

O/623/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003499288

BY DANIELS OSTAPOVS

TO REGISTER:

INSTALIME

AS A TRADE MARK IN CLASS 41

AND

IN THE MATTER OF THE OPPOSITION THERETO

UNDER NO. 421656 BY

INSTAGRAM LLC

BACKGROUND AND PLEADINGS

1. On 10 June 2020, Daniels Ostapovs (“the applicant”) applied to register the trade mark shown on the cover of this decision (“the applicant’s mark”) in the UK for the following services:

Class 41: Audio, video and multimedia production, and photography.

2. The applicant’s mark was published for opposition purposes on 3 July 2020 and, on 2 October 2020, it was opposed by Instagram LLC (“the opponent”). The opposition is based on sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”). In respect of the section 5(2)(b) ground, the opponent relies on the following marks:

INSTAGRAM

EUTM no. 17739392¹

Filing date 25 January 2018; registration date 24 January 2019

Relying on some goods and services.

(“the opponent’s first mark”);

INSTAGRAM

UK registration no. 3123325

Filing date 20 August 2015; registration date 15 January 2016

Relying on some goods and services.

(“the opponent’s second mark”);

INSTA

UK registration no. 3137174

Filing date 20 November 2015; registration date 8 April 2016

Relying on all goods.

(“the opponent’s third mark”); and

¹ Although the UK has left the EU and the EUTM relied upon by the opponent now enjoys protection in the UK as a comparable trade mark, the EUTM remains the relevant right in these proceedings. That is because the application was filed before the end of the Implementation Period and, under the transitional provisions of the Trade Marks (Amendment etc.) (EU Exit) Regulations 2019, I am obliged to decide the opposition on the basis of the law as it stood at the date of application

Instagram

UK registration no. 3444472

Filing date 15 November 2019; registration date 13 March 2020

Relying on all services.

("the opponent's fourth mark")

3. The goods and services upon which the opponent relies for its marks are set out in the **Annex** to this decision. In respect of its section 5(3) ground, the opponent relies on its first and second marks only. The opponent claims to have obtained a reputation for these marks in respect of its class 9 goods and its class 35, 38, 41, 42 and 45 services.
4. Under its section 5(2)(b) ground the opponent claims that due to the similarity between the marks and the identity and/or similarity between the parties' goods and services, there exists a likelihood of confusion. Under the section 5(3) ground the opponent claims that use of the applicant's mark would constitute an unfair advantage for the applicant, would be detrimental to the opponent's reputation and would dilute the distinctive character and repute of the opponent's first and second marks.
5. The applicant filed a counterstatement denying the claims made.
6. The opponent is represented by D Young & Co LLP and the applicant is unrepresented. While the opponent filed evidence in chief, the applicant did not. A hearing took place before me on 7 July 2021, by video conference. The opponent was represented by Mr Matthew Dick of the opponent's representative and the applicant elected not to attend the hearing. The opponent filed a skeleton argument ahead of the hearing. The applicant did not file any written submissions in lieu of his attendance at the hearing.
7. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU

Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

EVIDENCE

8. The opponent filed evidence in the form of the witness statement of Mr Allen Lo dated 9 January 2021. Mr Lo is the vice president of the opponent. His statement is accompanied by five exhibits. The opponent has also filed evidence in the form of the first and second witness statements of Matthew James Dick, both dated 10 January 2021. Mr Dick is a trade mark attorney employed by the opponent's representative. His first statement is accompanied by 14 exhibits while his second statement is accompanied by one exhibit.
9. I do not propose to summarise the evidence here. However, I have taken it into consideration in reaching my decision and will refer to it below, where necessary.

DECISION

Section 5(2)(b): legislation and case law

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

“(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 or association with the earlier trade mark.”

11. Section 5A of the Act states as follows:

“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.”

12. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“(6)(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

13. Given their filing dates, the opponent’s marks qualify as earlier trade marks under the above provisions.

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

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

15. The applicant's services are listed in **paragraph 1** of this decision. The opponent's goods and services are set out in the **Annex** of this decision.

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

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

17. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

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

- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

18. The General Court (“GC”) confirmed in *Gérard Meric v Office for Harmonization in the Internal Market*, Case T-133/05, that, even if goods or services 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.”

19. At the hearing, the opponent focussed its submissions in respect of the goods and services comparison on its first, second and third mark’s goods and services. I do not intend to reproduce these here but have taken them into account in making the following comparison.

20. While the applicant’s specification consists of just one term, being “audio, video and multimedia production, and photography”, I consider it necessary, for the purposes of the following goods and services comparison, to deal with the

applicant's "photography" services separately from its "audio, video and multimedia production" services.

21. In my view, "film production, other than advertising films", "production of music", "production of radio and television programmes", "production of shows" and "television production services" in the opponent's first mark are all services that relate to the production of video and audio. They are also, in my view, different types of multimedia production services. These services all fall within the term "audio, video and multimedia production" in the applicant's specification. These services are, therefore, identical under the principle outlined in *Meric*.

22. "Photography" in the applicant's specification is a broad service that covers a wide range of services that relate to photography. In my view, this service includes the provision of a photographer to photograph an event, the provision of a professional lighting set up and the editing, correction and retouching of any photographs taken. I consider that the opponent's rental of photography kiosk service is a type of photography service meaning that "rental of photography and/or videography kiosks for capturing, uploading, editing and sharing of pictures and videos" in the opponent's first, second and fourth marks' specification falls within the applicant's broader term. As a result, these services are identical under the principle outlined in *Meric*. However, if I am incorrect in my finding of identity, I am of the view that there is a degree of similarity between these services. This is on the basis that there is an overlap in purpose in that both aim to provide a service relating to photography. There is also an overlap in user on the basis that, for example, someone looking for photography services for a wedding may also look to rent a photography kiosk to entertain their guests at the wedding. Additionally, there may be a competitive relationship between these services on the basis that a user may wish to select a broad photography service or to rent photography equipment to allow them to take and edit the photos themselves. Finally, there is an overlap in trade channels in that an undertaking providing photograph services may also offer the rental of photography equipment, such as photography kiosks. While the services differ in nature and method of use, I consider that the overlap in purpose, user, trade channels and the competitive relationship between these services is sufficient to make a finding that these services are similar to a high degree.

23. The opponent has made submissions in respect of the similarity between the applicant's services and the goods in the opponent's third mark's specification. I have set out above that "photography" in the applicant's specification covers the service of editing, correcting and retouching photographs. Given that the purpose of "downloadable computer software for modifying the appearance and enabling transmission of photographs" is to modify photographs, it can be said that there is an overlap in purpose between these goods and services. While this overlap is noted, I do not consider there to be any overlap in user as a user of computer software for editing photographs is unlikely to seek photography services, and vice versa. I do not consider that these goods and services have a competitive relationship with one another nor are they complementary. Further, I do not consider that the nature or method of use overlaps on the basis that one is computer software and the other is a service. I also do not consider there to be an overlap in trade channels as computer software for editing photographs is likely to be provided by a computer software company whereas the applicant's photography services are likely to be provided by an individual photographer or a photography company. Overall, I do not consider an overlap in purpose alone is sufficient to warrant a finding of similarity between these goods and services. They are, therefore, dissimilar.

24. I note that the term "interactive photo and video equipment, namely, kiosks for capturing, uploading, editing, printing and sharing digital images and video" is included in the opponent's third mark's specification. While I have found above that "photography" as a service in the applicant's specification may include the rental of such kiosks, I do not consider that it covers their sale. While the purpose of both goods and services overlap in that they both relate to photography, that is where any similarity ends. There is no overlap in nature or method of use as one is a good and the other is a service. Further, a user of photography services is unlikely to seek to purchase an interactive photo kiosk and vice versa meaning there is no overlap in user. In my view, users are also unlikely to choose one over the other meaning there is no competitive relationship between them. There is also no complementary relationship between them as they are not important or

indispensable to one another.² Finally, while a provider of photography services may also rent out photography equipment, it is unlikely to produce and sell their own interactive photo kiosks meaning there is no overlap in trade channels. Overall, I do not consider that an overlap in purpose alone is sufficient to warrant a finding of similarity. Therefore, these goods and services are dissimilar.

