

o/638/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NOS. WO1536594 AND WO1535115

BY CSME TECHNOLOGY, INC.

TO REGISTER THE TRADE MARKS:

CHERRYTV

CHERRY.TV

IN CLASS 42

AND

IN THE MATTER OF CONSOLIDATED OPPOSITIONS THERETO

UNDER NOS. 421481 AND 421642

BY CHERIE FM

Background and pleadings

1. International trade marks IR1536594 and IR1535115 shown on the cover page of this decision were registered by CSME Technology, Inc. (the holder) with effect from 24 April 2020. From the same date, the holder designated the UK as a territory in which it seeks to protect the IRs under the terms of the Protocol to the Madrid Agreement. The holder seeks protection for both IRs in relation to the following services:

Class 42: Providing a web site that gives computer users the ability to upload, exchange and share photos, videos and video logs in the field of adult-oriented content; Providing an online non-downloadable Internet-based system application featuring technology enabling users to stream live broadcasts of audio, visual and audiovisual material in the field of adult-oriented content via a global computer network; none of the aforementioned services relating to gaming, gambling or casinos.

2. The request to protect IR1535115 was published on 3 July 2020 and the request for IR1536594 was published on 17 July 2020. On 17 September 2020 Cherie FM (the opponent) opposed the protection of IR1536594 in the UK based upon section 5(2)(b) of the Trade Marks Act 1994. They opposed protection of IR1535115 on 2 October 2020 also under section 5(2)(b). The opponent relies on the following trade mark for both oppositions:

CHERIE

IR1410614

Filing date: 22 February 2018

Registration date: 7 December 2018

Relying on all goods and services for which the earlier mark is registered, namely:

Class 9: Photographic and cinematographic apparatus and instruments; apparatus and media for recording, storing, disseminating, recovering, transmitting or reproducing sound, images, texts, information, data and computer codes; audiovisual apparatus and instruments; television sets; audio tape recorders; video recorders; radios; video projectors; magnetic recording media; sound recording disks; digital recording media; downloadable digital music; downloadable electronic publications; exposed films; videotapes; video game cartridges; audio and video cassettes; compact disks (audio-video); files of music, sound, images, text, signals, downloadable data and information online via a telecommunications network (Internet); software; game software (recorded programs); information processing apparatus; computers; electrical and electronic communication and telecommunication, radio-paging, radio

telephony and teaching apparatus and instruments; telephones, including portable telephones; paging apparatus; telecommunication apparatus and instruments; communication instruments and apparatus; electronic notepads; computer programs for accessing, browsing and searching databases online; Internet devices (software); equipment for processing information, namely the written word, images, voice and data; satellite transmission facilities, microwave beam equipment, telephone and telegraph multiplexes, terrestrial and spatial networks; cable networks, local area networks, telecommunication line termination systems; radio telephones, telephone answering apparatus, telephone recorders; cellular telephones; cellular telephone relays; electric batteries, earphones, chargers for portable telephones, cases for portable telephones; housings and parts of housings for mobile telephones; eyewear, spectacles, sunglasses, spectacle lenses, spectacle frames, spectacle cases.

Class 35: Advertising; advertising services online and by correspondence; dissemination of advertisements; public relations; computer file management, namely management of advertising or news media (advertising control); advertising sponsorship; rental of advertising space; radio and television advertising; dissemination of advertising material (prospectuses, samples); arranging newspaper subscriptions for others; organization of exhibitions for commercial or advertising purposes; advertising services; services involving compilation and systematization of data, music, sound, images, tests, signals and information in a central file.

Class 38: Telecommunication; broadcasting of radio and television programs; broadcasting and transmission of radio and television programs; electronic transmission of data, images, sounds, videos and documents; dissemination of music, sounds, images, texts, signals, information and codes by means of computer terminals and any other transmission systems such as radio waves, cables, satellites and the Internet; electronic messaging; connection and provision of access to electronic communication networks for transmitting or receiving data, sounds, music, videos and multimedia documents; paging services (radio, telephone or other means of electronic communication); rental of telecommunication apparatus, communication via computer terminals; cellular telephone communication; provision of telecommunication access to video and audio content provided via an on-line video-on-demand service; streaming of audio and video content on the Internet; press agencies.

