

O/0833/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004068880

BY KEWLIME EUROPE LTD

TO REGISTER THE FOLLOWING TRADE MARK:

AirTuner

IN CLASS 9

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO. 450056

BY AIR STUDIOS (LYNDHURST) LIMITED

Background and Pleadings

1. On 27 June 2024, Timber Apps Ltd, since re-named Kewlime Europe Ltd ('the Applicant'),¹ filed an application to register the trade mark shown on the cover of this decision ('the Contested Mark'). The application was published for opposition purposes in the Trade Marks Journal on 12 July 2024. Registration is sought in respect of the single term *Mobile apps*, in Class 9.
2. On 8 October 2024, the application was opposed by Air Studios (Lyndhurst) Limited ('the Opponent') based on section 5(2)(b) of the Trade Marks Act 1994 ('the Act').² The Opponent relies upon the following earlier registration:

UK00003721103

AIR

Filing date: 12 November 2021

Date of entry in register: 26 August 2022

Registered for goods and services in classes 9, 16, 35 and 41, of which the following are relied upon:³

Class 9:

electronic devices for combining, routing and/or changing the levels, tone and/or dynamics of audio signals; sound recording and sound mastering consoles; computer software enabling the arrangement, generation, recording, reproduction and sequencing of sounds; computer software enabling the arrangement, generation, recording, reproduction and sequencing of music; computer software to enable uploading, downloading, accessing, posting, displaying, tagging, blogging, streaming, linking, managing, sharing or otherwise providing electronic media or information via computer and communication networks; music, sounds, videos, images, text and information provided by a

¹ Timber Apps Ltd underwent a company name change to Kewlime Europe Ltd, which was updated by the Registry by way of Recordal reference no. RC555971 on 15 July 2025.

² The initial pleading included claims pursuant to sections 5(3) and 5(4)(a) of the Act, which were subsequently withdrawn on 7 April 2025. The opposition now proceeds pursuant to section 5(2)(b) only.

³ The full registered specification for UK00003721103 is set out at Annex 1 to this decision.

telecommunications network [...]; smartphone apparatus and software;
telephone apparatus and software.

3. The Opponent claims that the parties' marks are similar and that their respective goods are identical or similar; leading to a likelihood of confusion. In particular, the Opponent claims the following:
- that, visually and phonetically speaking, the marks are highly similar, or, in the alternative, similar;⁴
 - that, conceptually speaking, the marks are identical, or, in the alternative, highly similar;⁵
and
 - that the earlier mark enjoys an enhanced level of distinctive character by virtue of the use that has been made of it.⁶
4. The Applicant filed a Defence and Counterstatement in which it denies the claim against it in its entirety. In particular, the Applicant claims the following:
- that the visual, phonetic and conceptual differences between the marks are such that there is no likelihood of confusion;⁷
and
 - that the parties' goods are not similar.⁸
5. The Opponent is represented by Iceni Law Limited. The Applicant is not legally represented.
6. Both parties filed evidence. The Opponent also filed written submissions during the evidence round. A hearing was neither requested nor considered necessary; and

⁴ Opponent's statement of grounds, [9] and [10]

⁵ As above, [11].

⁶ Opponent's statement of grounds, [15]. The Opponent subsequently retreated from this position – see paragraph [43] of this decision.

⁷ Applicant's counterstatement, [7] – [9].

⁸ As above, [18].

both parties filed written submissions in lieu thereof. The following decision has been made after careful consideration of the case papers available to me.

Relevance of EU law

7. 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.

Evidence and submissions

8. The Opponent's evidence comes from:
 - (i) Simon Knee, Chief Executive Officer of the Opponent;
 - and
 - (ii) Duncan Welch, Director of the Opponent's representative.
9. Mr Knee's Witness Statement is dated 4 April 2025 and is accompanied by 6 exhibits: SK1 – SK6. Mr Welch's Witness Statement is dated 7 April 2025 and is accompanied by 2 exhibits: DW1 – DW2. The Opponent's written submissions are dated 6 April 2025.
10. The Applicant's evidence in reply comes from Eduardo Olmeda Zafrilla, Director of the Applicant. Mr Zafrilla's Witness Statement is dated 6 October 2025 and is accompanied by Exhibits 1-5.
11. I confirm that I have read all of the evidence and submissions; and I will refer to them to the extent that they are relevant.

