

O/0890/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004221823

BY ASTRID MEDIA PRODUCTIONS LTD

TO REGISTER THE FOLLOWING TRADE MARK:

ASTRID

IN CLASSES 9, 16, 35, 38 AND 41

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO. 457881

BY TURN UP AS

BACKGROUND AND PLEADINGS

1. On 19 June 2025, Astrid Media Productions Ltd ('the Applicant') 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 1 August 2025. Registration is sought in respect of goods and services in classes 9, 16, 35, 38 and 41. The full specification is set out at Annex 1 to this decision, with the opposed terms marked in underline.
2. On 31 October 2025, the application was partially opposed by Turn Up AS ('the Opponent') based on section 5(2)(b) of the Trade Marks Act 1994 ('the Act'). The Opponent relies upon the following earlier registration:

ASTRID S

UK801265820¹

Filing date: 21 May 2015

Date of entry in register: 26 July 2016

Priority details

Priority date: 28 April 2015

Priority country: Norway

TM from which priority claimed: 201505316 (whole)

Registered for goods and services in classes 9, 14, 25 and 41, relying on the following only:²

Class 9:

audio recordings of music; video and/or audio recordings; downloadable music files; downloadable video files; downloadable ring tones for mobile phones.

¹ This registration is a comparable mark (IR) pursuant to Article 56 of the 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01)', also known as the 'Withdrawal Agreement'. It is based on an International Registration ('IR') designating the EU, claiming priority from the original Norwegian filing.

² Full specification is at Annex 2 to this decision.

Class 41:

Entertainment activities; cultural activities; artist performances; concerts; TV appearances; production of music; audio production; production of video and film; arranging and conducting concerts and performances; arranging and conducting musical entertainment; arranging and conducting audio-visual entertainment; music publishing; songwriting for others; provision of information in the field of entertainment and music, via a website.

3. The Opponent claims that the parties' marks are highly similar and that their respective goods/services are identical and highly similar; leading to a likelihood of confusion.

4. The Applicant filed a Defence and Counterstatement in which it stated the following:³

'The Applicant agrees that there is some similarity in the marks and some overlap with the specification. Further facts and evidence will be provided at a later date.'⁴

The Applicant puts the Opponent to strict proof of use of their registration in the UK'.

5. The Opponent is represented by HGF Limited. The applicant is represented by Wilson Gunn.

6. Only the Opponent filed evidence. A hearing was neither requested nor considered necessary; and only the Opponent filed written submissions in lieu thereof. The following decision has been made after careful consideration of the case papers available to me.

³ Applicant's Counterstatement, at [8].

⁴ In the event, the Applicant filed no further documents.

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 is by way of the Witness Statement of Astrid Smeplass, dated 9 April 2026, which is accompanied by 11 exhibits. Ms Smeplass is Director of the Opponent. She is known professionally as Astrid S, a Norwegian singer-songwriter.⁵ The Opponent's written submissions are dated 22 July 2026.
9. 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

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

Proof of use provisions

11. Section 6A of the Act reads as follows:

'6A(1) This section applies where:

⁵ Witness Statement of A. Smeplass, [4].

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(b) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes –

a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade

mark in the variant form is also registered in the name of the proprietor),
and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.'

12. In the instant case, section 6A is engaged, because the earlier mark was registered for more than five years at the time that the contested application was filed. In its Statement of Use, the Opponent claims to have made genuine use of its earlier mark for the entire registered specification. As noted at [4], the Applicant has put the Opponent to proof of the aforesaid claim.

13. The relevant period within which genuine use must be shown is 20 June 2020 to 19 June 2025 ('the Relevant Period'). As the earlier mark is a comparable mark, use in the EU (which included the UK) may be relied upon for the period before IP Completion Day, being 31 December 2020. After that date, only use in the UK may be relied upon.

14. Section 100 of the Act states that:

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

The relevant case law on genuine use

15. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

‘105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the Court of Justice of the European Union (‘CJEU’) in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 *P Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

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

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

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

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

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

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

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

16. Proven use of a mark which fails to establish that ‘the commercial exploitation of the mark is real’ because the use would not be ‘viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark’ is, therefore, not genuine use.

17. Although the Opponent has claimed to have used its mark in respect of all registered terms, I propose to confine my assessment to the terms sought to be relied upon.

The Opponent’s evidence of use

18. By way of a general observation, a significant amount of material predates the Relevant Period and/or relates to non-UK countries (including Norway, Sweden and Denmark). In the absence of any narrative or submission to explain how, if at all, such material supports the Opponent’s case, I will focus only on the evidential material in so far as it sheds light on UK use within the Relevant Period. I note the following:

(a) Ms Smeplass has made the following positive statement about the use of the earlier mark:⁶

‘The ASTRID S mark has been used in the UK since 2014-2015 in connection with goods and services such as music releases and promotion. In particular, the mark has been used on music/audio recordings, live performances, digital content and broader brand activity, as well as merchandise products since at least 2015’.

Ms Smeplass has further stated that customers are able to find information about Astrid S, including upcoming tour/events, from the Opponent’s website ‘astridsofficial.com’.⁷ Although the mark is visible on the excerpt provided, the copyright notice of 2026 indicates that the material provided was taken from the site after the Relevant Period.

(b) I reproduce the following table that has been provided to show ‘Sales figures under the ASTRID S brand in the UK between the years 2020 and 2025’:⁸

Year	Sales (£)
2020	1,538.00
2021	367.00
2022	180.00
2023	83.00
2024	221.00
2025	90.00

No breakdown has been provided to show the goods or services to which these figures relate. Furthermore, without a monthly breakdown of the figures, I am unable to determine the proportion of the 2020 sales revenue referable to the Relevant Period, i.e. 20 June – 31 December 2020.

(c) A list of goods sold in the UK between 15 June 2020 and 5 April 2025 has been provided.⁹ Prices are expressed in ‘NOK’, i.e. Norwegian Krone. 48 items were sold; including 28 albums on vinyl, priced at 400 or 500 NOK each. The remaining items sold were merchandise such as hoodies, caps, shorts, stickers, T-shirts. The

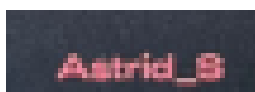
⁶ Witness Statement of A. Smeplass, [17].

⁷ Witness Statement of A. Smeplass, [13]; Exhibit 4.

⁸ Witness Statement of A. Smeplass, [25].

⁹ Exhibit 8.

transactions cover a range of dates from 15 June 2020 (i.e. just five days before the Relevant Period) to 5 April 2025. Custom appears to be widely dispersed across the UK, including, inter alia: Bristol, London, Manchester, Doncaster, St Helier, Glasgow, Newport, Birmingham, Enfield, Oxford, Pontypool. Ms Smeplass has stated that two albums have been released by Astrid S: the debut 'Leave it Beautiful', in 2020; and 'Joyride', on 24 May 2024.¹⁰ Several images of the sleeve art for the aforesaid albums feature in the evidence, bearing the following representations of the earlier mark:

Album title: Leave it Beautiful 	Album title: Joyride 
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As to the 'merchandise' goods, elsewhere in the evidence there is an excerpt from the 'merchandise' website of Astrid S, called 'byastrids.com', showing product listings for goods including baseball caps, T-shirts and hoodies. I note that the mark is only visible on the hoody. The prices are expressed in 'NOK', i.e. Norwegian Krone, which suggests that this content is directed to consumers based in Norway.

However, a screenshot from The Wayback Machine¹¹, dated 7 December 2020, announces the following: 'Leave it Beautiful Limited Collection Dropping December 9th' would be available '7:00 PM London'.¹² This indicates that preparations were made to launch merchandise promoting the aforesaid album in the UK. The 'merchandise' transactions listed in the aforementioned spreadsheet, in my view, show the fruits of such preparations.

(d) A table listing past performances by ASTRID S in the UK has been provided, including the following:¹³

¹⁰ Witness Statement of A. Smeplass, [10] and [11].

¹¹ A web-page archiving service.

¹² Exhibit 4.

¹³ Witness Statement of A. Smeplass, [21].

Year	Event	Location
2021	World Tour Part One (re-scheduled)	London (O2 Academy Islington)
2021	World Tour Part One (re-scheduled)	Manchester (The Deaf Institute)
2020*	World Tour Part One	London
2020*	World Tour Part One	Glasgow

*these events were scheduled but were cancelled due to the COVID-19 pandemic.

An extract from the website Seetickets.com, listing past performances from Astrid S, notes the dates of rescheduled performances in London and Manchester as the 7th and 10th of November 2021, respectively.¹⁴ According to Ms Smeplass' narrative evidence, approximately 500 tickets had been sold prior to the cancellations.¹⁵

(e) Ms Smeplass has stated that the Opponent invests heavily in online and offline marketing; with a large proportion of promotion and advertising taking place online, particularly via social media channels including Facebook, X¹⁶, TikTok and Instagram.¹⁷ The following table 'contains the estimated amount (£s) spent on annual advertising and promotion expenditure in the UK since 2020':¹⁸

Year	2020	2021	2022	2023	2024
£'s	8000	8000	3500	3500	5000

As with the table above at (b), I am unable to determine the goods/services to which the figures apply; or the proportion of 2020 expenditure referable to the Relevant Period.

(f) A selection of screenshots taken from music streaming platforms have been provided; with 'ASTRID S' clearly visible on all.¹⁹ From the examples that are

¹⁴ Exhibit 6.

¹⁵ Witness Statement of A. Smeplass, [23].

¹⁶ Formerly known as Twitter.

¹⁷ Witness Statement of A. Smeplass, [28].

¹⁸ As above, [29].

¹⁹ Exhibits 3 and 9.

plainly aimed at the UK market and relate to the Relevant Period, I note the following:

- An extract from the UK version of the platform YouTube²⁰ shows the video for the ASTRID S track 'Could be holding on' from the 'Leave it Beautiful' album.²¹ The following indicates that the content comes from the YouTube account for 'Astrid S', as opposed to being uploaded by another user:



There are 1.36M subscribers and there have been 629,411 views as of 16 October 2020. The video has 13K 'likes'.

