

**O/0340/24**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3783894**

**BY OLUWATOSIN OLUWOLE AJIBADE**

**TO REGISTER THE TRADE MARKS:**

**CHOPLIFE**

**ChopLife**

**CHOP LIFE**

**Chop Life**

**IN CLASSES 9, 16, 25, 35, 38, 41 & 42**

**AND**

**IN THE MATTER OF THE OPPOSITION THERETO**

**UNDER NO. 436991**

**BY MEDION AG**

## **BACKGROUND AND PLEADINGS**

1. On 3 May 2022, Oluwatosin Oluwole Ajibade (“the applicant”) applied to register the trade marks CHOPLIFE, ChopLife, CHOP LIFE and Chop Life as a series of four marks, under number 3783894 (“the application”). The application was published for opposition purposes on 22/7/2022 in respect of a range of goods and services in classes 9, 16, 25, 35, 38, 41 and 42. The full specification can be found in the Annex to this decision.

2. On 19 October 2022, MEDION AG (“the opponent”) filed a notice of opposition. The opposition is brought under s. 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and is directed against all of the goods and services in classes 9, 35, 38, 41 and 42. These are shown in the table in paragraph 18 of this decision.

3. Under s. 5(2)(b), the opponent relies upon its earlier comparable UK Trade Mark<sup>1</sup>:

UKTM No.	916673171
Mark	life
Filing Date	28 April 2017
Registration Date	13 January 2020

The earlier mark is registered for goods and services in classes 9, 35, 38, 41 and 42, all of which are relied upon in this opposition. They are set out in the table in paragraph 18 of this decision.

4. Under s. 5(2)(b), the opponent relies on all the goods and services for which the earlier mark is registered.

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<sup>1</sup> On 1 January 2021, the UK left the EU after the expiry of the transition period. Under Article 54 of the Withdrawal Agreement, the Registry created comparable UK trade marks for all rights holders with an existing EUTM. As a result of the opponent having an EUTM protected as at the end of the Implementation Period, comparable UK trade marks were automatically created. The comparable trade marks shown here is now recorded on the UK trade mark register, has the same legal status as if it had been applied for and registered under UK law, and retains its original filing date.

5. Given the respective filing dates, the opponent's mark is an earlier mark in accordance with s.6 of the Act. As the earlier mark had not completed its registration process more than five years before the filing date of the contested mark, it is not subject to the proof of use provisions specified in section 6A of the Act. Consequently, the opponent is entitled to rely upon all the goods and services of the earlier mark, without having to demonstrate genuine use.

6. The opponent contends that the competing marks are highly similar, and that the parties' goods and services are identical or similar, giving rise to a likelihood of confusion, including the likelihood of association.

7. The applicant filed a defence and counterstatement, denying the grounds of the opposition. The applicant denies that the marks are similar and that the goods and services are identical or similar.

8. Only the applicant filed submissions, which were received on 6 June 2023. Neither party requested to be heard, but the applicant filed further written submissions in lieu of an oral hearing on 8 August 2023. Therefore, the decision is taken following a careful perusal of the papers, and I shall refer to the applicant's submissions where appropriate.

### **PRELIMINARY POINTS**

9. Firstly, in its written submissions, the applicant argues that the opponent's lack of particularisation of the similarity between the goods and services has put it under a disadvantage. It further submits, that it would not be appropriate for me to make any findings on the similarity as a matter of natural justice. I do not understand the applicant to be arguing that the opponent's pleadings are defective and should not have been admitted; rather, that it takes issue with the way that the opponent has conducted this case. The specifications of both parties' marks are lengthy, as is apparent from the length of this decision. Where those goods are identical or self-evidently similar, I apply the factors set out in the established case law. However, I note that in *RALEIGH INTERNATIONAL Trade Mark* [2001] RPC 11, Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person, observed that when goods or services are not

identical or self-evidently similar, the opposition should be supported by evidence as to their similarity.<sup>2</sup> Thus, where the goods or services are not identical or self-evidently similar, I will make a finding of dissimilarity.

10. Secondly, in its written submissions, the applicant describes the different goods and services, and market sector it feels the opponent and the applicant operate within, asserting that this defeats any possibility of confusion. For reasons which I will now explain, the applicant's points about the difference in the actual goods and services offered by the parties will, as a matter of law, have no bearing on the outcome of this opposition.

11. The mark relied upon by the opponent has not been registered for five years at the date on which the application was filed. Consequently, the opponent is not required to prove use for any of the goods or services for which the earlier mark is registered. I must therefore make my assessment of the likelihood of confusion on the basis of the notional use of the earlier mark.

12. The concept of notional use was explained by Laddie J. in *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 like this:

"22. ... It must be borne in mind that the provisions in the legislation relating to infringement are not simply reflective of what is happening in the market. It is possible to register a mark which is not being used. Infringement in such a case must involve considering notional use of the registered mark. In such a case there can be no confusion in practice, yet it is possible for there to be a finding of infringement. Similarly, even when the proprietor of a registered mark uses it, he may well not use it throughout the whole width of the registration or he may use it on a scale which is very small compared with the sector of trade in which the mark is registered and the alleged infringer's use may be very limited also. In the former situation, the court must consider notional use extended to the full width of the classification of goods or services. In the latter it must

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<sup>2</sup> Paragraph 20

consider notional use on a scale where direct competition between the proprietor and the alleged infringer could take place.”

13. So far as the applicant’s claimed use of its applied-for series of marks are concerned, I remind myself that, in *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited* (Case C-533/06), the Court of Justice of the European Union (“CJEU”) stated at paragraph 66 of its judgment that when assessing the likelihood of confusion in the context of registering a new trade mark it is necessary to consider all the circumstances in which the marks applied for might be used if they were registered. As a result, even though the applicant has suggested the ways in which the marks will be used, and the goods and services for which it will be used, my assessment later in this decision must take into account only the applied-for series of marks – and its specification – and any potential conflict with the opponent’s earlier mark.

### **RELEVANCE OF EU LAW**

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

### **DECISION**

#### **Section 5(2)(b) and 5A: legislation and case law**

15. Sections 5(2)(b) and 5A of the Act read as follows:

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

[...]

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

16. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.*, Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Mark and Designs) (OHIM)*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing

in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion

## **Comparison of goods & services**

17. The goods and services to be compared are:

Opponent's goods and services	Applicant's goods and services
<p><b>Class 9</b></p> <p>Music software; Musical sound recordings; Musical video recordings; Downloadable digital music; Downloadable video recordings featuring music; Data recorded electronically; Downloadable electronic books exclusively referring to music and computer or technical devices used to consume digital music, comics, phantasy, science fiction, books for children, cookbook, crime novels, thriller, advisers, travel guides, novels, non-fiction books, schoolbooks, specialised books; Downloadable ring tones for mobile phones; Recorded content; Information technology and audio-visual, multimedia and photographic devices; Navigation, guidance, tracking, targeting and map making devices; Information technology and audiovisual equipment; Access control devices; Alarms and warning equipment.</p>	<p><b>Class 9</b></p> <p>Computer software to enable music artists and music labels to market and distribute their music; downloadable mobile applications for interacting with and funding artists and creators; computer software to facilitate the collection of royalties and revenues related to the foregoing; computer software for accessing information related to musical recordings; software for managing databases of recorded music files; computer programs for data analytics for the music industry; computer software for use in the delivery, distribution and transmission of musical recordings and related content; Downloadable musical sound recordings; media streaming software; Scientific apparatus and instruments; nautical apparatus and instruments; surveying apparatus and instruments; photographic apparatus and instruments; cinematographic apparatus; optical apparatus and instruments; weighing apparatus and instruments; measuring instruments and apparatus; signaling apparatus and instruments; verification (control) apparatus and instruments; teaching apparatus and instruments; sound recording apparatus; apparatus for the</p>

	<p>transmission of sound; sound reproduction apparatus; image recording apparatus; image transmission apparatus; image reproduction apparatus; digital recording media; mechanisms for coin-operated apparatus; cash registers; calculating machines; data processing equipment; computers; electronic tablets; ordiphones [smartphones]; e-readers; game software; computer software (recorded programs); computer peripherals; detectors; Electric wires; electrical relays; diving suits; diving gloves; diving masks; protective clothing against accidents, radiation and fire; personal protection devices against accidents; fire extinguishers; glasses (optics); 3D glasses; virtual reality headsets; eyewear; spectacle cases; memory or microprocessor cards; bags designed for laptop computers; smart watches; electric batteries; batteries for electronic cigarettes; charging stations for electric vehicles; diagnostic apparatus not for medical purposes; Digital materials, namely, non-fungible tokens or NFTs; Downloadable digital media, namely, digital collectibles created with blockchain-based software technology; Downloadable video game software; Downloadable virtual goods, namely, computer software programs</p>
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	<p>featuring in-game resources, tokens, and virtual currency for use in video games and online virtual worlds; Pre-recorded compact discs, cassettes, tapes, phonographic records, videotapes, videodiscs, and downloadable recordings; apparatus and instruments for recording, transmission or reproduction of sound or images; recording discs; recorded musical performances and music videos; films; Eyewear; sunglasses; sunglasses cases; sound and video recordings; music and video recordings in digital form; recorded and unrecorded sound and image carriers of all types, in particular CDs, recording discs and video films; DVDs, CDs, and audio and visual sound recordings featuring musical performances; musical sound recordings; computer application software for mobile phones, portable media players, and handheld computers for use in downloading music, ring tones and video games; handheld and mobile digital electronic devices, namely, tablet PCs, cellular phones, laptops, portable media players, handheld computers; cases and covers for mobile phones and mobile digital electronic devices, namely, laptops, cell phones, radio pagers, mobile computers; downloadable web-based application software in the nature</p>
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	<p>of a mobile application downloadable to handheld and mobile digital electronic devices for use in downloading music, ring tones and video games; decorative magnets, eyewear, eyeglass cases; computer bags; graduated glassware.</p>
<p><b>Class 35</b>  Computerised file management; On-line advertising on a computer network; Rental of advertising time on communication media; Publication of publicity texts; Rental of advertising space; Dissemination of advertising matter; Retailing in relation to electric household utensils; Retailing in relation to electronic household utensils; Retail services in relation to computer software; Retail services in relation to mobile phones; Retail services in relation to smartphones; Retail services in relation to smartwatches; Retail services in relation to downloadable music files; Retail services in relation to downloadable electronic publications; Retail services in relation to wearable computers; Retail services in relation to printed matter; Retail services in relation to navigation devices; Retail services in relation to audio-visual equipment.</p>	<p><b>Class 35</b>  Promoting the music of others through the distribution of recorded music to online streaming services via an online platform; business and sales monitoring and tracking services relating to online streaming music services. Advertising; business management; business administration; office work; distribution of advertising material (tracts, prospectuses, printed matter, samples); newspaper subscription services (for others); subscription services to telecommunications services for others; presentation of goods on any means of communication for retail sale; advice on organization and business management; accounting; reproduction of documents; employment agency services; computerized file management service; traffic optimization for websites; organization of exhibitions for commercial or advertising purposes; online advertising on a computer network; rental of advertising time on any means of communication; publication of publicity texts; rental of advertising</p>