Class 41: Entertainment; education; training; radio entertainment; television entertainment; entertainment by computer or other broadcast media; game services provided online from a computer network; sporting and cultural activities; entertainer services; production of radio and television programs; recording studio services; orchestra and music hall services; theater productions; show production, organization and performance; organization, production, presentation and conducting of tours, festivals, music concerts, events and musical and cultural shows; production of radio or television games;

publication of books, magazines, newspapers; film production; organization of competitions for educational and entertainment purposes; arranging and conducting of conferences, colloquiums, conventions; organization of exhibitions for cultural or educational purposes; night clubs and discotheque services (entertainment); on-line publication, over a computer network, of radio and television programs; club services relating to entertainment including the club services provided on-line over a computer network; book lending; entertainer services; rental of films, phonographic recordings, cinema projection apparatus and accessories, stage scenery; provision of non-downloadable music online; provision of non-downloadable online electronic publications; organization of award ceremonies relating to education and entertainment; disc jockey services; production and editing of music and video.

3. The opponent claims that the distinctive parts of both parties marks are highly similar, in particular visually and phonetically. They claim the letters TV in the contested marks are descriptive and non-distinctive. They state that the goods and services at issue are identical or highly similar and therefore there is a high likelihood of confusion. The holder filed counterstatements denying the claims made.
4. The registry informed the parties that the two proceedings would be consolidated in a letter dated 22 December 2020.
5. The holder is represented by Barker Brettell LLP and the opponent is represented by Mewburn Ellis LLP. Both parties submitted evidence in the form of witness statements. Neither party requested a hearing and both parties submitted submissions in lieu. I do not propose to summarise the submissions here however, I have taken them into consideration and will refer to them where necessary. This decision is therefore taken following careful perusal of the papers.
6. Although the UK has left the EU, section 6(3)(a) of the European (Withdrawal) Act 2018 required 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

7. The opponent's evidence consists of the witness statement of Mr Joe McAlary dated 19 February 2021. Mr McAlary is a Technical Assistant at Mewburn Ellis, the opponent's representatives. The statement is accompanied by 4 exhibits.
8. He states that he carried out an internet google search on 10 February 2021 for the terms: 'Cherry definition' and 'Cherry meaning'. Exhibit JM1 consists of print outs of a selection of the results from the Google search.

9. The first page from Exhibit JM1 is a screenshot from Collins dictionary website showing 'Cherry' and the initial definition as being a small round fruit. There is then a list of 6 different definitions on the next page from British English followed by 10 definitions from American English. Some of these include the fruit, the colour, the tree, slang for hymen or virginity or being a novice.
10. Next are screenshots from Lexico which again have the first definition as being the fruit followed by the fruit tree.
11. There are then screenshots from an emoji guide web page which shows the cherry emoji- each one being a representation of the fruit.
12. Mr McAlary then states he conducted an internet search on 11 February 2021 for the following terms: 'Cherry slang' and 'Cherry slang meaning'. He then produces further screenshots from this search in Exhibit JM2
13. Firstly, in Exhibit JM2 is a screenshot from dictionary.com for a search of 'pop the cherry' which is noted as being slang for losing virginity or doing something you haven't done before.
14. This is followed by a screenshot from onlineslangdictionary.com showing the slang definitions of 'cherry' as being virginal or in an unused/mint condition.
15. On 17 February 2021, Mr McAlary confirms he conducted a further internet search for the following terms: 'Cherry name', 'Cherry first name' and 'Cherry girls name'. These screenshots are then produced in JM3 with the first page being an extract from Wikipedia showing Cherry as a given name and a list of notable people with the first name 'Cherry'.
16. The next screenshot is from sheknows.com which shows the name 'Cherry' with its meanings in English, French and American. Finally from Exhibit JM3 is an extract from babynamemearingz.com. It states the meaning of Cherry is 'love and generosity' and is pronounced 'CHER-ee' with a latin origin.
17. Exhibit JM4 is made up of screenshots from Mr McAlary's internet search dated 11 February for the following terms: 'Cherie name', 'Cherie meaning' and 'Cherie name meaning'. The first page of Exhibit JM4 is an extract from Wikipedia for the name 'Cherie' where it states that it is an English female given name that comes from the French 'chérie' which means darling. It also provides a list of notable people with the name 'Cherie'.
18. A further extract from sheknows.com, this time for the name 'Cherie' is provided with the English, French and American meanings, all of these are noted to be from French origin meaning 'darling'.