- Another extract from YouTube shows various tracks from the 'Joyride' album available for listening with the numbers of views '1 year ago' ranging from 38K to 48K.²² I presume that these are the 'listening' figures as at 1 year prior to the Opponent obtaining the screenshots to file in evidence. Given that the album was released in 2024, it is reasonable to infer that all of the 'views' occurred within the Relevant Period.
- A further extract from the YouTube account for Astrid S shows the track 'I do', which was released in 2020,²³ available for viewing/listening; and indicates 406,523 views as at 4 March 2021.

(g) Screenshots of pages from the websites/platforms 'music.apple.com', 'Amazon.co.uk' and 'last.fm' have been provided. They are undated, although I note that the screenshots from Apple and Amazon have captured tabs relating to other web-pages open in the web browser when these screenshots were taken; including 'EUIPO', 'WIPO' and 'Trademark status [...]'. This suggests that the content was captured as it appeared at the evidence-gathering stage of these proceedings.

²⁰ 'GB' appears in superscript on the YouTube logo, which I presume to indicate the UK version of the platform.

²¹ Exhibit 3.

²² As above.

²³ Exhibit 1, Wikipedia entry for Astrid S.

Strictly speaking, these screenshots post-date the Relevant Period.²⁴ However, I note the following:

- The screenshot from music.apple.com features singles and albums released in, variously, 2021, 2024 and 2025. Music videos are also featured for releases in 2021, 2022 and 2024. Whilst the material demonstrates that *music was released* during the Relevant Period, there is nothing to tell me the proportion of UK consumers who might have accessed this content and/or during the Relevant Period. That said, I consider it a notorious fact that Apple has a worldwide reach as a music platform; and it seems likely, therefore, that some UK consumers will have accessed this content.
- A screenshot from Amazon.co.uk shows various 'Astrid S' albums and tracks, released in 2024 and 2025, available for listening.
- Undated extracts of webpages from 'last.fm' list albums and tracks available for listening, of which 6 examples were released on dates within the Relevant Period. The numbers of monthly listeners for each recording ranges from several hundred to around 214k. I am unable to determine the proportions of UK-based listeners or how many 'listens' occurred within the Relevant Period.

(h) Ms Smeplass has given narrative evidence that the music of Astrid S has been available from the following music streaming/ticketing platforms:

Spotify, since 2014; Apple Music, since 2015; YouTube, since 2014; Ticketmaster, since 2015; and Live Nation, since 2015.²⁵

Undated screenshots of pages from the social media platforms Spotify, TIK-TOK and Instagram have been provided showing various 'analytics' relating to UK listeners of the music of Astrid S. I note the following:

²⁴ Exhibit 5.

²⁵ Witness Statement of A. Smeplass, [34].

- Spotify – 164,913 UK listeners within the ‘last 28 days’ (presumed to be the 28 days preceding the Opponent filing its evidence). Whilst this figure represents the state of affairs after the Relevant Period, an accompanying graph showing the number of listeners over ‘the last 12 months’ shows that the number of UK listeners remained steadily above 10k for the whole of 2025 and beyond.

I am unable to determine the proportion of followers acquired on the following platforms during the Relevant Period. However, for completeness, I include the figures provided (which I presume to be contemporaneous with the date of the evidence being filed):

- TIK-TOK – a total of 31.9k UK followers.
- Instagram – a total of 21.9k UK followers.

(i) A selection of press articles has been provided, although it is not clear whether all are directed to the UK market; and no detail has been provided on reach/circulation.²⁶ An article dated 16 October 2020, from standard.co.uk, anticipates the release of the ‘Leave it Beautiful’ album. Further articles from the publications/websites ‘Official Charts’ and ‘Spindle:Radar’, dated 16 October 2020 and 6 January 2022, respectively, also mention the aforesaid album.

Amongst the articles is a table labelled ‘Astrid_S_UK_press_best-effort’, apparently compiled by the Opponent itself, listing publications where Astrid S has been mentioned or covered, with two examples from the Relevant Period:

- An article dated 16 October 2020 from the Evening Standard titled ‘Astrid S – Leave it Beautiful review: Quirky beats elevate made-for-the-charts pop’.
- An article dated 18 September 2020 from NME (New Music Express) titled ‘Astrid S announces debut album ‘Leave it Beautiful’ and shares new single’. In my experience as an ordinary member of the UK public, I am aware of the NME as a longstanding and well-known UK publication covering popular music news.

²⁶ Exhibit 10.

(j) Evidence has been provided of music by Astrid S being available to purchase as a ringtone. A screenshot from YouTube shows an audio file for 'Hurts So Good Ringtone – Astrid S [edit audio]' posted by an undertaking called 'Ringtone Express', 15K views of the page/file '2 years ago' (i.e. two years relative to the date of the evidence filed). The content was, therefore, live for some of the Relevant Period. The same ringtone was available from 'Freeringtones' (also via YouTube) and 'Zedge.net'. Zedge appears to be a site that 'collates' the platforms/providers offering the ringtone, and the four options are dated either 2022 or 2023, which I presume to be the date that they were released.

Variant forms

19. Before I proceed to make findings on genuine use, it is necessary to address the matter of variant forms. As noted at [18(c)], 'ASTRID S' has, in some instances, appeared in the following form:



20. I remind myself of section 46(2) of the Act according to which 'use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor)'.

21. The earlier mark is a word mark. I find that the mark will be perceived by the average consumer as the forename 'Astrid' with the 'S' likely seen as an initial for a surname. The distinctive character of the registered mark resides in the whole of the mark in so far as 'ASTRID S' neither describes nor alludes to the goods/services in respect of which the mark is registered. I do not consider that the different typeface or the presence of the underscore between 'Astrid' and 'S' add to or subtract from the distinctive character in its registered form. I find the aforesaid variant to be an acceptable variant of the earlier mark as it appears on the register.

Sufficient use

22. For use to be genuine, it must have been real commercial exploitation of the mark, in the course of trade, sufficient to create or maintain a market for the goods and services at issue.
23. In making my assessment, I am required to consider all relevant factors, including (i) the scale and frequency of the use shown; (ii) the nature of the use shown; (iii) the services for which use has been shown; (iv) the nature of those services, and the market(s) for them; and (v) the geographical extent of the use shown. I also bear in mind the comments of the General Court (GC) in *New Yorker SHK Jeans GmbH KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM), Case T-415/09:

‘53. In order to examine whether use of an earlier mark is genuine, an overall assessment must be carried out which takes account of all the relevant factors in the particular case. Genuine use of a trade mark, it is true, cannot be proved by means of probabilities or suppositions, but has to be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (*COLORIS*, paragraph 24). However, it cannot be ruled out that an accumulation of items of evidence may allow the necessary facts to be established, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (see, to that effect, judgment of the Court of Justice of 17 April 2008 in Case C-108/07, *Ferrero Deutschland v OHIM*, not published in the ECR, paragraph 36).’

Assessment of the evidence

24. In *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834, Kitchen LJ (as he then was) set out the approach to be followed when considering partial revocation of a trade mark or assessing which goods and services may be relied on under section 5(2). He said:

‘244. As I described in *Maier v Asos*, the approach to be adopted is relatively straightforward (although I readily acknowledge that it may on occasion be difficult to apply) and it is in my view consistent with the earlier decisions of the Court of Appeal to which I referred at paragraph [63]. On reflection, I think it can be expressed more clearly as follows.

245. First, it is necessary to identify the goods or services in relation to which the mark has been used during the relevant period.

246. Secondly, the goods or services for which the mark is registered must be considered. If the mark is registered for a category of goods or services which is sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, use of the mark in relation to one or more of the subcategories will not constitute use of the mark in relation to all of the other categories.

247. Thirdly, it is not possible for a proprietor to use the mark in relation to all possible variations of a product or service. So care must be taken to ensure this exercise does not result in the proprietor being stripped of protection for goods or services which, though not the same as those for which use has been proved, are not in essence different from them and cannot be distinguished from them other than in an arbitrary way.

248. Fourthly, these issues are to be considered having regard to the perception of the average consumer and the purpose and intended use of the products or services in issue. Ultimately it is the task of the tribunal to arrive at a fair specification of goods or services having regard to the use which has been made of the mark.

249. This approach does strike an appropriate balance. It gives effect to the clear intention of the EU legislature that marks must actually be used or, if not used, be subject to revocation. ... It is also fair to proprietors for it does not require a proprietor to prove that he has used his mark in relation to all possible variations of the goods or services covered by its registration but only those which are sufficiently distinct to constitute coherent categories or subcategories. I am also satisfied that it gives

appropriate protection to the legitimate interest of a proprietor in being able in the future to extend his range of goods or services within the scope of the terms describing the goods or services for which its mark is registered.'

25. This approach was endorsed by the Supreme Court in *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36:

'261. ... First, there can be no doubt that an application to register a mark in respect of a broad category of goods or services may be made *partly* in bad faith in so far as the broad description includes distinct sub-categories of goods or services in relation to which the applicant never had any intention to use the mark, whether conditionally or otherwise. In my view, that emerges clearly from the decision of the CJEU in this case. The approach to be adopted in such a case was explored and explained by the Court of Appeal in *Merck KGaA v Merck Sharp & Dohme Corp* [2017] EWCA Civ 1834; [2018] ETMR 10, at paras 241-249 and, so far as I am aware, that approach has proved workable and appropriate and has stood the test of time, save that it must now be seen in light of the more recent guidance given by the CJEU in, for example: *Ferrari SpA v DU* (Joined Cases C-720/18 and C-721/18) EU:C:2020:854; [2021] Bus LR 106, at paras 36-53. There the CJEU explained, at para 40, that the essential criterion to apply for the purposes of identifying a coherent subcategory of goods or services capable of being viewed independently is their purpose and intended use.'