	<p>space; dissemination of advertisements; communication advice (advertising); public relations; communication advice (public relations); company audits (commercial analyses); commercial intermediation services (concierge).</p>
<p><b>Class 38</b>  Telecommunications; Mobile telephone communication services; Providing access to multimedia content online; Provision of access to data on communication networks; Providing telecommunications connections to a global computer network; Rental of telecommunication equipment; Teleconferencing services; Electronic messaging; Rental of access time to global computer networks; Providing access to digital music web sites on the internet; Audiovisual communication services; Radio broadcasting; Television broadcasting; Telecommunication gateway services; Providing access to telecommunication networks; Providing access to digital music web sites on the internet; Providing access to a video sharing portal; Providing user access to computer programmes in data networks; Providing access to databases in computer networks; Provision of electronic sound links; Provision of electronic video links; Providing user access to portals on the Internet;</p>	<p><b>Class 38</b>  Providing access to digital music web sites on the internet; broadcasting and transmission of streamed, up-loadable and downloadable music, audio, video and other multimedia content; streaming of audio and video over the internet; webcasting services; providing community forums for the transmission of information and messages between users, in the field of music related entertainment; providing access to websites and databases on the Internet that presents artists, music albums and songs, entertainment services, namely, music related current events and entertainment news and that allow customers to programme audio, text, video and other multimedia content, including music related concerts, news, cultural events on a website and in mobile applications;  Telecommunications;  telecommunications information;  communications by computer terminals;  communications by fiber optic networks;  radio communications; telephone calls;</p>

<p>Provision of access to an Internet portal featuring video-on-demand programs.</p>	<p>mobile radiotelephony; providing user access to global computer networks; provision of online forums; provision of access to databases; electronic display services (telecommunications); connection by telecommunications to a global computer network; press agencies; news agencies (news); rental of telecommunications apparatus; radio broadcasts; TV shows; teleconferencing services; videoconferencing services; electronic mail services; rental of access time to global computer networks.</p>
<p><b>Class 41</b>  Entertainment; Videotape production; Rental of sound recordings; Booking of seats for shows; Game services provided on-line from a computer network; Publication of electronic books and journals on-line, exclusively referring to music and computer or technical devices used to consume digital music, comics, phantasy, science fiction, books for children, cookbook, crime novels, thriller, advisers, travel guides, novels, non-fiction books, schoolbooks, specialised books; Providing publications from a global computer network or the internet which may be browsed exclusively referring to music and computer or technical devices used to consume digital music, comics, phantasy, science fiction, books for</p>	<p><b>Class 41</b>  Providing audio material, concert information, and information about music albums, artists and songs, via a website; entertainment news and information in the field of music, provided via a website; entertainment services, namely, the provision of streamed, up-loadable, non-downloadable, or downloadable music, to online users via global or local computer networks; Entertainment services in the nature of providing online, non-downloadable audio and video featuring musical performances; production, distribution, and presentation of sound and video recordings in the field of music; music and musical publishing services; providing education in the field of music through live and online workshops; Education; training;</p>

children, cookbook, crime novels, thriller, advisers, travel guides, novels, non-fiction books, schoolbooks, specialised books; Providing on-line publications exclusively referring to music and computer or technical devices used to consume digital music; Providing electronic publications exclusively referring to music and computer or technical devices used to consume digital music, comics, phantasy, science fiction, books for children, cookbook, crime novels, thriller, advisers, travel guides, novels, non-fiction books, schoolbooks, specialised books; Providing a computer game that may be accessed network-wide by network users; Providing digital music from the internet; Provision of information relating to entertainment online from a computer database of the Internet; Providing on-line reviews of books; Internet games (non-downloadable); Providing video entertainment via a website; Providing television programmes, not downloadable, via video-on-demand transmission services; Providing films, not downloadable, via video-on-demand transmission services; Providing on-line music, not downloadable; Provision of on-line entertainment; Provision of games by means of a computer based system; Entertainment provided via the

entertainment; sports and cultural activities; entertainment information; education information; vocational retraining; provision of leisure facilities; publication of books; loan of books; providing films, not downloadable, through video-on-demand services; motion picture production; rental of television sets; rental of show sets; photography services; organization of competitions (education or entertainment); organization and conduct of conferences; organization and conduct of conferences; organization and conduct of congresses; organization of exhibitions for cultural or educational purposes; reservation of tickets for shows; gaming services provided online from a computer network; gambling services; electronic publication of books and periodicals online; Entertainment services; providing music and related information via the Internet; providing online video games, dance events by a recording artist, multimedia production services; Entertainment services in the nature of live musical performances; production of motion picture films, fan clubs.

<p>internet; Entertainment provided via a global communication network; Providing information in the field of music; Provision of entertainment information by electronic means.</p>	
<p><b>Class 42</b>          Hosting services and software as a service and rental of software; Consultancy in the field of computers; Conversion of computer programs and data, other than physical conversion; Conversion of data or documents from physical to electronic media; On-line computer services; Digitalization of sound and images; Cross-platform conversion of digital content into other forms of digital content; Copying of computer software; Computer hardware development; Software development, programming and implementation.</p>	<p><b>Class 42</b>          Computer services, namely, providing an online platform to allow music professionals to distribute and promote recorded music to online streaming services.</p>

18. The General Court (“GC”) confirmed in *Gérard Meric v OHIM*, Case T-133/05, that, even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services* (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

19. In *Canon*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) stated that:

“23. In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

20. In *British Sugar Plc v James Robertson & Sons Limited (Treat)*, [1996] R.P.C. 281, Jacob J (as he was then) identified the following factors as relevant when assessing the similarity of goods and services:

“(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”<sup>3</sup>

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<sup>3</sup> At [296].

21. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC stated that “complementary” means:

“[...] there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

22. For the purposes of considering the issue of similarity of goods, it is permissible to consider groups of terms collectively where appropriate. In *Separode Trade Mark*, BL O-399-10, Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person, said:

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”<sup>4</sup>

23. While making my comparison, I bear in mind the comments of Floyd J. (as he then was) in *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch):

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise. ... Nevertheless the principle should not be taken too far. ... Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”<sup>5</sup>

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<sup>4</sup> Paragraph 5  
<sup>5</sup> Paragraph 12

24. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

## **Class 9**

*Computer software to enable music artists and music labels to market and distribute their music.*

25. The applicant’s software goods are intended to market and distribute music. The software enables an artist or music label to get their music to the end consumer so that they can listen to it, make them aware of new releases, and so on. It may therefore include the software necessary for streaming and downloading music. My view is that the applicant’s term is included within the opponent’s broad term *music software*. I find the parties’ goods to be identical on the basis of the principle set out in *Meric*.

*Computer software for use in the delivery, distribution and transmission of musical recordings and related content; computer application software for mobile phones, portable media players, and handheld computers for use in downloading music, ring tones...; downloadable web-based application software in the nature of a mobile application downloadable to handheld and mobile digital electronic devices for use in downloading music, ring tones.....*

26. The applicant’s goods are all types of software for playing, downloading, and streaming music. My view is that these goods are included within the opponent’s broad term *music software*. I find the parties’ goods to be identical on the basis of the principle set out in *Meric*.

*Downloadable mobile applications for interacting with and funding artists and creators; computer software to facilitate the collection of royalties and revenues related to the*

foregoing; software for managing databases of recorded music files; computer programs for data analytics for the music industry.

27. I will compare these goods with the opponent's *music software*, the core meaning of which, following the guidance set out in *YouView*, I construe to be software for playing or producing music. There is a point of similarity in that the respective goods are software products for use in the music industry. However, the purpose of the applicant's goods is to perform administration functions such as managing databases and analysing data in the music industry, so the purpose of the goods differs. The goods do not compete and are not obviously complementary. There is likely to be some overlap in user as the applicant's goods are targeted at music professionals, whilst the opponent's goods are targeted at the general public who wish to play and stream music and the professionals who produce the music that the public listen to. Overall, I consider there to be a low degree of similarity.

Computer software for accessing information related to musical recordings.