DECISION

Earlier mark

12. In accordance with section 6(1)(a) of the Act, the Opponent's mark is an earlier mark by virtue of its filing date, which precedes the date of application for the Contested Mark.

The proof of use provisions

13. Section 6A of the Act provides that, in opposition proceedings, where the date on which the registration procedure of the earlier mark was completed more than 5 years prior to the filing date (or priority date) of the Contested Mark, the Opponent may be required to prove use of the earlier mark. In the instant case, section 6A is not engaged, because the earlier mark had not been registered for five years or more at the time that the application was filed. The Opponent is therefore entitled to rely upon every term that it seeks to rely upon.

The relevant legislation

14. Section 5(2)(b) of the Act reads as follows:

'5(1) [...]

(2) A trade mark shall not be registered if because—

(a) [...]

(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.'

Relevant case law

15. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*, [2025] UKSC 25:

(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 greater 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; and

(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.

A note on fair and notional use

16. The Applicant, at several points in its Counterstatement, has speculated as to the extent to which the Opponent has used its mark in respect of terms that it relies upon.⁹ The Applicant has also provided examples of the Contested Mark in use on its own website and Google Play.¹⁰ It is important to clarify that I am required to make the assessment of the likelihood of confusion notionally and objectively based on the Opponent's goods as registered and the Applicant's goods as applied for, in accordance with the relevant case law. That assessment requires that I must not take into account the actual way in which either party has used its mark in the marketplace, or aspects of their goods that cannot be determined upon inspection of the register. Furthermore, I must consider all of the circumstances in which the mark applied for might be used if it were registered.¹¹ In this connection, I note the case of *Devinlec Développement Innovation Leclerc SA v OHIM*,¹² in which the Court of Justice of the European Union ('CJEU') said the following:

⁹ Applicant's Counterstatement, paragraphs [15], [19] and [24].

¹⁰ Witness Statement of E.O. Zafrilla, [3]; Exhibits 1 and 2.

¹¹ As per *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C- 533/06, [66]

¹² Case C-171/06P.

‘59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks.’

Comparison of goods

17. The goods to be compared are set out above at [1] and [2].

18. Section 60A of the Act provides:

‘For the purpose of this Act goods and services-

(a) 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.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the ‘Nice Classification’ means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.’

19. I note the case of *Gérard Meric v Office for Harmonisation in the Internal Market*,¹³ in which the General Court (‘GC’) held that:

¹³ Case T-133/05.

‘29. ... 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’.

20. The Opponent has identified the following terms under its earlier mark as the most appropriate points of comparison for the Applicant’s *Mobile apps* in Class 9:¹⁴

*music, sounds, videos, images, text and information provided by a telecommunications network [...];*¹⁵

and

smartphone apparatus and software; telephone apparatus and software.

21. I find that the Applicant’s *Mobile Apps* will be encompassed by the Opponent’s broader term *smartphone [...]* *software* on the basis that an ‘app’ is a type of software. I find the parties’ goods to be identical based on the principle in *Meric*.

Average consumer and the purchasing act

22. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect. The word ‘average’ denotes that the person is typical. In *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*, [2025] UKSC 25, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

¹⁴ Opponent’s written submissions dated 6 April 2025, [4] and [6].

¹⁵ The term set out in the Opponent’s written submissions is *music, sounds, videos, images, text and information provided by a telecommunication network, by on-line delivery and by way of the Internet and the world-wide web or other communications network*, albeit the aforesaid wording underlined is not relied upon in the Opponent’s Statement of Grounds.