25. As for the remaining goods in the opponent's third mark's specification, I see no obvious level of similarity with the applicant's services. These goods and services are, therefore, dissimilar.

26. As some degree of similarity between goods and services is necessary to engage the test for likelihood of confusion,³ my findings above mean that the opposition reliant upon the opponent's third mark under section 5(2)(b) fails.

The average consumer and the nature of the purchasing act

27. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' services. I must then decide the manner in which these 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 “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

² *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

³ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

28. In its skeleton arguments, the opponent stated that,

“the Contested Services are directed both at the public at large (as the end consumer) as well as at business customers with a degree of professional knowledge or expertise. The public’s degree of attentiveness will vary from low to above average, depending on the price, specialised nature, or terms and conditions of the services provided.

The Applicant’s TM8 and Counterstatement notes that the Contested Services are in fact directed solely at end users/members of the general public who wish to purchase flexible magnets printed with photographs they have taken. Such products are inexpensive. As such the relevant public to be considered is the general public exerting a relatively low degree of attention.”

29. While I note the opponent’s reference to the applicant’s use, I must make my assessment of the average consumer based on what the services cover and not how the applicant uses them. However, in respect of the opponent’s comments on the average consumer, I agree that the user of the services at issue will be both members of the general public and business users. For example, a member of the general public may seek photography services for a wedding or for a photo shoot whereas a business user is likely to seek audio, video or multimedia production services.

30. The services are likely to be selected directly through the provider itself either in person or online. The services are likely to be displayed on a list of services in catalogues or on placards. A similar process will apply where the services are selected online in that they are likely to be selected after viewing a list of services on the provider’s website. In addition to the visual element, I consider that the aural element will play a significant role in the selection process on the basis that the services may be selected after a consultation or meeting with the provider. For example, when selecting photography services for a wedding, the user is likely to have a meeting where their needs and requirements are discussed in detail. Therefore, the selection of the services at issue is likely to be both visual and aural.

31. The services are likely to range from being fairly inexpensive to very expensive. For example, photography services can cover the editing of photographs that may be done relatively inexpensively but can also cover full-service photography for events that could be expensive. As for the applicant's production services, these are likely to be expensive. In my view, the services are likely to be selected infrequently. The average consumer's considerations when selecting the services at issue are likely to vary considerably. When selecting them, the average consumer is likely to consider the previous work of the photographer or production company, any testimonials from previous customers and the range of services they are able to provide, for example, it may not be the case that all photographers are able to provide editing/retouching services to photographs, being something a consumer may require as part of a full package. I recognise that some services may attract an average degree of attention from the average consumer for simple photoshoots. However, I am of the view that some services may attract a higher (but not the highest) degree of attention for services such as larger scale video production services.

Distinctive character of the opponent's marks

32. 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).”

33. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of 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 a mark can be enhanced by virtue of the use made of it.
34. The opponent has pleaded that its marks have obtained an enhanced level of distinctiveness through use. Before moving to consider the evidence on this point, I will first assess the inherent distinctiveness of the opponent’s marks. The opponent’s first and second marks consist of the word ‘INSTAGRAM’. I consider that the average consumer will view this mark as a made-up word with no obvious meaning. These marks have no descriptive or allusive qualities and I, therefore, consider that they enjoy a high degree of inherent distinctive character. As for the opponent’s fourth mark, this is also the word ‘Instagram’ but in a stylised, cursive font. The stylisation is not particularly remarkable and will not, in my view, contribute to the distinctiveness of the mark to the point that it increases it beyond a high level.
35. Turning to the issue of enhanced distinctiveness through use, I note that from the evidence the opponent’s brand is a social media platform for editing and sharing photographs and videos. The opponent’s brand also includes a messaging service.⁴

⁴ Paragraph 8 of the First Witness Statement of Mr Matthew James Dick

36. I note that the opponent has not provided any evidence as to the size of the relevant market for the opponent's services. Given the wide range of the opponent's services, I am of the view that the relevant markets for these services would be significant with an annual turnover of hundreds of millions, if not billions, of pounds. In any event, there is no evidence regarding annual turnover of the opponent to be able to compare it to the relevant market.
37. The opponent has provided a number of press articles from BBC News covering the sale of Instagram to Facebook in 2012.⁵ In this evidence, I note that use of Instagram is free to users and allows them to apply up to 17 filters to the pictures they take before uploading them to the site. The articles then discuss the addition of video clips to the Instagram app⁶ that also contains editing features and, notably, a feature that offers iPhone users of the app the ability to stabilise their footage. In addition to the above, the introduction of 'Instagram Live' is discussed in a BBC Newsbeat article that shows the editing abilities of the Instagram app.⁷
38. The opponent's evidence discusses the accounts of a number of UK based celebrities⁸ and the significant number of followers these accounts have. While this is noted, there is nothing to suggest that the followers of these accounts are UK based.
39. Further, the evidence shows a significant number of worldwide users which I note that, as of June 2018, stood at 1 billion monthly active accounts.⁹ The opponent states that more than 500 million accounts are active every day and that more than 80% of active Instagram accounts are associated with users outside the United States. Extensive media coverage is also provided in the form of press articles from UK-wide media outlets such as Mail Online, The Sun, the Telegraph, The Times, Express.co.uk, The London Evening Standard, The Guardian and The Mirror.¹⁰ Additional press articles are provided that the opponent claims to demonstrate the reputation throughout the UK of photography and multimedia/video production

⁵ Pages 1 to 4 of Exhibit MJD3 of the First Witness Statement of Mr Matthew James Dick

⁶ Pages 5 to 6 of Exhibit MJD3 of the First Witness Statement of Mr Matthew James Dick

⁷ Pages 22 to 25 of Exhibit MJD3 of the First Witness Statement of Mr Matthew James Dick

⁸ Exhibit MJD4 and MJD5 of the First Witness Statement of Mr Matthew James Dick

⁹ Paragraph 3 of the Witness Statement of Mr Allen Lo

¹⁰ Exhibit MJD6 of the First Witness Statement of Mr Matthew James Dick

from Mail Online, The Guardian, The Independent, The Daily Telegraph and Wired magazine.¹¹ While there is mention of photography filters, the news articles focus solely on the Instagram platform as being for photography. As for the article regarding 'Instagram Live',¹² I note that this is a guide to the opponent's video feature.

40. The opponent has provided print outs from a website called 'App Annie',¹³ which the opponent states is the world's leading independent app analytics company. This shows the popularity of the Instagram app within the UK in the form of line graphs. The evidence shows figures for the iOS apps and Android apps, being the Apple and Google operating systems, respectively. While I am conscious not to assume that my own knowledge is not more widespread than it is, I do not consider it to be an issue of serious dispute to take it on judicial notice that these operating systems are the two most popular operating systems for mobile phones in the UK.¹⁴ The opponent has provided a breakdown of what these graphs show, which states that the Instagram app:

- a. has been in the top 4 iOS apps for the 'photo and video' category since 2010;
- b. has been in the top 10 overall iOS apps since April 2012;
- c. was the number 8 overall iOS app as of June 2020 (being the month of the application at issue);
- d. was the number 1 iOS app for the 'photo and video' category as of June 2020;
- e. has been in the top 20 overall Android apps since April 2012;
- f. has been in the top 4 Android apps for the 'Social' category since 2012;
- g. was the number 12 overall Android app as of June 2020; and
- h. was the number 2 Android app for the 'Social' category since 2012.