28. I will compare these goods with the opponent's *music software*. There is a point of similarity in that the respective goods are software products for use in the music industry. However, the purpose of the applicant's goods is to provide access to information related to musical recordings, so the purpose of the goods differs. The goods do not compete and are not obviously complementary in the sense described in *Boston Scientific*. There may be some overlap in the channels of trade as the consumer is likely to expect to be able to find some information about recordings from the same place that it accesses the music. The respective goods may be targeted at the same consumer. This is because those who wish to play music may also want to access information relating to music. Overall, I consider there to be a medium degree of similarity.

Media streaming software; Computer software (recorded programs).

29. The applicant's broader terms will encompass the opponent's *music software*. I find the parties' goods to be identical on the basis of the principle set out in *Meric*.

Downloadable musical sound recordings.

30. The applicant's goods are synonymous with the opponent's *downloadable digital music*. I find the parties' goods to be identical.

Cinematographic apparatus; sound recording apparatus; apparatus for the transmission of sound; sound reproduction apparatus; image recording apparatus; image transmission apparatus; image reproduction apparatus; e-readers; virtual reality headsets; apparatus and instruments for recording, transmission or reproduction of sound or images; portable media players.

31. To my mind, the applicant's goods are apparatus and devices used to communicate audio and visual information. Thus, the applicant's goods are all included in the opponent's broad term *audio-visual devices and equipment*. I find the parties' goods to be identical on the basis of the principle set out in *Meric*.

Photographic apparatus and instruments.

32. The applicant's goods are synonymous with the opponent's term *photographic devices*. I find the parties' goods to be identical.

Verification (control) apparatus and instruments.

33. The opponent's *access control devices* are included in the applicant's broader term. I find the parties' goods to be identical on the basis of the principle set out in *Meric*.

Teaching apparatus and instruments.

34. I shall compare these goods to the opponent's *audio-visual devices and equipment*. To my mind, *audio-visual devices and equipment* is a broad term that includes audio-visual teaching apparatus such as electronic white boards, slide projectors, video projectors, projection and display screens etc. Thus, I find the parties' goods to be identical on the basis of the principle set out in *Meric*.

Detectors.

35. The applicant's term covers goods that are included in the opponent's *warning equipment*. I find the parties' goods to be identical on the basis of the principle set out in *Meric*.

Personal protection devices against accidents.

36. I will compare these goods with the opponent's *alarms and warning equipment*. The purpose of the applicant's goods is to protect against accidents and will include goods such as safety goggles, whilst the opponent's goods are intended to detect, alert, and warn of events, such as intrusions and fires. Thus, the purpose of the goods is different. The physical nature and method of use of the goods is different. The goods are not in competition nor are they complementary and they do not share trade channels or target the same consumer. I find that the goods are dissimilar.

Data processing equipment; computers; electronic tablets; computer peripherals; memory or microprocessor cards; handheld and mobile digital electronic devices, namely, tablet PCs, laptops, handheld computers.

35. The applicant's goods are included within the opponent's *information technology equipment and devices*. I find the parties' goods to be identical on the basis of the principle set out in *Meric*.

Pre-recorded compact discs, cassettes, tapes, phonographic records, videotapes, videodiscs, and downloadable recordings; recorded musical performances and music videos; films; sound and video recordings; music and video recordings in digital form; recorded sound and image carriers of all types, in particular CDs, recording discs and video films; DVDs, CDs, and audio and visual sound recordings featuring musical performances; musical sound recordings; digital recorded media.

37. The applicant's goods are included within the opponent's broad term *recorded content*. I find the parties' goods to be identical on the basis of the principle set out in *Meric*.

Fire extinguishers.

38. I shall compare these goods with the opponent's *alarms and warning equipment*, which includes fire alarms and warning equipment within its ambit. At a general level there is a similarity of purpose between the respective goods as they all relate to protecting against fire. However, I acknowledge that the purpose of the applicant's goods is to put out a fire, while the purpose of the opponent's goods is to warn people of danger (which could include a fire). The physical nature and method of use of the goods is different. The goods may reach the market through coinciding channels of trade and are targeted to the same end consumer. Overall, I consider the goods to be similar to a low degree.

Ordiphones [smartphones]; smart watches; handheld and mobile digital electronic devices, namely, cellular phones.

39. I shall compare the applicant's goods with the opponent's *audio-visual devices and equipment*. In my view, there is a cross-over in purpose between the respective goods since both can be used to stream content. There is also a limited degree of competition between the respective goods since the consumer can choose what device to stream-content, although I acknowledge that the applicant's goods have a lot of other functions. The goods may reach the market through coinciding channels of trade and are targeted to the same end consumer. Thus, I consider the goods to be similar to a low to medium degree.

Recording discs; unrecorded sound and image carriers of all types, in particular CDs, recording discs and video films.

40. I shall compare the applicant's goods with the opponent's *audio-visual devices and equipment*. To my mind there is a degree of complementarity, where the consumer may expect, for example, the producers of CD players to also produce the discs. There is also a cross-over in purpose since both are designed to communicate audio-visual content. The goods may reach the market through coinciding channels of trade and are targeted to the same end consumer. Thus, I consider the goods to be similar to a medium degree.

Bags designed for laptop computers; cases and covers for mobile digital electronic devices, namely, laptops and mobile computers; computer bags.

41. The purpose of the applicant's goods is to protect and transport computers. I will compare these goods to the opponent's *information technology devices and equipment*, which is a broad term which incorporates computers and mobile phones within its ambit. To my mind there is a degree of complementarity, where the consumer may expect both the laptop / mobile computer and the bags and cases to be provided by the same undertaking. The respective goods may reach the market through coinciding channels of trade and are targeted to the same end consumer. However, the purpose and physical nature of the goods is different. Thus, I consider the goods to be similar to a low to medium degree.

Game software; downloadable video game software; downloadable virtual goods, namely, computer software programs featuring in-game resources, tokens, and virtual currency for use in video games and online virtual worlds; computer application software for mobile phones, portable media players, and handheld computers for use in downloading.... video games; downloadable web-based application software in the nature of a mobile application downloadable to handheld and mobile digital electronic devices for use in downloading.... video games.

42. I will compare these goods to the opponent's *software development services* in class 42. The applicant's goods have a different nature and purpose to that of the opponent's services. However, producers of computer software may also render software related services, for example a software developer may produce its own games and also sell its development services to third parties. To that extent, there is a degree of complementarity, where the consumer may expect the goods and services to be provided by the same undertaking. However, the respective users will be different since the games software will be aimed at consumers of those products, whilst the services will be aimed at a computer games business. Thus, I consider the goods and services to be similar to a low to medium degree.

Calculating machines.

43. I shall compare the applicant's goods with the opponent's *information technology devices and equipment*. In my mind there is a crossover in purpose between the respective goods since both can be used for arithmetic purposes. However, I note that information technology equipment, such as computers, can be used to perform more general tasks such as sending and receiving e-mails and downloading and streaming content, which a calculating machine cannot. Therefore, the goods are not in competition nor are they complementary and they do not share trade channels. Thus, I consider the goods to be similar to a low degree.

*Electric batteries*

44. I shall compare these goods with the opponent's *information technology devices and equipment*. The applicant's specification includes electric batteries for information technology goods. Thus, the purpose of the applicant's goods is to supply power to IT devices and equipment, which will allow them to operate without being connected to a power outlet. To my mind there is a degree of complementarity, where the consumer may expect both the information technology goods and the batteries to be provided by the same undertaking. The respective goods may reach the market through coinciding channels of trade and are targeted to the same end consumer. However, the purpose and physical nature of the goods is different. Thus, I consider the goods to be similar to a low to medium degree.

*Digital materials, namely, non-fungible tokens or NFTs; downloadable digital media, namely, digital collectibles created with blockchain-based software technology.*

45. I understand *non-fungible tokens or NFTs* to be pieces of data that are used as a means of authenticating and showing ownership of digital materials and are recorded on a blockchain, which I understand to be a decentralised ledger of data. Consequently, I consider that it is included in the opponent's broader term *Data recorded electronically* and I find that the parties' goods are identical on the basis of the principle set out in *Meric*.

46. I shall compare the applicant's *Downloadable digital media, namely, digital collectibles created with blockchain-based software technology* with the opponent's *Downloadable digital music*. I understand the applicant's term to mean digital media items, such as songs or artwork, that use blockchain technology to verify their authenticity and ownership. As these items could be music, I find that the parties' goods are identical on the basis of the principle set out in *Meric*.

*Scientific apparatus and instruments; nautical apparatus and instruments; surveying apparatus and instruments; optical apparatus and instruments; weighing apparatus and instruments; measuring instruments and apparatus; signaling apparatus and instruments; mechanisms for coin-operated apparatus; cash registers; electric wires; electrical relays; diving suits; diving gloves; diving masks; protective clothing against accidents, radiation and fire; glasses (optics); 3D glasses; eyewear; spectacle cases; batteries for electronic cigarettes; charging stations for electric vehicles; diagnostic apparatus not for medical purposes; sunglasses; sunglasses cases; cases and covers for mobile phones and mobile digital electronic devices, namely, cell phones, radio pagers; decorative magnets; eyeglass cases; graduated glassware.*

47. None of these goods appear to have any similarity with the opponent's goods or services. They all have a different purpose, nature, and methods of use. They are not obviously in competition or complementary and they do not obviously share trade channels. Therefore, in the absence of any evidence or submissions to the contrary, I conclude that these goods are not similar to the opponent's goods or services.

### **Class 35**

*Online advertising on a computer network; publication of publicity texts; rental of advertising space.*

48. These services appear identically in the opponent's specification.

*Computerized file management services.*

49. These services are self-evidently identical to the opponent's *computerised file management*.

Advertising.

50. The opponent's *on-line advertising on a computer network* is included in the applicant's services. I find the parties' services to be identical on the basis of the principle set out in *Meric*.

Communication advice (advertising).

