O/0553/25

TRADE MARKS ACT 1994

IN THE MATTER OF INTERNATIONAL REGISTRATION NO. WO0000001726270 DESIGNATING THE UK BY TIXR, INC.

TIXR

IN CLASSES 9, 41 AND 42

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO. OP000444009 BY VIPR DIGITAL LIMITED

Background and pleadings

1. International trade mark 1726270 ("the IR") consists of the sign shown on the cover page of this decision. The Holder is Tixr, Inc. The IR is registered with effect from 24 March 2023. With effect from 01 September 2023 the Holder designated the UK as a territory in which it seeks to protect the IR under the terms of the Protocol to the Madrid Agreement. The Holder seeks protection for the IR in relation to the following goods:

   Class 9: Downloadable software in the nature of a mobile application for making reservations and bookings for sports, cultural, and entertainment events and for paying for and providing electronic tickets for sports, cultural, and entertainment events.

   Class 41: Ticket agency services rendered online via a mobile application for sporting, cultural, and other entertainment events.

   Class 42: Software as a service services (SaaS) featuring non-downloadable software for reserving, selling and printing tickets; software as a service services (SaaS) featuring non-downloadable software for processing cash, credit card, and debit transactions associated with ticket reservations and sales; software as a service services (SaaS) featuring non-downloadable software for managing events, promoting events, advertising events, marketing events, and communicating with event ticket holders; software as a service services (SaaS) featuring non-downloadable software for managing ticketing and venue operations, namely, providing to venue operators the ability to manage their ticketing and related sales operations and authenticating event tickets; software as a service services (SaaS) featuring software for facilitating selection, sale, and tracking of statistical data for and related to event tickets and event related amenities.

2. The request to protect the IR was published on 20 October 2023. On 06 November 2023, VIPR Digital Limited ("the Opponent") opposed the protection of the IR in the

UK based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against all of the goods and services in the IR.

3. The Opponent relies upon the following two trade marks:

 (1 of 2)

 (2 of 2)

Trade mark no. UK00003790010 ("the first earlier registration") (series of 2 marks)
Filing date: 19 May 2022
Registration date 12 August 2022

FIXR

Trade mark no. UK00912203873[1] ("the second earlier registration")
Filing date: 08 October 2013
Registration date: 06 March 2014

4. Both earlier rights are registered for the same goods and services. For the purpose of these proceedings the Opponent relies upon all the goods and services for which the marks are registered, namely:

Class 9: Computer software; downloadable software; application software for mobile devices; software for creating and delivering messages and electronic mail; software for providing access to communications networks; software for application and database integration; software for

[1] The earlier mark was initially registered at the European Union Intellectual Property Office (EUIPO). The opponent's mark is a comparable mark based on the opponent's pre-existing EUTM, being EUTM 12203873. On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with an existing EUTM.

viewing electronic maps; software for the location and reservation of taxis via mobile device; software for information, directory, booking and reservation services; software enabling payment for tickets and reservations; electronic publications; downloadable electronic publications; electronic databases; computer hardware; electronic global positioning systems; Global Positioning System [GPS] apparatus; satellite navigational apparatus; telecommunications apparatus; telecommunications, smartphone and application icons; magnetic or encoded cards; electronic card readers; software for card readers; digital music downloadable from the internet or a computer database; downloadable music files.

Class 35: Marketing and promotional services; promoting the goods and services of others; promoting the goods and services of others via electronic communications featuring product or service reviews, discounts, coupons, offers, links to the websites of others and other purchase related information; providing commercial information about events, venues, goods and services; organisation and operation of loyalty, discount and incentive schemes; providing marketing and promotion of events; mobile marketing; organisation of events for commercial and advertising purposes namely, providing event registration and booking services.