26. In *easyGroup Limited v Easy Live (Services) Limited & Ors* [2025] EWCA Civ 946, Arnold LJ gave further consideration to the approach to identifying independent subcategories:

'82. As the Court of Justice made clear in *ACTC* and *Ferrari*, the essential criteria which must be applied in determining whether a category of goods or services can be divided into independent subcategories are purpose and intended use. It is not sufficient that different goods may be aimed at different publics or sold in different shops or that different goods or services belong to different market segments. These criteria are easier to apply to goods than to

services, in particular because it is easier to distinguish between the purpose and the intended use of goods than it is to distinguish between the purpose and the intended use of services. In the case of services, it seems to me that the logic of the Court of Justice's approach means that one should consider the intended mode of use of the services in question.'

27. The amount of evidential material showing unequivocal instances of the earlier mark being used within the Relevant Period and directed to the UK market is modest. However, I find that it is sufficient to show that there has been genuine use of the mark in respect of part of the registered specification. I set out my reasoning in the following paragraphs ([28]-[30]).

28. UK sales figures, together with an itemised list of UK transactions, demonstrate concrete sales. Two live musical performances have been given in the UK, for which preparation by way of promotion and ticketing will have taken place. Although both the sales figures and the number of transactions in respect of the goods is very low, it is clear to me that there has been significant use of the mark in respect of digital versions of musical content from streaming platforms such as YouTube and Apple music. It is my understanding that streaming of music is often free. I have borne in mind that use of a mark need not be quantitatively significant to amount to genuine use, nor is there a requirement for there to be actual sales of the goods or services at stake. Whilst the examples of trade mark use on streaming platforms during the Relevant Period are few in number, they reveal consistent use of the mark to guarantee the origin of the musical recordings of 'Astrid S', across the breadth of the Relevant Period. Extracts from YouTube dated 16 October 2020 reveal a significant UK following of 1.36M, with 629,411 views/listens of the 'Leave it Beautiful' album – which was released in 2020 - by 16 October 2020. To my mind, this shows a fairly 'strong start' to the Relevant Period in terms of exposure of the mark to UK consumers. Towards the latter portion of the Relevant Period, another YouTube extract dated '1 year ago' (relative to the date of evidence being filed, therefore placing the material within the Relevant Period) records the number of 'listens' for tracks from the 2024 'Joyride album' as 38-48k. Whilst these numbers might not be enormous, they are far from trivial.

29. Extracts from platforms including Apple and Amazon offer musical recordings from Astrid S released in 2021, 2024 and 2025. Although I am unable to determine the proportion of UK listeners for the aforesaid platforms, it seems likely, given their worldwide reach, that the UK would be a target market. Data analytics from the platform Spotify show the number of UK listeners of the music of Astrid S to remain above 10k for the duration of 2025.
30. The estimated figures for marketing and advertising expenditure do not strike me as particularly high, nor are they trivial. However, UK press articles, particularly the piece from the NME in September 2020, which must have a significant readership, show that the arrival of the first 'Astrid S' album was deemed 'newsworthy' for those interested in popular music. I also bear in mind that the music streaming platforms themselves are promotional in nature.
31. Looking at the evidence in the round, I am satisfied that there has been genuine use of the 'ASTRID S' mark throughout the Relevant Period. I will now proceed to determine a fair specification against the registered terms, noted above at [2], according to the guidance in the *Merck* case.

Class 9

Registered term: *audio recordings of music*

32. Much of the evidence relates to use of the mark in respect of musical recordings, in the form of audio and/or video, in digital or 'online' form. There is also evidence of sales of musical recordings on vinyl. I consider the term *audio recordings of music* to be sufficiently broad to enable standalone sub-categories to be identified within it. My view is that the term will encompass musical recordings in a variety of formats, including compact discs (CDs); audio tapes; vinyl; digital/electronic sound files. The evidence does not show use of the mark for musical recordings in formats other than digital/online or vinyl. There is no evidence of the mark being used for CDs or audio tapes. Although digital/online recordings will cover several types of electronic file, I do not consider the particular type of file to change the essence of the musical recordings themselves; i.e. they are all musical recordings that are

stored and accessed electronically. In this regard, I have borne in mind the warning in *Merck* that I must take care not to strip the Opponent of protection for goods (or services) that, whilst not the same, do not differ in their essential function. I therefore consider a fair specification for the Opponent's goods to be *audio recordings of music, not including CDs or tapes*.

Registered term: *video and/or audio recordings*

33. The 'audio recordings' aspect of this term has been addressed above at [32]. As to 'video recordings', much of the 'Astrid S' music featured on the online platforms appears to be in the form of video content. I consider 'Video recordings' to encompass several types of recorded content other than music videos, as well as covering several formats. As to types of content, examples include, inter alia: feature films, broadcasts, programmes (including series comprising several episodes). As to format, there is no use of the mark in respect of video content on physical media such as video tapes, DVDs or any other type of video disk. Use appears to be confined to online/electronic video content. Nothing in the evidence demonstrates use of the earlier mark in respect of video content other than music; and I consider it appropriate to limit the registered term to reflect this. I therefore propose the following as a fair specification for the above registered term:

video recordings of music, none in the form of physical media, and/or audio recordings of music, not including tapes or CDs.

Registered terms: *downloadable music files; downloadable video files*

34. It is my view that electronic/online music files and videos are capable of being downloaded (i.e. saved to another drive or device) and that many streaming services provide music content with this capability. Following my reasoning set out above at paragraphs [32] to [33], I consider the following to be a fair specification for the above registered terms: *downloadable music files; downloadable video files of music*

Registered term: *downloadable ring tones for mobile phones*

35. There are two examples of the earlier mark being used in respect of downloadable ring tones for mobile phones. To my mind, this is a narrow term that cannot be readily divided into further sub-categories. I do not, therefore, propose to limit this term. Even if my finding of genuine use for this term is wrong by reason of being overly liberal, the fair terms set out at paragraphs [32] to [34] provide a much firmer footing for the Opponent's case than reliance on *downloadable ring tones for mobile phones*.

Class 41

Registered terms: *Entertainment activities; cultural activities; artist performances; concerts*

36. The evidence demonstrates that ASTRID S gave two live musical performances in the UK in 2021, previously scheduled for 2020. Based on my experience as an ordinary member of the public, I appreciate that many musical artists, particularly in popular music, do not ordinarily give UK performances at regular intervals across an entire five-year period. I find the evidence to be sufficient to support a finding that the mark has been used for live musical performances. I consider that this activity falls within each of the broad terms listed above. I must now consider the extent to which it is appropriate to divide the registered terms to reflect the use shown. Both *entertainment* and *cultural activities* are broad terms encompassing a variety of pursuits including, inter alia, the arts and sports. *Artist performances* will include a variety of events including musical, poetry, drama and dance. *Concerts* typically comprise live performances of music and/or singing, spanning a variety of musical genres; and, to my mind, they would be unlikely to be regarded as covering non-musical performances. The Opponent's evidence is focused on live music performances and there is nothing to indicate that the mark has been used in respect of any other artform or cultural activity. The essence of a live musical performance is the playing of music and/or the performance of vocals to entertain an audience. Whilst there are other non-musical performances that are enjoyed through the same mode of delivery (e.g. stand-up comedy; poetry readings; plays), my view is that musical performances are viewed as a discrete category of entertainment/cultural activity by the average consumer. As already noted, music

has several genres; examples including classical, opera and popular music. Some genres can be further divided into sub-genres (particularly in classical music). To my mind, it is not always easy (or possible) to firmly assign a piece of music to a particular genre; not least because musical artistry often involves creating pieces that blend several genres, or that might even be considered 'genre-defying'. To limit the specification by musical genre would, to my mind, be artificial. In the light of the foregoing, I consider the following to be a fair specification:

Entertainment activities, namely musical performances; cultural activities, namely musical performances; artist performances, namely musical performances; concerts

Registered terms: *arranging and conducting concerts and performances*;
arranging and conducting musical entertainment

37. Each of these terms has two aspects, i.e. arranging and conducting. I consider the 'arranging' aspect to entail the acts of organisation, administration and logistics of putting on performances/entertainment. As to the 'conducting' aspect, I consider the ordinary understanding of 'conducting' in the context of musical performances/entertainment to be the giving of direction as to, inter alia, the tempo, meter and volume of the music by way of hand or baton movements. In the instant case, whilst I acknowledge that the live performances given by ASTRID S clearly relied upon 'arranging' services in order to make the events happen, such services have not been held out to third parties under the ASTRID S mark. The Opponent's offering under the mark is the act of musical performance, rather than the services that facilitate the performance. Furthermore, there is nothing in the evidence to indicate that the conducting of musical performances has been provided as a service. All things considered, the evidence does not demonstrate use of the mark in respect of the registered terms listed above.

Registered term: *arranging and conducting audio-visual entertainment*

38. I understand 'audio-visual entertainment' to encompass any performance or content that combines both sound and visuals; e.g. a music concert with screen visuals or a music video. Whilst the Opponent has clearly demonstrated use of the

mark in respect of music video content, my view is that the acts of arranging and conducting the music video content (i.e. its production) are services that the Opponent would engage from a third party (or perform for itself) rather than hold out to others under its mark. I find that the evidence does not demonstrate use for the above registered term.

Registered terms: *production of music; audio production; production of video and film*

39. There is nothing in the evidence to indicate that the Opponent has held out, to third parties, production services under its mark. If it were the case that the Opponent had performed the acts of production for its own audio/video recordings of music, then that alone would not count as genuine use. I find that the evidence does not demonstrate use of the mark for the above registered term.

Registered term: *TV appearances*

40. In the absence of any evidence to show use of the mark in the UK with respect to TV appearances, I find that there has been no use for the above registered term.

Registered terms: *music publishing; songwriting for others*

41. Nothing in the evidence indicates that the above services have been held out to third parties under the earlier mark. I find that there has been no use for the above registered terms.