51. To my mind these services relate to advice given to a third party on how to promote its goods and services to others, specifically through advertising them. I will compare these services with the opponent's *on-line advertising on a computer network*. The purpose of the opponent's services is to advertise goods and services to the consumer. Thus, in my view, the services are closely allied and are clearly important or indispensable for each other, and the nature of the relationship is one where the consumer would understand all of them to be under the control of a single entity. They also share the same channels of trade and target the same consumer. I consider there to be a high degree of similarity between the services.

Presentation of goods on any means of communication for retail sale.

52. To my mind these are services which are offered to retailers of goods to enable them to present goods on communication media. I will compare these goods with the opponent's *on-line advertising on a computer network*. The respective services share a purpose since both are used for advertising goods to the public. There is also a degree of complementarity, where the consumer may expect the services to be provided by the same undertaking. I have no evidence to make a finding on whether the channels of trade are the same, but both services target the same end consumer. I consider there to be a high degree of similarity.

Distribution of advertising material (tracts, prospectuses, printed matter, samples); dissemination of advertisements.

53. The applicant's services are included in the opponent's *dissemination of advertising matter*. I find the parties services to be identical on the basis of the principle set out in *Meric*.

Office work; business administration.

54. I will compare these services with the opponent's *computerised file management*. The opponent's services concern helping organisations organise files on computer systems including functions like naming or storing files. This is a core day-to-day activity of an organisation. Thus, the opponent's services are included in the applicant's broader terms, which concern the day-to-day functions of a business. I find the parties' services to be identical on the basis of the principle set out in *Meric*.

Rental of advertising time on any means of communication.

55. I shall compare the applicant's services with the opponent's *rental of advertising space*. The opponent's services relate to giving third parties access to physical space for example in publications or on billboards for advertising purposes. The applicant's services relate to providing third parties with time slots for example on television or radio for advertising purposes. Thus, in my view, there is a cross-over in purpose between the respective services since both relate to rental services for advertising purposes. The nature of the services is the same. The respective services will be competitive because the consumer can choose how and where to advertise its goods or services. I have no evidence to make a finding on whether the channels of trade are the same, but both services target the same end consumer. I consider there to be a high degree of similarity.

Promoting the music of others through the distribution of recorded music to online streaming services via an online platform.

56. In my view, it is not wholly clear from the wording itself whether the service is a promotional service or a music service. In *Pathway IP Sarl v Easygroup Ltd* [2018]

EWHC 3608 (Ch)<sup>6</sup>, Henry Carr J concluded that when specifications lack clarity and precision it would be appropriate to use classes as an aid to interpretation of the specification. Using the class 35 heading as an aid, I interpret the applicant's specification as being a promotional service. I shall compare the applicant's services to the opponent's *on-line advertising on a computer network*, which includes on-line advertising of music in its ambit. The purpose of the services is the same as both relate to attracting the attention of consumers to motivate them to make a purchase. The nature of the services is the same. There is likely to be a degree of competition between the services because the consumer can choose how and where to promote / advertise its music. I have no evidence to make a finding on whether the channels of trade are the same, but both services target the same end consumer, namely, those looking to promote their music to third parties. I consider there to be a high degree of similarity.

*Public relations; communication advice (public relations).*

57. I will compare these services with the opponent's *publication of publicity texts*. The purpose of the applicant's services is to manage and disseminate information from an individual or an organisation to the public in order to influence their perception. The opponent's services concern the publication of such information. Thus, the purpose of the services is therefore the same. There is also a complementary relationship between these services. This is because the services are closely allied and are clearly important or indispensable for each other, and the nature of the relationship is one where the consumer would understand all of them to be under the control of a single entity. I consider there to be a high degree of similarity.

*Organization of exhibitions for advertising purposes.*

58. These services will be compared with the opponent's *on-line advertising on a computer network*. The respective services share a similar purpose, namely, to advertise goods and services for third parties. However, the nature of the applicant's services, which will include *inter alia* research on and securing venues, equipment,

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<sup>6</sup> At para 79

and exhibitors for exhibitions, differs from that of the opponent's services. I have no evidence to make a finding on whether the channels of trade are the same, but both services target the same end consumer, namely, those looking to advertise goods and services to the public. I consider there to be a low to medium degree of similarity between the services.

*Business management; advice on organization and business management.*

59. I will compare the applicant's services to the opponent's *computerised file management*. The purpose of the applicant's services is to help with the running of a business. The opponent's services concern helping organisations organise files on computer systems including functions like naming or storing files. Thus, at a general level the purpose of the services is the same i.e., helping with the running of a business. However, business management services are normally those concerned with the day-to-day management and organisation of a business, while the opponent's services are concerned with organising files on computer systems. There may be some overlap in channels of trade and the user of the respective services is the same. I consider there to be a low degree of similarity between the services.

*Business and sales monitoring and tracking services relating to online streaming music services.*

60. I will compare these services with the opponent's *providing digital music from the internet* in class 41. The purpose of the applicant's services is to help with the running of a business by monitoring and tracking sales relating to online streaming of music. The purpose of the applicant's services is to provide digital music entertainment. The purpose and nature of the services is therefore different. They are not in competition; however, the opponent's services are essential for the delivery of the applicant's services and therefore there is a degree of complementarity, where the consumer may expect the services to be provided by the same undertaking. The respective users will be different since the applicant's services will be aimed at music businesses, whilst the opponent's services will be aimed at the general public who stream music. I find that these services are similar to a low degree.

Traffic optimization for websites.

61. I will compare these services with the opponent's *providing access to multimedia content online* in class 38. The purpose of the applicant's services is to improve website performance and user experience. The opponent's services are concerned with the provision of access to multimedia content online, which may be provided via websites. Thus, the purpose and nature of the respective services differ. The respective services are not in competition nor are they complementary. The users will be different since the applicant's services will be aimed at website owners, whilst the opponent's services will target the general public who browse the internet. I find that these services are dissimilar.

Organization of exhibitions for commercial purposes.

62. I will compare these services with the opponent's *rental of advertising space*. The purpose of the applicant's services is to organize exhibitions for commercial purposes. This will involve *inter alia*, research on and securing exhibitors for the exhibitions. The opponent's services relate to giving third parties access to physical space, for example in publications or on billboards for advertising purposes. There may be some cross over in purpose as both are intended to advertise goods or services to the public. However, the nature of the applicant's services, which will include *inter alia* research on and securing venues, equipment, and exhibitors for exhibitions, differs from that of the opponent's. I have no evidence to make a finding on whether the channels of trade are the same, but both services target the same end consumer, namely, those looking to advertise goods and services to the public. I consider there to be a low to medium degree of similarity between the services.

Newspaper subscription services (for others); subscription services to telecommunications services for others; accounting; reproduction of documents; employment agency services; company audits (commercial analyses); commercial intermediation services (concierge).

63. None of these services appear to have any similarity with the opponent's goods or services. They all have a different purpose and nature. They are provided in a different

way and, therefore, do not share methods of use. They are not obviously in competition or complementary and they do not obviously share trade channels. Therefore, in the absence of any evidence or submissions to the contrary, I conclude that these services are not similar to the opponent's goods or services.

### **Class 38**

Providing access to digital music web sites on the internet; telecommunications; rental of access time to global computer networks.

64. These services appear identically in the opponent's specification.

Telecommunications information.

65. I will compare these services with the opponent's *telecommunications*. The purpose of the opponent's services is to allow transmission of information via various technologies to allow people to communicate. The applicant's services relate to the provision of advice concerning telecommunications. Thus, the purpose, nature and method of use of the services differs. They are not in competition. However, to my mind there is a degree of complementarity, where the consumer may expect both the telecommunication services and the information about such services to be provided by the same undertaking. The channels of trade are the same and they target the same end consumer. I consider there to be a high degree of similarity.

Telephone calls; mobile radiotelephony; electronic display services (telecommunications); teleconferencing services; videoconferencing services; electronic mail services; communications by computer terminals; communications by fiber optic networks.

66. The applicant's services are included in the opponent's broad term *telecommunications*. I find that they are identical on the basis of the principle set out in *Meric*.

Broadcasting and transmission of streamed, up-loadable and downloadable music, audio, video and other multimedia content; streaming of audio and video over the internet; webcasting services; providing access to websites and databases on the Internet that presents artists, music albums and songs, entertainment services, namely, music related current events and entertainment news and that allow customers to programme audio, text, video and other multimedia content, including music related concerts, news, cultural events on a website and in mobile applications.

67. The applicant's services are included in the opponent's *providing access to multimedia content online*. I find that they are identical on the basis of the principle set out in *Meric*.

Radio communications.

68. The applicant's services are included in the opponent's *audiovisual communication services*. I find that they are identical on the basis of the principle set out in *Meric*.

Provision of access to databases; providing community forums for the transmission of information and messages between users, in the field of music related entertainment; provision of online forums.

69. The applicant's services are included in the opponent's *provision of access to data on communication networks*. I find that they are identical on the basis of the principle set out in *Meric*.

Providing user access to global computer networks; connection by telecommunications to a global computer network.

70. The applicant's services are included in the opponent's *providing telecommunications connections to a global computer network*. I find that they are identical on the basis of the principle set out in *Meric*.

Rental of telecommunications apparatus.

71. The applicant's services are synonymous with opponent's *rental of telecommunication equipment*. I find that they are identical on the basis of the principle set out in *Meric*.

Radio broadcasts, TV shows.

72. The applicant's services are included in the opponent's *radio and television broadcasting*. I find that they are identical on the basis of the principle set out in *Meric*.

Press agencies; news agencies (news).

