

O/1036/24

TRADE MARKS ACT 1994

IN THE MATTER OF

APPLICATION NO. 3790243

IN THE NAME OF RUSTY EGAN PRODUCTIONS LIMITED

TO REGISTER

VISAGE

AS A TRADE MARK IN CLASSES 9, 16, 41

AND

OPPOSITION THERETO UNDER NO. 600002620

BY

TANYA HARRINGTON, AMANDA LLOYD & GEORGE ROBINSON

Background and pleadings

1. On 20 May 2022, Rusty Egan Productions Limited (“***the Applicant***”) applied to register in the UK the trade mark shown on the cover page of this decision, under number UK00003790243 (“***the Contested Mark***”). Details of the application were published for opposition purposes on 12 August 2022. Registration is sought for the following goods and services:

Class 9 Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus; apparatus for recording, transmission or reproduction of sound or images, compact discs, records, pre-recorded audio and video tapes; computer programs; computer games; pre-recorded compact discs and records.

Class 16 Paper, cardboard and goods made from these materials, not included in other classes; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers' type; printing blocks; books, magazines, journals, posters, photographs, postcards, greeting cards, song books, sheet music, wall charts.

Class 41 Education; providing of training; entertainment; sporting and cultural activities; provision of recording studio facilities, music publishing services, presentation of live musical performances; production of musicals, concerts and films; video tapes, disc and cassette recordings; provision of musical compositions; organisation of musical performances; management of live shows and live performances.

2. Tanya Harrington, Amanda Lloyd, and George Robinson (“**the Opponents**”) oppose the application in full under the fast track opposition procedure, under section 5(2)(a) of the Trade Marks Act 1994 (“**the Act**”)¹. The Opponents rely upon UK trade mark registration number UK00003440429 (“Visage”) which has a filing date of 30 October 2019 and a registration date of 8 August 2020 (“**the Earlier Mark**”). For the purposes of this opposition, the Opponents rely upon all the goods and services for which the mark is registered, which are as follows:

Class 9 Sound and video recordings; films prepared for exhibition; records; tapes; video and tape cassettes; laser-readable, magnetic-readable and optical-readable discs for recording, reproduction or transmitting sound; pre-recorded sound and video storage media; pre-recorded digital sound and video storage media; compact discs; compact disc ROM's; mini-discs; digital audio tapes, cassettes, computer chips and discs; digital video tapes, downloads, streamed audio, cassettes, computer chips and discs; sound or video recording, reproduction or transmitting apparatus and instruments; computer software and computer programs; parts and fittings for all the aforesaid goods.

Class 25 Articles of clothing, footwear, headgear.

Class 41 Concerts & Entertainment services.

3. By virtue of its earlier filing date, the registration set out above constitutes an earlier mark within the meaning of section 6 of the Act.
4. Given the registration date of the Earlier Mark (as indicated above), it had not completed its registration process more than five years before the filing date of the application in issue. Thus, it is not subject to proof of use pursuant to section 6A of the Act. The Opponents can, therefore, rely upon all of the goods and services listed above without having to demonstrate use.
5. In the notice of opposition, the Opponents claim they are acting on behalf of the performer Steve Strange (now deceased) to protect his rights. They essentially

¹ There appears to have been some confusion as to who the correct opponent should be when the original Form TM7F was filed on 10 November 2022. Further to correspondence from the tribunal and the filing of Form TM16 in relation to the earlier mark, the opponents were confirmed as being Tanya Harrington, Amanda Lloyd, and George Robinson.

contend that the use of the Earlier Mark by the Applicant (including its registration as a trade mark) creates a likelihood of confusion (both direct and indirect) in the mind of the relevant consumer as to the source of origin for the goods and services at hand.