41. Cross-referencing the above breakdown with the screenshots provided, I am content to conclude that the breakdown above is reflective of what the graphs show. While there is no evidence that points to the geographical spread of the mark

¹¹ Exhibit MJD7 of the First Witness Statement of Mr Matthew James Dick

¹² Pages 8 to 13 of MJD7 of the First Witness Statement of Mr Matthew James Dick

¹³ Exhibit AL4 of the Witness Statement of Mr Allen Lo

¹⁴ *Chorkee Ltd v Cherokee Inc.*, Case BL O/048/08

throughout the UK, the consistent high rankings of the app indicate to me that the app is downloaded by a significant number of users from all over the UK.

42. I note that the opponent has not provided any evidence in respect of its advertising expenditure in promoting its marks.

43. While the opponent has not provided specific user numbers within the UK, I am content to conclude that the userbase of the opponent's app is significant. This is particularly the case given (1) the active userbase worldwide is very substantial, being 1 billion users a month as of June 2018 (80% of which are outside the United States) and (2) the app's consistently high rankings in since 2010 in the iOS and Android app stores in the UK. Taking all of this into account, there is clearly sufficient evidence to support the opponent's claim to enhanced distinctiveness in the UK in relation to the following goods and services:

The opponent's first mark:

Class 9: Downloadable computer software for modifying the appearance and enabling transmission of photographs; computer software for the collection, editing, organizing, modifying, transmission, storage and sharing of data and information; computer software to enable uploading, downloading, accessing, posting, displaying, tagging, blogging, streaming, linking, sharing or otherwise providing electronic media or information via computer and communication networks; software for creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, embedding, transmitting, and sharing or otherwise providing electronic media or information via computer and communication networks; software for the collection, editing, organizing, modifying, transmission, storage and sharing of data and information; software for sending and receiving electronic message alerts, notifications and reminders; software, namely, an application providing social networking

functionalities; software for social networking; software for remote communication; software for sending and receiving electronic messages, graphics, images, audio and audio visual content via the internet and communications networks; messaging software.

Class 38: Telecommunications services, namely, electronic transmission of data, messages, graphics, photographs, images, audio, video and information; providing chatrooms, instant messaging services, and electronic bulletin boards; audio, text and video broadcasting service over the internet or other communications networks; computer aided transmission of messages and images; providing access to computer, electronic and online databases; electronic transmission of electronic media, data, messages, graphics, images, audio, video and information; broadcasting services over computer or other communication networks namely, uploading, posting, displaying, tagging, and electronically transmitting data, information, messages, graphics, and images; instant messaging services; peer-to-peer photo sharing, video sharing and data sharing services, namely, electronic transmission of digital photo files, audio, videos, audio-visual content and graphics among users; photosharing and data sharing services, namely, electronic transmission of digital photo files, videos, audio visual content and data among internet and mobile device users; providing access to computer databases in the fields of online networking, online introduction and dating; information, advisory and consultancy services relating to the aforesaid services.

Class 41: Publishing services, namely, publishing of electronic publications for others.

Class 42: Software for electronic messaging; Providing online facilities featuring software for sending and receiving electronic messages, instant messages, electronic message alerts and reminders,

photographs, images, graphics, data, audio, videos and audio-visual content via the internet and communication networks.

The opponent's second mark:

Class 9: Downloadable computer software for modifying and enabling transmission of images, audio-visual and video content; Downloadable computer software for viewing and interacting with a feed of images, audio-visual and video content and associated text and data; Downloadable computer software for finding content and content publishers, and for subscribing to content; Computer software for tagging images, audio-visual and video content with data indicating date, location, people and subject matter; Computer software for social networking; Computer software for creating, managing, and interacting with an online community; Computer software for managing social networking content, interacting with a virtual community, and transmission of images, audio-visual and video content, photographs, videos, data, text, messages, comments, advertisements, media advertising communications and information; Computer software for creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, embedding, transmitting, sharing, searching, or otherwise providing or interacting with electronic media; Computer software for sending electronic message alerts, notifications and reminders; Software for sending and receiving electronic messages.

Class 38: Photo sharing and video sharing services, namely, electronic transmission of digital photo files, videos and audio visual content among internet users; telecommunications services, namely, electronic transmission of images, audio-visual and video content, photographs, videos, data, text, messages,

advertisements, media advertising communications and information.

Class 41: Publishing services, namely, publishing of electronic publications for others.

The opponent's fourth mark

Class 38: Photo sharing and video sharing services, namely, electronic transmission of digital photo files, videos and audio visual content among internet users; Telecommunications services, namely, electronic transmission of data, messages, graphics, photographs, images, audio, video, audio-visual content, and information; Peer-to-peer photo and data sharing services, namely, electronic transmission of digital photo files, graphics and audio content among internet users; Telecommunications and peer-to-peer network computer services, namely, electronic transmission of images, audio-visual and video content, photographs, videos, data, text, messages, advertisements, media advertising communications and information; Streaming and live streaming of video, audiovisual, and interactive audiovisual content via the internet.

Class 41: Photosharing and video sharing services; Electronic publishing services for others; Publishing services, namely, publishing of electronic publications for others.

44. I note that the services in the opponent's specifications for which I have found to be identical and/or similar to the applicant's services are not included in the above list of goods and services. As a result, any enhanced distinctiveness attributed to the opponent's marks will not affect my decision under the section 5(2)(b) grounds.

Comparison of marks

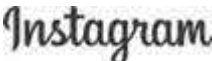
45. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

46. 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.”

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

48. The respective trade marks are shown below:

The opponent's marks	The applicant's mark
INSTAGRAM ("the opponent's first and second marks")  ("the opponent's fourth mark")	INSTALIME

49. At the hearing the opponent gave submissions regarding the similarity of the marks. The applicant has also made comments regarding the similarity of the marks in its counterstatement. Whilst I do not intend to reproduce these in full here, I have taken all of them into account and will only refer to them below if necessary. As the opponent's first and second marks are identical, I will deal with them together.

Overall Impression

50. The applicant's mark and the opponent's first and second marks are word only marks with no other elements that contribute to their overall impressions, which lie in the words themselves.

51. The opponent's fourth mark, like its first and second marks, is a depiction of the word 'Instagram' but displayed in a stylised, cursive typeface. The overall impression of the mark is dominated by the word 'Instagram' with the stylisation playing a much lesser role.

Visual Comparison

The applicant's mark and the opponent's first and second marks

52. All marks begin with the letters 'INSTA'. However, following these letters, the parties' marks differ. The applicant's mark has the letters 'LIME' whereas the opponent's marks have the letters 'GRAM'. While the similarities sit at the beginning of the parties' marks, which is where average consumers tend to focus,¹⁵ the ending of the marks differ entirely. Taking all of this into account, I am of the view that the marks are visually similar to a medium degree.

The applicant's mark and the opponent's fourth mark

53. While these marks share the same similarities and differences as set out above, they differ further in the use of a stylised typeface in the opponent's fourth mark.

¹⁵ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

While the difference in presentation is noted, I do not consider it extends beyond normal and fair use. This means that, as the applicant's mark is a word only mark that can be used in any standard typeface, it can be presented in the same typeface as the opponent's fourth mark. As a result, I consider these marks to be visually similar to a medium degree for the same reasons set out in paragraph 52 above.

Aural Comparison

54. The aural element of the opponent's marks is identical and consists of three syllables that will be pronounced 'IN-STUH-GRAM'. The applicant's mark also consists of three syllables but will be pronounced 'IN-STUH-LYME'. The beginnings of the marks are identical and the marks are of equal length. While average consumers are likely to focus on the beginnings of the marks, being where these marks are identical, their ends are entirely different when pronounced. Overall, I consider the marks to be aurally similar to a medium degree.