(a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;

(b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;

(c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;

(d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by enabling courts and tribunals to determine such issues so far as possible without the need for evidence;

(e) The average consumer's level of attention varies according to the category of goods or services in question; and

(f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

23. The Opponent has submitted that the average consumer of an Application (frequently referred to in everyday parlance as an 'App') is the general public; and that the purchasing act amounts to selecting and downloading the App from a general Application website such as Google Play or the Apple Apps Store.¹⁶ It submits that such purchases are: fairly frequent; often made on a 'whim' (given that many Apps are free to download); and without advice/input from sales staff.¹⁷

¹⁶ Opponent's written submissions dated 6 April 2025, [18].

¹⁷ As above, [18] and [19].

The Opponent submits that there will be a visual aspect to the purchasing process, but that the aural and conceptual aspects should not be ignored.¹⁸ The Opponent argues that the average consumer will pay only a low degree of attention ‘since price is often not a relevant factor’.¹⁹

24. I more-or-less agree with the Opponent’s analysis. I will add that, in my view, whilst many *mobile Apps* would be fairly casual purchases (particularly those that are free), the breadth of the category is such that there will be other more specialised/technical Apps that would be downloaded at a cost. Consequently, I consider that a number of purchasers will be professionals seeking an App to enable them to perform work tasks via their smartphones. I find that the level of attention paid by the average consumer would depend on the particular App sought; ranging from fairly low (e.g. for a free photo filter App) to at least medium (e.g. for a more technical App for professional use). Factors influencing the purchasing process might include, inter alia: the amount of data space occupied by the App; its compatibility with other mobile Apps already installed.

Comparison of the marks

25. 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 CJEU 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

¹⁸ Opponent’s written submissions dated 6 April 2025, [18].

¹⁹ As above, [19].

impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.'

26. The marks to be compared are:

Earlier mark: AIR	Contested Mark: AirTuner
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Overall impression of the marks

27. The earlier mark is a word mark,²⁰ comprising the element 'AIR'. The overall impression is based solely on the single word of which it is formed.

28. The Contested Mark is also a word mark, comprising the element 'AirTuner'. I consider that the average consumer will likely perceive 'AirTuner' as a compound noun, i.e. a single noun made by combining the words 'Air' and 'Tuner'. In this connection, I have borne in mind the case of *Usinor SA v OHIM*²¹ in which the GC observed that, whilst an average consumer normally perceives a mark as a whole without analysing its details, a verbal sign will tend to be broken down into verbal elements which, for the average consumer, suggest a concrete meaning or resemble words known to them. I consider this to be the case here. Notwithstanding that the constituents 'Air' and 'Tuner' will be recognised as two words, the overall impression of the mark resides in their combination 'AirTuner'. My view is that neither constituent word within the compound noun dominates the other. I find that the distinctive character of the Contested Mark resides in the combination 'AirTuner'.

Visual comparison

29. The Opponent claims that the marks are visually similar to a high degree by virtue of the shared element 'AIR'.²² The Applicant, on the other hand, argues that, whilst the shared element might give rise to some visual similarity, the presence of the

²⁰ In word marks, it is the word that is protected; irrespective of colour, form or typeface: see *LA Superquímica v EUIPO*, Case T-24/17, [39].

²¹ Case T-189/05, [62].

²² Opponent's written submissions dated 6 April 2025, [25].

additional element 'Tuner' in the Contested Mark is enough to differentiate the marks for the purpose of the opposition.²³

30. The fact that the earlier mark is wholly subsumed within, and forms the first part of, the Contested Mark will inevitably give rise to some visual overlap. However, I consider that the presence of the 'Tuner' element, which functions as the second half of the combination 'AirTuner', gives rise to a significant visual difference between the marks. I note that the Opponent treats the 'Tuner' element within the Contested Mark as a mere descriptive suffix to the 'Air' element.²⁴ I will address the conceptual aspects of the mark below; but, for now, it is appropriate to refer to my earlier comments on the overall impression of the Contested Mark in which I found that 'Air' and 'Tuner' function as constituent parts of the compound noun 'AirTuner'. It is for this reason that I find that the 'Tuner' element will be neither overlooked nor deemed to be subordinate to 'Air'.