73. I will compare these services with the opponent's *provision of access to data on communication networks*. The purpose of the applicant's services is to write, collect and distribute news and press reports. In the present day, the distribution is likely to be done by electronic media. To my mind, there is a cross-over in purpose between the respective services since both relate to providing access to (news) data electronically. That both services facilitate the provision of news creates a degree of similarity, although the nature and method of use are different. The applicant's services are targeted at media organisations seeking news content for their publications, websites, or broadcasts, whilst the opponent's services are targeted at the general public who wish to read data (including news) over the internet. Thus, the targeted consumers differ as do the channels of trade. Overall, I consider there to be a low degree of similarity between the services.

**Class 41**

Entertainment.

74. This term appears identically in the opponent's specification.

Providing audio material, concert information, and information about music albums, artists and songs, via a website; entertainment news and information in the field of music, provided via a website; providing music and related information via the internet.

75. The applicant's terms cover services that are included in the opponent's *provision of information relating to entertainment online from a computer database of the internet*. I find that they are identical on the basis of the principle set out in *Meric*.

*Electronic publication of books and periodicals online.*

76. The opponent's *publication of electronic books and journals on-line, exclusively referring to music* is included in the applicant's broader specification. I find that they are identical on the basis of the principle set out in *Meric*.

*Reservation of tickets for shows.*

77. The applicant's services are synonymous with the opponent's *booking of seats for shows*. I find that they are identical.

*Entertainment services.*

78. The applicant's services are synonymous with the opponent's *entertainment*. I find that they are identical.

*Entertainment services, namely, the provision of streamed, up-loadable, non-downloadable, or downloadable music, to online users via global or local computer networks; entertainment services in the nature of providing online, non-downloadable audio and video featuring musical performances; entertainment information; organization of competitions (entertainment); providing dance events by a recording artist; entertainment services in the nature of live musical performances; presentation of sound and video recordings in the field of music; fan clubs.*

79. The applicant's services are included in the opponent's broad term *entertainment*. I find that they are identical on the basis of the principle set out in *Meric*.

*Gambling services.*

80. I will compare these services with the opponent's *Entertainment. Gambling services* provide the opportunity to win what could constitute a substantial amount of money, which would be the main purpose for some users, with any entertainment value playing a secondary role. However, there will be other 'casual' consumers who gamble for entertainment purposes, with any 'winnings' considered a bonus. To my mind, the opponent's term *Entertainment* is so broad that it could relate to a vast range of different fields. As such, it can be argued that the term clearly encompasses the provision of *gambling services*, and therefore includes the opponent's *Entertainment (services)*. I find that they are identical on the basis of the principle set out in *Meric*.

*Cultural activities; organization of exhibitions for cultural... purposes.*

81. These services (in a commercial context) are a form of entertainment intended to entertain the public, as well as to promote the cultural activity in question. I find that they are identical to the opponent's *entertainment* on the basis of the principle set out in *Meric*.

*Gaming services provided online from a computer network.*

82. The applicant's services are synonymous with the opponent's *game services provided on-line from a computer network*. I find that they are identical.

*Providing online video games.*

83. The applicant's services are included in the opponent's *game services provided on-line from a computer network*. I find that they are identical on the basis of the principle set out in *Meric*.

*Providing films, not downloadable, through video-on-demand services.*

84. These services are synonymous with the opponent's *films, not downloadable, via video-on-demand transmission services*. The respective services are identical.

*Sports activities.*

85. I will compare the applicant's services with the opponent's *entertainment*. The purpose of the applicant's services is to provide for physical activity, which can be competitive and organised, while providing entertainment to participants and spectators. Thus, the purpose of the services is the same and they share the same trade channels and target the same end consumer. I consider the services to be similar to a high degree.

*Provision of leisure facilities.*

86. I will compare the applicant's services with the opponent's *entertainment*. The purpose of the applicant's services is to provide the physical space in which leisure activities take place, for example social clubs. Thus, there is a similarity of purpose between the services, since the purpose of the opponent's services is to provide entertainment and amusement to users, while the purpose of the applicant's services is to provide the physical environments in which such entertainment can take place. They also share the same trade channels and target the same end consumer. I consider the services to be similar to a high degree.

*Publication of books.*

87. In *Sky Plc & Ors v Skykick UK Ltd & Anor* [2020] EWHC 990 (Ch), Arnold LJ said that 'terms should not be interpreted widely but confined to the core of the possible meanings attributable to the terms.' In my mind the core meaning of the applicant's term relates to the publication of physical books. I will compare these services with the opponent's *publication of electronic books and journals on-line, exclusively referring to music*. The purpose of the respective services is the same and they may be in competition since the authors can choose whether they want their books to be available in hard copy, electronically or both. They also share the same channels of trade and target the same consumer. I consider the services to be similar to a high degree.

*Loan of books.*

88. I will compare these services with the opponent's *providing publications from a global computer network or the internet which may be browsed exclusively referring to music*. The applicant's services concern the loaning of books over a given period, whilst the purpose of the opponent's services is to allow the public to read publications over the internet. Thus, the purpose of the respective services is the same namely providing publications to educate, entertain and/or inform the reader. The respective services may be in competition since the consumer can choose to either borrow a publication through a service such as a lending library or read it over the internet, although the nature and method of use of the services is different. There is likely to be a cross-over in trade channels, since the applicant's services will be primarily provided by libraries, and they may also provide access to electronic publications via the internet. And both services target the same end consumer, namely, those looking to read books. Overall, I consider the services to be similar to a medium degree.

*Motion picture production; production of motion picture films; multimedia production services; production and distribution of sound and video recordings in the field of music; music and musical publishing services.*

89. I will compare these services with the opponent's *entertainment (services)*. In my mind there is a complementary relationship between these services. This is because the services are closely allied and are clearly important or indispensable for each other, and the nature of the relationship is one where the consumer would understand all of them to be under the control of a single entity. I consider there to be a medium degree of similarity.

*Rental of television sets.*

90. I shall compare the applicant's services with the opponent's *audio visual devices and equipment* in class 9. The opponent's specification is broad and would include television sets within its ambit. The purpose of the goods and services is the same, namely, to allow consumers to watch television and thus there may be an element of competition with each other. However, as the applicant's *rental of television sets* is a service, and the opponent's *audio visual devices and equipment* are goods, their nature is different. There may be some cross over in channels of trade in the sense

that some businesses selling televisions may also provide the option to rent them, although I have no evidence on this point. The user of the goods and services is the same. However, to my mind it is unlikely that consumers would think that the same undertaking is responsible for the respective goods and services. Overall, I consider there to be a low degree of similarity.

*Providing education in the field of music through live and online workshops.*

91. I shall compare the applicant's services to the opponent's *publication of electronic books and journals on-line, exclusively referring to schoolbooks*. There is a cross-over in purpose between the services as both are intended to educate. However, the nature and method of use differs. There may be an element of competition since the consumer can choose how to educate themselves. I have no evidence to make a finding on whether the channels of trade are the same, but the services target the same end consumer, namely, those looking to educate themselves in the field of music. I consider there to be a low to medium degree of similarity between the services.

*Organization of competitions (education).*

92. I shall compare the applicant's services to the opponent's *publication of electronic books and journals on-line, exclusively referring to schoolbooks*. The purpose of the applicant's services is to run competitions as part of an educational programme, while the opponents are publishing services. Thus, the purpose of the services is different. The nature and method of use differs. The respective services do not compete and nor are they complementary. I have no evidence to make a finding on whether the channels of trade are the same, but the applicant's services target those seeking to enter competitions, while the applicant's services target school children or schoolteachers. Overall, I consider the respective services to be dissimilar.

*Education; training.*

93. I shall compare the applicant's services to the opponent's *publication of electronic books and journals on-line, exclusively referring to schoolbooks*. There is a cross-over

in purpose between the services as both are intended to educate, although I acknowledge that the opponent's service is primarily a publishing service. In my view, there is also a complementary relationship between these services because the opponent's schoolbooks may be used in the delivery of the applicant's education and training services. However, in my view, it is unlikely that consumers would think that the same undertaking is responsible for the respective services. The services target the same end consumer, namely, those looking to educate themselves. Overall, I consider there to be a low degree of similarity.

Education information.

94. I shall compare the applicant's services to the opponent's *publication of electronic books and journals on-line, exclusively referring to schoolbooks*. The purpose of the applicant's services is to provide information about education, for example information about educational methods or curriculum details. Thus, there is a point of similarity in that the respective services both relate to education. However, the nature and method of use differs. I have no evidence to make a finding on whether the channels of trade are the same, but the applicant's services target those seeking out information regarding educational matters, while the opponent's services target school children and schoolteachers. Overall, I consider there to be a medium degree of similarity.

Vocational retraining.

95. I shall compare the applicant's services to the opponent's *publication of electronic books and journals on-line, exclusively referring to schoolbooks*. There is a similarity of purpose between the services as both are intended to educate, although I acknowledge that the opponent's service is primarily a publishing service. I understand vocational retraining to be retraining or refresher training relating to a particular career or occupation, which is normally provided to adults and may be practical training provided in a workplace setting, whereas schoolbooks are publications used in a school classroom setting to teach children. The nature and method of use differs. The channels of trade are different and the applicant's services target adults or businesses wishing to retrain or refresh themselves on particular skills for their chosen vocation,

whilst the opponent's services target school children or schoolteachers. Overall, I consider the respective services to be dissimilar.

Photography services.

96. I compare these services with the opponent's *photographic devices* in class 9. The opponent's *photographic devices* are different in nature, method of use and intended purpose from the applicant's *photography services*. Although the opponent's goods are essential for the delivery of the applicant's services, to my mind it is unlikely that consumers would think that the same undertaking is responsible for the respective goods and services. The services are likely to be provided by a professional photographer, rather than the undertaking that produces the equipment. There may be an element of competition whereby consumers who want a photographic record of an occasion, may choose to employ a business providing photography services or buy the equipment to take the photographs themselves. The channels of trade and end user are different. Overall, I find there to be a low degree of similarity.