Conceptual Comparison

55. I consider that the stylisation in the opponent's fourth mark has no conceptual impact. Therefore, I will consider the opponent's marks together. I note that in the applicant's counterstatement, he stated that the word 'INSTALIME' was "derived from three words, being "INSTALL IMAGE ME". While this may have been the case, I do not consider that the average consumer would understand this and will, instead, view the mark as a made-up word. As I am of the view that both parties' marks will be seen as made-up words with no obvious meaning, I consider them to be conceptually neutral.

Likelihood of confusion

56. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in

determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

57. I have found the applicant's services to be identical or similar to a high degree with the services in the opponent's first and second marks' specifications. I have concluded that the average consumer for the services at issue will either be a member of the general public or a business user who will select the services by both visual and aural means. Depending on the services selected, I have concluded that the average consumer will pay either an average or high (but not the highest) degree of attention during the selection of the services. I have found the opponent's marks to enjoy a high degree of distinctive character. I have found the marks to be visually and aurally similar to a medium degree and conceptually neutral.

58. Before moving to assess the likelihood of confusion, it is necessary to consider the opponent's evidence regarding the use of the word 'INSTA' as a reference to 'INSTAGRAM'. While the opponent sought to rely on a mark consisting solely of the word 'INSTA', the opposition reliant upon that mark failed for reasons set out at paragraph 26 above. Despite this, I consider the evidence on this point is still relevant to the assessment of likelihood of confusion. Of the evidence, I note the following:

- a. As early as 2013, the online dictionary ‘The Urban Dictionary’ referred to ‘INSTA’ as an abbreviation of INSTAGRAM and this definition remains as of January 2021;¹⁶
- b. The Cambridge English Dictionary shows ‘INSTA’ as being “short for Instagram” and the Power Thesaurus show INSTA as a synonym in the English language for INSTAGRAM.¹⁷ These print outs are dated approximately 7 months after the relevant date; and
- c. A number of press articles from UK publications between 2015 and 2020 that the opponent claims refer to ‘INSTA’ when referring to the INSTAGRAM platform. However, only two of the articles actually use the term ‘INSTA’ in solus as a reference to ‘INSTAGRAM’¹⁸

59. While the evidence is noted, it is underwhelming. In my view, it does not convincingly point toward widespread use by average consumers of the word ‘INSTA’ as an abbreviation of ‘INSTAGRAM’.

60. Taking all of the above factors and the principle of imperfect recollection into account, I consider that the differences between the marks are sufficient to ensure that they will not be misremembered or mistakenly recalled as each other. Consequently, I am satisfied that there is no likelihood of direct confusion between the marks, even on services that are identical.

61. It now falls to me to consider whether there is a likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10.

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the

¹⁶ Exhibit MJD12 of the First Witness Statement of Matthew James Dick

¹⁷ *ibid*

¹⁸ Exhibit MJD13 of the First Witness Statement of Matthew James Dick

other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

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

- (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).
- (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI”, etc.). BL O/375/10 Page 15 of 16
- (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).”

62. I have borne in mind that the examples given by Mr Purvis QC are not exhaustive. Rather, they were intended to be illustrative of the general approach.¹⁹

63. The case law cited above sets out that where an earlier mark has a highly distinctive character, there is a greater likelihood of confusion. While this case is

¹⁹ *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10

noted, it does not automatically follow that I must make such a finding here. In the present case, simply because the marks share the common element 'INSTA', it does not mean that the average consumer will be indirectly confused by the marks. This is particularly the case given that the different elements, being 'GRAM' and 'LIME', have no obvious connection and I do not consider that the average consumer will consider them to be indicative of a sub-brand or brand extension of one another. I am of the view that the use of 'INSTA' as part of two separate made up words will be seen as coincidental and not indicative of different marks from the same of economically connected undertakings. Consequently, I do not consider there to be a likelihood of indirect confusion, even on goods that are identical.

64. Even if I found identity between the services for which the opponent has demonstrated an enhanced level of distinctiveness for, I still would not have found likelihood of confusion between the marks on the basis that both marks are invented words and there is no obvious link between the different elements, being 'GRAM' and 'LIME'.

65. The opposition based on section 5(2)(b) fails in its entirety. I will now proceed to consider the opposition based on the section 5(3) grounds.

Section 5(3)

66. Section 5(3) of the Act states:

“5(3) A trade mark which –

is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.”

67. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Adidas-Salomon*, Case C-487/07, *L’Oreal v Bellure*, Case C-323/09, *Marks and Spencer v Interflora*, Case C383/12P, *Environmental Manufacturing LLP v OHIM*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Salomon*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark’s reputation and distinctiveness; *Intel*, paragraph 42

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark’s ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that

this will happen in future; *Intel, paragraphs 76 and 77* and *Environmental Manufacturing, paragraph 34*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the holder of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74* and the court's answer to question 1 in *L'Oreal v Bellure*).

68. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that its marks have achieved a level of knowledge, or reputation, amongst a significant part of the public. Secondly, the opponent must establish that the public will make a link between the marks, in the sense of the earlier mark being brought to mind by the later mark. Thirdly, assuming the first and second conditions have been met, section 5(3) requires that one or more of three types of damage claimed by the opponent will occur. It is unnecessary for the purposes of section 5(3) that the goods are similar, although the relative distance between them is one of the factors

which must be assessed in deciding whether the public will make a link between the marks.

69. The relevant date for the assessment under section 5(3) is the date of the application at issue, being 10 June 2020.

Reputation

70. In *General Motors*, Case C-375/97, the CJEU held that:

“25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it.”

71. In its notice of opposition, the opponent claimed that its first and second marks have a reputation in its class 9 goods and its class 35, 38, 41, 42 and 45 services. The opponent's second mark is a UK trade mark meaning that the opponent is required to show its mark had established a reputation amongst a significant part of the relevant UK public at the relevant date. The opponent's first mark is a EUTM,

so the relevant territory is the European Community and the trade mark must have a reputation in a substantial part of that territory. However, I note paragraph 30 of *Pago International GmbH v Tirolmilch registrierte GmbH*, Case C-301/07, wherein the CJEU held that:

“a Community trade mark must be known by a significant part of the public concerned by the products or services covered by that trade mark, in a substantial part of the territory of the Community, and that, in view of the facts of the main proceedings, the territory of the Member State in question may be considered to constitute a substantial part of the territory of the Community.”

72. Further, I also refer to the case of *Whirlpool Corporations and others v Kenwood Limited* [2009] ETMR 5 (HC) wherein Mr Geoffrey Hobbs QC, as Deputy Judge in the High Court held that:

“the United Kingdom can for that purpose be regarded as a substantial part of the Community, with or without the addition of France and Germany. It thus appears to me that Whirlpool's Community trade mark has a reputation in the Community.”

73. In my view, at the relevant date, the UK constituted a substantial part of the territory of the Community.

74. Despite not providing any evidence regarding its market share or its advertising expenditure, the opponent has provided evidence of use of its app within the UK. I have discussed this evidence in detail when assessing the enhanced distinctive character above but for completeness, I note that the opponent has provided evidence of its app's consistently high rankings in the UK iOS and Android app stores since 2010 and, also, its high ranking in June 2020 (being around the relevant date). While I also note that the evidence shows a significant number of one billion active users worldwide a month (80% of which are located outside the United States), I am unable to identify the exact level of use within the UK. However, taking into account the level of worldwide users together with the high rankings of the app in the UK, the opponent has painted a picture of significant and

intensive level of use of its app in the UK over a sufficient length of time (with its first high ranking in the app stores being some 10 years before the relevant date).