31. I remind myself that that the beginnings of words tend to have more visual (and aural) impacts than their ends;²⁵ although this is not an absolute rule. It is also important to note that the earlier mark 'AIR' is short. In this regard, I refer to the case of *dm-drogerie markt GmbH & Co. KG v OHIM*²⁶ in which it was observed that 'in the context of word signs which are relatively short, even a difference consisting of a single consonant will preclude a finding that there is a high degree of visual similarity between the two signs'.²⁷ I consider the difference in the lengths of the competing marks to have an appreciable visual impact on the average consumer.

32. In the light of the foregoing, I find the level of visual similarity between the marks to be no more than medium.

Aural comparison

²³ Applicant's Counterstatement, [7].

²⁴ Opponent's written submissions dated 6 April 2025, [25].

²⁵ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, [81] – [83].

²⁶ Case T-304/10.

²⁷ As above, [42].

33. The words 'AIR' and 'Tuner' will be articulated in the normal way. The Opponent has conceded that the Contested Mark will be articulated in full.²⁸ The parties appear to agree that the element 'AIR' will be articulated in the same way in either mark.²⁹ I agree on both points. Aurally speaking, the differences in the lengths of the marks will be stark: one syllable (earlier mark) versus three syllables (Contested Mark). I find the level of aural similarity between the marks to be no more than medium.

Conceptual comparison

34. I note the following from the Opponent's written submissions:³⁰

'As for the word 'tuner', this is plainly descriptive and will, therefore, have very little impact on the concept of the trade mark, or in the alternative provide a clearer description as to the nature of the trade mark, (a mobile app for tuning into [sic] a radio station). [...] the word 'AIR' has an identical concept across both marks, with the word 'tuner' contributing to only a very slight degree. [...] the trade marks are conceptually similar to a very high degree, or in the alternative, a high degree.'

'AirTuner is simply a combination of the Opponent's trade mark with a description of the nature of the goods of interest bolted on the end, and no new overall meaning is created.'

35. In support of its argument, the Opponent refers to two earlier decisions of this Tribunal concerning the respective trade marks 'CARTEL DESIGN'³¹ and 'CAT SECURITY'.³² The Hearing Officer found that the mark 'CARTEL DESIGN' would not be understood as having a unitary meaning; rather, it would be perceived 'simply as a combination of two known words with no real meaning outside of the meanings associated with those individual words'.³³ He found that the word

²⁸ Opponent's written submissions dated 6 April 2025, [26].

²⁹ Applicant's Counterstatement, [8].

³⁰ Opponent's written submissions dated 6 April 2025, [27] – [29].

³¹ BLO/0666/24.

³² BLO/0174/25.

³³ BLO/0666/24, [64].

element 'DESIGN' would be perceived as alluding to the fact that the services offered under the mark related to design.³⁴ A similar finding was made in respect of the mark 'CAT SECURITY'.³⁵ The Hearing Officer found that the word 'SECURITY' could be considered descriptive for some of the goods/services in question and that it, therefore, played a lesser role within the mark.

36. Whilst the observations in these earlier decisions are noted, I do not consider them to be on all fours with the instant case, for the reasons set out in the following paragraphs.

37. I have found that the Contested Mark 'AirTuner' will be perceived as a compound noun comprised of two constituent words, with neither 'Air' nor 'Tuner' dominating. The same cannot be said of the marks 'CARTEL DESIGN' and 'CAT SECURITY'; because the elements 'DESIGN' and 'SECURITY' would be seen as descriptive 'add-ons', with the words 'CARTEL' and 'CAT' playing the dominant/distinctive roles within the marks.

38. The earlier mark comprises the word 'AIR' solus. As the Opponent points out, 'AIR' has several meanings, including, inter alia: to express a view or opinion (as in 'airing one's view'); denoting the gas that we breathe; or denoting the impression given by someone (e.g. 'he had an air of superiority about him').³⁶ I consider that any one of these meanings might be attributed to the earlier mark by the average consumer; although the notion of the air that we breathe strikes me as the most likely immediate concept that would be evoked.