Registered term: *provision of information in the field of entertainment and music, via a website.*

42. It is my view that any '*provision of information in the field of [...]*' term is inherently difficult to address in the context of a 'proof of use' assessment, due to its sheer breadth (even where a field is very niche). The word 'information' is ordinarily understood as facts or details about something. Based on a literal construction of the above term, more-or-less any detail about something pertaining to

entertainment or music could be included. In the instant case, I have considered whether it might be said that an extract from Spotify comprising a mere list of audio/video recordings of the music of ASTRID S to stream would fall within the term. Such liberality seems somewhat uneasy given that little more than the mere existence of a musical artist's website with a few details (within a relevant period) might substantiate use of a mark in respect of a 'provision of information' term – thus enabling an Opponent to oppose a mark on this footing. Ms Smeplass has given narrative evidence that customers are able to find information about Astrid S, including forthcoming tours/events, on her website, although the extracts provided include a 2026 copyright which places the content after the Relevant Period. However, even if I could be sure that this content was published and directed to UK consumers during the Relevant Period, I do not consider the presence of details of a particular musical artist, published on their own website, to substantiate use of the mark in respect of *provision of information* [...] as a service. Clear examples of services that would be encompassed by the aforesaid term might include, inter alia, fanzines or directories of entertainment events. I am unable to find that there has been genuine use in respect of the above registered term.

Section 5(2)(b) opposition:

43. Following my assessment of genuine use, the Opponent may rely upon the earlier mark to the following extent (additional wording underlined):

Class 9:

Audio recordings of music, not including CDs or tapes;

video recordings of music, none in the form of physical media, and/or audio recordings of music, not including tapes or CDs.

downloadable music files;

downloadable video files of music;

downloadable ring tones for mobile phones.

Class 41:

Entertainment activities, namely musical performances;

cultural activities, namely musical performances;

artist performances, namely musical performances;
concerts

Relevant legislation

44. 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.’

45. I also note section 5A of the Act:

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

Relevant case law

46. 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.

Comparison of goods and services

47. The goods and services to be compared are set out at [43] and Annex 1.

48. Section 60A of the Act provides:

(1) '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.'

49. I note the case of *Gérard Meric v Office for Harmonisation in the Internal Market*,²⁷ in which the GC held that:

²⁷ 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’.

50. The CJEU in *Canon*, Case C-39/97, stipulates that all relevant factors relating to the parties’ goods and services must be taken into account:

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

51. Goods or services will be found to be in a competitive relationship only where one is substitutable for the other.²⁸ In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC described ‘complementary’ in the following terms: “[...] 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”.²⁹ 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.

52. Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281,³⁰ identified the following factors for assessing similarity of the respective goods and services:

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

²⁸ *Lidl Stiftung & Co KG v EUIPO*, Case T-549/14.

²⁹ Paragraph 82.

³⁰ *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.

- (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.

53. Goods (or services) may be grouped together for the purposes of assessment, as Geoffrey Hobbs Q. C. (as he then was), sitting as the Appointed Person, said in *Separate Trade Mark* BL O-399-10:

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

54. Case law establishes that ‘... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise’ but ‘Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.’

55. Although the Applicant stated in its Defence and Counterstatement that it accepted that there was some overlap between the parties’ specifications, it has not set out the extent of such overlap. Furthermore, the Applicant’s admission was based on

the Opponent's registered specification. The Applicant has filed nothing further to its Counterstatement. For these reasons, the Applicant's admission cannot be treated as a concession that all contested terms bear some similarity to those of the Opponent. It is therefore necessary to conduct a full comparison of the goods and services based on the fair specification.

Class 9

56. I have found a number of the contested goods to be clearly identical to those of the Opponent, based upon the principle in *Meric*. I set out those points of identity in the following table:

Opponent's terms:	Contested terms:
<i>Audio recordings of music, <u>not including CDs or tapes</u></i>	<i>Audio recordings; Recorded media</i>
<i>video <u>recordings of music, none in the form of physical media</u> [...]</i>	<i>Downloadable video recordings; Video recordings; Downloadable videos; Pre-recorded videos; Media content; Audiovisual recordings.</i>

57. I will compare the remaining opposed goods according to the usual 'Treat' factors.

Contested goods: *Podcasts; Downloadable podcasts; Videocasts; Downloadable videocasts*

58. A 'podcast' is an audio or video programme, usually consisting of episodes, which can be downloaded from/streamed over the internet to listen to and/or view on demand. I understand 'videocasts' to be a type of podcast in video format as opposed to just audio. I compare these terms to the Opponent's *downloadable*

music files. Both parties' goods will share a purpose to the broad extent that their purpose is to entertain the listener/viewer; albeit the podcast/videocast goods will often have an informative aspect that is not ordinarily present in musical recordings. Users will overlap, albeit to the rather unremarkable extent that individuals who listen to or watch podcasts/videocasts might also listen to music that is downloaded from the internet. Trade channels will overlap in many cases. As to the natures of the competing goods, musical content is qualitatively different to the content of podcasts/videocasts; i.e. soundscapes (Opponent) versus narration, reportage or drama (Applicant). Whilst I acknowledge that one might deliberate over whether to listen to, say, an episode from a podcast documentary series or a musical track or orchestral movement, given the different types of listening experience, I do not consider the goods to be commercially realistic substitutes for one another. I do not find a complementary relationship, either. Despite overlapping trade channels, neither good is useful nor important to the other. Methods of use will converge to the extent that both goods will be downloaded from the internet on demand, although podcasts/videocasts will more often be listened to sequentially (i.e. from one episode to the next) whereas music, particularly popular music tracks, will not necessarily be consumed in this way. All things considered, I do not consider there to be an appreciable level of similarity between the goods. In case I am wrong about that, any similarity will be no more than very low.

Contested goods: *Audio tapes; Pre-recorded audio tapes; Digital audio tapes; Audio digital tapes; Sound recording tapes*

59. I compare the contested goods to the Opponent's *downloadable music files*. To the extent that the content recorded on the contested goods is music, the parties' goods will overlap in purpose. Given the difference in format (i.e. physical tapes versus electronic/digital files), their methods of use will differ. Users will overlap. I understand that music files are typically provided via music streaming platforms/websites; and that such outlets do not typically provide physical tapes. I consider the goods to be in a competitive relationship: a consumer might deliberate over whether to purchase music on a physical tape or whether to download it instead. There is no complementarity between the goods; neither being necessary

nor important for the other. The natures of the goods are very different; one being physical tapes whilst the other is a non-physical entity. All things considered, I find a low to medium level of similarity between the parties' goods.

Contested goods: *Pre-recorded video tapes; Video tapes*

60. I compare the contested goods to the Opponent's *downloadable video files of music*. For reasons analogous to those set out above at [59], I find a low to medium level of similarity between the parties' goods.

Contested goods: *Pre-recorded audio tapes featuring games; Prerecorded non-musical audio tapes; audio books*

61. I compare the contested goods to the Opponent's *downloadable music files*. The goods will differ in purpose by virtue of being different types of content which give different experiences to the user. The nature of the respective goods and their methods of use will also differ given their different formats: physical tapes versus electronic/digital files. Users will overlap to the unremarkable extent that many people listen to music downloads, some of whom may also listen to games, audio books and other non-musical recordings. To my mind, trade channel overlap is unlikely. I find the parties' offerings to be neither competitive nor complementary. All things considered, I can find no appreciable level of similarity between the parties' goods. I do not consider that comparison with any other of the Opponent's goods or services would place the Opponent in any better position.

Contested goods: *Video tapes with recorded animated cartoons; Pre-recorded video tapes featuring games*

62. I compare the contested goods to the Opponent's *downloadable video files of music*. For reasons analogous to those set out above at [61], I am unable to find similarity between the parties' goods.

Contested goods: *Digital recording media; Digital data recording media*

63. It is my understanding that 'digital/digital data recording media' refer to the digital storage spaces that hold recorded content. Examples include, inter alia: hard drives, removable storage drives and cloud-based storage. Bearing in mind the respective purposes, users, trade channels, natures and methods of use of the parties' goods and services, as well as the matters of competition and complementarity, I am unable to find any appreciable level of similarity between the contested terms and any of the Opponent's specification. Whilst there will be user overlap (and, perhaps, some trade channel overlap), these factors, without more, are insufficient to support a finding of similarity. I do not consider that comparison with any other of the Opponent's goods or services would place the Opponent in any better position.

Class 38

64. Before I proceed to compare the contested terms under this class, it is helpful to note that the class heading for services belonging to class 38 of the Nice classification system ('Nice System') is 'Telecommunications Services'. The Explanatory Note states that that '[c]lass 38 includes mainly services that allow at least one party to communicate with another, as well as services for the broadcasting and transmission of data'.³¹ The list of examples of services included in this class includes, inter alia:³²

- transmission of digital files and electronic mail;
- providing user access to global computer networks;
- radio and television broadcasting;
- and
- video-on-demand transmission.

65. The Nice System expressly states that Class 38 does not include 'content or subject matter that may be contained in the communication activity, for example, downloadable image files' (which are proper to class 9). An example of something

³¹ Explanatory Note regarding Class 38 of the Nice System (online).

³² As above.

that is not included is 'services conducted using telecommunications connections, for example, online retail services for downloadable digital music', which is proper to class 35.

66. It is clear from the Nice System guidance that the acts of service that are included in Class 38 are the acts of, inter alia, transmitting, broadcasting and providing the channels for content being brought to its audiences. In other words, class 38 services are concerned with the 'mechanics' of bringing information/content to consumers, rather than the creation of the content itself.

Contested services: *Podcasting; Transmission of podcasts; Videocasting; Podcasting services; Transmission of videocasts*

67. The core acts of service under the above terms are the acts that enable the transmission of podcasts/videocasts to their audiences. For example, a provider of these services might provide the platform and infrastructure through which the podcast/videocast material is transmitted to an audience. To my mind, such services would include enabling functionalities such as the availability of podcasts/videocasts 'on demand', for example. Broadly speaking, the Opponent's goods and services comprise musical content, in various formats, and musical performances. Bearing in mind the purposes, users, methods of use, trade channels and natures of the parties' offerings, as well as the matters of competition and complementarity, I am unable to find any appreciable level of similarity between the parties' goods and services. Any user overlap will simply be down to the fact that many members of the general public listen to music in one format or another, of whom many may also happen to listen/watch podcasts/videocasts. I can find no similarity between the parties' goods and services.