Class 36: Financial services; financial services provided via the Internet; arranging and conducting financial transactions; electronic payment services; credit and debit card services; issuing of stored value cards; provision of prepaid cards and tokens; issuing of vouchers and gift vouchers; issuing of tokens of value in relation to bonus and loyalty schemes; financial services relating to the provision of vouchers for the purchase of services and products; automated payment of accounts; payment administration services enabling customers to purchase services and products via the Internet and mobile applications.

Class 41: Arranging of ticket reservation and booking for entertainment, arranging of ticket reservation and booking for events and venues for cultural and entertainment purposes; organisation of entertainment and events; providing entertainment, cultural and sporting activities; ticket information services for entertainment and events; provision of information relating to entertainment, cultural and sporting events; provision of information relating to entertainment, cultural and sporting events by computer, mobile telecommunications devices and digital networks; entertainment, cultural and sporting event planning services; publishing of reviews relating to goods, services, entertainment, events and venues; providing digital music (not downloadable) for the internet; providing digital music (not downloadable) from the internet.

5. The above marks qualify as earlier marks under section 6(1) of the Act. As the first earlier registration had not been protected for more than five years at the date the IR was filed, it is not subject to the use provisions contained in section 6A of the Act. The second earlier registration was filed more than five years at the date the IR was filed, however the Holder did not request proof of use. The Opponent can, therefore, rely upon all of the goods and services it has identified without having to demonstrate use.

6. The Opponent claims there is a likelihood of confusion because the goods and services are identical or similar and the marks are similar.

7. The Holder filed a counterstatement which it denies that the goods and services are identical or similar, and states that the marks are dissimilar.

8. The Opponent is represented by Mathys & Squire LLP and the Holder is represented by Bird & Bird LLP. Neither party requested a hearing, nor filed evidence in these proceedings. However, both parties filed submissions in lieu of a hearing. I make this decision having taken full account of all the papers, referring to them as necessary.

9. 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)

10. Section 5(2)(b) of the Act is 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".

Section 5(2)(b) - case law

11. 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 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; Page 8 of 20

(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 and services

12. As the Opponent's two earlier registrations rely upon identical goods and services, they will be considered together.

13. The competing goods and services are as follows:

Opponent's earlier registrations	Holder's IR
Class 9: Computer software; downloadable software; application software for mobile devices; software for creating and delivering messages and electronic mail; software for providing access to communications networks; software for application and database integration; software for viewing electronic maps; software for the location and reservation of taxis via mobile device; software for information, directory, booking and reservation services; software enabling payment for tickets and reservations; electronic publications; downloadable electronic publications; electronic databases; computer hardware; electronic global positioning systems; Global Positioning System [GPS] apparatus; satellite navigational apparatus; telecommunications apparatus; telecommunications, smartphone and application icons; magnetic or encoded cards;	Class 9: Downloadable software in the nature of a mobile application for making reservations and bookings for sports, cultural, and entertainment events and for paying for and providing electronic tickets for sports, cultural, and entertainment events. Class 41: Ticket agency services rendered online via a mobile application for sporting, cultural, and other entertainment events. Class 42: Software as a service services (SaaS) featuring non-downloadable software for reserving, selling and printing tickets; software as a service services (SaaS) featuring non-downloadable software for processing cash, credit card, and debit transactions associated with ticket reservations and sales; software as a service services (SaaS) featuring non-downloadable software for managing events, promoting events, advertising events, marketing