Rental of show sets; organization and conduct of conferences; organization and conduct of congresses; organization of exhibitions for educational purposes.

97. None of these services appear to have any similarity with the opponent's goods or services. They all have a different purpose and nature. They are provided in a different way and, therefore, do not share methods of use. They are not obviously in competition or complementary and they do not obviously share trade channels. Therefore, in the absence of any evidence or submissions to the contrary, I conclude that these services are not similar to the opponent's goods or services.

**Class 42**

Computer services, namely, providing an online platform to allow music professionals to distribute and promote recorded music to online streaming services.

98. The applicant's services are included in the opponent's *on-line computer services*. I find that they are identical on the basis of the principle set out in *Meric*.

## **The average consumer and the nature of the purchasing act**

99. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see *Lloyd Schuhfabrik Meyer*, Case C-342/97).

100. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. (as he was then) described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

101. The respective goods and services are wide ranging and include, *inter alia*, sound and video recordings, software, advertising services, telecommunication services, entertainment services and on-line computer services. Such goods and services are commonly purchased by members of the general public, although I acknowledge that some services may be targeted at business customers, e.g. computer software and advertising services for music professionals.

102. The goods and services are sold through a variety of channels, from high street stores or via the internet, to specialist providers, with the frequency of purchase ranging from infrequent for the more specialised goods and services, to relatively frequently for the likes of CDs and DVDs and television streaming/transmission services. The selection process would be a combination of visual and aural; some consumers would seek information from written reviews and recommendations,

particularly on the internet, whereas others would receive verbal advice from sales representatives.

103. Accordingly, the level of attention will vary, being medium for the purchase of more everyday goods and services, whereas for the more bespoke goods and services, considerations such as technical reviews, price, quality, ease of use, suitability of the product and the reputation of the provider would be taken into account before purchasing those goods or accessing the services, leading to a higher degree of attention being paid by the consumer of those goods and services.

### **Comparison of marks**

104. It is clear from *Sabel* that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo* that:

“[...] it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

105. Therefore, it would be wrong to dissect the trade marks artificially, though it is necessary to take into account the distinctive and dominant components of the marks; due weight must be given to any other features which are not negligible and hence contribute to the overall impressions created by the marks.

106. The competing marks are as follows:

The earlier mark	The contested marks
life	CHOPLIFE ChopLife CHOP LIFE Chop Life

107. I note that the contested marks are a series of marks. The applicant contends that each version of the applicant’s mark must be considered separately and independently against the opponent’s mark. In *Comic Enterprises Ltd v. Twentieth Century Fox Film Corporation* [2016] EWCA Civ 455 Kitchin L.J. (as he then was) made it clear that the fact that marks have been registered as a series does not mean that courts and tribunals are constrained to consider them all as substantially the same mark. It follows that it would be possible to find a likelihood of confusion against one or more, but not all, of the contested marks. However, it is my view that all four of the marks in the series would be perceived as a combination of the two words “CHOP” and “LIFE”. The GC held in *Usinor SA v OHIM*, Case T-189/05, that, while the average consumer perceives a mark as a whole, they will break down a verbal sign into verbal elements that suggest a concrete meaning or resemble known words. Thus, in my view, all four marks in the series create the same overall impression on the average consumer.

**Overall impression**

108. The applicant’s mark comprises the word ‘life’ presented in standard-lower case letters without any stylisation. In *LA Superquimica v EUIPO*, Case T-24/17, the GC held that such plain word marks protected the word or words contained in the mark irrespective of capitalisation or typeface used.<sup>7</sup> The overall impression of the earlier mark lies in the word ‘life’.

109. The opponent’s marks are in word-only format and comprise the words ‘Chop Life’ presented in standard letters without any stylisation. I am of the view that none of

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<sup>7</sup> Paragraph 39

the words dominate and therefore the overall impression of the mark resides in the combination of the words. The applicant contends that the words 'Chop Life' hang together to mean 'living life to the full' or, in West Africa, 'enjoying life and celebrating it to the fullest'. However, I have no evidence to support such an argument, and, in my view, the average consumer would not be aware of this and would not understand the phrase to have any meaning. In my view there is no obvious conceptual synergy between 'Chop' and 'Life' and accordingly, I find that the word 'life' retains an independent distinctive role within the mark.

### ***Visual comparison***

110. Visually, the earlier mark appears as the second word of the contested marks. The word 'Chop' in the contested marks is a point of visual difference between them. I also remind myself that in *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the GC stated that in general the average consumer tends to pay more attention to the beginnings of words.<sup>8</sup> Additionally, English speakers read from left to right, so the beginnings of marks will generally be more significant than the ends. Bearing in mind my assessment of the overall impressions, I find that there is a medium degree of visual similarity between the competing marks.

### ***Aural comparison***

111. The earlier mark comprises one syllable 'life'. The contested marks comprise two syllables 'chop-life'. All these words are common English words and will be given their usual pronunciation. Thus, the second syllable of the contested marks is identical to the only syllable of the earlier mark. They differ insofar as the contested mark also contains an additional syllable. Overall, I find that there is a medium degree of aural similarity between the competing marks.

### ***Conceptual comparison***

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<sup>8</sup> Paragraphs 81 and 83

112. The competing marks coincide in that they both contain the word 'life', which is a common English word meaning the period between birth and death, or the experience or state of being alive. They differ in that the applicant's marks also convey a meaning emanating from the English word 'Chop', which means to cut something into pieces with an axe, knife, or other sharp instrument. Thus, I find that there is a medium degree of conceptual similarity between the competing marks.

### **Distinctive character of the earlier mark**

113. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of Page 17 of 37 commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

114. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or

allusive of the goods or services, to those with high inherent distinctive character, such as invented words. Dictionary words which do not allude to the goods or services will be somewhere in the middle.

115. The applicant argues that the earlier mark consists of a common word in everyday usage, which alludes to the goods and services 'fitting in with one's lifestyle'. The applicant submits that the earlier mark has a weak to moderate level of inherent distinctiveness.

116. Although the distinctiveness of a mark may be enhanced as a result of it having been used in the market, the opponent has filed no evidence of use. Consequently, I have only the inherent position to consider.

117. The earlier mark is in word-only format and consists of the common word 'life' with no other elements. The distinctive character of the mark lies in the word itself. The mark cannot be afforded a low level of distinctive character simply because it is a common/everyday word. The applicant claims that the word alludes to the goods and services 'fitting into one's lifestyle'; however, in my view such a message would be fairly non-specific. Thus, in my view the word 'life' has no meaning in relation to the goods and services under consideration. I find that the earlier mark possesses a medium level of inherent distinctive character.

### **Likelihood of confusion**

118. A degree of similarity between the goods is essential for there to be a finding of likelihood of confusion. In *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated that:

"49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be

considered but it is unnecessary to interpose a need to find a minimum level of similarity.”

119. As no similarity was found for the goods and services listed below, there is no likelihood of confusion to consider for these goods and services.

*Class 9: Scientific apparatus and instruments; nautical apparatus and instruments; surveying apparatus and instruments; optical apparatus and instruments; weighing apparatus and instruments; measuring instruments and apparatus; signaling apparatus and instruments; mechanisms for coin-operated apparatus; cash registers; electric wires; electrical relays; diving suits; diving gloves; diving masks; protective clothing against accidents, radiation and fire; personal protection devices against accidents; glasses (optics); 3D glasses; eyewear; spectacle cases; batteries for electronic cigarettes; charging stations for electric vehicles; diagnostic apparatus not for medical purposes; sunglasses; sunglasses cases; cases and covers for mobile phones and mobile digital electronic devices, namely, cell phones, radio pagers; decorative magnets; eyeglass cases; graduated glassware.*

*Class 35: Newspaper subscription services (for others); subscription services to telecommunications services for others; accounting; reproduction of documents; employment agency services; traffic optimization for websites; company audits (commercial analyses); commercial intermediation services (concierge).*

*Class 41: Rental of show sets; organization and conduct of conferences; organization and conduct of congresses; organization of exhibitions for educational purposes; organization of competitions (education); vocational retraining.*

120. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. One such factor is the interdependency principle i.e., a lesser degree of similarity between the respective trade marks may be offset by a greater degree of

similarity between the respective goods, and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

121. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related.

122. Earlier in this decision, I concluded that:

- Some of the applicant's goods and services are identical or similar to various degrees to those protected under the earlier mark;
- The average consumer is a member of the general public or a business professional, who will demonstrate a medium to high degree of attention during the purchasing process;
- The purchasing process for the goods and services will be visual and aural in nature;
- The earlier marks possess a medium level of inherent distinctive character; and
- The earlier mark and the contested marks are visually, aurally and conceptually similar to a medium degree.

123. I consider that the difference that I have identified between the marks will be registered by the average consumer and is sufficiently marked that one party's mark would unlikely be mistaken for the other. The positioning of the element 'Chop' at the

start of the applicant's mark is such that it would not be easily overlooked; It is positioned at the start of the mark. Thus, I find that there is no likelihood of direct confusion.

124. I now consider whether there is a likelihood of indirect confusion. In *L.A. Sugar Limited v Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., sitting as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

- a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).
- b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

- c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

125. These three categories are not exhaustive. Rather, they were intended to be illustrative of the general approach. This was confirmed by the Court of Appeal in *Liverpool Gin Distillery and others v Sazerac Brands LLC and others* [2021] EWCA Civ 1207. Regarding the explanation given in *L.A. Sugar* about how indirect confusion arises, Arnold LJ said:

“12. This is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition. For example, one category of indirect confusion which is not mentioned is where the sign complained of incorporates the trade mark (or a similar sign) in such a way as to lead consumers to believe that the goods or services have been co-branded and thus that there is an economic link between the proprietor of the sign and the proprietor of the trade mark (such as through merger, acquisition or licensing).”