Contested services: *Radio program broadcasting; Radio programme broadcasting; Broadcast of radio programmes; Radio broadcasting; Radio and television program broadcasting; Radio and television programme broadcasting; Interactive television and radio broadcasting; Radio and television broadcasting; Television and radio broadcasting; Subscription television broadcasting.*

68. The Oxford English Dictionary defines broadcasting as:³³

‘the action of transmitting or disseminating audio or visual material (esp. radio or television programmes) by radio, television, the internet etc., esp. as a mass communication to a large audience.’

69. In other words, broadcasting involves the scheduled transmission of content to all listeners/viewers who happen to be ‘tuned in’ or ‘logged on’ at the time of transmission.

70. I consider the Opponent’s class 9 term *video recordings of music, none in the form of physical media, and/or audio recordings of music, not including tapes or CDs*, to be the most appropriate comparator for the above contested services. The parties’ offerings will have distinct core purposes. The Opponent’s goods consist of audio and/or visual musical content, which is typically ‘consumed’ as entertainment. The purpose of the Applicant’s acts of service, on the other hand, is to transmit the audio/visual content (which will encompass musical recordings) to an audience. I nevertheless acknowledge that there is some overlap in purpose to the broad extent that the musical content being disseminated through radio/television broadcasting channels is intended to entertain. Users will overlap to the extent that the majority of the general public listen to the radio and/or watch television. I consider trade channel overlap unlikely. Although programmes/content broadcast on the radio and television will often feature music, I do not consider the parties’ offerings to be in a competitive relationship. Musical recordings, as class 9 goods, will be selected and downloaded because the consumer has selected a particular artist or track/piece (or video thereof) to listen to or watch. To my mind, radio or television broadcasting services would not typically provide a realistic alternative. For example, a consumer seeking a particular downloadable musical piece by Mozart, or track by The Beatles, would not engage a radio or television broadcasting service to obtain it. Radio and television broadcasting typically entails putting on a changing schedule of programmes rather than providing a compendium of musical recordings. The parties’ respective goods and acts of

³³ Oxford English Dictionary (online version).

service are different in nature. I do not find the goods/services to be complementary. An average consumer would not ordinarily presume the same undertaking to be responsible for creating a musical recording as well as providing a radio and television broadcasting service. All things considered, I find a low level of similarity between the parties' terms.

Contested services: *Streaming audio and video material on the Internet; Video, audio [...] streaming services Streaming of audio material on the internet; Streaming of video material on the internet; Transmission of audio and video content via satellite.*

71. I compare the contested services to the Opponent's *video recordings of music, none in the form of physical media, and/or audio recordings of music, not including tapes or CDs*. It is my understanding that 'streaming' involves the audio or visual content (e.g. from a sound or video file) being sent over the internet to the individual user. (I find 'streaming' to be a sub-category of 'transmission of'). Users and trade channels will inevitably overlap given that the Opponent's audio/visual musical recordings will be available via streaming platforms. The goods and services will differ in nature given that the recordings are goods whereas the Applicant's offerings entail acts of service. I find the goods and services to be in a competitive relationship: an average consumer might choose between purchasing an individual download of a piece of music or instead listening to it via a streaming platform. I do not consider the goods and services to be complementary given that the average consumer would not presume the creator of the musical recording (e.g. the artist) to also be the provider of the streaming services. All things considered, I find a medium level of similarity between the goods and services.

Contested services: *television streaming services*

72. My view is that 'television streaming services' entails the provision of television programmes 'on-demand', i.e. as audio-visual files that can be accessed by the user whenever they so choose. 'On-demand' television programmes are typically made available after the programme in question has already been delivered by way of a scheduled broadcast (although I appreciate that this is not always the

case). I compare the contested services to the Opponent's *downloadable video files of music*. Users will inevitably overlap given that many general consumers watch 'catch-up' or 'on-demand' television programmes, of whom many will likely also happen to listen to music downloads. I consider trade channel overlap to be unlikely for the same reasons provided above at [70]. Methods of use will be similar given that, in both cases, the musical content will be viewed as a streamed file. For the reasons provided at [70], I find the parties' goods and services to be neither competitive nor complementary. I find a fairly low level of similarity between the goods and services.

Contested services: *Audio broadcasting; Broadcasting of video and audio programming over the Internet; Video broadcasting; Audio and video broadcasting services provided via the Internet; Digital audio broadcasting; Audio, video and multimedia broadcasting via the Internet and other communications networks*

73. I refer back to the definition of 'broadcasting' set out above at [68] – [69]. I compare the contested services to the Opponent's *video recordings of music, none in the form of physical media, and/or audio recordings of music, not including tapes or CDs*. For reasons analogous to those provided above at [70], I find a low level of similarity between the parties' terms.

Class 41

74. I have found a number of the contested services to be identical to those of the Opponent, based on the principle in *Meric*. I set out those points of identity in the following table:

Opponent's terms:	Contested terms:
<i>Entertainment activities, namely musical performances</i>	<i>Provision of live shows; Live entertainment; Entertainment; Entertainment services; Live entertainment services;</i>

	<i>Provision of live entertainment</i>
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75. I will consider the remaining opposed terms based on the usual 'Treat' factors.

Contested services: Audio recording studio services; Providing audio or video studios; Operation of video and audio equipment for the production of radio and television programs; Providing audio or video studio services; Recording, film, video and television studio services; Studio services for the recording of videos; Recording studio services for videos; Recording studios; Sound recording studios; Recording studio services; Provision of video recording studio facilities; Rental of tape recording equipment; Rental of recording studios; Provision of recording studio facilities; Video taping

76. Broadly speaking, the above contested services concern the 'mechanics' of making audio/visual recordings, as opposed to the creation/performance of the content of which they comprise. The purposes, methods of use and trade channels for these services differ greatly from those of any good/service within the Opponent's specification. The Opponent's goods and services will be consumed by the general public, whereas users of the above services will be mostly professionals in the arts. The above services are neither in competition with, nor complementary to, the Opponent's goods/services. All things considered, I can find no similarity between the parties' offerings.

Contested services: Audio and video recording services; Production of video and audio recordings; Audio, film, video and television recording services; Production of audio recordings; Audio and video production, and photography; Production of video recordings; Audio recording services; Audio production; Production of audio master recordings; Video recording services; Production of sound and video recordings; Audio recording and production services; Audio, video and multimedia production, and photography; Sound recording services; Recording services; Production of sound recordings; Production of audio-visual recordings; Sound recording [...] services; Production of video and/or sound recordings; Production of audiovisual recordings; Editing of audio recordings; Audio and video editing services; Editing of video recordings; Editing or recording of sounds and images

77. The contested services listed above comprise the acts of recording, production and editing of audio-visual content. For reasons analogous to those provided above at [76], I can find no similarity between the parties' goods and services.

Contested services: *Publication of audio books; Publishing of books, magazines; Publication of electronic books and journals online; Publication of books; Online publication of electronic newspapers.*

78. At the core of the above 'publication' (or publishing) services is the act of making written content or recordings of the spoken word available to the general public. Bearing in mind the purposes, users, methods of use, trade channels and natures of the parties' offerings, as well as the matters of competition and complementarity, I am unable to find any appreciable level of similarity between the parties' goods and services. Users will overlap to the unremarkable extent that many of the ordinary public read or listen to recordings of the spoken word, and many also 'consume' music, whether pre-recorded or live performances.

Contested services: *Creation [writing] of podcasts; Creation [writing] of educational content for podcasts*

79. The contested services concern the act of writing material for podcasts. To my mind, these services serve a very different purpose to those of the Opponent's goods and services. Bearing in mind the other relevant factors (users, methods of use, trade channels and natures of the parties' offerings, as well as the matters of competition and complementarity) I am unable to find any appreciable level of similarity between the parties' goods and services.

Contested services: *News programme services for radio or television; News syndication for the broadcasting industry.*

80. The above contested services are aimed at the sector of the broadcasting industry concerned with disseminating news. Bearing in mind the purposes, users, methods of use, trade channels and natures of the parties' offerings, as well as the matters

of competition and complementarity, I am unable to find any appreciable level of similarity between the parties' goods and services.

Contested services: *Entertainment services for sharing audio and video recordings; Entertainment services for matching users with audio and video recordings; Provision of audio and visual media via communications networks; On-line entertainment; Audio entertainment services; Video entertainment services*

81. The contested services listed above, insofar as they encompass musical content, would be provided by, inter alia, online 'streaming' platforms, a well-known example being 'Spotify' (which is featured in the Opponent's evidence). I compare these terms to the Opponent's *video recordings of music, none in the form of physical media, and/or audio recordings of music, not including tapes or CDs*. Users and trade channels will clearly overlap given that downloadable musical recordings are listened to/viewed via streaming platforms. The parties' offerings will overlap to the broad extent that both are intended to entertain the user with musical content. However, their specific purposes will differ. The Applicant's services entail the provision of an array of recordings to choose to download, listen to/view and/ or share with other users. The Opponent's recordings are mere goods and evidently do not have the functionalities that the contested services offer. I find that there will be competition between the parties' offerings in instances where a consumer might choose between downloading a single musical recording on to a device, or, instead, using a streaming platform which offers access to an array of recordings. I do not, however, find complementarity; the average consumer would unlikely presume the artistic creator of the recorded music to be commercially responsible for the online channel/streaming platform through which it is made available. All things considered, I find a low to medium level of similarity between the parties' goods and services.

Contested services: *Provision of entertainment via podcast; Provision of entertainment via podcasts*

82. Broadly speaking, the Opponent's goods and services comprise musical recordings or performances. To my mind, musical recordings are not typical

content for podcasts. Whilst both parties' offerings are entertaining, they provide different listening/viewing experiences. Users will overlap to the unremarkable extent that much of the general public listens to music, many of whom will also happen to enjoy podcasts. Trade channels may overlap somewhat given that streaming platforms might provide music downloads as well as podcasts. I do not find the parties' goods and services to be competitive or complementary. All things considered, I do not find any appreciable level of similarity between the parties' offerings.

Contested services: *Production of podcasts; Production of video tapes and video discs*

83. For reasons analogous to those provided above at [76], I can find no similarity between the parties' goods and services.