19. Finally, there is a screenshot from babynamespedia.com regarding the name 'Cherie' and its meaning. It states the pronunciation is 'SHeh-RIY' and derives from French. It also states it is a derivative of 'Sherry'. There are details relating to the number of times the name is now used and also details of famous people with the name.
20. The holder has also provided evidence in the form of a witness statement from Catherine Wiseman who is their acting representative from Barker Brettell LLP. The statement is accompanied by 6 exhibits.
21. Ms Wiseman states that the word 'Cherry' is English and predominantly recognised as the name of a fruit. She provides an extract from Cambridge Dictionary and The Free Dictionary in Exhibit CAW1 which shows the meanings of the word. This first definition focuses on the fruit and then the colour.
22. Secondly, there is a slang definition of Cherry from The Free Dictionary which is noted as being the hymen. The extract then lists the various meanings of this.
23. Ms Wiseman then states that the word Cherie is French and translates as sweetheart or darling, providing evidence of this in the form of a google translate search at Exhibit CAW2. There is also a screenshot from Dictionary.com which lists 'Cherie' as a female given name as the first definition, followed by the definition as 'dear; sweetheart' from French.
24. Ms Wiseman then goes on to state that it is compulsory for languages to be taught in schools up until the age of 14 in England. Provided at Exhibit CAW3 is a copy of the Secondary School English National Curriculum. The reference to languages is found at page 98 of the booklet. It does not make specific reference to any language in particular.
25. It is further claimed that English schools commonly teach French, German and Spanish and that since 2015 French has been the most popular language choice for GCSE students. It is also claimed that many students continue to study French to A Level. To support this, Ms Wiseman has provided a copy of the British Council Language Trends 2020 Survey Report at Exhibit CAW4. Upon analysing the report, it appears that in 2019 there were more than 120,000 French GCSE entries, 41,000 German GCSE entries and 96,000 Spanish GCSE entries with around 6-7% of students of each language continuing to A Level studies.
26. The next statement from Ms Wiseman is that famous musicians are known to release songs in multiple languages. Ms Wiseman names Shakira, Lady Gaga, Celine Dion, The Beatles and Blur amongst others. In support of this claim is an article from Babel Magazine website for 'When Music is Multilingual: 10 Artists Who Perform in Other Languages'.

27. Finally, Exhibit CAW6 which comprises a Wikipedia page for the song ‘My Cherie Amour’ by Stevie Wonder which was released in 1969 and the lyrics of that song from a Google search.

28. Ms Wiseman goes on to say that the above exhibits show that French is a recognised language in the UK and that English consumers would be accustomed to seeing French words. She claims this would mean that a UK consumer would be able to decipher the French meaning of CHERIE and be able to differentiate this from an English word.

Decision

Section 5(2)(b)

29. Section 5(2)(b) reads as follows:

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

(a)...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

30. 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 IR 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.”

(b) The trade mark upon which the opponent relies qualifies as an earlier trade mark because it was applied for at an earlier date than the holder’s marks pursuant to section 6 of the Act. The opponent’s mark is not subject to the proof of use requirements pursuant to section 6A of the Act. This is because the earlier mark had not been registered for more than 5 years at the filing date of the applications in issue. The opponent can, therefore, rely upon all of the goods and services which it has identified.

Section 5(2)(b) case law

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

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

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

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

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

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

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

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

(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

32. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

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

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

33. 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 of its judgment 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”.

34. 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.