6. The Applicant subsequently filed its defence and counterstatement², denying the grounds of opposition and asking for the opposition to be dismissed. More specifically, the Applicant submitted that Rusty Egan is the owner of the Rusty Egan Productions Limited (the Applicant) and that the mark “Visage” identifies the band founded by Rusty Egan and Midge Ure and that only one year later Steve Strange was asked to join the band. Currently Rusty Egan, after the passing of Steve Strange in 2015, has been performing under the name “Visage” with Midge Ure’s consent. The Applicant contends that the Opponents does not have any goodwill in the name “Visage” and the public will associate “Visage” with Rusty Egan and Midge Ure and that Rusty Egan’s company (the Applicant) has the exclusive right to use the name “Visage”. The Applicant’s comments appear to concentrate on the issue of goodwill. However, whether the Opponents, or indeed, the Applicant, have any goodwill is irrelevant to the pleaded ground under section 5(2)(a) of the Act. That ground requires, simply, a notional and objective assessment as to whether there is a likelihood of confusion between the marks for any, or all, of the goods and services at issue. I do, however, note that there is a related case between the parties concerning the validity of the Opponents’ Earlier Mark and that the grounds relied upon in that case are under section 5(4)(a) and 3(6) of the Act³. That case is far behind this opposition, with no defence having been admitted and no evidence having yet been filed by either party. As the validity of the Earlier Mark has been challenged in those cancellation proceedings, my decision in this opposition will be a provisional one, pending the outcome of the cancellation proceedings.
7. The Opponents are represented by George Robinson. The Applicant is represented by New Media Law LLP.

² Originally filed on 22 January 2024, then subsequently amended and re-filed on 2 February 2024

³ Cancellation number 507164

8. Rule 6 of the Trade Marks (Fast Track Opposition (Amendment) Rules 2013, S.I. 2013 2235 disappplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but it provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

9. The effect of the above is to require parties to seek leave in order to file evidence in fast track oppositions. Further, Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it, or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken.

10. In this case, neither party elected to file written submissions nor sought leave to file evidence.⁴

Relevance of EU law

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

Decision

The law

12. The relevant parts of section 5 of the Act are as follows:

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

⁴ On 5 March 2024 the Applicant filed evidence in the form of a witness statement by Peter Egan and Exhibits PE1–PE7. The Opponent also filed evidence on 18 March 2024 in the form of an email from George Robinson and attachments. Neither party had requested leave to do so, thus, the Tribunal informed the parties that both parties’ evidence would be disregarded (see official letter dated 26 March 2024).

(a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

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

Case law

13. The leading authorities which guide me are from the Court of Justice of the European Union (“CJEU”): *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The Principles

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

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

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

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

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

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

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

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

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

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

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

Comparison of goods and services

14. When making the comparison, all relevant factors relating to the goods and services in the specification should be taken into account. In *Canon*, the CJEU stated at paragraph 23 of its judgment:

“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”.

15. In terms of being complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*), this relates to close connections or relationships that are important or indispensable for the use of the other. In *Boston Scientific Ltd v OHIM* Case T- 325/06, it was stated:

“It is true that goods are complementary if 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..”

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

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services;
- c) The respective trade channels through which the goods or services reach the market;
- d) 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;
- e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

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

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category,

designated by trade mark application (Case T-388/00 *Institut fur 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”.

18. For the purposes of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

19. The competing goods and services are as follows:

Applicant's goods and services	Opponents' goods and services
<u>Class 9</u>	<u>Class 9</u>
Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus; apparatus for recording, transmission or reproduction of sound or images, compact discs, records,	Sound and video recordings; films prepared for exhibition; records; tapes; video and tape cassettes; laser-readable, magnetic-readable and optical-readable discs for recording, reproduction or transmitting sound; pre-recorded sound and video storage media; pre-recorded digital sound and video storage media; compact discs; compact disc ROM's; mini-discs; digital audio tapes, cassettes, computer chips and discs; digital video tapes, downloads, streamed audio, cassettes, computer chips and discs; sound or video recording, reproduction or transmitting apparatus and instruments; computer software and computer programs; parts and fittings for all the aforesaid goods.

pre-recorded audio and video tapes; computer programs; computer games; pre-recorded compact discs and records.	
<u>Class 16</u>	
Paper, cardboard and goods made from these materials, not included in other classes; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers' type; printing blocks; books, magazines, journals, posters, photographs, postcards, greeting cards, song books, sheet music, wall charts.	
	<u>Class 25</u>
	Articles of clothing, footwear, headgear.
<u>Class 41</u>	<u>Class 41</u>
Education; providing of training; entertainment; sporting and cultural activities; provision of recording studio facilities, music publishing services, presentation of live musical performances; production of musicals, concerts and films; video tapes, disc and cassette recordings; provision of musical compositions; organisation of	Concerts & Entertainment services.

musical performances; management of live shows and live performances.	
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Class 9

- “*photographic, cinematographic, optical apparatus and instruments*”

16. Albeit worded differently, I find the Applicant’s terms above to be identical to the Opponents’ “sound or video recording, reproduction or transmitting apparatus and instruments”. In the eventuality I am mistaken, I find the respective terms to have a high degree of similarity as they share the same nature (electronic or digital apparatus and instruments), users, intended purpose (apparatus to capture images, sound and/or video), method of use, and distribution channels. These goods are also in competition as consumers will compare and decide what apparatus they prefer to purchase among different options.