Contested services: *Rental of sound and video recordings; Rental of video recordings; video entertainment services; Rental of audio recordings*

84. I compare the above contested services to the Opponent's class 9 goods *downloadable music files*. It is my understanding that the rental of audio and video recordings ordinarily involves hard copies of video or audio cassettes or discs. The parties' goods and services will overlap in purpose to the extent that both ultimately provide musical entertainment. However, the Applicant's services typically entail the provision of an array of recordings to choose from; such provision being inapplicable to a recording as a mere good. Users will overlap. Trade channels will be separate given that downloadable music is typically provided by a streaming platform. The goods and services will clearly differ in terms of their physical natures and methods of use given that the Opponent's offering is a good whereas the Applicant is providing acts of service. I consider the respective offerings to be in a competitive relationship; one might deliberate over whether to purchase a downloadable album over whether to rent a hard copy of it. However, I do not find complementarity. All things considered, I find a medium level of similarity between the parties' goods and services.

Contested services: *Presentation of live comedy shows; Presentation of live comedy performances*

85. I compare the above contested services to the Opponent's *Entertainment activities, namely musical performances*. Whilst both services ultimately involve the provision of entertainment, the core acts of service are different, and they involve different types of entertainment: live musical performance versus presentation of live comedy. I consider the presentation of live shows to be different to the performances in a live show; the former is provided by a promoter or events organiser whereas the latter is provided by the artists performing on the stage. It is my understanding that entertainment promoters/organisers provide their services to music venues or performers themselves (or their managers/agents). In essence, the contested services entail the 'mechanics' of putting on live comedy performances, e.g. booking venues and organising ticketing etc. The Opponent's act of service is the performing of live music before an audience. Users and trade channels will be separate. The parties' services are neither competitive nor complementary. In the light of the foregoing, I am unable to find any similarity between the parties' services.

Contested services: *Rental of entertainment halls*

86. Bearing in mind the purposes, users, methods of use, trade channels and natures of the parties' offerings, as well as the matters of competition and complementarity, I am unable to find similarity between the parties' goods and services.

Contested services: *Presentation of radio programmes*

87. My view is that the presentation of radio programmes involves the communication of the content to the listener, an example being a newsreader. Bearing in mind the purposes, users, methods of use, trade channels and natures of the parties' offerings, as well as the matters of competition and complementarity, I am unable to find similarity between the parties' goods and services.

Contested services: *Production of live shows; Entertainment services for producing live shows; Live show production services; Production of live performances; Production of shows; Production of live entertainment events; Production of live entertainment; Production of live entertainment features; Production of entertainment shows featuring singers; Live entertainment production services; Organisation of live shows; Organisation of live performances; Arranging of entertainment shows; Planning of shows; Organising of entertainment; Arranging of visual entertainment; Organisation of entertainment services; Entertainment services in the nature of organizing social entertainment events; Organisation of entertainment and cultural events*

88. The contested terms listed above entail the ‘mechanics’ of making live shows happen. This is distinct from the acts of performance that form the content of the live shows. For similar reasons to those provided at [85], I do not find the parties’ offerings to be similar.

Contested services: *Performances (Presentation of live -); Live performances (Presentation of -); Presentation of live performances; Presentation of live entertainment performances; Presentation of live entertainment events;*

89. The above contested terms are concerned with the presentation of live events, including musical performances. My comments at [85] on the distinction between the presentation of live events as opposed to performance apply here. For reasons similar to those provided at [85], I do not find any similarity between the parties’ goods and services.

Contested services: *Provision of entertainment services through the media of audio tapes*

90. I compare the above contested services to the Opponent’s class 9 goods *downloadable music files*. For reasons analogous to those provided at [84], I find a medium level of similarity between the parties’ goods and services.

Contested services: *Live demonstrations for entertainment*

91. 'Live demonstrations' will cover an array of activities considered to create an entertaining spectacle; although they would not ordinarily be understood to encompass music. Examples of spectacles covered by the contested term might include, inter alia: circus stunts; live science events; live painting, craft or cooking demonstrations. I compare the contested services to the Opponent's *Entertainment activities, namely musical performances*. At the core of each party's service is the giving of a performance, albeit different types of activity are being exhibited, creating different experiences for the audience. Users will overlap to the unremarkable extent that many people who attend musical performances also happen to attend live demonstrations. Whilst, in real life, one might deliberate between choosing one form of entertainment over another, I do not consider live musical performances and live demonstrations (which do not typically include musical performances) to be commercially realistic alternatives. I do not find complementarity, either; neither service being important nor necessary for the other. I do not find any appreciable level of similarity between the parties' services.

92. Some similarity between the parties' goods and services is essential in order to find a likelihood of confusion between the parties' marks under section 5(2)(b) grounds. In the case of *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated that:

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

93. For the goods and services that I have found to be dissimilar, the opposition, therefore, fails at this point. For ease of reference, I have found no similarity for the following:

Class 9:

Digital recording media; Digital data recording media; Pre-recorded audio tapes featuring games; Prerecorded non-musical audio tapes; audio books; Video tapes with recorded animated cartoons; Pre-recorded video tapes featuring games

Class 38:

Podcasting; Transmission of podcasts; Videocasting; Podcasting services; Transmission of videocasts

Class 41:

Audio recording studio services; Providing audio or video studios; Operation of video and audio equipment for the production of radio and television programs; Providing audio or video studio services; Recording, film, video and television studio services; Studio services for the recording of videos; Recording studio services for videos; Recording studios; Sound recording studios; Recording studio services; Provision of video recording studio facilities; Rental of tape recording equipment; Rental of recording studios; Provision of recording studio facilities; Video taping; Audio and video recording services; Production of video and audio recordings; Audio, film, video and television recording services; Production of audio recordings; Audio and video production, and photography; Production of video recordings; Audio recording services; Audio production; Production of audio master recordings; Video recording services; Production of sound and video recordings; Audio recording and production services; Audio, video and multimedia production, and photography; Sound recording services; Recording services; Production of sound recordings; Production of audio-visual recordings; Sound recording [...] services; Production of video and/or sound recordings; Production of audiovisual recordings; Editing of audio recordings; Audio and video editing services; Editing of video recordings; Editing or recording of sounds and images; Publication of audio books; Publishing of books, magazines; Publication of electronic books and journals online; Publication of books; Online publication of electronic newspapers; Creation [writing] of podcasts; Creation [writing] of educational content for podcasts; News

programme services for radio or television; News syndication for the broadcasting industry; Provision of entertainment via podcast; Provision of entertainment via podcasts; Production of podcasts; Production of video tapes and video discs; Presentation of live comedy shows; Presentation of live comedy performances; Rental of entertainment halls; Presentation of radio programmes; Production of live shows; Entertainment services for producing live shows; Live show production services; Production of live performances; Production of shows; Production of live entertainment events; Production of live entertainment; Production of live entertainment features; Production of entertainment shows featuring singers; Live entertainment production services; Organisation of live shows; Organisation of live performances; Arranging of entertainment shows; Planning of shows; Organising of entertainment; Arranging of visual entertainment; Organisation of entertainment services; Entertainment services in the nature of organizing social entertainment events; Organisation of entertainment and cultural events; Live demonstrations for entertainment; Performances (Presentation of live -); Live performances (Presentation of -); Presentation of live performances; Presentation of live entertainment performances; Presentation of live entertainment events;

94. The opposition remains live for the following:

Class 9:

Audio recordings; Recorded media; Downloadable video recordings; Video recordings; Downloadable videos; Pre-recorded videos; Media content; Audiovisual recordings; Pre-recorded video tapes; Video tapes; Podcasts; Downloadable podcasts; Videocasts; Downloadable videocasts; Audio tapes; Pre-recorded audio tapes; Digital audio tapes; Audio digital tapes; Sound recording tapes.

Class 38:

Radio program broadcasting; Radio programme broadcasting; Broadcast of radio programmes; Radio broadcasting; Radio and television program

broadcasting; Radio and television programme broadcasting; Interactive television and radio broadcasting; Radio and television broadcasting; Television and radio broadcasting; Subscription television broadcasting; Streaming audio and video material on the Internet; Video, audio [...] streaming services Streaming of audio material on the internet; Streaming of video material on the internet; Audio broadcasting; Broadcasting of video and audio programming over the Internet; Video broadcasting; Audio and video broadcasting services provided via the Internet; Digital audio broadcasting; Audio, video and multimedia broadcasting via the Internet and other communications networks; Transmission of audio and video content via satellite; television streaming services.

Class 41:

Provision of live shows; Live entertainment; Entertainment; Entertainment services; Live entertainment services; Provision of live entertainment; Entertainment services for sharing audio and video recordings; Entertainment services for matching users with audio and video recordings; Provision of audio and visual media via communications networks; On-line entertainment; Audio entertainment services; Video entertainment services; Rental of sound and video recordings; Rental of video recordings; video entertainment services; Rental of audio recordings; Provision of entertainment services through the media of audio tapes

Average consumer and the purchasing act

95. 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:

(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.

96. For all of the goods and services that remain in issue, the average consumer will be the general public. The cost and frequency of the purchases will vary depending on the good purchased or service engaged.

Class 9

97. I consider musical recordings, as goods, to be 'everyday' purchases at reasonably low price-points. For example, a purchase of a musical album on vinyl might range

from £15 or £20 up to several tens of pounds and beyond. On the other hand, a musical recording as a download will be considerably cheaper; in some cases, free. To my mind, these goods will be sought specifically because the consumer has a particular artist in mind whose music they wish to listen to. For that reason, in most cases, a consumer will be moved to make a purchase because they have heard of the artist and/or their music already and wish to purchase audio/visual recordings of it for their enjoyment. My view is that, for the goods concerned, the aural aspect of the purchasing process will be particularly important in many cases. For example, where the listener's first exposure to the goods is when they have heard the recordings on the radio or in pubs, restaurants and other establishments that tend to have music playing. For many other cases, the visual aspect will be important; e.g. where music videos are encountered online. Because the goods concerned are frequent fairly 'low stakes' purchases, I consider that a medium level of attention would be paid.

