,936
1 October 2011	30 September 2012	193,922
1 October 2012	30 September 2013	178,047
1 October 2013	31 March 2014	71,663

63. As mentioned in relation to the grounds under 46(1)(b), the letter from RW Associates confirms only that Amplifier PR Limited were a trading company throughout the relevant timeframe until they ceased trading in March 2014. As

previously mentioned, it offers nothing in the way of confirmation that the trade mark AMPLIFIER has been used in the UK in respect of the services as registered.

64. The invoices provided during this period provide a little more detail than those under Section 46(1)(b). There is both the cost of the services, alongside the following descriptions:

- Two day monthly PR Programme as agreed for March 2010 & 5 Percent Admin Fee;
- To time for PR Programme Activities for August as agreed;
- For PR Activity in July as agreed & 5 Percent Admin Fee;
- Draft writing of Town Crier press release in April;
- To costs for PR activities in core PR programme in March as agreed

65. I find the third description, namely “PR Activity in July as agreed & 5 Percent Admin Fee” to be too vague to provide evidence of use of under a particular service covered by the proprietor’s registration. It is unclear whether this is a reference to PR ‘activity’ set or run by the proprietor for another company carry out in an educational or consultancy format, or whether this is a PR activity as a service undertaken by the proprietor on behalf of a company.

66. I find the wording of the second, third and fifth invoices, namely “Two day monthly PR Programme as agreed”, “To time for PR Programme Activities for August as agreed” and “To costs for PR activities in core PR programme in March as agreed” to be better, but still a little unclear. I note there is a reference to the proprietor’s “programmes” included in Exhibit PS-1, which states “‘Amplified Creative Thinking (ACT) for peak performance’ programmes, workshops and strategic marketing communications and reputation management consultancy services have been specifically developed to deliver exactly this ...” [amplified creative thinking] explaining they work with companies to help with “formalising the creative thinking process and applying it to real commercial and operational challenges and opportunities ... to get leaders, entrepreneurs and their teams to think differently and approach

challenges and opportunities with more innovative and creative perspectives and renewed enthusiasm". However, the problem I have with the description of the programmes provided at PS-1 is that there is no evidence that the type of programme described by the proprietor on the screenshots with a copyright notice of 2018 is the same programme as described on invoices issued by the former proprietor eight years prior in 2010, and there is no explanation of such. On balance, it appears likely that second, third and fifth invoices relate to services that may fall broadly within the proprietor's *Advisory services relating to public relations; consultancy relating to public relations* and *public relations consultancy* in class 35, but the specifics are impossible to define.

67. I find the fourth invoice to be by far the most helpful in determining the actual services offered by the proprietor. I find drafting a press release to fall within the following services in the proprietor's class 35:

*public relations; public relations services;*

68. There was also a further invoice included within Exhibit PS-8, that appears to have been issued by a third party named Camouka and relates to invoicing a party that appears to be the proprietor in respect of services for creating a website and printing business cards. It appears as though this may have been included for the purpose of confirming the proprietor engaged another party to create a website and print business cards on their behalf within the relevant timeframe, but does little to assist with showing use of the proprietor's mark.

69. Again, I find the turnover figures provided to be of limited assistance, as there is no indication as to which of the proprietor's services in class 35 the figures relate, and Mr Spiers has indicated simply that the mark has been used in respect of all of the services in class 35.

### **Genuine use and fair specification**

70. As identified from the case law set out at paragraph 27, genuine use of a mark should be use by the proprietor (or an authorised third party), that is more than

merely token and is consistent with the essential function of a trade mark. Use of the mark should be in respect of goods or services already marketed, or for which preparations have commenced, and be for the purpose of creating or preserving an outlet for the goods or services that bear the mark. All relevant factors and circumstances should be considered when assessing whether use is genuine, including the economic sector and market characteristics, the scale, frequency and target of the use, the territorial extent of the use and the evidence the proprietor is able to provide. It should be considered that use need not be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services, but it is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use.

71. I note that the witness statement of Paul Spiers submits that genuine use of the mark has been made in respect of all services as registered in class 35. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL 0/404/13, Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller-General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in

the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

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

72. I have, in this instance, no reason to doubt that Mr Spiers believes anything other than the statements made in his witness statement, that genuine use of the mark has been made in respect of all services in class 35. However, the act of assessing whether genuine use of the mark has been evidenced to the tribunal is to be made following careful consideration of the evidence provided and the relevant case law as previously identified. Whilst I do not doubt that Mr Spiers believes that he has made genuine use of the mark, indeed, he may be privy to an abundance of evidence attesting to this use that may not have been provided in this case, I do not find his statement alone to be satisfactory evidence of genuine use. I am therefore required to turn to the evidence filed in support of his statement for the purpose of seeking satisfaction that genuine use has been shown.

73. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is

likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

74. Further, in *Aegon UK Property Fund Limited v The Light Aparthotel LLP*, BL O/472/11), Mr Daniel Alexander Q.C. as the Appointed Person stated that:

“17. .... unless it is obvious, the proprietor must prove that the use was in relation to the particular goods or services for which the registration is sought to be maintained.

75. I also note Mr Alexander’s comments in *Guccio Gucci SpA v Gerry Weber International AG* (O/424/14). He stated:

“The Registrar says that it is important that a party puts its best case up front – with the emphasis both on “best case” (properly backed up with credible exhibits, invoices, advertisements and so on) and “up front” (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. [...] The rule is not just “use it or lose it” but (the less catchy, if more reliable) “use it – and file the best evidence first time round – or lose it””

76. I consider at this point that the question is not whether each piece of evidence provided individually can evidence genuine use of the mark under each ground, but rather whether the picture that the proprietor has created with the combination of evidence provided is capable of establishing genuine use has been made of the mark, within the UK, within the relevant time frame and in relation to the services for which the mark has been registered<sup>25</sup>.

77. From the evidence provided for 46(1)(b), it is clear there was a business, with the Managing Director Paul Spiers that was operating under the mark ‘amplifier’ to some extent during the relevant timeframe. However, what is not at all clear from the evidence provided is the services the mark has been used in relation to, and the extent of the use (if any) in respect of those protected in class 35. I have found from the evidence there was a website that describes the offering of some services falling broadly into class 35 with a copyright notice during the relevant period, but the evidence falls short of showing these services were really engaged with within the relevant timeframe. I do not find the possibility that *strategic marketing communications advice* may have been, to some extent, offered to a single client (the IPIA) within the relevant time frame to be sufficient to show genuine use of the mark.

78. From the evidence provided under 46(1)(a), it is also clear that there was a business, with the Managing Director Paul Spiers, running to some extent under the mark “amplifier” within the relevant timeframe. Further, I have found in the form of the drafting of a single press release, that there has been some use of the mark in relation to the following services:

*public relations; public relations services;*

79. I also find that it is likely there has been some use that falls within the meaning of the following services in 2010 and 2013, although the specifics of this are not certain:

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<sup>25</sup> *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

*Advisory services relating to public relations; consultancy relating to public relations and public relations consultancy*

80. However, I cannot find on the basis of one invoice for the sum of £450 exc. VAT over the period of five years that the registration has been used in respect of *public relations; public relations services*. Without further evidence or a breakdown of the turnover figures or any additional evidence of use of the mark in respect of these services, I cannot attribute any additional use to these services throughout the five year period. Although the proprietor has not provided evidence relating to the size of this market in the UK, it is my view that it will be large. Similarly, on the basis of the three invoices provided relating broadly to 'PR Programmes' to a value of £4,400 exc. VAT over the five year period, I cannot find that use in respect of any of the proprietor's services has been shown.

81. In the case of both 46(1)(b) and 46(1)(a), I do not find the evidence provided to be sufficiently solid and specific to show genuine use of the proprietor's mark. Whilst I can, to some extent, find (minimal) use of the mark by the proprietor in respect of the general field of public relations, the evidence is at best, inconclusive. It is not solid or specific enough to satisfy me in relation to any particular service from those registered that the proprietor has shown use for the purpose of creating or preserving market share, and I cannot therefore allow the registration to be maintained on this basis.

### **Conclusion – Non use**

82. The application for revocation is successful on both grounds 46(1)(a) and 46(1)(b). The registration will be revoked in respect of all services for which it is registered, with an effective date of 22 August 2014.

### **COSTS**

The applicant for revocation has been successful and is entitled to a contribution towards its costs. In the circumstances I award the applicant for revocation the sum

of £1300 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official fees:	£200
Preparing statement and considering counterstatement	£300
Considering and commenting on the other side's evidence	£800
Total	£1300

I therefore order Amplifier Group Ltd to pay Wittersham Ltd the sum of £1300. The above sum should be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 24<sup>th</sup> day of September 2020**

**Rosie Le Breton  
For the Registrar,  
The Comptroller-General**