- “*apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity*”

17. The Applicant’s term above has at least a low level of similarity with the Opponents’ “*computer chips*”. The Applicant’s term encompasses different electric devices that regulate electricity (e.g., batteries or converters). Computer chips are devices containing, *inter alia*, resistors and capacitors. Therefore, the respective goods share the same nature (electric components), intended purpose (transform, accumulate, regulate, or control electricity), and method of use. These goods can also be complementary when used together (e.g., an internal battery or converter and a computer chip built in the same device).

- “*data processing equipment and computers*”

18. The Opponents’ “*computer chips*” play a large and primary role in the functioning of the Applicant’s “*data processing equipment and computers*”. They are needed for a computer (or other data processing equipment) to function and may also be purchased separately by the user of a computer/data processing machine as spare parts or for improving the performance. Thus, there is a close relationship and complementary character between the goods. Moreover, it is very likely that the companies, which manufacture computers/data processing machines, will also

manufacture integrated circuits for these machines. Finally, they share the same distribution channels and target the same public. Therefore, the respective goods are highly similar.

- “compact discs, records, pre-recorded audio and video tapes; pre-recorded compact discs and records”

19. The terms above fall within the Opponents’ wider category of “pre-recorded digital sound and video storage media”. Thus, they are identical in line with *Meric*.

- “computer programs”

20. The term above is self-evidently identical to the Opponents’ “computer software and computer programs”.

- “computer games”

21. I find the Applicant’s term above to be highly similar to the Opponents’ “computer software and computer programs” as they share the same nature (software/computer program), method of use, users, intended purpose, and share the same trade channels. I also find the respective goods to be complementary as computer games must be compatible with and need the user’s computer software to function.

- “apparatus for recording, transmission or reproduction of sound or images”

22. Albeit worded differently, the above term is identical to the Opponent’s “sound or video recording, reproduction or transmitting apparatus and instruments”.

- “magnetic data carriers, recording discs”

23. “Magnetic data carriers” and “recording discs” are carriers that use magnetic technology to operate (such as floppy discs, magnetic tapes, or hard drives). Thus, although worded differently, the above terms are identical to the Opponents’ “magnetic-readable and optical-readable discs”.

24. I can see no obvious similarity between the Applicant’s “automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, [...]; fire-extinguishing apparatus; Scientific, nautical, surveying, [...] weighing, measuring, signalling, checking (supervision), life-saving

and teaching apparatus and instruments” and any of the Opponents’ goods or services. Absent any submissions from the Opponents as to where the similarity lies, I find the goods dissimilar.

Class 16

16. In the statement of grounds, the Opponents state that “The printed matter inside a CD inlay case printed with Visage on it with Visage artwork would confuse fans of Visage that this product was a CD from Visage. Also printed posters from the West festival in Belgium in 2021 were distributed.” There are no further arguments from the Opponents as to why the Applicant’s goods in class 16 are similar to the goods/services covered by the Earlier Mark. A CD inlay is not the trade of printed matter per se, rather it is the trade of a CD (which happens to have a printed cover). I therefore find no similarity between the respective goods based on that argument. The reference to posters being distributed from a festival appears to be a claim that the Applicant’s posters are similar to the Opponents’ ‘Entertainment services’ (which would cover festivals). I am not persuaded that a provider of festivals would be responsible for the production of posters. The respective nature, purpose and methods of use of the respective goods and services is quite different, and they are not in competition nor complementary in the sense described in the case law. In the absence of any further arguments from the Opponents as to why they are similar, I find no similarity between them. Bearing in mind the comments of Iain Purvis KC, sitting as the Appointed Person in the *SmartX* trade mark decision,⁵ that the Opponents have identified no other basis for similarity, and that it is not obvious to me that there is any similarity between the Applicant’s goods in class 16 and any of the Opponents’ goods or services, I find that there is no similarity

Class 41

- *“entertainment; sporting and cultural activities; presentation of live musical performances; production of musicals, concerts and films; provision of musical compositions; organisation of musical performances; management of live shows and live performances”*

⁵ BL O/0911/24, at [32].