39. As to the role of 'Air' in the Contested Mark, I find that the pairing of 'Air' with 'Tuner' will likely make a different impression on the average consumer. The Opponent has described a 'Tuner' as an electronic device for selection of a specific frequency or waveband, such as in the act of tuning a radio.³⁷ I find that, for a significant proportion of average consumers, 'Tuner' would indeed be understood in this way.

³⁴ BLO/0666/24, [64].

³⁵ BLO/0174/25, [55].

³⁶ Opponent's written submissions dated 6 April 2025, [23].

³⁷ As above.

To my mind, the wording ‘AirTuner’, in the context of the goods in question (*mobile Apps*) would conjure the notion of an App capable of connecting to a radio and tuning in to a particular station/wavelength. I find that the ‘Air’ part of the mark would be seen as alluding to the wireless (i.e. ‘in the ether’) character of the connections made by mobile Apps. For some average consumers, ‘Air’ might also conjure the idea of ‘on air’ as in a broadcast being aired/‘on air’.

40. Whilst I agree with the Opponent’s suggested meaning of ‘tuner’, I respectfully disagree with its subsequent argument that the conjunction of ‘Air’ and ‘Tuner’ to form ‘AirTuner’ adds no further meaning over and above the meaning conveyed by the earlier mark ‘AIR’.³⁸ To my mind, the presence of the word ‘Tuner’ would move the average consumer to understand ‘Air’ in the sense of wireless connections or signals moving through the ether (perhaps also in the sense of ‘on air’ radio broadcasts). I consider it unlikely that the earlier mark ‘AIR’ solus would be understood in the same way because, without any other elements present in the mark, there is nothing to lead the average consumer in that direction. It is my view that the overall concepts imparted by the marks are appreciably different. The concept of tuning in to something (e.g. a radio) is not an idea that would be readily prompted by the earlier mark. In case I am wrong about this, then any conceptual overlap will be fairly low, e.g. perhaps down to the fact that the notions of signals ‘through the air or ether’ (i.e. wireless connections) and the air that we breathe both relate to the atmosphere in some way.

Distinctive character of the earlier mark

41. 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

³⁸ Opponent’s written submissions dated 6 April 2025, [23].

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).

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 commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)'.

42. Registered trade marks possess varying degrees of inherent distinctive character. Where a mark is suggestive or allusive of a characteristic of the goods or services, it tends to be lower. Inherent distinctive character may range up to a high level for marks which consist of invented words with no allusive qualities.

43. The Opponent has retreated from its initial pleading in which it claimed that the earlier mark enjoyed an enhanced level of distinctiveness. It now submits that 'AIR' is an ordinary dictionary word with no allusive or descriptive qualities in the context of the relevant goods; and that it, therefore, enjoys a medium level of distinctiveness.³⁹ I agree.

Likelihood of confusion

44. Confusion can be direct or indirect. Mr Iain Purvis Q. C., (as he then was) as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v*

³⁹ Opponent's written submissions dated 6 April 2025, [40].

*By Back Beat Inc*⁴⁰. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*⁴¹, the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that they have kept in mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark but mistakenly matches it to the imperfect image of the earlier mark in their ‘mind’s eye’. Indirect confusion occurs when the average consumer recognises that the competing marks are not the same in some respect, but the similarities between them, combined with the goods/services at issue, leads them to conclude that the goods/services are the responsibility of the same or an economically linked undertaking.

45. I must keep in mind that a global assessment is required taking into account all of the relevant factors, including the principles a) – k) set out above at [15]. When considering all relevant factors ‘in the round’, I must bear in mind that a greater degree of similarity between goods (or services) *may* be offset by a lesser degree of similarity between the marks, and vice versa.

46. I will address direct confusion first.

47. I have made the following findings:

- The parties’ goods are identical, based on the principle in ‘Meric’.
- I have found the levels of visual and aural similarity between the marks to be no higher than medium.
- Conceptually speaking, I have found the overall ideas conveyed by the marks to be appreciably different. In case I am wrong about that, any level of conceptual similarity will be fairly low.
- The earlier mark is distinctive to a medium degree.
- I have found the purchasing act to be primarily visual.