electronic card readers; software for card readers; digital music downloadable from the internet or a computer database; downloadable music files. Class 35: Marketing and promotional services; promoting the goods and services of others; promoting the goods and services of others via electronic communications featuring product or service reviews, discounts, coupons, offers, links to the websites of others and other purchase related information; providing commercial information about events, venues, goods and services; organisation and operation of loyalty, discount and incentive schemes; providing marketing and promotion of events; mobile marketing; organisation of events for commercial and advertising purposes namely, providing event registration and booking services. Class 36: Financial services; financial services provided via the Internet; arranging and conducting financial transactions; electronic payment services; credit and debit card services; issuing of stored value cards; provision of prepaid cards and tokens; issuing of vouchers and gift vouchers; issuing of tokens of value in relation to bonus and loyalty schemes; financial services relating to the provision of vouchers for the purchase of services and products; automated payment of accounts; payment administration services enabling customers to purchase services and products via the Internet and mobile applications. Class 41: Arranging of ticket reservation and booking for entertainment, arranging of ticket	events, and communicating with event ticket holders; software as a service services (SaaS) featuring non-downloadable software for managing ticketing and venue operations, namely, providing to venue operators the ability to manage their ticketing and related sales operations and authenticating event tickets; software as a service services (SaaS) featuring software for facilitating selection, sale, and tracking of statistical data for and related to event tickets and event related amenities.

reservation and booking for events and venues for cultural and entertainment purposes; organisation of entertainment and events; providing entertainment, cultural and sporting activities; ticket information services for entertainment and events; provision of information relating to entertainment, cultural and sporting events; provision of information relating to entertainment, cultural and sporting events by computer, mobile telecommunications devices and digital networks; entertainment, cultural and sporting event planning services; publishing of reviews relating to goods, services, entertainment, events and venues; providing digital music (not downloadable) for the internet; providing digital music (not downloadable) from the internet.	

14. In *Gérard Meric v OHIM,* Case T-133/05, the General Court ("GC") stated that:

> "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 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".

15. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon,* Case C-39/97, the court stated at paragraph 23 that:

> "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.

16. Guidance on this issue has come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

    (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.

17. For the purposes of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons.[2]

[2] *Separode Trade Mark* (BL O/399/10), per Mr Geoffrey Hobbs QC, sitting as the Appointed Person; and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35, at paragraphs 30 to 38).

18. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (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."

19. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, Lord Kitchin set out the proper approach to considering terms in specifications:

> "365. […] The correct approach, as a matter of principle, in considering a specification of services which is defined by terms which are not clear or precise, is to confine the terms used to the substance or core of their possible meanings: see, for example, *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 159; [2004] RPC 40, at para 43. So too, if a specification of goods is defined by terms which are ambiguous, then it should be confined to those goods which are clearly covered. These principles are consistent with first, the requirement that the specifications of goods and services must be clear and precise so that others know what they can and cannot do; and secondly, general fairness because any ambiguity is the responsibility of the owner of the mark. If despite this, the words used are still unclear so that they cannot be interpreted, then it is permissible to disregard them. But, in my opinion, that will rarely be the case."

20. I also note that section 60A(1)(a) of the Act provides that goods and services are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification, nor dissimilar to each other on the ground that they appear in different classes under the Nice Classification.

CLASS 9

"Downloadable software in the nature of a mobile application for making reservations and bookings for sports, cultural, and entertainment events and for paying for and providing electronic tickets for sports, cultural, and entertainment events".

21. The Holder's above goods fall within the Opponent's wider category "downloadable software". As such the goods are identical as per the principle outlined in *Meric.*

CLASS 41

"Ticket agency services rendered online via a mobile application for sporting, cultural, and other entertainment events".

22. I understand 'ticket agency services' as the provision of services to facilitate the booking and/or reservation of tickets to events and the management of such bookings. I therefore consider the Holder's above services to be highly similar to the Opponent's "arranging of ticket reservation and booking for entertainment, arranging of ticket reservation and booking for events and venues for cultural and entertainment purposes". I say this because they overlap in nature and purpose, being to facilitate the booking or reservation of tickets to events. I note that the method of use may vary, as while the Holder's services are provided specifically via a mobile application, the Opponent's services are not restricted and could be provided in a range of different formats, which may include use via an app. An undertaking that provides ticket reservation and booking services may also offer these services via a mobile application. A consumer could choose to book tickets via an app, rather than via other means (e.g. telephone, website or in person), meaning that the services at issue will be in competition, with a customer choosing one service over another. I consider there will be an overlap in user, being a member of the public seeking event tickets. However, I do not consider that the services are complementary in the way outlined in caselaw. Overall, I find the services to be similar to a high degree.