17. The above terms fall within the Opponents' wider category of "*Concerts & Entertainment services*". Thus, they are identical in line with *Meric*.

- "*music publishing services*"

18. I find the services above to be dissimilar from any of the Opponents' services in class 41. I considered that there may be some level of complementarity between the services above and the Opponents' "*records*" and "*tapes*" in class 9 being these the physical media for audio/video recordings; however, I do not find that consumers are likely to believe that a recording company is also responsible for the manufacture and distribution of the records or discs on which the sound/video is recorded.

- "*video tapes, disc and cassette recordings*"

19. The ordinary and natural meaning of the term above seems to be of the tapes, discs, and cassette recordings themselves which are proper to class 9; there is no reference to the 'service' nature of the term (e.g., 'production of video tapes...' or 'rental of video tapes...') which would render the term proper to class 41. Therefore, I will consider the term above as having been misclassified and actually proper to class 9. To this regard, I find the Applicant's term to be identical to the Opponents' "*pre-recorded digital sound and video storage media*".

- "*Education; providing of training; provision of recording studio facilities*"

20. I can see no obvious similarity between the services above and any of the Opponents' services in class 41 or any of the Opponents' goods. Absent any submissions from the Opponents as to where the similarity lies, I find the services dissimilar.

Conclusion on the goods and services comparison

21. As some degree of similarity between the respective goods and services is necessary to engage the test for likelihood of confusion, my findings above mean that the opposition reliant upon the 5(2)(a) ground aimed against those goods and

services I have found to be dissimilar must fail.⁶ For ease of reference, the opposition proceeds only in relation to the following goods and services:

Class 9: photographic, cinematographic, optical, apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; data processing equipment and computers; compact discs, records, pre-recorded audio and video tapes; pre-recorded compact discs and records; computer programs; computer games; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs.

Class 41: entertainment; sporting and cultural activities; presentation of live musical performances; production of musicals, concerts and films; provision of musical compositions; organisation of musical performances; management of live shows and live performances; *video tapes, disc and cassette recordings.*

The average consumer and the nature of the purchasing act

22. It is necessary to determine who the average consumer is for the respective parties' goods and services. The relevant goods and services are those for which I have found identity or similarity. I must then decide the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words

⁶ See *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA and *Waterford Wedgwood PLC v OHIM* - C398/07 P.

“average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median”.

23. The average consumer of the category of goods concerned is deemed to be reasonably well-informed and reasonably observant and circumspect (see, to that effect, Case C-210/96, *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31).
24. For the purposes of assessing the likelihood of confusion, it must be borne in mind that the average consumer’s level of attention is likely to vary according to the category of goods and services in question.⁷
25. The average consumer for the goods in class 9 will be a member of the general public as well as professionals (e.g., photographers, video makers, or other creators). The goods are likely to be sold through a range of retail outlets (and their online equivalents) usually selling a variety of general merchandise, including department stores and online marketplaces. The goods can also be sold in more specialised retailers (especially for photographic, cinematographic, optical, apparatus and computers). The goods are likely to be displayed on shelves in stores and where they can be bought online, an image of them will likely be displayed on a webpage. In each instance, the consumer will select the goods having viewed them or an image or description of them first. Thus, I consider the purchase of the goods to be mainly visual; however, I do not discount aural considerations will play their part, particularly when advice is sought from sales representatives or for word of mouth recommendations.
26. I consider the costs of the goods to range from average (for electricity-related apparatus, compact discs, and tapes) to possibly fairly high (e.g., for photographic apparatus and computers). The average consumer will likely consider the specific features of the products such as, for example, durability and voltage capacity (for instruments relating to electricity), lens or audio/video quality (for optical, instruments) and processor, memory, weight, and suitability for computers. The professional public is likely to carry out further considerations on the specific features of the products and, hence, will pay a higher level of attention. I therefore

⁷ *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV*, (Case C-342/97, para 26).

find the degree of attention will vary from medium (average) for the general public to above medium for the professionals. However, the likelihood of confusion must be assessed from the perspective of the former (the general public) since they are the group who will pay the lower degree of attention.⁸