Class 38

98. As to the class 38 services, the decision to tune in to a particular radio station or television programme will, for many average consumers, be a daily occurrence without much consideration. On the other hand, the decision to purchase a subscription service will usually be more carefully considered. Consumers will likely encounter the services on radio, television, in printed matter and online. For the 'radio' services, the aural aspect of the purchasing process will clearly be relevant; with radio programmes and channels likely being advertised through radio channels themselves. Where the services are television-related or internet-based, then the purchasing process will more often be visual; with such services most likely to be advertised on television and online. I find that the relevant services will likely be engaged with a level of attention between low and medium.

Class 41

99. For the services that entail live musical performances, the price-points will vary. At the lower end of the scale, a music gig in a pub or club might cost between a few pounds up to tens of pounds. At the other end of the scale, an evening opera

performance might cost anything up to two or three hundred pounds. In my view, the factors driving the purchasing decision will be narrow and specific, i.e. a desire to see the artist or a particular piece of music performed because the consumer admires the artist/composer and wishes to hear a live performance by them. Other factors will include, inter alia: the location and venue where the performance is to be held; the types of seating available. I find that the level of attention paid during the purchasing act will be at least medium, but not high.

Comparison of the marks

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

101. The marks to be compared are:

Earlier mark: ASTRID S	Contested Mark: ASTRID
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Overall impression of the marks

102. Both marks are word marks.³⁴

103. The earlier mark comprises the word element 'ASTRID' followed by the letter 'S'. I consider that the average consumer would see the mark in its entirety and understand 'ASTRID' to be a female name. My view is that the presence of the 'S' character would likely be perceived as an initial for a surname. To my mind, the immediate impression conveyed by 'ASTRID S' is that it is a reference to a person named Astrid whose surname begins with 'S'.

104. The Contested Mark consists of the sole word element 'ASTRID'. I find that the word will be seen as the female name. The overall impression resides in the single word of which the mark is composed.

Visual comparison

105. The Contested Mark is subsumed within, and forms the first part of, the earlier mark. The only visual difference between the marks is the presence of the letter 'S' in the earlier mark. I find the marks to have a high level of visual similarity.

Aural comparison

106. The element 'ASTRID' will be articulated in the same way in each mark, i.e. 'ASS-TRID'. The only point of aural distinction derives from the presence of the 'S' in the earlier mark, which will be articulated as the initial, i.e. 'ESS'. To my mind, the average consumer will likely articulate the earlier mark in full, i.e. 'ASS-TRID ESS'. In this instance, I find that the difference in the lengths of the marks (three syllables versus two syllables) will be readily perceived aurally. Furthermore, the presence of the 'S' in the earlier mark would move the average consumer to place the emphasis on the 'ESS' sound, i.e. ASS-TRID ESS. In the Contested Mark, on the other hand, the emphasis will be on the first syllable, i.e. ASS-TRID.

107. All things considered, I find the marks to have a medium to high level of aural similarity.

³⁴ 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].

Conceptual comparison

108. The Opponent has submitted that³⁵ '[c]onceptually, the marks are identical or at least highly similar, as consumers will understand "ASTRID" to mean a feminine name or "STAR" in the Greek language'.

109. In the absence of any evidence to demonstrate the Greek meaning contended for by the Opponent, my view is that 'ASTRID' will most likely be perceived as a female forename. I must now decide whether the presence of the 'S' in the earlier mark give rise to any conceptual difference between the marks. In this connection, I note the decision of *GEORGINE*,³⁶ in which Mr Philip Harris sitting as the Appointed Person, made the following points:

- The mere fact that the marks in issue can be grouped under a common generic term of 'names' does not automatically lead to conceptual similarity;³⁷
- It is also the case that the mere fact that names differ structurally, or identify different individuals, does not necessarily preclude conceptual similarity;³⁸
- Even though, at a general level, different names denote different people, at another level, they can have some conceptual similarity by virtue of deriving from the same root/concept/theme.³⁹

110. I refer back to my comments on the overall impressions of the marks. I found that the presence of the 'S' in the earlier mark would likely be understood as an initial for the surname of a person named 'ASTRID'. Bearing in mind the above dicta from Mr Harris, my view is that the presence of the initial 'S' does not give rise to any appreciable conceptual difference between the marks; both marks would be seen as denoting the name of a person named Astrid, and the presence

³⁵ Opponent's written submissions in lieu of a hearing, [28].

³⁶ BLO/1212/23.

³⁷ As above, [31].

³⁸ BLO/1212/23, [32].

³⁹ As above, [34].

of the 'S' does not shed any light on whether the respective marks refer to two separate persons or otherwise. I find the marks to be more-or-less conceptually identical. In case I am wrong about that, then the level of conceptual similarity is very high.

Distinctive character of the earlier mark

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

'22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases 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).'

112. Registered trade marks possess varying degrees of inherent distinctive character from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, to those with high inherent distinctive

character, such as invented words which have no allusive qualities. The distinctiveness of the mark can be enhanced by the use that has been made of it.

113. The Opponent has submitted that the earlier mark is inherently distinctive to a normal or high degree.⁴⁰ In my view, the mark neither describes nor alludes to the relevant goods and services. I have found that the mark will be perceived as the name of a person with the forename 'Astrid' and a surname with the initial 'S'. I find the mark to be inherently distinctive to a normal degree.

114. I now consider whether the evidence demonstrates that the earlier mark enjoys an enhanced level of distinctiveness by virtue of the use that has been made of it.

115. Whilst the evidence clearly demonstrates a level of awareness, in the UK, of the musical artist 'Astrid S', my view is that it is insufficient to support a finding of enhanced distinctiveness. Whilst the numbers of followers/viewers and 'likes' on various music platforms are, on the face of it, not insignificant, there is nothing in the evidence to enable me to form a view on the market share held by the mark. The figures for sales revenue and marketing expenditure are very modest. The UK market for musical recordings must be presumed to be enormous; and no material has been provided to indicate the Opponent's position within it. I am unable to find that the distinctiveness of the earlier mark has been elevated from its inherent position of having a 'normal' level of distinctiveness.

Likelihood of confusion

116. 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 By Back Beat Inc*⁴¹. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*⁴², the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the

⁴⁰ Opponent's written submissions in lieu of a hearing, [19].

⁴¹ Case BL O/375/10 at [16].

⁴² *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

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.

117. 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 [46]. 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.

118. I will address direct confusion first.

119. I have made the following findings:

- I have found a number of goods and services to have a level of similarity ranging from 'no more than very low' to 'identical'.
- Visually speaking, I have found the marks to be highly similar;
- I have found the marks to have a medium to high level of aural similarity;
- Conceptually speaking, I have found the marks to be more-or-less identical (and certainly at least highly similar);
- The earlier mark is inherently distinctive to a normal degree;
- I have found both the visual and aural aspects of the purchasing process to be more-or-less equally important in the context of the goods and services at stake;
- The average consumer will be the general public;
- The attention level of the average consumer will range from low to medium.

120. For direct confusion to occur, the average consumer would need to overlook the presence of the 'S' in the earlier mark. Following my comments on the overall impression of the mark, the 'S' cannot be treated as a negligible component of the mark. I have found the aural aspect of the purchasing process to be particularly important in the context of the 'audio' goods and services; and I can conceive of no reason why the average consumer would neglect to articulate the 'S' in the earlier mark. I have borne in mind the case of *dm-drogerie markt GmbH & Co. KG v OHIM*⁴³ 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'.⁴⁴ The aforementioned case concerned word marks of five or six characters in length. I acknowledge that, in the instant case, the marks are six and seven characters; and that the visual difference is arguably not quite as stark as was the case in *dm-drogerie*. However, aurally speaking, the extra syllable in the earlier mark will be impactful. It is my view that, despite the identity and similarity of the goods/services, 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. I find this to be the case even though the marks are more-or-less conceptually identical, and even where only a low level of attention is paid during the purchasing act. I have borne in mind the interdependency principle and considered whether the identity of some of the goods/services succeeds in muting the aural and visual differences that I have identified between the marks. I do not think that it does. Whilst the presence of the 'S' represents a visual difference of just one character, I can find no reason for the average consumer to either overlook it or neglect to articulate it. I find that there is no likelihood of direct confusion. However, for the reasons that follow, I do find there to be a likelihood of indirect confusion

121. 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]:

⁴³ Case T-304/10.

⁴⁴ As above, [42].

‘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’.

122. 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’.⁴⁵

123. I also note that, in *L.A. Sugar Limited v Back Beat Inc*⁴⁶ 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.).

(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)’.

124. My view is that the instant case does not readily align with any of Mr Purvis’ three categories. However, it is important to bear in mind that these categories are not intended to be exhaustive. I have found the presence of the ‘S’ in the earlier

⁴⁵ *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207.

⁴⁶ Case BL O/375/10

mark to make little, if any, appreciable conceptual difference between the marks. It is my view that the average consumer will readily notice the visual and aural differences between the marks, by virtue of the 'S' in the earlier mark, but perceive them as indicative of alternative versions of the same badge of origin. For example, the marks might be seen merely as earlier and later versions by way of a re-brand; one in which the undertaking is denoted by 'Astrid' whereas another version includes the initial of 'Astrid's' surname. I find that there is a likelihood of indirect confusion between the marks. However, I consider that this finding applies only to the contested goods/services whose similarity is at least low. I have found the following terms to be similar to the Opponent's goods to only a very low degree; and I consider 'podcast/videocast' content to be sufficiently removed from musical-related goods/services that they escape the penumbra of the likelihood of confusion:

Podcasts; Downloadable podcasts; Videocasts; Downloadable videocasts

125. The opposition has been partially successful. Subject to any successful appeal, the Contested Mark, UK00004221823:

i) May proceed to registration in respect of the following (as well as the unopposed goods and services, namely those in classes 16 and 35):

Class 9:

Digital recording media; Digital data recording media; Pre-recorded audio tapes featuring games; Prerecorded non-musical audio tapes; audio books; Video tapes with recorded animated cartoons; Pre-recorded video tapes featuring games; Podcasts; Downloadable podcasts; Videocasts; Downloadable videocasts.

Class 38:

Podcasting; Transmission of podcasts; Videocasting; Podcasting services; Transmission of videocasts.