CLASS 42

"Software as a service services (SaaS) featuring non-downloadable software for reserving, selling and printing tickets; software as a service services (SaaS) featuring non-downloadable software for processing cash, credit card, and debit transactions associated with ticket reservations and sales; software as a service services (SaaS) featuring non-downloadable software for managing events, promoting events, advertising events, marketing events, and communicating with event ticket holders; software as a service services (SaaS) featuring non-downloadable software for managing ticketing and venue operations, namely, providing to venue operators the ability to manage their ticketing and related sales operations and authenticating event tickets; software as a service services (SaaS) featuring software for facilitating selection, sale, and tracking of statistical data for and related to event tickets and event related amenities".

23. The Holder's above services are all different types of "software as a service" which is a model for the distribution of software to customers who can access it over the internet. Accordingly, rather than buying software outright and paying for periodic upgrades, etc., the above services tend to be subscription based, meaning that any updates/upgrades are delivered automatically during the subscription period. In view of this, I consider that the Holder's above services overlap with the Opponent's "computer software" in class 9. In saying this, I note that the Opponent's "computer software" is not limited nor restricted, and therefore can encompass all types of computer software, whilst the Holder's class 42 services are limited to specific software as a service. The goods and services may overlap in trade channels, for example, in relation to "software as a service services (SaaS) featuring non-downloadable software for reserving, selling and printing tickets", the average consumer may presume that computer software specifically used for reserving, selling and printing tickets (which is encompassed by the opponent's term) will have the same undertaking providing both the goods and services. There will also be an overlap in user, who will also assume that the goods and services originate from the same undertaking, especially as they are important and indispensable to one another (the software as a service cannot be provided without the software). Consequently, I consider that they are complementary. I also

consider that the goods and services may be in competition, to the extent that the user will choose to either access their software via the internet, or to purchase the equivalent software outright. Taking all of the above into account, I find the goods and services are similar to between a medium and high degree.

Average consumer and the purchasing act

24. It is necessary for me to determine who the average consumer is for the goods and services in question; I must then determine the manner in which the goods and services are likely to be selected by the average consumer in the course of trade.

25. 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 in question: *Lloyd Schuhfabrik Meyer, Case C-342/97.* 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. described the average consumer in these terms:

> "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."

26. In respect of the goods and services at issue, I find that the average consumer will be members of the public at large and business users. The specifications at issue cover a broad range of software, software as a service and ticketing services, the purchasing process for which is likely to involve scrutinising the brochures and websites of specialist companies that offered the goods/services and perusal of

advertisements or signage on physical premises; therefore, the purchasing process would be primarily a visual one. However, the consumer may also seek reviews or recommendations about the goods/services at issue, where verbal factors would come into play.

27. The frequency of purchase and costs will vary according to the exact nature of the goods/service at issue. However, even where the cost is low, an individual consumer will, in my view, consider various factors to ensure that it meets their needs; including ease of use, reliability and (for software) compatibility with other technology. Where the average consumer is a company, their level of attention will be slightly higher as they would want to ensure the goods/services are suitable for their business and that the reputation of their business was protected.

28. Weighing all factors, I find that where the average consumer is a member of the general public, they will apply an average degree of attention to the purchase. Where the average consumer is a company, they will apply a slightly higher than average attention to the purchase.

Comparison of marks

29. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) 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 Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, 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."