⁴⁰ Case BL O/375/10 at [16].

⁴¹ *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

- The average consumer will be predominantly the general public, with some professional consumers, depending on the App downloaded/purchased.
- The attention level of the average consumer will range from fairly low to at least medium.

48. Despite the identity of the goods, it is my view that the net effect of the differences that I have identified between the marks is sufficient to prevent one mark from being mistaken for the other. For direct confusion to occur, the average consumer would need to overlook the presence of the 'Tuner' element within the Contested Mark. Bearing in mind that I have found the overall impression of the Contested Mark to reside in the very combination of the words 'Air' and 'Tuner', with neither constituent word dominating, the prospect of failing to notice the latter word is far-fetched. The visual aspect of the purchasing process will be particularly important in the instant case, given that many Apps are simply downloaded from an 'App' store/website, without input from a seller. Conceptually speaking, I have found that the presence of the word 'Tuner' determines that the word 'Air' will most likely be seen in the context of wireless connections/airborne signals. The mark 'AirTuner', in the context of *mobile Apps*, might conjure the idea of an App that enables the user to connect to another device and tune in to a radio channel, for instance. The earlier mark, comprising 'AIR' solus, which enjoys a medium degree of distinctive character, does not elicit the same notion in the average consumer. I have borne in mind the interdependency principle according to which a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods (or services), and vice versa. I do not think that the aforesaid principle has any impact in the instant case. I find the differences between the marks, along all three planes of comparison, to be so impactful that they cannot be 'muted' by the identity of the goods. I find that there is no likelihood of direct confusion. I find this to be so even where the purchase is made very casually with a fairly low level of attention.

49. I will now proceed to consider whether there is a likelihood of indirect confusion.

50. In the case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor Q.C. (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said the following at [16]:

‘a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion’. Mr Mellor went on to say that, if there is no likelihood of direct confusion, ‘one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion’.

51. Arnold LJ emphasised that ‘there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion’.⁴²

52. I also note that, in *L.A. Sugar Limited v Back Beat Inc*⁴³ Mr Iain Purvis Q. C. (as he then was), as the Appointed Person, explained that:

‘17. Instances where one may expect the average consumer to reach such a conclusion [i.e. to conclude that marks relate to the same or economically linked undertakings] 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.).

⁴² *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207.

⁴³ Case BL O/375/10

(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).

53. I acknowledge that these categories are not intended to be exhaustive. The Opponent's argument is that the average consumer will believe that the competing trade marks originate from the same or economically-connected undertakings because the 'Tuner' element will be perceived as a reference to the nature and purpose of the relevant goods.⁴⁴ In essence, the Opponent treats 'Tuner' as a non-distinctive 'add-on'; thus seeking to align the instant case with the second of Mr Purvis' three categories. I re-iterate my finding that the overall impression conveyed by the Contested Mark resides in the combination 'AirTuner', with both constituent words 'Air' and 'Tuner' contributing to the conceptual message. To my mind, the Contested Mark does not readily lend itself to deconstruction in terms of one element being distinctive and the other being descriptive. Accordingly, I do not consider the 'Tuner' element to function by way of an 'add-on'. As to the first of Mr Purvis' categories, I have found the earlier mark 'AIR' to have just a medium degree of distinctive character; such that the mark cannot be considered to be so strikingly distinctive that the Contested Mark would be presumed to be a related brand. Finally, turning to the third of Mr Purvis' categories, following my finding that the most likely immediate concept evoked by 'Air' solus would be the air that we breathe, I do not consider 'AirTuner', (which alludes to wireless connections) to be a logical or plausible brand extension. My view is that the average consumer would think that the presence of 'AIR' in both marks was coincidental. Aside from the aforesaid three categories, I can conceive of no other mental process according to which an average consumer would conclude that the parties' marks belong to the same or economically-related undertakings. I can find no 'proper basis' for a finding of a likelihood of indirect confusion.