35. In *Gérard Meric v Office for Harmonisation in the Internal Market* ('Meric'), Case T-133/05, the General Court ("the GC") stated that:

"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 für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark".

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

37. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court stated that "complementary" means:

"...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers

may think that the responsibility for those goods lies with the same undertaking”.

38. In *Sanco SA v OHIM*, Case T-249/11, the General Court indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings.

39. The competing goods and services are as follows:

Holders Services	Opponents Goods & Services
<p>Class 42: Providing a web site that gives computer users the ability to upload, exchange and share photos, videos and video logs in the field of adult-oriented content; Providing an online non-downloadable Internet-based system application featuring technology enabling users to stream live broadcasts of audio, visual and audiovisual material in the field of adult-oriented content via a global computer network; none of the aforementioned services relating to gaming, gambling or casinos.</p>	<p>Class 9: Photographic and cinematographic apparatus and instruments; apparatus and media for recording, storing, disseminating, recovering, transmitting or reproducing sound, images, texts, information, data and computer codes; audiovisual apparatus and instruments; television sets; audio tape recorders; video recorders; radios; video projectors; magnetic recording media; sound recording disks; digital recording media; downloadable digital music; downloadable electronic publications; exposed films; videotapes; video game cartridges; audio and video cassettes; compact disks (audio-video); files of music, sound, images, text, signals,</p>

	<p>downloadable data and information online via a telecommunications network (Internet); software; game software (recorded programs); information processing apparatus; computers; electrical and electronic communication and telecommunication, radio-paging, radio telephony and teaching apparatus and instruments; telephones, including portable telephones; paging apparatus; telecommunication apparatus and instruments; communication instruments and apparatus; electronic notepads; computer programs for accessing, browsing and searching databases online; Internet devices (software); equipment for processing information, namely the written word, images, voice and data; satellite transmission facilities, microwave beam equipment, telephone and telegraph multiplexes, terrestrial and spatial networks; cable networks, local area networks, telecommunication line termination systems; radio telephones, telephone answering apparatus, telephone recorders; cellular telephones; cellular telephone relays; electric batteries, earphones, chargers for portable telephones, cases for portable telephones; housings and parts of housings for mobile telephones; eyewear, spectacles, sunglasses,</p>
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spectacle lenses, spectacle frames, spectacle cases.

Class 35: Advertising; advertising services online and by correspondence; dissemination of advertisements; public relations; computer file management, namely management of advertising or news media (advertising control); advertising sponsorship; rental of advertising space; radio and television advertising; dissemination of advertising material (prospectuses, samples); arranging newspaper subscriptions for others; organization of exhibitions for commercial or advertising purposes; advertising services; services involving compilation and systematization of data, music, sound, images, tests, signals and information in a central file.

Class 38: Telecommunication; broadcasting of radio and television programs; broadcasting and transmission of radio and television programs; electronic transmission of data, images, sounds, videos and documents; dissemination of music, sounds, images, texts, signals, information and codes by means of computer terminals and any other transmission systems such as radio waves, cables, satellites and the

	<p>Internet; electronic messaging; connection and provision of access to electronic communication networks for transmitting or receiving data, sounds, music, videos and multimedia documents; paging services (radio, telephone or other means of electronic communication); rental of telecommunication apparatus, communication via computer terminals; cellular telephone communication; provision of telecommunication access to video and audio content provided via an on-line video-on-demand service; streaming of audio and video content on the Internet; press agencies.</p> <p>Class 41: Entertainment; education; training; radio entertainment; television entertainment; entertainment by computer or other broadcast media; game services provided online from a computer network; sporting and cultural activities; entertainer services; production of radio and television programs; recording studio services; orchestra and music hall services; theater productions; show production, organization and performance; organization, production, presentation and conducting of tours, festivals, music concerts, events and musical and cultural shows; production of radio or</p>
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	<p>television games; publication of books, magazines, newspapers; film production; organization of competitions for educational and entertainment purposes; arranging and conducting of conferences, colloquiums, conventions; organization of exhibitions for cultural or educational purposes; night clubs and discotheque services (entertainment); on-line publication, over a computer network, of radio and television programs; club services relating to entertainment including the club services provided on-line over a computer network; book lending; entertainer services; rental of films, phonographic recordings, cinema projection apparatus and accessories, stage scenery; provision of non-downloadable music online; provision of non-downloadable online electronic publications; organization of award ceremonies relating to education and entertainment; disc jockey services; production and editing of music and video.</p>
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40. In class 38 the opponent has registered: “connection and provision of access to electronic communication networks for transmitting or receiving data, sounds, music, videos and multimedia documents; provision of telecommunication access to video and audio content provided via an on-line video-on-demand service; streaming of audio and video content on the Internet;” these earlier services are similar to the contested provision of website and application services, as they all provide the user with access to audio and visual content via on-line communications