30. It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

31. The respective trade marks are shown below:

Opponent's IR	Holder's IR
 (1 of 2)  (2 of 2) (The first earlier registration)	TIXR
FIXR (The second earlier registration)	

32. The Holder's mark comprises of the letters "TIXR". As there are no other elements, the overall impression of the mark lies in the combination and arrangement of these letters. It is a plain word mark, so is protected in whatever form, colour or typeface it is used.[3]

The first earlier registration

33. The Opponent's first earlier mark is a series of two, both consisting of the letters "FIXR", with the first mark presented in black on a white background, and the second mark in red (with a gradient from a darker tone on the left to brighter tone of red on the right) on a white background. The letter "F" is presented in a standard typeface. The letters "IXR" are stylised through the use of negative space formed

[3] *La Superquimica v EUIPO*, Case T-24/17, paragraph 39.

by diagonal lines layered over the letter "X", which extends to the lower right corner of the letter "I" and upper left corner of the letter "R". Despite the stylisation, the letters "IXR" are still clearly discernible. I consider that the word "FIXR" plays a greater role in the overall impression of the mark with the stylisation playing a lesser role. The Opponent submits that the letters "IXR" are the dominant and distinctive element of the earlier marks,[4] however I consider the overall impression of the mark lies in the combination of all elements.

34. Visually, the marks differ in their initial letter, which is "F" in the Opponent's mark and "T" in the Holder's mark. The marks overlap in the last three letters "IXR" (forming the second, third and fourth letters respectively) but a point of visual difference is the stylised negative space, which cuts through the letters. While the stylisation will not go unnoticed, I consider that the letters "IXR" are still clearly discernible. Bearing in mind that the beginnings of marks tend to have more impact that the ends[5] and that differences in short marks tend to make more of an impact.[6] I consider the marks to be visually similar to no more than a medium degree.

35. Aurally, the Opponent's mark will be pronounced "FICKS" – "ER" and the Holder's mark will be pronounced "TICKS" – "ER". Whilst the marks share the pronunciation of the "-ICKS-ER" element, they differ in their first letter sound, being "F" and "T". I consider that the stylisation of the mark does not impact the way it will be pronounced. Overall, and again taking into account that the beginnings of marks tend to have most impact, I find that there is a medium degree of aural similarity between the competing marks.

36. Conceptually, neither mark is an ordinary dictionary word. I consider that the stylisation of the mark does not impact its conceptual nature. I note that the Opponent submits that neither mark has a meaning, and therefore there is a high degree of conceptual similarity[7]. The Holder submits that the average consumer will recognise 'tix' as a reference to tickets, and therefore understand the concept

[4] Opponent's submissions in lieu paragraph 27.
[5] *El Corte Inglés, SA* v *OHIM*, Cases T-183/02 and T-184/02
[6] *Robert Bosch GmbH* v *Bosco Brands UK Limited*, BL O/301/20
[7] Opponent's submissions in lieu paragraph 35.

of the mark as related to services for arranging tickets.[8] However, for a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM*. I consider that the identification of the "TIX" element to refer to tickets would involve an extra step of analysis by the average consumer, and I remind myself that the mark must be assessed by reference to the overall impressions created by the marks.[9] I consider that the average consumer, who perceives the mark as a whole and does not proceed to analyse its various details, will see "TIXR" as an invented word.

37. The Holder also submits that due to "FIXR" being pronounced identically to the word 'fixer', the average consumer will apply the meaning of "someone who is skilled at arranging for things to happen, especially dishonestly".[10] Further to this, the Holder submits that the Opponent's mark at least alludes to the intended purpose of the Opponent's goods and services, being a person who arranges things on the consumer's behalf.

38. I acknowledge that the Opponent's mark will be pronounced identically to the English word 'fixer', and therefore consider a significant proportion of consumers may assign the ordinary dictionary definition of 'fixer' to the mark (being a person who fixes or arranges things). Where consumers assign this meaning to the Opponent's mark, the marks will be conceptually dissimilar. I say this because meaning can be identified in the Opponent's marks but not in the Holder's.