75. The evidence also shows various news articles from a range of news publications such as the BBC, the Daily Mail and The Sun, amongst others. These are large UK based publications with a widespread reach across the entirety of the UK. While the articles do not indicate the level of users of the opponent's marks, they do point to the opponent's success and are, in my view, sufficient in demonstrating widespread knowledge of the 'INSTAGRAM' brand throughout the UK.

76. As for evidence of use in the EU, this is provided by way of evidence of rankings of the opponent's app in various countries.²⁰ While I note that these screenshots show the Instagram app being highly ranked in a wide number of countries as of December 2020, they are dated after the relevant date so do not show rankings as at the relevant date. Further, it is not clear what countries are referred to in the rankings. For example, the evidence simply states that the Instagram app is ranked a top 5 app in 63 countries but not what countries and whether or not these are EU countries. In my view, this evidence does not assist the opponent.

77. Taking the evidence as a whole, I am of the view that the opponent has demonstrated that its marks have obtained a strong reputation amongst a significant part of the relevant public in the UK as at the relevant date. As a result of my finding at paragraph 73 above, I consider the UK to be a significant part of the territory of the Community meaning that the opponent has also demonstrated a reputation in the EU in respect of its first mark.

78. While a reputation is claimed in all of the opponent's class 9 goods and class 35, 38, 41, 42 and 45 services, I do not consider that the reputation extends to all of these goods or services. I have set out above that the evidence shows use of a social media platform for the editing and sharing photographs and videos that also consists of a messaging service.

79. I make the same finding here as I have in respect of enhanced distinctiveness above in that the evidence only shows use of some of the opponent's goods and

²⁰ Exhibit AL2 of the Witness Statement of Mr Allen Lo

services in its first and second marks' specifications. For ease of reference, these goods and services are as follows:

The opponent's first mark:

Class 9: Downloadable computer software for modifying the appearance and enabling transmission of photographs; computer software for the collection, editing, organizing, modifying, transmission, storage and sharing of data and information; computer software to enable uploading, downloading, accessing, posting, displaying, tagging, blogging, streaming, linking, sharing or otherwise providing electronic media or information via computer and communication networks; software for creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, embedding, transmitting, and sharing or otherwise providing electronic media or information via computer and communication networks; software for the collection, editing, organizing, modifying, transmission, storage and sharing of data and information; software for sending and receiving electronic message alerts, notifications and reminders; software, namely, an application providing social networking functionalities; software for social networking; software for remote communication; software for sending and receiving electronic messages, graphics, images, audio and audio visual content via the internet and communications networks; messaging software.

Class 38: Telecommunications services, namely, electronic transmission of data, messages, graphics, photographs, images, audio, video and information; providing chatrooms, instant messaging services, and electronic bulletin boards; audio, text and video broadcasting service over the internet or other communications networks; computer aided transmission of messages and images; providing access to computer, electronic and online databases; electronic transmission of electronic media, data,

messages, graphics, images, audio, video and information; broadcasting services over computer or other communication networks namely, uploading, posting, displaying, tagging, and electronically transmitting data, information, messages, graphics, and images; instant messaging services; peer-to-peer photo sharing, video sharing and data sharing services, namely, electronic transmission of digital photo files, audio, videos, audio-visual content and graphics among users; photosharing and data sharing services, namely, electronic transmission of digital photo files, videos, audio visual content and data among internet and mobile device users; providing access to computer databases in the fields of online networking, online introduction and dating; information, advisory and consultancy services relating to the aforesaid services.

Class 41: Publishing services, namely, publishing of electronic publications for others.

Class 42: Software for electronic messaging; Providing online facilities featuring software for sending and receiving electronic messages, instant messages, electronic message alerts and reminders, photographs, images, graphics, data, audio, videos and audio-visual content via the internet and communication networks;

The opponent's second mark:

Class 9: Downloadable computer software for modifying and enabling transmission of images, audio-visual and video content; Downloadable computer software for viewing and interacting with a feed of images, audio-visual and video content and associated text and data; Downloadable computer software for finding content and content publishers, and for subscribing to content; Computer software for tagging images, audio-visual and video content with data indicating date, location, people and subject

matter; Computer software for social networking; Computer software for creating, managing, and interacting with an online community; Computer software for managing social networking content, interacting with a virtual community, and transmission of images, audio-visual and video content, photographs, videos, data, text, messages, comments, advertisements, media advertising communications and information; Computer software for creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, embedding, transmitting, sharing, searching, or otherwise providing or interacting with electronic media; Computer software for sending electronic message alerts, notifications and reminders; Software for sending and receiving electronic messages.

Class 38: Photo sharing and video sharing services, namely, electronic transmission of digital photo files, videos and audio visual content among internet users; telecommunications services, namely, electronic transmission of images, audio-visual and video content, photographs, videos, data, text, messages, advertisements, media advertising communications and information.

Class 41: Publishing services, namely, publishing of electronic publications for others.

Link

80. As noted above, my assessment of whether the public will make the required mental 'link' between the marks must take account of all relevant factors. The factors identified in *Intel* are:

The degree of similarity between the conflicting marks.

I have found above that the marks are visually and aurally similar to a medium degree and conceptually neutral.

The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public.

As set out above, I do not consider that the opponent has demonstrated a reputation in respect of the services that I found to be similar to the applicant's services. While there is a superficial overlap in user between the opponent's reputed goods and services and the applicant's services on the basis that both may be selected by a member of the general public, I do not consider there to be any overlap in nature, method of use or purpose between the parties' services. Further, I do not consider that an undertaking providing the applicant's services will also provide the opponent's goods or services. This finding is made while taking into account the fact that the majority of the parties' goods and services relate to photography and other types of multimedia. Consequently, I do not consider a superficial overlap in user alone to be sufficient for the parties' goods and services to be considered similar.

In respect of the relevant section of the public of the parties' goods and services, there is, as set out above, a superficial level of overlap on the basis that the user bases for both parties' goods and services are so broad.

The strength of the earlier marks' reputation

The opponent's marks have a strong reputation in the UK.

The degree of the earlier marks' distinctive character, whether inherent or acquired through use

I have found that the opponent's marks enjoy a high level of inherent distinctiveness. In respect of enhanced distinctiveness through use, the evidence

shows that the opponent's marks strongly identify the goods and services with a single undertaking.

Whether there is a likelihood of confusion

I have found that there is no likelihood of confusion between the marks.

81. Notwithstanding the fact that there is no likelihood of confusion between the marks and the differences between the parties' goods and services, I consider that the strength of the opponent's reputation and the common element of 'INSTA' (being a non-descriptive or allusive element that is present at the beginning of all three marks) are, in my view, sufficient to find that a link would still be made.

Damage

82. The opponent has pleaded that use of the applicant's mark would constitute an unfair advantage for the applicant, would be detrimental to the opponent's reputation and would dilute the distinctive character and repute of the opponent's first and second marks. I will deal with each head of damage in turn below.

Unfair advantage

83. I bear in mind that unfair advantage has no effect on the consumers of the opponent's marks' goods and services. Instead, the taking of unfair advantage of the distinctive character or reputation of an earlier mark means that consumers are more likely to buy the goods and services of the later mark than they would otherwise have been if they had not been reminded of the earlier mark.

84. In *Jack Wills Limited v House of Fraser (Stores) Limited* [2014] EWHC 110 (Ch) Arnold J. considered the earlier case law and concluded that:

“80. The arguments in the present case give rise to two questions with regard to taking unfair advantage. The first concerns the relevance of the defendant's intention. It is clear both from the wording of Article 5(2) of the Directive and

Article 9(1)(c) of the Regulation and from the case law of the Court of Justice interpreting these provisions that this aspect of the legislation is directed at a particular form of unfair competition. It is also clear from the case law both of the Court of Justice and of the Court of Appeal that the defendant's conduct is most likely to be regarded as unfair where he intends to benefit from the reputation and goodwill of the trade mark. In my judgment, however, there is nothing in the case law to preclude the court from concluding in an appropriate case that the use of a sign the objective effect of which is to enable the defendant to benefit from the reputation and goodwill of the trade mark amounts to unfair advantage even if it is not proved that the defendant subjectively intended to exploit that reputation and goodwill.”