networks. They share end-user and may also be said to be complementary in the sense that the provider of an app or website requires access to telecommunications services, and the provider of such services will often also provide a website or further means in which to offer content to its consumers.

41. It is reasonable, in my opinion, that the average consumer might expect that the same undertaking would offer e.g. 'telecommunication access to video and audio content provided via an on-line video-on-demand service; streaming of audio and video content on the Internet; the connection and provision of access to electronic communication networks for transmitting and receiving multimedia', and also provide a website or application on which that audio and video content would be displayed. I therefore find these services to be similar, but to no more than a medium degree.

42. The opponent's registration also includes in class 38: 'electronic transmission of data, images, sounds, videos and documents; dissemination of music, sounds, images, texts, signals, information and codes by means of computer terminals and any other transmission systems such as radio waves, cables, satellites and the Internet;' which they state is similar to the services under the holder's marks. The opponent claims that both sets of services have the same purpose, which is providing an internet-based system that allows transmission and sharing of audio and visual content. I do consider that the purpose appears to be the same. Considering the other criteria established in *Treat*, I believe there is a difference in the nature of the services. The holder's services focus on the provision of a website or internet-based system in order to share content whereas the opponent's services are largely focused on the 'electronic transmission' of content.

43. There also seems to be a slight difference in the users of these services, with the focus of the holder's services being to allow its users to share content. The opponent has argued that these services would be complementary as per the *Sanco* case. I agree that it would be reasonable that the average consumer may think that the same undertaking would offer both 'electronic transmission of data, images, sounds, videos and documents; dissemination of music, sounds, images, texts, signals, information and codes by means of computer terminals and any other

transmission systems such as radio waves, cables, satellites and the Internet;’ and the services under the holder’s marks. It is likely that a party who provides the electronic transmission of images and videos etc, may also provide a platform such as a web site or internet based system for the display of that content. I therefore find these services to be similar to a low degree.

44. The opponent also has: “entertainment; entertainment by computer or other broadcast media;” registered in class 41. The opponent refers to “television entertainment; on-line publication, over a computer network, of radio and television programs” within their submissions however, I consider the more general “entertainment” and “entertainment by computer or other broadcast media;” to be closer to the holder’s services and so I will therefore consider these broader services initially.

45. A definition of entertainment is: ‘performances of plays and films, and activities such as reading and watching television, that give people pleasure’.¹ I consider that a website or internet based application such as that which the holder is providing could be deemed to contain forms of entertainment. It is the case that the holder is not providing the content itself, merely the platform from which that content can be accessed. Therefore, there is a degree of separation between the contested services and the broad ‘entertainment’ services of the opponent, however the consumer of entertainment generally would encompass the users of the holder’s website and application. I therefore find these services to be similar to at least a low degree.

46. I note that the opponent has claimed that the following goods and services in classes 9 and 41 are similar to the contested services: “software; files of music, sound, images, text, signals, downloadable data and information online via a telecommunications network (Internet); provision of non-downloadable music online”. Software’ is defined as the programs that can be used with a particular computer system² and a non-downloadable Internet-based system application

¹ <https://www.collinsdictionary.com/dictionary/english/entertainment>

² <https://www.collinsdictionary.com/dictionary/english/software>

could be considered as a form as software however, the opponent's registration is for class 9 'software' which is a good against the provision of a non-downloadable application as a service and therefore, although the users and use might be the same, the nature will differ. I find that there will be no more than a low level of similarity.