54. The section 5(2)(b) opposition has failed in its entirety. Subject to any successful appeal, UK00004068880 may proceed to registration in full.

⁴⁴ Opponent's written submissions dated 6 April 2025, [48].

COSTS

55. The Applicant is the successful party. However, I note that no Tribunal Cost Pro Forma has been filed. Consequently, I make no order for costs.

Dated this 15th day of September 2026

N. R. Morris

**For the Registrar,
the Comptroller-General**

Annex 1

UK00003721103 stands registered in respect of the following:

Class 9:

Cinematographic, photographic, and optical apparatus and instruments; apparatus for recording, transmission or reproduction of sound, vision, or images; data processing equipment and computers; transistors, amplifiers, microphones, equalisers, filters, and audio distortion devices; computer hardware and firmware; computer software (including software downloadable from the Internet); computer software for virtual reality; computer programs; audio equalisers and mixing desks; electronic devices for combining, routing and/or changing the levels, tone and/or dynamics of audio signals; sound recording and sound mastering consoles; computer software enabling the arrangement, generation, recording, reproduction and sequencing of sounds; computer software enabling the arrangement, generation, recording, reproduction and sequencing of music; computer software to enable uploading, downloading, accessing, posting, displaying, tagging, blogging, streaming, linking, managing, sharing or otherwise providing electronic media or information via computer and communication networks; music, sounds, videos, images, text and information provided by a telecommunications network, by on-line delivery and by way of the Internet and the world-wide web or other communications network; videos; DVDs; MP3s; CDs; audio and/or visual tapes, cassettes, discs, records, phonograph records and downloads including downloadable from the Internet; film, sound and video recordings; downloadable publications in electronic form supplied on-line, from databases, or from facilities provided on the Internet; electronic publications; publications in electronic form, supplied on-line from databases or from facilities on the Internet; electronic games, computer game programs; telephone apparatus and instruments; telephone ring tones; smartphone apparatus and software; telephone apparatus and software; computer programs for accessing, browsing and searching online databases all for use via smartphones, tablets, computers, decoders, set top boxes and electronic devices; mobile telephone cases; protective cases for tablet computers; eyewear, eyeglass frames, sunglasses; eye glasses and spectacles; corrective glasses and spectacles; protective glasses and spectacles; contact lenses; frames for glasses and

spectacles; eye glass cases; cords, ribbons, chains, and devices for retaining eye glasses; clip on sunglasses; eyeglass cases; encoded prepaid payment cards; electronic and magnetic cards for use in connection with payment for goods and services; loyalty cards; parts and fittings for all the aforesaid goods.

Class 16:

Printed matter; printed publications; books; paper, cardboard and goods made from these materials, not included in other classes; tickets; maps; diaries; posters; manuals; trading cards; magazines; newspapers; timetables; leaflets; directories; drawings; photographs; postcards; prints; stationery; calendars; bookmarks; music books; sheet music; instructional and teaching materials; parts and fittings for all the aforesaid goods.

Class 35:

Advertising, marketing, publicity, business management and business information services; advertising and promotional services; the promotion of products and services for others; marketing and promotion of recording artists; distributorship of music; distribution of musical sound and video recordings; distribution of samples; management of performing artists; business management of performing artists; retail store services, advertising and publicity services promoting the interests of musicians, singers, songwriters, musical performers and artists; online retail store services, mail order catalogues services connected with the sale of cinematographic, photographic, and optical apparatus and instruments, apparatus for recording, transmission or reproduction of sound, vision, or images, data processing equipment and computers, transistors, amplifiers, microphones, equalisers, filters, and audio distortion devices, computer software for virtual reality, computer hardware and firmware, computer software (including software downloadable from the Internet), computer programs, computer software development tools, computer software to enable uploading, downloading, accessing, posting, displaying, tagging, blogging, streaming, linking, managing, sharing or otherwise providing electronic media or information via computer and communication networks, music, sounds, videos, images, text and information provided by a telecommunications network, by on-line delivery and by way of the Internet and the world-wide web or other communications network, videos, DVDs, MP3s, CDs, audio and/or visual tapes, cassettes, discs, records, phonograph