39. I am of the view that another significant proportion of average consumers will see "FIXR" as an invented word. However, I remind myself that even though consumers normally perceive marks as a whole,[11] they nevertheless will break down elements if they suggest a meaning or resemble words known to them. Bearing this in mind, I am of the view that where "FIXR" is seen as an invented word, a significant proportion of average consumers will still identify the word "FIX" within the mark and this will be attributed its ordinary dictionary meaning. In this scenario, I find

[8] Holder's submissions in lieu paragraph 12.
[9] *Sabel BV v. Puma AG* (particularly paragraph 23)
[10] Holder's submissions in lieu paragraph 12.
[11] *Usinor SA v OHIM,* Case T-189/05

that reference to “FIX” results in the marks being conceptually dissimilar. I say this because meaning can be identified in the Opponent’s marks but not in the Holder’s.

The second earlier registration

40. The Opponent’s second earlier mark consists of the letters “FIXR” with no other elements. The overall impression of the mark lies in the combination and arrangement of these letters.

41. Visually, the marks overlap in the last three letters “IXR” (forming the second, third and fourth letters respectively) but differ in their initial letter, which is “F” in the Opponent’s mark and “T” in the Holder’s mark. Bearing in mind that the beginnings of marks tend to have more impact that the ends[12] and that differences in short marks tend to make more of an impact;[13] I consider the marks to be visually similar to a medium degree.

42. Aurally, the Opponent’s second earlier registration will be pronounced in the same way as the Opponent’s first earlier mark. In view of this, for the same reasons set out at paragraph 35, I find that there is a medium degree of aural similarity between the marks.

43. Conceptually, for the same reasons set out at paragraph 36-39, I find that the marks “TIXR” will be seen as an invented word with no obvious meaning and “FIXR” will be assigned the ordinary dictionary definition of the words “fixer” or “fix”. As meaning can be identified in the Opponent’s marks but not in the Holder’s, the marks are conceptually dissimilar.

Distinctive character of the earlier trade mark

44. The distinctive character of a trade mark can be appraised only, first, by reference to the goods and services in respect of which registration is sought and, secondly,

[12] *El Corte Inglés, SA* v *OHIM*, Cases T-183/02 and T-184/02
[13] *Robert Bosch GmbH* v *Bosco Brands UK Limited*, BL O/301/20

by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In *Lloyd Schuhfabrik*, the CJEU stated that:

> "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 C-108/97 and C-109/97 *Windsurfing Chiemsee* v *Huber and Attenberger* [1999] ECR I-0000, paragraph 49).
>
> 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 commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)."

45. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods and services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

46. As the Opponent has not filed any evidence to show that the distinctiveness of its marks has been enhanced through use, I only have the inherent position to consider.

47. Although I do not discount the stylisation of the Opponent's first earlier registration, I consider that it does not significantly impact the distinctive character of the mark, which lies in the word "FIXR". I will therefore be comparing the Opponent's earlier marks collectively against the Holder's mark. In view of this, reference to the 'Opponent's mark' encompasses both of the opponent's marks and the findings I reach in the comparison will apply to both.

48. As set out in the conceptual comparison, the Holder submits that "FIXR" will be pronounced as 'fixer' and as such the average consumer will apply the meaning of "someone who is skilled at arranging for things to happen, especially dishonestly".[14] Further to this, the Holder submits that the Opponent's mark at least alludes to the intended purpose of the Opponent's goods and services. I disagree. Although the average consumers may assign the mark the meaning of the ordinary dictionary terms "fix" or "fixer", these words have no obvious meaning in relation to the goods and services at issue. Taking this into account, I consider the mark is inherently distinctive to a medium degree.

Likelihood of Confusion

49. I must now feed all of my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors: i) the interdependency principle, whereby a lesser degree of similarity between the goods and services may be offset by a greater similarity between the marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*); ii) the principle that the more distinctive the earlier mark is, the greater the likelihood of confusion (*Sabel BV v Puma AG*), and; iii) the factor of imperfect recollection i.e. that consumers rarely have the opportunity to compare marks side by side but must rather rely on the imperfect picture that they have kept in their mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V*).