85. Given the strength of the opponent's marks' reputation and the presence of the common element of 'INSTA', it is my view that it is quite clear that there is potential for the applicant to gain an unfair advantage by using the highly similar mark 'INSTALIME'. The applicant, by using the identical prefix 'INSTA' would achieve instant familiarity in the eyes of the average consumers, thereby securing a commercial advantage and benefitting from the opponent's reputation without paying financial compensation. Such commercial advantage would not exist were it not for the strong reputation of the opponent's marks. Therefore, I find it likely that the applicant's mark is takes unfair advantage of the opponent's marks.

86. As damage is made out on the basis of unfair advantage, I do not consider it necessary to go on to consider the opponent's other heads of damage.

87. The opposition based upon section 5(3) succeeds in its entirety.

CONCLUSION

88. The opposition has succeeded and the application is refused in respect of all of the services applied for.

COSTS

89. As the opponent has been successful, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicant the sum of **£1,400** as a contribution towards its costs. The sum is calculated as follows:

Filing a notice of opposition:	£200
Preparing evidence:	£500
Attendance at a hearing:	£500
Official fee:	£200
Total	£1,400

90. I therefore order Daniels Ostapovs to pay Instagram LLC the sum of £1,400. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings (subject to any order of the appellate tribunal).

Dated this 24th day of August 2021

A COOPER
For the Registrar

ANNEX

The opponent's first mark

Class 9

Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signaling, 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; compact discs, DVDs and other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment, computers; computer software; fire-extinguishing apparatus; software applications; electronic game software; video game software; downloadable computer software for modifying the appearance and enabling transmission of photographs; computer software for the collection, editing, organizing, modifying, transmission, storage and sharing of data and information; computer software for use as an application programming interface (API); application programming interface (API) for computer software which facilitates online services for social networking, building social networking applications and for allowing data retrieval, upload, download, access and management; computer software to enable uploading, downloading, accessing, posting, displaying, tagging, blogging, streaming, linking, sharing or otherwise providing electronic media or information via computer and communication networks; downloadable electronic publications; downloadable video recordings in the nature of creative tutorials in the field of advertising on social media; information technology and audio-visual equipment; information technology and audio-visual, multimedia and photographic apparatus and instruments; cameras [photography]; software, namely, an application providing social networking functionalities; software for social networking; software for opinion polling; software allowing users to post questions with answer options; software allowing users to join discussions and post comments about opinion polls, questions and answers; software allowing users to give compliments and positive feedback; software for creating, managing, and interacting with an online community; software for creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating,

indicating sentiment about, commenting on, embedding, transmitting, and sharing or otherwise providing electronic media or information via computer and communication networks; software for the collection, editing, organizing, modifying, transmission, storage and sharing of data and information; software for sending and receiving electronic message alerts, notifications and reminders; software for remote communication; software for sending and receiving electronic messages, graphics, images, audio and audio visual content via the internet and communications networks; software for wireless content, data and information delivery; messaging software; virtual reality helmets adapted for use in playing video games; wearable peripherals for playing video games specially adapted for computers, video game consoles, handheld video game consoles, tablet computers, and mobile telephones; parts and fittings for the aforesaid goods.

Class 16

Photographs; photograph albums; photographs (apparatus for mounting -).

Class 35

Advertising; business management; business administration; office functions; marketing services; promotion services; dissemination of advertising for others via computer and communication networks; promoting the goods and services of others via computer and communication networks; market research services; provision of market research information; online advertisements; advertising, marketing and promoting the goods and services of others by means of providing photo and video equipment at special events; business consultation regarding marketing activities; media planning and media buying services; brand consulting; design of advertising materials for others; provision of market research and information services; media planning and media buying for others; advertising services for tracking advertising performance, for managing, distributing and serving advertising, for analysing advertising data, for reporting advertising data, and for optimizing advertising performance; consulting services in the field of advertising; customizing marketing efforts of others; commercial information services; advertisement targeting; management of electronically stored advertising; facilitating the exchange and sale of services and products of third parties via computer and communication networks; retail, wholesale and online retail services relating to computer hardware, computer

software, magnetically encoded gift cards, computer peripheral devices, computers, mobile devices, wearable peripherals for computers, tablet computers, mobile devices and mobile telephones, computer peripherals, video game equipment, telecommunications equipment, smartphones, handheld computers, computer tablets, chemicals, chemical substances, paints, varnishes, preservatives; retail, wholesale and online retail services relating to cleaning preparations, cosmetics, toiletries, perfumery, dentifrices, industrial oils, industrial greases, lubricants, fuels, illuminants, candles, pharmaceuticals, medical preparations, veterinary preparations, dietary supplements, preparations for destroying vermin, common metals and their alloys, metal materials for building and construction, small items of metal hardware, amusement and video game machines, machine tools; retail, wholesale and online retail services relating to motors and engines, hand tools, cutlery, scientific apparatuses and instruments, photographic and cinematographic apparatuses and instruments, computer software, computer hardware, apparatus and instruments for recording and transmission of sound or images, apparatus and instruments for reproduction of sound or images, medical and veterinary apparatuses and instruments; retail, wholesale and online retail services relating to lighting apparatuses, heating apparatuses, cooking apparatuses, refrigerating apparatuses, vehicles, firearms, explosives, precious metals, jewellery, horological and chronometric instruments, musical instruments, printed matter, stationery and office requisites, packaging, rubber, plastics and resins, luggage and bags, wallets and purses, umbrellas; retail, wholesale and online retail services relating to non-metallic building materials, non-metallic buildings, furniture, bedding, small items of non-metallic hardware, household and kitchen utensils and containers, articles for cleaning purposes, glassware, porcelain and earthenware products, ropes and string, vehicle covers, padding material, cushioning and stuffing material, threads for textile use, textiles, household linen, clothing, footwear, headgear, haberdashery products; retail, wholesale and online retail services relating to hair decorations, materials for covering floors, wall hangings, games, toys, playthings, sporting equipment, meat, fish, poultry, eggs, milk, oils and fats, vegetables, fruits, food and beverage products, preparations for food and beverage products, agricultural products, aquacultural products, horticultural and forestry products, tobacco, smokers' articles; providing online marketplaces for sellers of goods and/or services; providing online facilities for connecting sellers with buyers; providing online facilities featuring information for

consumers in the field of gifts; promoting the goods and services of others by providing online facilities featuring gift suggestions; business networking; employment and recruiting services; compilation of on-line computer databases and on-line searchable databases; charitable services, namely promoting public awareness about charitable, philanthropic, volunteer, public and community service and humanitarian activities; organizing exhibitions and events in the field of software and hardware development for commercial or advertising purposes; association services that promote the interests of professionals and businesses in the field of mobile software application development; incentive award programs for software developers; online business networking services; online business networking services accessible by means of downloadable mobile applications; providing information in the form of databases featuring information in the fields of online business networking; information, advisory and consultancy services relating to all of the aforesaid.