records and downloads including downloadable from the Internet, film, sound and video recordings, downloadable publications in electronic form supplied on-line, from databases, or from facilities provided on the Internet, electronic publications, publications in electronic form, supplied on-line from databases or from facilities on the Internet, electronic games, computer game programs, telephone apparatus and instruments, telephone ring tones, smartphone apparatus and software, telephone apparatus and software, computer programs for accessing, browsing and searching online databases all for use via smartphones, tablets, computers, decoders, set top boxes and electronic devices, mobile telephone cases, protective cases for tablet computers, eyewear, eyeglass frames, sunglasses, eye glasses and spectacles, corrective glasses and spectacles, protective glasses and spectacles, contact lenses, frames for glasses and spectacles, eye glass cases, cords, ribbons, chains, and devices for retaining eye glasses, clip on sunglasses, eyeglass cases, encoded prepaid payment cards, electronic and magnetic cards for use in connection with payment for goods and services, loyalty cards, printed matter, printed publications, books, paper, cardboard and goods made from these materials, tickets, maps, diaries, posters, manuals, magazines, newspapers, timetables, leaflets, directories, drawings, photographs, postcards, prints, stationery, calendars, bookmarks, music books, instructional and teaching materials; provision of consumer product information relating to music, fashion, health, well-being and life styles; provision of consumer product information relating to music fashion, health, well-being and life styles via searchable indexes and databases and via online electronic documents and databases; music exhibitions for commercial or promotional purposes; providing an online marketplace for the buying and selling of music, fashion, health, well-being and life styles products and materials; organisation and management of business incentive and loyalty schemes; administration, management and organisation of customer loyalty programs including such programs involving discounts or incentives; arranging and conducting trade show exhibitions in the field of music and entertainment; arranging and conducting fairs and exhibitions for business and advertising purposes; promoting and conducting trade shows in the field of music; promotion of concerts for others; advice, consultation and information services relating to the aforesaid services.

Class 41:

Entertainment; cultural activities; recording studio services; organisation and arrangement of competitions, films, music, cultural, educational and entertainment events; organisation of prize draws; organisation of competitions; fan club organisation services; production services for films, radio programmes, television programmes, shows, concerts and for the theatre; booking agency and ticket agency services; box office services; audio and video studio services and sound recording studio services; sound recording and video entertainment services; agency services for radio, television and other personalities; artistic direction of artists services; administration, management and organisation of personal appearances by actors, celebrities, singers and artists; arranging personal appearances by persons in the public eye, (celebrities); arranging personal appearances by persons in the public eye, (celebrities) relating to music; sound recording, radio, film and video production and distribution services; entertainment services, in the form of live audio and visual performances by actors and singers; film and television (including cable television) production and direction services; publishing; music publishing; publication of books, magazines and other texts on-line; publications and articles in electronic format; entertainment by means of mobile communications devices; publication of electronic books, magazines, journals and web blogs; electronic publishing of books and magazines for others; digital music, films, video, audio and graphic images (not downloadable) provided from a computer, the Internet and/or web sites on the Internet; electronic library services for the supply of electronic information (including archive information) in the form of text, audio and/or video information; providing on-line electronic publications (not downloadable); educational services; providing digital music (not downloadable) from the Internet; providing downloadable pre-recorded music and video for a fee or pre-paid subscription via the Internet or pre-bundled with computing devices; electronic games services provided by means of the Internet; entertainment services in the nature of providing virtual reality games; entertainment services in the nature of providing virtual reality audio equalisers and mixing desks experiences; providing computer databases in the fields of music, video, games and sports; entertainment services in the nature of musical, video, audio-video, and textual materials; club services; private members clubs; live music performances; live entertainment; live events; hire of sound recording studios and equipment; hire of video production studios and equipment; education and training

for sound recording, audio/video production music production and/or audio/video post-production; gaming services, betting, lottery and gambling services; advice, consultation and information services relating to the aforesaid services.