27. The average consumer of the services at issue is likely to be a member of the general public. The services are likely to be purchased at varying degrees of frequency; for example, some may only occasionally purchase tickets for entertainment events, whilst others may be more regular attendees. Likewise, the cost of the services is likely to vary considerably; for instance, booking fees for films are likely to be fairly inexpensive, whilst live shows and performances (e.g., concerts or musicals) are likely to be more expensive. The purchasing process is unlikely to be merely casual, with consumers considering factors such as cost, location, view, quality, and performers. In light of all this, whilst the level of attentiveness is likely to vary depending on the particular service being selected, I find that, overall, the general public will demonstrate a medium level of attention during the purchasing process. The services are likely to be purchased directly from the provider, after viewing information in brochures or on websites. In these circumstances, visual considerations will dominate. However, I do not discount that there may be an aural component to the selection process in the form of word-of-mouth recommendations or discussions with the provider.

Comparison of trade marks

28. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, the CJEU held that:

“54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

29. The trade marks to be compared are as follows:

Earlier trade mark	Contested trade mark
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⁸ Case T-356/14, [25] – [26].

Visage	VISAGE
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30. The Earlier Mark consists of the word “Visage” with the first letter capitalised. The Contested Mark consists of the same word, “VISAGE” all capitalised. Since the protection conferred by the registration of a word mark applies to the word stated in the application for registration and not to the individual graphic features that the mark might possess (22/05/2008, T 254/06, RadioCom, EU:T:2008:165, § 43), it is irrelevant whether a word mark is depicted in lower- or upper-case letters, or in a combination thereof in a manner that does not depart from the usual way of writing, as in the case of the Contested Mark. Consequently, the difference in the signs under comparison in this regard is immaterial. Absent any other stylisation, the marks are clearly identical.

Distinctive character of the Earlier Mark

31. 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 *WindsurfingChiemsee 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).”

32. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or allusive of the goods, to those with high inherent distinctive character, such as invented words.
33. Although the distinctiveness of a mark may be enhanced as a result of it having been used in the market, the Opponents have filed no evidence of use of their mark. Accordingly, I have only the inherent position to consider.
20. The Earlier Mark features the English dictionary word “Visage” meaning “face” (mainly used in literary writing). Therefore, the Earlier Mark is an arbitrary dictionary word (not commonly used in spoken English) that is neither descriptive of the goods and services at hand nor does it have any other semantic correlation with the goods and services. For this reason, I find the Earlier Mark has an above medium (above average) degree of inherent distinctive character.

Likelihood of confusion

34. There is no simple formula for determining whether there is a likelihood of confusion. The factors considered above have a degree of interdependency (*Canon* at [17]). I must make a global assessment of the competing factors (*Sabel* at [22]), considering the various factors from the perspective of the average consumer and deciding whether the average consumer is likely to be confused. In making my assessment, I must keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).
35. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other (*L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10).
36. I have found the respective goods and services similarity to range from low to identity. The level of attention is medium for the general public. The distinctiveness of the Earlier Mark is above medium. The purchase of the contested goods and

services is considered to be mainly visual but the potential for aural use is borne in mind. The respective marks are identical. Weighing all of these factors I find that the average consumer is likely to mistake one mark for the other, even for goods that are similar to a low degree due to the interdependency principle. Thus, there is a likelihood of direct confusion between the marks in relation to the respective goods and services. I would have reached the same conclusion even if I had found that the distinctiveness of the Earlier Mark is of a medium level (rather than above medium).

Provisional outcome

37. This opposition is provisionally and partially successful for those goods and services for which I found similarity or identity, namely:

Class 9: photographic, cinematographic, optical, apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; data processing equipment and computers; compact discs, records, pre-recorded audio and video tapes; pre-recorded compact discs and records; computer programs; computer games; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs.

Class 41: entertainment; sporting and cultural activities; presentation of live musical performances; production of musicals, concerts and films; provision of musical compositions; organisation of musical performances; management of live shows and live performances; video tapes, disc and cassette recordings.

Status of this decision and costs

21. This is a provisional decision. A final decision will be made once the outcome of cancellation number 507164 is known. These proceedings are suspended until such time.

22. The period for appeal will run from the date of my final decision.

23. Costs will be covered in the final decision when the full outcome of this opposition becomes clear.

Dated this 1st day of November 2024

Andrea Rossi

For the Registrar