50. There are two types of confusion that may occur. Direct confusion is where the average consumer mistakes one mark for the other, while indirect confusion is

[14] Holder's submissions in lieu paragraph 12.

where the average consumer recognises that the marks are different, but for some reason assumes that the later mark also identifies the goods or services of the owner of the earlier mark, or that the two undertakings are related: see *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, paragraph 16.

51. The following factors must be considered to determine if a likelihood of confusion can be established:

- I have found the marks to be visually similar to no more than a medium degree.
- I have found the marks to be aurally similar to a medium degree.
- I have found the marks to be conceptually dissimilar.
- I have found the earlier mark to be inherently distinctive to a medium degree.
- I have identified the average consumer for the goods to be members of general public or businesses, who will select the goods and services primarily by visual means, although I do not discount an aural component.
- I have concluded that between a medium and slightly higher than medium degree of attention will be paid during the purchasing process.
- I have found the parties' goods and services range from being identical to similar to a medium degree.

52. Taking all the above and the principle of imperfect recollection into account, I do not consider that the parties' marks will be mistakenly recalled or misremembered for one another. I recognise the marks share the letters "IXR" which is a point in favour of the Opponent. The Opponent submits that the letters "IXR" are the dominant and distinctive element of the earlier marks,[15] however, I found that the distinctive character lies in the mark as a whole in relation to the second earlier mark. I found that the stylisation of the Opponent's first earlier registration plays a lesser role in the overall impression of the mark and does not significantly affect the comparison of the marks, nor their distinctive character. I consider that the visual and aural differences between the marks due to the initial letters being "F" and "T" will be sufficient to enable the average consumer to differentiate between

[15] Opponent's submissions in lieu paragraph 27.

them. This is because consumers are believed to place more emphasis on pronouncing the initial elements[16] and will be more likely to notice this point of difference. In addition, the marks are short, both being four letters, and so the differences between them are more likely to be noticed.[17]

53. This, alongside the conceptual dissimilarity between the marks, will allow the average consumer to accurately recall the marks. Consequently, notwithstanding the medium inherent distinctive character of the opponent's marks, I consider there to be no likelihood of direct confusion between the marks, even for the goods that I have found to be identical and even where the average consumer is paying a lower level of attention.

54. That leaves indirect confusion to be considered. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis QC, (as he then was) 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:

[16] *El corte Ingles* v *OHIM*
[17] *Dm-drogerie markt* v *OHMI* EU: T:2011:602, [43]

(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)."

55. These three categories are not exhaustive; rather, they were intended to be illustrative of the general approach, as has been confirmed by the Court of Appeal. 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.[18]

56. Furthermore, in *Liverpool Gin*,[19] Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] 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". Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

[18] *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17
[19] *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207

57. While I note the examples set out by Mr Purvis are not exhaustive, in this case I see no reason why a consumer would believe the marks at issue are from the same or economically linked undertakings. Bearing in mind my findings set out in paragraph 48, I consider that the shared use of the letters “IXR” would be seen as coincidental, even where the goods are identical. Where the marks are seen on identical goods, the shared use of “IXR” may bring the other mark to mind, however I consider this would be mere association, rather than indirect confusion. I also see no reason why the average consumer would see the use of ‘T’ instead of an ‘F’ at the beginning of the mark to be a logical indicator of a sub-brand or brand extension. Taking all of this into account I find that there exists no likelihood of indirect confusion between the marks at issue.

CONCLUSION

58. The opposition is unsuccessful, and the IR may proceed to registration.

COSTS

59. The Holder has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the Holder the sum of £600 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Considering the Notice of opposition and preparing a counterstatement	£250
Preparing and filing written submissions and submissions in lieu of a hearing	£350
Total	**£600**

60. I therefore order VIPR Digital Limited to pay Tixr, Inc. the sum of £600. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 19th day of June 2025

E REES

For the Registrar