Class 41:

Audio recording studio services; Providing audio or video studios; Operation of video and audio equipment for the production of radio and television programs; Providing audio or video studio services; Recording, film, video and television studio services; Studio services for the recording of videos; Recording studio services for videos; Recording studios; Sound recording studios; Recording studio services; Provision of video recording studio facilities; Rental of tape recording equipment; Rental of recording studios; Provision of recording studio facilities; Video taping; Audio and video recording services; Production of video and audio recordings; Audio, film, video and television recording services; Production of audio recordings; Audio and video production, and photography; Production of video recordings; Audio recording services; Audio production; Production of audio master recordings; Video recording services; Production of sound and video recordings; Audio recording and production services; Audio, video and multimedia production, and photography; Sound recording services; Recording services; Production of sound recordings; Production of audio-visual recordings; Sound recording [...] services; Production of video and/or sound recordings; Production of audiovisual recordings; Editing of audio recordings;–Audio and video editing services; Editing of video recordings; Editing or recording of sounds and images; Publication of audio books; Publishing of books, magazines; Publication of electronic books and journals online; Publication of books; Online publication of electronic newspapers; Creation [writing] of podcasts; Creation [writing] of educational content for podcasts; News programme services for radio or television; News syndication for the broadcasting industry; Provision of entertainment via podcast; Provision of entertainment via podcasts; Production of podcasts; Production of video tapes and video discs; Presentation of live comedy shows; Presentation of live comedy performances; Rental of entertainment halls; Presentation of radio programmes; Production of live shows; Entertainment services for producing live shows; Live show production services; Production of live performances; Production of shows; Production of live entertainment events; Production of live entertainment; Production of live entertainment features; Production of entertainment shows featuring singers; Live entertainment production services; Organisation of live shows; Organisation of live performances; Arranging of entertainment shows; Planning of shows; Organising of entertainment; Arranging of visual entertainment; Organisation of entertainment

services; Entertainment services in the nature of organizing social entertainment events; Organisation of entertainment and cultural events; Live demonstrations for entertainment; Performances (Presentation of live -); Live performances (Presentation of -); Presentation of live performances; Presentation of live entertainment performances; Presentation of live entertainment events.

And

ii) is refused registration for the following:

Class 9:

Audio recordings; Recorded media; Downloadable video recordings; Video recordings; Downloadable videos; Pre-recorded videos; Media content; Audiovisual recordings; Pre-recorded video tapes; Video tapes; Audio tapes; Pre-recorded audio tapes; Digital audio tapes; Audio digital tapes; Sound recording tapes.

Class 38:

Radio program broadcasting; Radio programme broadcasting; Broadcast of radio programmes; Radio broadcasting; Radio and television program broadcasting; Radio and television programme broadcasting; Interactive television and radio broadcasting; Radio and television broadcasting; Television and radio broadcasting; Subscription television broadcasting; Streaming audio and video material on the Internet; Video, audio [...] streaming services; Streaming of audio material on the internet; Streaming of video material on the internet; Audio broadcasting; Broadcasting of video and audio programming over the Internet; Video broadcasting; Audio and video broadcasting services provided via the Internet; Digital audio broadcasting; Audio, video and multimedia broadcasting via the Internet and other communications networks; Transmission of audio and video content via satellite; television streaming services.

Class 41:

Provision of live shows; Live entertainment; Entertainment; Entertainment services; Live entertainment services; Provision of live entertainment;

Entertainment services for sharing audio and video recordings; Entertainment services for matching users with audio and video recordings; Provision of audio and visual media via communications networks; On-line entertainment; Audio entertainment services; Video entertainment services; Rental of sound and video recordings; Rental of video recordings; video entertainment services; Rental of audio recordings; Provision of entertainment services through the media of audio tapes.

COSTS

126. Both parties have enjoyed a roughly even measure of success. Consequently, I make no order for costs.

Dated this 30th day of September 2026

N. R. Morris

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

Annex 1

Application UK00004221823: full specification of goods and services for which registration is sought, with the opposed terms marked in underline:

Class 9 <u>Podcasts; Downloadable podcasts; Videocasts; Downloadable videocasts; Downloadable video recordings; Pre-recorded audio tapes featuring games; Audio recordings; Audio books; Video recordings; Audio tapes; Pre-recorded audio tapes; Pre-recorded video tapes featuring games; Pre-recorded video tapes; Video tapes; Prerecorded non-musical audio tapes; Recorded video tapes; Digital audio tapes; Audio digital tapes; Video tapes with recorded animated cartoons; Downloadable videos; Pre-recorded videos; Media content; Digital recording media; Recorded media; Digital data recording media; Sound recording tapes; Audiovisual recordings.</u>
Class 16 Magazines; Computer magazines; Newspapers; Books.
Class 35 Media relations services; Advertising via electronic media and specifically the internet; Media buying services; Advertising; Advertising and marketing; Advertising and advertisement services; Advertising and marketing services; Marketing, advertising, and promotional services; Online advertising; Hire of advertising billboards; Advertising services; Distribution of advertising, marketing and promotional material; Digital advertising services; Advertising planning; Preparation of advertising campaigns; Arrangement of advertising; Online advertising services; Scriptwriting for advertising purposes; Direct market advertising; Post-production editing of advertising or commercials; Marketing; Production of advertising matter; Producing promotional videotapes, video discs, and audio visual recordings; Online retail store services in relation to clothing; Promotion of goods and services through sponsorship; Promotion of goods and services for others; Advertising particularly services for the promotion of goods.
Class 38

Podcasting; Transmission of podcasts; Videocasting; Podcasting services; Audio broadcasting; Streaming audio and video material on the Internet; Broadcasting of video and audio programming over the Internet; Video, audio and television streaming services; Transmission of videocasts; Video broadcasting; Radio program broadcasting; Radio programme broadcasting; Streaming of audio material on the internet; Broadcast of radio programmes; Radio broadcasting; Radio and television program broadcasting; Streaming of video material on the internet; Audio and video broadcasting services provided via the Internet; Radio and television programme broadcasting; Digital audio broadcasting; Interactive television and radio broadcasting; Audio, video and multimedia broadcasting via the Internet and other communications networks; Radio and television broadcasting; Television and radio broadcasting; Subscription television broadcasting; Transmission of audio and video content via satellite.

Class 41

Production of podcasts; Provision of entertainment via podcast; Creation [writing] of podcasts; Creation [writing] of educational content for podcasts; Provision of entertainment via podcasts; Production of video and audio recordings; Audio and video recording services; Publication of audio books; Entertainment services for sharing audio and video recordings; Presentation of radio programmes; Audio, film, video and television recording services; Video taping; News programme services for radio or television; Production of audio recordings; Presentation of live comedy shows; Audio recording and production; Audio recording studio services; Audio and video production, and photography; Production of video recordings; Providing audio or video studios; Audio recording services; News syndication for the broadcasting industry; Editing of audio recordings; Operation of video and audio equipment for the production of radio and television programs; Rental of audio recordings; Providing audio or video studio services; Audio production; Audio and video editing services; Recording, film, video and television studio services; Studio services for the recording of videos; Recording studio services for videos; Production of audio master recordings; Video recording services; Editing of video recordings; Production of sound and video recordings; Audio recording and production services; Audio, video and multimedia production, and photography; Entertainment services for matching

users with audio and video recordings; Production of video tapes and video discs;
Production of live shows; Organisation of live shows; Provision of live shows;
Entertainment services for producing live shows; Live show production services;
Live entertainment; Live demonstrations for entertainment; Performances
(Presentation of live -); Live performances (Presentation of -); Presentation of live
performances; Presentation of live comedy performances; Presentation of live
entertainment performances; Production of live performances; Organisation of
live performances; Presentation of live entertainment events; Production of
shows; Production of live entertainment events; Production of live entertainment;
Production of live entertainment features; Arranging of entertainment shows;
Planning of shows; Production of entertainment shows featuring singers;
Entertainment; Entertainment services; On-line entertainment; Live
entertainment services; Audio entertainment services; Video entertainment
services; Organising of entertainment; Live entertainment production services;
Provision of live entertainment; Rental of entertainment halls; Arranging of visual
entertainment; Organisation of entertainment services; Provision of audio and
visual media via communications networks; Entertainment services in the nature
of organizing social entertainment events; Provision of entertainment services
through the media of audio tapes; Organisation of entertainment and cultural
events; Recording studios; Sound recording studios; Recording studio services;
Sound recording services; Recording services; Editing or recording of sounds
and images; Production of sound recordings; Provision of video recording studio
facilities; Rental of tape recording equipment; Production of audio-visual
recordings; Rental of recording studios; Sound recording and video entertainment
services; Rental of sound and video recordings; Production of video and/or sound
recordings; Production of audiovisual recordings; Provision of recording studio
facilities; Rental of video recordings; Publishing of books, magazines; Publication
of electronic books and journals online; Publication of books; Online publication
of electronic newspapers.

Annex 2

Registration UK801265820: full specification of goods and services, with the terms relied upon marked in underline:

Class 9 <i>Electronic storage media; <u>audio recordings of music; video and/or audio recordings; optical disks; CDs; DVDs; CD-ROM; phonograph records; audio cassettes; videotapes; downloadable music files; downloadable video files; downloadable ring tones for mobile phones; skins and covers for cell phones, smart phones, tablets and laptops; computer software; computer software applications, downloadable; computer game software; spectacles; sunglasses; cases for spectacles and sunglasses; decorative magnets; bags and cases for laptops, cell phones or electronic devices.</u></i>
Class 14 <i>Jewellery, ornaments (jewellery), precious stones; charms; horological and chronometric instruments and cases therefor, key chains (jewellery); key chains (jewellery); badges of precious metal; structural parts and fittings for the aforementioned goods.</i>
Class 25 <i>Clothing, footwear, headgear</i>
Class 41 <i><u>Entertainment activities; cultural activities; artist performances; concerts; TV appearances; production of music; audio production; production of video and film; arranging and conducting concerts and performances; arranging and conducting musical entertainment; arranging and conducting audio-visual entertainment; music publishing; publication of texts; writing of texts; songwriting for others; fan club services in the nature of entertainment; provision of information in the field of entertainment and music, via a website.</u></i>