Class 38

Telecommunications; telecommunications services, namely, electronic transmission of data, messages, graphics, photographs, images, audio, video and information; providing chatrooms, instant messaging services, and electronic bulletin boards; broadcasting services; data broadcasting services; audio, text and video broadcasting service over the internet or other communications networks; computer aided transmission of messages and images; providing access to computer, electronic and online databases; providing online forums for communication on topics of general interest; providing user access to global computer networks; rental of access time to global computer networks; streaming of data; transmission of digital files; electronic transmission of electronic media, data, messages, graphics, images, audio, video and information; chatroom services for social networking; providing online chat rooms and electronic bulletin boards; providing access to computer, electronic and online databases in the fields of social networking; broadcasting services over computer or other communication networks namely, uploading, posting, displaying, tagging, and electronically transmitting data, information, messages, graphics, and images; instant messaging services; peer-to-peer photo sharing, video sharing and data sharing services, namely, electronic transmission of digital photo files, audio, videos, audio-visual content and graphics among users; photosharing and data sharing services,

namely, electronic transmission of digital photo files, videos, audio visual content and data among internet and mobile device users; providing access to computer databases in the fields of online networking, online introduction and dating; information, advisory and consultancy services relating to the aforesaid services.

Class 40

Photographic printing

Class 41

Education; providing of training; entertainment; sporting and cultural activities; providing computer, electronic and online databases in the field of entertainment; Publication of electronic journals and blogs featuring user generated or specified content; Publishing services, namely, publishing of electronic publications for others; Rental of photography and/or videography kiosks for capturing, uploading, editing and sharing of pictures and videos; academies [education]; amusement parks; amusements; arranging and conducting of colloquiums; arranging and conducting of concerts; arranging and conducting of conferences; arranging and conducting of congresses; arranging and conducting of seminars; arranging and conducting of symposiums; arranging and conducting of workshops [training]; arranging of beauty contests; booking of seats for shows; cinema presentations; club services [entertainment or education]; coaching [training]; discotheque services; education information; educational examination; electronic desktop publishing; entertainer services; entertainment information; organisation of fashion shows for entertainment purposes; film production, other than advertising films; gambling; game services provided on-line from a computer network; games equipment rental; health club services [health and fitness training]; holiday camp services [entertainment]; music-halls; news reporters services; organization of shows [impresario services]; organization of sports competitions; party planning [entertainment]; personal trainer services [fitness training]; physical education; practical training [demonstration]; production of music; production of radio and television programmes; production of shows; providing amusement arcade services; providing karaoke services; providing on-line electronic publications, not downloadable; providing sports facilities; publication of books; publication of electronic books and journals on-line; publication of texts, other than publicity texts; radio entertainment; recording studio services;

providing recreation facilities; sport camp services; subtitling; television entertainment; theatre productions; ticket agency services [entertainment]; timing of sports events; tuition; interactive entertainment services; electronic games services provided by means of any communications network; entertainment services provided by means of telecommunication networks; information services relating to education, training, entertainment, sporting and cultural activities provided by means of telecommunication networks; provision of news information; television production services; television programming services; television production and television programming services provided by means of Internet protocol technology; provision of musical events; entertainment club services; presentation of live performances; night clubs; rental of music venues and stadiums; casino services; ticket reservations for entertainment, sporting and cultural events; ticket information services for entertainment, sporting and cultural events; ticket agency services for entertainment, sporting and cultural events; provision of on-line computer games; rental of computer games programs; computer amusement services; provision of information, news and commentary in the field of computer games; arranging, organising and conducting computer game competitions; publishing services; arranging, organising and conducting of competitions, games and quizzes; arranging, organising and conducting of competitions, games and quizzes for entertainment, recreational, cultural and educational purposes; organisation of awards; conducting of phone-in competitions; issuing of tickets for entertainment events; employment training; photo sharing and video sharing services; information, advisory and consultancy services relating to all of the aforesaid.

Class 42

Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software; conversion of data or documents from physical to electronic media; software as a service; electronic data storage; electronic storage of photographs; updating of computer software; application service provider (ASP) services, namely hosting software applications of others; interactive hosting services which allow the users to publish and share their own content and images online; hosting on-line web facilities for others; hosting online web facilities for others for sharing online content; hosting a web site that gives users the ability to upload

photographs; computer services, namely, hosting an interactive website featuring technology that allows users to manage their online photograph and social networking accounts; providing online software for modifying the appearance and enabling transmission of photographs; file sharing services, namely, hosting a website featuring technology enabling users to upload and download electronic files; hosting on-line web facilities for others for managing and sharing on-line content; providing technical information from searchable indexes and databases of information; providing on-line non-downloadable software for database management; online data storage; providing search engines for obtaining data via the internet and communications networks; provision of Internet search engines; providing search engines for obtaining data via communications networks; computer services, namely, creating virtual communities for registered users to participate in discussions and engage in social, business and community networking; computer network services; providing interactive online facilities featuring technology that allows users to manage images, photographs, text, graphics, audio-visual, video content, data and personal social networking accounts; providing online facilities that give users the ability to upload, modify and share audio, video, photographic images, text, graphics and data; application service provider (ASP); application service provider (ASP) featuring software to enable or facilitate the editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, embedding, transmitting, and sharing or otherwise providing audio and video content, photographic images, text, graphics and data; application service provider (ASP) featuring software to enable or facilitate voice over internet protocol (VOIP) calls, phone calls, video calls, text messages, electronic messages, instant messages, and online social networking services; application service provider (ASP), namely, providing, hosting, managing, developing, and maintaining applications, software, web sites, and databases in the fields of wireless communication, mobile information access, and remote data management for wireless delivery of content to handheld computers, laptops and mobile electronic devices; computer services, namely, hosting electronic facilities in the nature of internet websites, mobile applications and other similar communication platforms for others for organizing and conducting meetings, events and interactive discussions via communication networks; application service provider (ASP) services, namely, hosting computer software applications of others; application service provider (ASP)

featuring software to enable or facilitate the uploading, downloading, streaming, posting, displaying, blogging, linking, sharing or otherwise providing electronic media or information over communication networks; peer-to-facilities photo sharing services, namely, providing online facilities featuring technology enabling users to edit, upload, download, access, view, post, display, tag, blog, stream, link, annotate, indicate sentiment about, comment on, embed, transmit, or share images, photographs, text, graphics, audio-visual, video content, and data; application service provided (ASP) featuring software to enable or facilitate taking and editing photographs and recordings and editing videos; computer services, namely, creating virtual communities for registered users to organize groups, meeting and events, participate in discussions and engage in social, business and community networking; providing online facilities featuring technology that enables users to create personal profiles featuring social networking information and to transfer and share such information among multiple online facilities; providing an online network service that enables users to transfer personal identity data to and share personal identity data with and among multiple websites; hosting a web site featuring technology that enables online users to create personal profiles featuring social networking information and to transfer and share such information among multiple websites; providing software in the nature of a mobile application; providing software for social networking, creating a virtual community, and transmission of audio, video, images, text, content and data; providing software for opinion polling; providing technical information from searchable indexes and databases of information, including text, electronic documents, databases, graphics and audio visual information, on computer and communication networks; providing software allowing users to post questions with answer options; providing software allowing users to join discussions and post comments about opinion polls, questions and answers; providing software allowing users to give compliments and positive feedback; computer services, namely, hosting online facilities for others for interactive discussions via communication networks; providing temporary use of non-downloadable software applications for social networking, creating a virtual community, and transmission of audio, video, photographic images, text, graphics and data; computer services in the nature of customized web pages featuring user-defined or specified information, personal profiles, audio, video, photographic images, text, graphics and data; computer services in the nature of customized electronic accounts featuring user-defined or user-specified information,

personal profiles, audio, video, photographic images, text, graphics and data; information, advisory and consultancy services relating to the aforesaid services; Software as a service (SAAS) services featuring software for sending and receiving electronic messages, notifications and alerts; software for electronic messaging; Providing online facilities featuring software for sending and receiving electronic messages, instant messages, electronic message alerts and reminders, photographs, images, graphics, data, audio, videos and audio-visual content via the internet and communication networks; providing user authentication services in e-commerce transactions; providing user authentication of electronic funds transfer, credit and debit card and electronic check transactions via a global computer network; information, advisory and consultancy services relating to all of the aforesaid.