126. I recognise that a finding of indirect confusion should not be made merely because the competing marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.<sup>9</sup> I also bear in mind that a finding of a likelihood of indirect confusion is not a “consolation prize” for those who fail to establish a likelihood of direct confusion.<sup>10</sup>

127. I must also consider the impact of the case law of the CJEU in *Medion* and *Bimbo*. In *Whyte and Mackay Ltd v Origin Wine UK Ltd & Anor*, [2015] EWHC 1271 (Ch), Arnold J (as he then was) said:

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<sup>9</sup> *Duebros limited v Heirler Cenovis GmbH*, BL O/547/17

<sup>10</sup> *Cheeky Italian Limited v Ahish Sutaria*, BL O/219/16

“18. The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19. The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks – visually, aurally and conceptually – as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20. The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meaning of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21. The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

128. Having considered the contested mark as a whole, I found that there is no obvious conceptual synergy between ‘Chop’ and ‘Life’ and found that the word ‘life’ retains an independent distinctive role within the contested mark. However, as the judge in *Whyte*

and Mackay said, this does not automatically mean that there is a likelihood of confusion and I must still conduct a global assessment.

129. Having regard to all the above principles, in the event that the average consumer immediately notices and recalls the differences between the competing marks, they will also recognise the word 'life', which has an independent distinctive character within the contested marks, and which consists of the whole of the earlier mark. In *Sazerac Arnold LJ* gave a further example of indirect confusion to add to the examples cited in *LA Sugar*: this is where consumers believe that goods and services have been co-branded. In my view, where I have found the goods to be identical or highly similar, the relevant consumer of the goods and services in question will perceive the addition of the word 'Chop' as a co-branding of the earlier mark. I find this to be the case even where the level of attention paid by the consumer is high. Taking all of the above into account, I am satisfied that the average consumer would believe that the goods and services, which I have found to be identical or similar to a high degree, have been co-branded and thus that there is an economic link between the parties. Accordingly, I find that there is a likelihood of indirect confusion for the following goods and services:

*Class 9: Computer software to enable music artists and music labels to market and distribute their music; computer software for use in the delivery, distribution and transmission of musical recordings and related content; computer application software for mobile phones, portable media players, and handheld computers for use in downloading music, ring tones...; downloadable web-based application software in the nature of a mobile application downloadable to handheld and mobile digital electronic devices for use in downloading music, ring tones.....; media streaming software; computer software (recorded programs); downloadable musical sound recordings; cinematographic apparatus; sound recording apparatus; apparatus for the transmission of sound; sound reproduction apparatus; image recording apparatus; image transmission apparatus; image reproduction apparatus; e-readers; virtual reality headsets; apparatus and instruments for recording, transmission or reproduction of sound or images; portable media players; photographic apparatus and instruments; verification (control) apparatus and instruments; teaching apparatus and instruments; detectors; data processing equipment; computers; electronic*

*tablets; computer peripherals; memory or microprocessor cards; handheld and mobile digital electronic devices, namely, tablet PCs, laptops, handheld computers; pre-recorded compact discs, cassettes, tapes, phonographic records, videotapes, videodiscs, and downloadable recordings; recorded musical performances and music videos; films; sound and video recordings; music and video recordings in digital form; recorded sound and image carriers of all types, in particular CDs, recording discs and video films; DVDs, CDs, and audio and visual sound recordings featuring musical performances; musical sound recordings; digital recorded media; digital materials, namely, non-fungible tokens or NFTs; downloadable digital media, namely, digital collectibles created with blockchain-based software technology.*

*Class 35: Online advertising on a computer network; publication of publicity texts; rental of advertising space; computerized file management services; communication advice (advertising); advertising; presentation of goods on any means of communication for retail sale; distribution of advertising material (tracts, prospectuses, printed matter, samples); dissemination of advertisements; office work; business administration; rental of advertising time on any means of communication; promoting the music of others through the distribution of recorded music to online streaming services via an online platform; public relations; communication advice (public relations).*

*Class 38: Providing access to digital music web sites on the internet; telecommunications; rental of access time to global computer networks; telecommunications information; telephone calls; mobile radiotelephony; electronic display services (telecommunications); teleconferencing services; videoconferencing services; electronic mail services; communications by computer terminals; communications by fiber optic networks; broadcasting and transmission of streamed, up-loadable and downloadable music, audio, video and other multimedia content; streaming of audio and video over the internet; webcasting services; providing access to websites and databases on the Internet that presents artists, music albums and songs, entertainment services, namely, music related current events and entertainment news and that allow customers to programme audio, text, video and other multimedia content,*

*including music related concerts, news, cultural events on a website and in mobile applications; radio communications; provision of access to databases; providing community forums for the transmission of information and messages between users, in the field of music related entertainment; provision of online forums; providing user access to global computer networks; connection by telecommunications to a global computer network; rental of telecommunications apparatus; radio broadcasts, TV shows.*

*Class 41: Entertainment; providing audio material, concert information, and information about music albums, artists and songs, via a website; entertainment news and information in the field of music, provided via a website; providing music and related information via the internet; electronic publication of books and periodicals online; reservation of tickets for shows; entertainment services; entertainment services, namely, the provision of streamed, up-loadable, non-downloadable, or downloadable music, to online users via global or local computer networks; entertainment services in the nature of providing online, non-downloadable audio and video featuring musical performances; entertainment information; organization of competitions (entertainment); providing dance events by a recording artist; entertainment services in the nature of live musical performances; presentation of sound and video recordings in the field of music; fan clubs; gambling services; cultural activities; organization of exhibitions for cultural... purposes; gaming services provided online from a computer network; providing online video games; providing films, not downloadable, through video-on-demand services; sports activities; provision of leisure facilities; publication of books.*

*Class 42: Computer services, namely, providing an online platform to allow music professionals to distribute and promote recorded music to online streaming services.*

130. That leaves the goods and services which I have found to be similar to a low to medium degree. In my view, the average consumer, displaying a medium to high level of attention, will put the use of the word 'life' in the competing marks down to coincidental use and will not assume an economic link between the parties. Thus,

applying the interdependency principle and taking all of the above into consideration, in my mind there is sufficient differences between the marks and the goods and services to prevent the likelihood of confusion on the part of the relevant consumer. Accordingly, I find that there is no likelihood of indirect confusion for the following goods and services:

*Class 9: Fire extinguishers; ordiphones [smartphones]; smart watches; handheld and mobile digital electronic devices, namely, cellular phones; recording discs; unrecorded sound and image carriers of all types, in particular CDs, recording discs and video films; bags designed for laptop computers; cases and covers for mobile digital electronic devices, namely, laptops and mobile computers; computer bags; game software; downloadable video game software; downloadable virtual goods, namely, computer software programs featuring in-game resources, tokens, and virtual currency for use in video games and online virtual worlds; computer application software for mobile phones, portable media players, and handheld computers for use in downloading.... video games; downloadable web-based application software in the nature of a mobile application downloadable to handheld and mobile digital electronic devices for use in downloading.... video games; calculating machines; electric batteries; downloadable mobile applications for interacting with and funding artists and creators; computer software to facilitate the collection of royalties and revenues related to the foregoing; computer software for accessing information related to musical recordings; software for managing databases of recorded music files; computer programs for data analytics for the music industry.*

*Class 35: Organization of exhibitions for advertising purposes; business management; advice on organization and business management; business and sales monitoring and tracking services relating to online streaming music services; organization of exhibitions for commercial purposes.*

*Class 38: Press agencies; news agencies (news).*

*Class 41: Motion picture production; production of motion picture films; multimedia production services; production and distribution of sound and video recordings in the field of music; music and musical publishing services; rental of television sets; providing education in the field of music through live and online workshops; loan of books; education; training; education information; photography services.*

## **CONCLUSION**

131. The opponent has been partially successful under section 5(2)(b) of the Act in relation to the majority of the opposed goods and services in classes 9, 35, 38, 41 and subject to any appeal against my decision, the application by Oluwatosin Oluwole Ajibade, may proceed to registration in respect of the remaining goods of the application produced below:

*Class 9: Scientific apparatus and instruments; nautical apparatus and instruments; surveying apparatus and instruments; optical apparatus and instruments; weighing apparatus and instruments; measuring instruments and apparatus; signaling apparatus and instruments; mechanisms for coin-operated apparatus; cash registers; electric wires; electrical relays; diving suits; diving gloves; diving masks; protective clothing against accidents, radiation and fire; personal protection devices against accidents; glasses (optics); 3D glasses; eyewear; spectacle cases; batteries for electronic cigarettes; charging stations for electric vehicles; diagnostic apparatus not for medical purposes; sunglasses; sunglasses cases; cases and covers for mobile phones and mobile digital electronic devices, namely, cell phones, radio pagers; decorative magnets; eyeglass cases; graduated glassware; fire extinguishers; ordiphones [smartphones]; smart watches; handheld and mobile digital electronic devices, namely, cellular phones; recording discs; unrecorded sound and image carriers of all types, in particular CDs, recording discs and video films; bags designed for laptop computers; cases and covers for mobile digital electronic devices, namely, laptops and mobile computers; computer bags; game software; downloadable video game software; downloadable virtual goods, namely, computer software programs featuring in-game resources, tokens, and virtual*

*currency for use in video games and online virtual worlds; computer application software for mobile phones, portable media players, and handheld computers for use in downloading.... video games; downloadable web-based application software in the nature of a mobile application downloadable to handheld and mobile digital electronic devices for use in downloading.... video games; calculating machines; electric batteries.*