47. "Files of music, sound, images, text, signals, downloadable data and information online via a telecommunications network (Internet)" is another class 9 good within the opponent's registration. These are the types of files that might be used on or with the holder's services which suggests that a level of complementarity may exist. These types of files are important to the provider of a website or an application. The nature, purpose and use of these goods and services will differ however, the class 9 goods are physical files themselves as opposed to the holder's services of providing a website/application for users to potentially upload such files. I therefore find that there will be no more than a low degree of similarity.

48. The opponent's "provision of non-downloadable music online" will differ in nature, uses and purpose to the holder's services as it is concerned with the provision of the actual music files against "Providing a web site that gives computer users the ability to upload, exchange and share photos, videos and video logs in the field of adult-oriented content; Providing an online non-downloadable Internet-based system application featuring technology enabling users to stream live broadcasts of audio, visual and audiovisual material in the field of adult-oriented content via a global computer network;" as the former concerns providing the music files themselves against providing a platform for users to stream or share files, I therefore find that there will be no more than a low degree of similarity.

49. I have thoroughly considered the remaining goods and services relied upon by the opponent and I believe that they are less similar than the aforementioned goods and services for which I have conducted a full comparison. As there is likely to be very little or no similarity between the remaining goods and services of the opponent and the contested services, e.g. headphones in class 09 share no level of similarity with the contested services and cannot be said to be complementary in any way, I will go no further in my goods and services comparison.

Average consumer and the purchasing act

50. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

51. 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.”

52. The services in question cover a fairly broad range. Firstly, I will consider the holder's services, which I believe due to the adult nature of the content may be accessed by the general public over the age of 18 for personal use. I would consider that the costs of such services would be either free to access or with a subscription fee and in relation to the application, there may be a fee to download this together with an ongoing subscription. I believe that the charges would be fairly low in price and purchased somewhat frequently however, there could be an ongoing subscription commitment where the costs do eventually add up. The method of purchase will almost exclusively be online and therefore a visual purchase however, I do not discount that there may be other methods of purchase or certainly aural recommendations. I therefore find that the average consumer would pay a medium level of attention in relation to these purchases.

53. In relation to “entertainment; entertainment by computer or other broadcast media;” I consider that ‘entertainment’ generally is a very broad category which encompasses many forms of entertainment. This could range from low cost goods or services such as a book or going to the cinema to see a film, to higher expenditure on services such as a ticket to the theatre or opera. The former could be undertaken on a fairly regular basis whilst the latter would be a less frequent occurrence. I consider that these purchases will be mostly visual in nature, viewed on a website or in a store/theatre. I do not discount the possibility to purchase tickets for certain types of entertainment over the phone which would obviously require an aural element to the purchase process. I find that the average consumer would be a member of the general public and, depending on the nature of the ‘entertainment’, would pay between a low and high degree of attention in relation to these purchases.

54. Next I will consider the opponent’s “electronic transmission of data, images, sounds, videos and documents; dissemination of music, sounds, images, texts, signals, information and codes by means of computer terminals and any other transmission systems such as radio waves, cables, satellites and the Internet; connection and provision of access to electronic communication networks for transmitting or receiving data, sounds, music, videos and multimedia documents; provision of telecommunication access to video and audio content provided via an on-line video-on-demand service; streaming of audio and video content on the Internet”. I would consider the average consumer of these services to be the general public. The uptake of these services will be relatively frequent. The average consumer will take various factors into consideration such as the ease of use/access, type of services offered, e.g. online websites or mobile applications and the suitability of those services to the consumer’s needs. I find that the level of attention paid during the purchasing process will be no more than medium.

Comparison of the marks

55. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse

its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

56. 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.