Class 45

Legal services; security services for the physical protection of tangible property and individuals; dating services; social introduction, networking and dating services; online social networking services; online social networking services accessible by means of downloadable mobile applications; computer software licensing; social introduction agencies; dating services provided through social networking; providing information in the form of databases featuring information in the fields of social online networking; user identification services; user verification services; Internet based social introduction and social networking services; information, advisory and consultancy services relating to the aforesaid services.

The opponent's second mark

Class 9

Downloadable computer software for modifying and enabling transmission of images, audio-visual and video content; Downloadable computer software for viewing and interacting with a feed of images, audio-visual and video content and associated text and data; Downloadable computer software for finding content and content publishers, and for subscribing to content; Computer software for tagging images, audio-visual and video content with data indicating date, location, people and subject matter; Computer search engine software; Computer software for social networking; Computer software for creating, managing, and interacting with an online community;

Computer software for managing social networking content, interacting with a virtual community, and transmission of images, audio-visual and video content, photographs, videos, data, text, messages, comments, advertisements, media advertising communications and information; Computer software for creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, embedding, transmitting, sharing, searching, or otherwise providing or interacting with electronic media; Computer software for sending electronic message alerts, notifications and reminders; Software for sending and receiving electronic messages; Computer software for disseminating advertising for others; Computer software for use as an application programming interface (API); Computer software in the nature of application programming interfaces (APIs) which facilitate online services for social networking, developing software applications, and purchasing and disseminating advertising; Interactive photo and video equipment, namely, kiosks for capturing, uploading, editing, printing and sharing digital images and video.

Class 35

Marketing, advertising and promotion services; Dissemination of advertising for others via computer and communication networks; Promoting the goods and services of others via computer and communication networks; Marketing and advertising consultation services; Market research services; Provision of market research information; Online advertisements; Advertising, marketing and promoting the goods and services of others by means of providing photo and video equipment at special events.

Class 38

Telecommunications services; Photo sharing and video sharing services, namely, electronic transmission of digital photo files, videos and audio visual content among internet users; telecommunications services, namely, electronic transmission of images, audio-visual and video content, photographs, videos, data, text, messages, advertisements, media advertising communications and information; Peer-to-peer network computer services, namely, electronic transmission of images, audio-visual and video content, photographs, videos, data, text, messages, advertisements, media advertising communications and information; Providing access to computer, electronic

and online databases; Providing online forums for communication, namely, transmission on topics of general interest; Providing email and instant messaging services; Chatroom services for social networking; Providing online communications links which transfer web site users to other local and global web pages.

Class 41

Providing computer, electronic and online databases in the field of entertainment; Publication of electronic journals and blogs featuring user generated or specified content; Publishing services, namely, publishing of electronic publications for others; Rental of photography and/or videography kiosks for capturing, uploading, editing and sharing of pictures and videos.

Class 42

Design and development of computer software; Providing a website that gives users the ability to engage in social networking and manage their social networking content; Providing temporary use of non-downloadable software for social networking, managing social networking content, creating a virtual community, and transmission of images, audio-visual and video content, photographs, videos, data, text, messages, advertisements, media advertising communications and information; Providing temporary use of non-downloadable software for modifying and enabling transmission of images, audio-visual and video content; Providing temporary use of non-downloadable computer software for viewing and interacting with a feed of images, audio-visual and video content and associated text and data; Providing temporary use of non-downloadable computer software for finding content and content publishers, and for subscribing to content; Providing temporary use of non-downloadable computer software for tagging images, audio-visual and video content with data indicating date, location, people and subject matter; Providing information from searchable indexes and databases of information; Providing search engines for obtaining data via communications networks; Providing an online network service that enables users to transfer personal identity data and to share personal identity data with and among multiple applications or websites; Computer services, namely, hosting online web facilities for others for organizing and conducting meetings, events and interactive discussions via communication networks; Computer services, namely, creating a virtual community for registered users to share, view, subscribe to and

interact with images, audio-visual and video content and related data and information; Application service provider (ASP) services, namely, hosting computer software applications of others; Application service provider (ASP) featuring software for social networking, managing social networking content, creating a virtual community, and transmission of images, audio-visual and video content, photographs, videos, data, text, messages, advertisements, media advertising communications and information; Application service provider (ASP) featuring software to enable creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, embedding, transmitting, sharing, searching, or otherwise providing or interacting with electronic media; Application service provider (ASP) featuring application programming interface (API) software which facilitates online services for social networking, developing software applications, and purchasing and disseminating advertising; Application service provider (ASP) featuring software for use in buying, selling, tracking, valuing, optimizing, targeting, analyzing, delivery, and reporting of online advertising and marketing; Application service provider (ASP) featuring software for use in designing and managing online advertising and marketing campaigns; Platform as a service (PAAS) featuring computer software platforms for social networking, managing social networking content, creating a virtual community, and transmission of images, audio-visual and video content, photographs, videos, data, text, messages, advertisements, media advertising communications and information; Rental of computer software that gives users the ability to upload, edit, and share images, videos and audio-visual content.

Class 45

Online social networking services; Internet based social introduction, networking and dating services; Providing information in the form of databases featuring information in the fields of social networking, social introduction and dating.

The opponent's third mark

Class 9

Downloadable computer software for modifying the appearance and enabling transmission of photographs; computer software for the collection, editing, organizing,

modifying, transmission, storage and sharing of data and information; computer software to enable uploading, downloading, accessing, posting, displaying, tagging, blogging, streaming, linking, sharing or otherwise providing electronic media or information via computer and communication networks.

The opponent's fourth mark

Class 38

Photo sharing and video sharing services, namely, electronic transmission of digital photo files, videos and audio visual content among internet users; Telecommunications; Providing access to computer, electronic and online databases; Telecommunications services, namely, electronic transmission of data, messages, graphics, photographs, images, audio, video, audio-visual content, and information; Providing online forums for communication, namely, transmission on topics of general interest; Providing online communications links which transfer mobile device and internet users to other local and global online locations; Facilitating access to third party websites or to other electronic third party content via a universal login; Providing online chat rooms, instant messaging services, and electronic bulletin boards; Audio, text and video broadcasting services over the internet and other communications networks; providing access to computer databases in the fields of social networking and social introduction and dating; Peer-to-peer photo and data sharing services, namely, electronic transmission of digital photo files, graphics and audio content among internet users; Telecommunications and peer-to-peer network computer services, namely, electronic transmission of images, audio-visual and video content, photographs, videos, data, text, messages, advertisements, media advertising communications and information; Streaming and live streaming of video, audiovisual, and interactive audiovisual content via the internet.

Class 41

Education; providing of training; entertainment; sporting and cultural activities; Entertainment services, namely, providing an online forum for the dissemination of content, data, and information for entertainment and social and business networking purposes; Entertainment services, namely, providing access to interactive electronic and online databases of user-defined content, third-party content, photos, video,

audio, visual, and audio-visual material in the field of general interest; Photosharing and video sharing services; Electronic publishing services for others; online journals, namely, weblogs (blogs) featuring user-defined content; Providing computer, electronic and online databases in the field of entertainment; Publishing services, namely, publishing of electronic publications for others; Rental of photography and videography kiosks for capturing, uploading, editing and sharing of pictures and videos; Entertainment services, namely, providing online facilities for streaming entertainment content and live streaming video of entertainment events; Organizing live exhibitions and conferences in the fields of culture, entertainment and social networking for non-business and non-commercial purposes; providing entertainment information from searchable indexes and databases of information, including text, electronic documents, databases, graphics, photographic images and audio visual information, via the internet and communication networks; Entertainment and educational services, namely, providing non-downloadable movies, television shows, webcasts, audiovisual, and multimedia works via the internet, as well as information, reviews, and recommendations regarding movies, television shows, webcasts, audiovisual, and multimedia works.