*Class 16: Bookbinding materials; photographs; stationery; adhesives (sticky materials) for stationery or household use; materials for artists; paint brushes ; office requisites (except furniture); instructional or teaching material (except apparatus); printing characters; paper ; cardboard; paper or cardboard boxes; posters; scrapbooks; cards; books ; newspapers; flyers; pamphlets; calendars; writing instruments; engraved works of art; lithographed works of art; pictures (paintings) framed or not; sewing patterns; drawings; drawing instruments; paper pocket tissues; paper towels; paper table linen; toilet paper ; bags (envelopes, pouches) of paper or plastic for packaging; garbage bags of paper or plastic; Printed matter; posters, calendars, decals, stickers, photographs, souvenir books; books in the field of music, motion pictures, musical performers; photographs; posters; baby books; stickers; print materials, namely, art prints, colour prints, concert programs, calendars, pens, post cards; gift bags; paper flags; trading cards; paper baby bibs.*

*Class 25: Clothes; shoes; millinery; shirts; leather clothing; belts (clothing); furs (clothing); gloves (clothing); scarves; ties; hosiery; socks; slippers; beach shoes; skiing boots; sport shoes; underwear.*

*Class 35: Business and sales monitoring and tracking services relating to online streaming music services; newspaper subscription services (for others); subscription services to telecommunications services for others; accounting; reproduction of documents; employment agency services; traffic optimization for websites; company audits (commercial analyses); commercial intermediation services (conciierge); organization of exhibitions for commercial purposes; organization of exhibitions for advertising purposes; business management; advice on organization and business management.*

Class 38: *Press agencies; news agencies (news).*

Class 41: *Photography services; rental of show sets; organization and conduct of conferences; organization and conduct of congresses; organization of exhibitions for educational purposes; motion picture production; production of motion picture films; multimedia production services; production and distribution of sound and video recordings in the field of music; music and musical publishing services; rental of television sets; providing education in the field of music through live and online workshops; loan of books; education; training; vocational retraining; organization of competitions (education); education information.*

## **COSTS**

132. In these proceedings, both parties have enjoyed a share of success, with the greater part going to the opponent, who is therefore entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. Considering the partial extent of the success, and taking into account the lack of any detail of the similarity between the goods and services on the part of the opponent, I have made a reduction to the costs to reflect this, and as such, I consider the following to be reasonable:

Official fee	£100
Preparing a written statement	£150
<b>Total</b>	<b>£250</b>

133. I therefore order Oluwatosin Oluwole Ajibade to pay MEDION AG the sum of **£250**. This sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 15<sup>th</sup> day of April 2024**

**Lee Scott**

**For the Registrar**

**The Comptroller-General**

## **Annex – Applicant’s full specification.**

Class 9: Computer software to enable music artists and music labels to market and distribute their music; downloadable mobile applications for interacting with and funding artists and creators; computer software to facilitate the collection of royalties and revenues related to the foregoing; computer software for accessing information related to musical recordings; software for managing databases of recorded music files; computer programs for data analytics for the music industry; computer software for use in the delivery, distribution and transmission of musical recordings and related content; Downloadable musical sound recordings; media streaming software; Scientific apparatus and instruments; nautical apparatus and instruments; surveying apparatus and instruments; photographic apparatus and instruments; cinematographic apparatus; optical apparatus and instruments; weighing apparatus and instruments; measuring instruments and apparatus; signaling apparatus and instruments; verification (control) apparatus and instruments; teaching apparatus and instruments; sound recording apparatus; apparatus for the transmission of sound; sound reproduction apparatus; image recording apparatus; image transmission apparatus; image reproduction apparatus; digital recording media; mechanisms for coin-operated apparatus; cash registers; calculating machines; data processing equipment; computers; electronic tablets; ordiphones [smartphones]; e-readers; game software; computer software (recorded programs); computer peripherals; detectors; Electric wires ; electrical relays; diving suits; diving gloves; diving masks; protective clothing against accidents, radiation and fire; personal protection devices against accidents; fire extinguishers ; glasses (optics); 3D glasses; virtual reality headsets; eyewear; spectacle cases; memory or microprocessor cards; bags designed for laptop computers; smart watches; electric batteries; batteries for electronic cigarettes; charging stations for electric vehicles; diagnostic apparatus not for medical purposes; Digital materials, namely, non-fungible tokens or NFTs; Downloadable digital media, namely, digital collectibles created with blockchain-based software technology; Downloadable video game software; Downloadable virtual goods, namely, computer software programs featuring in-game resources, tokens, and virtual currency for use in video games and online virtual worlds; Pre-recorded compact discs, cassettes, tapes, phonographic records, videotapes, videodiscs, and downloadable recordings; apparatus and instruments for recording, transmission or reproduction of sound or

images; recording discs; recorded musical performances and music videos; films; Eyewear; sunglasses; sunglasses cases; sound and video recordings; music and video recordings in digital form; recorded and unrecorded sound and image carriers of all types, in particular CDs, recording discs and video films; DVDs, CDs, and audio and visual sound recordings featuring musical performances; musical sound recordings; computer application software for mobile phones, portable media players, and handheld computers for use in downloading music, ring tones and video games; handheld and mobile digital electronic devices, namely, tablet PCs, cellular phones, laptops, portable media players, handheld computers; cases and covers for mobile phones and mobile digital electronic devices, namely, laptops, cell phones, radio pagers, mobile computers; downloadable web-based application software in the nature of a mobile application downloadable to handheld and mobile digital electronic devices for use in downloading music, ring tones and video games; decorative magnets, eyewear, eyeglass cases; computer bags; graduated glassware.

Class 16: Bookbinding materials; photographs; stationery; adhesives (sticky materials) for stationery or household use; materials for artists; paint brushes ; office requisites (except furniture); instructional or teaching material (except apparatus); printing characters; paper ; cardboard; paper or cardboard boxes; posters; scrapbooks; cards; books ; newspapers; flyers; pamphlets; calendars; writing instruments; engraved works of art; lithographed works of art; pictures (paintings) framed or not; sewing patterns; drawings; drawing instruments; paper pocket tissues; paper towels; paper table linen; toilet paper ; bags (envelopes, pouches) of paper or plastic for packaging; garbage bags of paper or plastic; Printed matter; posters, calendars, decals, stickers, photographs, souvenir books; books in the field of music, motion pictures, musical performers; photographs; posters; baby books; stickers; print materials, namely, art prints, colour prints, concert programs, calendars, pens, post cards; gift bags; paper flags; trading cards; paper baby bibs.

Class 25: Clothes ; shoes ; millinery; shirts; leather clothing; belts (clothing); furs (clothing); gloves (clothing); scarves; ties; hosiery; socks ; slippers; beach shoes; skiing boots ; sport shoes ; underwear.

Class 35: Promoting the music of others through the distribution of recorded music to online streaming services via an online platform; business and sales monitoring and tracking services relating to online streaming music services. Advertising ; business management; business administration; office work; distribution of advertising material (tracts, prospectuses, printed matter, samples); newspaper subscription services (for others); subscription services to telecommunications services for others; presentation of goods on any means of communication for retail sale; advice on organization and business management; accounting ; reproduction of documents; employment agency services; computerized file management service; traffic optimization for websites; organization of exhibitions for commercial or advertising purposes; online advertising on a computer network; rental of advertising time on any means of communication; publication of publicity texts; rental of advertising space; dissemination of advertisements; communication advice (advertising); public relations ; communication advice (public relations); company audits (commercial analyses); commercial intermediation services (concierge).

Class 38: Providing access to digital music web sites on the internet; broadcasting and transmission of streamed, up-loadable and downloadable music, audio, video and other multimedia content; streaming of audio and video over the internet; webcasting services; providing community forums for the transmission of information and messages between users, in the field of music related entertainment; providing access to websites and databases on the Internet that presents artists, music albums and songs, entertainment services, namely, music related current events and entertainment news and that allow customers to programme audio, text, video and other multimedia content, including music related concerts, news, cultural events on a website and in mobile applications; Telecommunications; telecommunications information; communications by computer terminals; communications by fiber optic networks; radio communications; telephone calls; mobile radiotelephony; providing user access to global computer networks; provision of online forums; provision of access to databases; electronic display services (telecommunications); connection by telecommunications to a global computer network; press agencies; news agencies (news); rental of telecommunications apparatus; radio broadcasts; TV shows; teleconferencing services; videoconferencing services; electronic mail services; rental of access time to global computer networks.

Class 41: Providing audio material, concert information, and information about music albums, artists and songs, via a website; entertainment news and information in the field of music, provided via a website; entertainment services, namely, the provision of streamed, up-loadable, non-downloadable, or downloadable music, to online users via global or local computer networks; Entertainment services in the nature of providing online, non-downloadable audio and video featuring musical performances; production, distribution, and presentation of sound and video recordings in the field of music; music and musical publishing services; providing education in the field of music through live and online workshops; Education; training; entertainment ; sports and cultural activities; entertainment information; education information; vocational retraining; provision of leisure facilities; publication of books; loan of books; providing films, not downloadable, through video-on-demand services; motion picture production; rental of television sets; rental of show sets; photography services; organization of competitions (education or entertainment); organization and conduct of conferences; organization and conduct of conferences; organization and conduct of congresses; organization of exhibitions for cultural or educational purposes; reservation of tickets for shows; gaming services provided online from a computer network; gambling services; electronic publication of books and periodicals online; Entertainment services; providing music and related information via the Internet; providing online video games, dance events by a recording artist, multimedia production services; Entertainment services in the nature of live musical performances; production of motion picture films, fan clubs.

Class 42: Computer services, namely, providing an online platform to allow music professionals to distribute and promote recorded music to online streaming services.