57. The respective trade marks are shown below:

<p>CHERRYTV CHERRY.TV</p>	<p>CHERIE</p>
<p>Contested trade marks</p>	<p>Earlier trade mark</p>

58. The contested marks contain the word ‘CHERRY’ with the addition of ‘TV’ and ‘.TV’ respectively. ‘TV’ is understood to be a common shortening for ‘television’ and so could be said to be allusive of the services provided by the holder. As for the ‘.TV’ element this seems to be in the format of a web page address e.g. ‘.co.uk’ or ‘.com’. Again, this could be allusive as to the services provided. Although both ‘TV’ and ‘.TV’ could be said to play a lesser role in the distinctiveness of the marks due to

being allusive, I believe they will not go unnoticed and will be considered by the average consumer. The word 'CHERRY' can be said to be the more distinctive element within each of the contested marks having no obvious link with the services on offer and appearing at the beginning of the marks. No single element can be said to dominate the contested marks, however the word 'CHERRY' does constitute the initial element. Given the marks are presented as one word, I believe the overall impression lies in the marks as a whole.

59. The earlier mark comprises a single word that does not appear to be suggestive or allusive of the goods and services at issue and therefore the overall impression of the mark lies in that word.

60. Visually, the contested marks comprise the word 'CHERRY' followed by the letters 'TV' and '.TV' without any spaces between the words. They are presented in a plain font with no additional stylisation. The earlier mark is registered for the plain word 'CHERIE' and is also presented in a standard font.

61. The marks therefore share the same first four letters. However, the final two letters of the earlier mark have no counterpart in the contested marks and the final letters at the end of the words CHERRY and CHERIE, i.e. 'RY' and 'IE' are not visually similar. The contested marks also contain the additional suffixes 'TV' and '.TV' which have no counterpart in the earlier mark. The holder's marks contain four letters that have no counterpart in the earlier mark (plus an additional character in IR1535115). I therefore consider the marks to be visually similar to no more than a medium degree.

62. Considering the marks aurally, the holder suggested in their submissions that the word 'CHERRY' would be pronounced with a hard 'CH' at the beginning and ending with a short 'e' sound compared to the earlier mark CHERIE which would begin with a softer 'SH' sound and end with an elongated 'eee', something which I agree with. I would consider that the holder's marks would be pronounced CH-air-ri and the opponent's mark would be pronounced as Sh-air-ree?.

63. I must also consider that the holder's marks contain the additional endings of 'TV' and '.TV'. I believe the first will be articulated as the two letters 'T-V' and the latter will be articulated as either 'dot T-V' or simply 'T-V'. Even if these additional elements are said to be allusive of services provided, I consider that they will still be articulated by the average consumer as they are so closely tied to the word 'CHERRY'. There is no spacing between these elements and websites are often referred to with their domain ending. I do not discount that there may be some people who will not articulate the '.TV' or 'TV', however I think this would be a minority.
64. In the event that the consumer does not articulate the 'TV' or '.TV' elements of the contested marks, I believe the marks to be aurally similar to at least a medium degree. In the event the average consumer does articulate the additional elements mentioned above, then I consider the marks to be aurally similar to no more than a medium degree.
65. Turning to the conceptual assessment of the marks at issue, I note that a fair amount of the evidence submitted by both parties in this matter revolves around the meaning of the words 'CHERRY' and 'CHERIE'. The first meaning that appeared on each screenshot provided for the meaning of 'CHERRY' was that of the well-known fruit. The evidence also points to the fact that CHERRY is a known colour. 'TV' would be understood to be a common shortening for television. However, when considered in the context of the applied for services, I do consider that the adult nature of these services combined with the additional suffixes 'TV' and '.TV' might perhaps lead the consumer to apply the slang meanings of the word CHERRY as shown within the evidence.
66. The word CHERIE of the opponent's mark is said to come from the French language and means 'darling' or 'sweetheart' as can be seen in both parties' evidence. However, I consider that there will be a proportion of the relevant UK public that does not understand that the word comes from French and will instead perceive it as a female forename. There is also a chance that a part of the public might also perceive the word 'CHERRY' as a female forename however, with the addition of the 'TV' and '.TV' suffixes I believe it to be unlikely that this concept will

come to the average consumer's mind. In my opinion, the combinations of CHERRYTV or CHERRY.TV would be perceived by the average consumer simply as the name of a television channel or station. As none of the possible conceptual impacts of CHERRYTV or CHERRY.TV can be said to also be conveyed by the earlier mark, I find the marks to be conceptually dissimilar.

Distinctive Character of the Earlier Mark

67. 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).”

68. In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to

increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything, it will reduce it.”

69. The opponent did not file any evidence and has made no claim of an enhanced level of distinctiveness in its earlier mark. I must therefore consider the position based on the inherent distinctiveness of the mark.

70. The opponent’s mark consists of the word ‘CHERIE’ which is likely to be seen by the average consumer as a female name. It potentially might also be understood to be the French word meaning ‘darling’ or ‘sweetheart’. The word does not directly describe the services being provided and does not appear allusive or suggestive. Therefore, the opponent’s earlier mark can be said to be inherently distinctive to a medium degree.

Likelihood of Confusion

71. There are two types of confusion that I must consider. Firstly, direct confusion i.e. where one mark is mistaken for the other. The second is indirect confusion which is where the consumer appreciates that the marks are different, but the similarities between the marks lead the consumer to believe that the respective goods or services originate from the same or a related source.

72. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

73. I have come to the conclusions above that the marks at issue are visually similar to no more than a medium degree; aurally similar to either at least a medium degree or no more than a medium degree; they are conceptually dissimilar and the average consumer would be paying between a low and high degree of attention. The goods and services at issue have been found to be similar to between a low and no more than medium degree. Although the earlier mark is inherently distinctive to a medium degree, I do not believe that there is any likelihood of direct confusion here. The marks are sufficiently different in their visual, aural and, in particular, their conceptual aspects that the average consumer, general public or professional, would not mistake one for another.

74. I must therefore consider the possibility of indirect confusion. Again, I take guidance from Mr Purvis in *L.A. Sugar Limited* where he stated:

“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.).
- (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”).

75. These examples are not exhaustive but provide helpful focus.

76. Turning to the above categories; firstly, the shared elements between the marks are the letters ‘CHER’ which form the beginning of each mark but which are common letters and cannot be said to be strikingly distinctive.

77. Secondly, there is a difference in spelling between the marks, which also affects the meaning/concept of each mark when considering the terms CHERIE and CHERRY. These meanings are clear and obvious and will not be overlooked. Therefore, it is not solely the addition of the ‘TV’ and ‘.TV’ suffixes, which could be said to be allusive of the services provided, that serve to distinguish these marks from each other. I found the overall impression of the applicant’s marks to be that of the whole terms CHERRYTV and CHERRY.TV, and I believe the average consumer of the services at issue will perceive the marks as single expressions and will not, as a matter of course, break the marks down by dropping the ‘TV’ or ‘.TV’ suffixes. I therefore do not believe that the contested marks will be considered a sub brand of the earlier CHERIE brand, or vice-versa

78. The change of spelling in the marks would not be an obvious or logical brand extension in my opinion. I do not consider this to be a step that the average consumer of the goods or services at issue would expect to be reasonable.

79. Whilst the categories set out above by Mr Purvis are not exhaustive, I can find no other reason why the average consumer of the 'CHERIE' brand would, when exposed to the contested marks, assume that the goods and services at issue came from the same or an economically linked undertaking, or vice-versa

79. Due to the above, I do not believe that there is any reason to expect an economic connection between the two.

80. I therefore find that there would be no indirect confusion between the marks.

Conclusion

81. The Opposition has failed in its entirety and so the contested marks will proceed to registration.

Costs

82. The holder has been successful and is entitled to a contribution towards its costs. Award of costs are based upon the scale as set out in Tribunal Practice Notice 2 of 2016. The award of costs in this matter has been calculated as follows:

Considering the Notice of Opposition and preparing Counter Statement	£350
Preparing evidence and considering the Opponent's evidence	£650

Preparing submissions in lieu and considering the Opponent's written submissions in lieu	£400
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Total	£1400
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83. I therefore order CHERIE FM to pay CSME TECHNOLOGY, INC. the sum of £1400. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 27th day of August 2021

L Nicholas
For the Registrar