

**O/1043/22**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003607581**

**BY VIVO MOBILE COMMUNICATION CO., LTD.**

**TO REGISTER THE FOLLOWING MARK:**

The logo for Vivo, featuring the word "vivo" in a bold, lowercase, sans-serif font. The letter 'i' has a small diamond shape above it.

**IN CLASSES 35, 38 AND 41**

**IN THE MATTER OF OPPOSITION THERETO**

**UNDER NO. OP000426799**

**BY VEVO LLC**

## Background and pleadings

1. On 10 March 2021, VIVO MOBILE COMMUNICATION CO., LTD. (“the applicant”) filed the trade mark shown below, UK00003607581, which has a priority date of 24 January 2020. The mark was published for opposition purposes on 11 June 2021.



2. The registration is sought for the following services:

Class 35      Presentation of goods on communication media, for retail purposes; Provision of space on websites for advertising goods and services; On-line advertising on a computer network; Organization of exhibitions for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Providing user reviews for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Providing user rankings for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Providing user ratings for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area

network/wireless headsets and software; Import-export agency services; Sales promotion for others; Provision of an on-line marketplace for buyers and sellers of goods and services; Compilation of information into computer databases; Systemization of information into computer databases; Arranging subscriptions to telecommunication services for others; Updating and maintenance of data in computer databases; Web indexing for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Compiling indexes of information for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Commercial information and advice for consumers in the choice of products and services, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Appointment reminder services [office functions]; none of the aforesaid services to be used in respect of consumer goods research, and/or marketing solutions, and/or opinion polling.

Class 38 Cellular telephone communication; Communications by computer terminals; Providing telecommunications connections to a global computer network; Providing internet chatrooms; Providing access to databases; Voice mail services; Transmission of digital files; Streaming of data; Providing online forums; Radio communication; Radio broadcasting; Rental of telecommunication equipment; Transmission of data by electronic means; Computer aided transmission of messages

and images; Transmission of podcasts; Rental of smartphones; News agency services; Paging services [radio, telephone or other means of electronic communication]; Providing information in the field of telecommunications; Teleconferencing services.

Class 41 Training services; Organization of competitions [education]; Organization of exhibitions for cultural or educational purposes; Arranging and conducting of conferences; Arranging and conducting of congresses; Providing online electronic publications, not downloadable; Photography; Photographic reporting; News reporters services; Club services [education]; Game services provided on-line from a computer network; Teaching; Organization of lotteries; Health club services [health and fitness training]; Toy rental; Games equipment rental; Providing user reviews for cultural purposes; Providing user rankings for cultural purposes; Providing user ratings for cultural purposes; Conducting guided tours; all the aforementioned services excluding those services concerning: organization of competitions [entertainment], club services [entertainment], party planning [entertainment], providing user reviews for entertainment purposes, providing user rankings for entertainment purposes, providing user ratings for entertainment purposes, organization of concerts and theatre events and production of live entertainment shows, other than production of live radio, web and television entertainment shows.

3. Vevo LLC (“the opponent”) opposes the trade mark on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against all of the applicant’s services and relies on the mark and the services detailed below.
4. Comparable mark UK00908201071, filed on 6 April 2009, registered on 8 January 2019, priority date 14 January 2009.

# VEVO

Class 35 Promoting the interests of musicians, singers, songwriters, musical performers and artists; distribution of musical sound recording and video recordings through the Internet; retail store services and computerized on-line retail store services featuring CD's, cassettes, musical DVD's, videocassettes, musical records, downloadable prerecorded music and audio-visual content, musical event ticketing, clothing, collectibles, posters, prints, books, programs, glass ware, jewelry, calendars, accessories and other merchandise; subscriptions to books, reviews, newspapers, electronic journals or comic books in the field of music; preparing audio-visual displays in the field of music and musical entertainment; promoting goods and services of others by arranging for sponsors to affiliate their goods and services with professional sports, entertainment, or other events in the field of music, through the Internet; advertising, including promotion of products and services of third parties through sponsoring arrangements and license agreements relating to international sports, entertainment and music events; providing information about the goods and services of others via a global computer network; musical contests and incentive award programs to promote the sale of products and services of others.

Class 38 Streaming or transmitting streamed audio, video and audio-visual recordings via the internet; providing on line facilities for real-time interaction with other computer users concerning music and entertainment; digital and electronic transmission of voice, data, sound, images, audio and video content, and messages in the fields of music and musical entertainment.

Class 41 Entertainment services; entertainment services including programs in the fields of music and entertainment distributed on line, mobile communication devices, wireless devices, radio, in the fields of music and entertainment; providing on line entertainment in the fields of music and entertainment; providing online entertainment, namely providing audio, video and audio-visual recordings in the field of music and entertainment; entertainment services, namely providing on line non-downloadable prerecorded musical sound and video recordings via a global computer network; entertainment in the nature of ongoing live concerts and performances by musical artists and groups; entertainment services, namely, providing on-line reviews of music, musical artists and music videos; entertainment services, namely, providing prerecorded music, information in the field of music, and commentary and articles about music, all on line via a global computer network; preparing audio-visual displays in the field of music; production, publishing and distribution of audio, video and audiovideo recordings; sweepstake services; entertainment services, namely, conducting contests.

5. In its Form TM7, the opponent's statement of case is that the respective services are identical or similar and that the marks are similar and that there is a likelihood of confusion. The opponent also claims that the "likelihood [of confusion] is compounded by the enhanced distinctive character through use of the Opponent's mark."
6. The applicant filed a Form TM8 and a counterstatement denying the claims made.
7. No hearing having been requested, the opponent filed a written submission in lieu of a hearing. The applicant did not file any written submissions.

8. The opponent filed evidence which is detailed below.
9. The applicant is represented by Trademarkit LLP and the opponent is represented by Beck Greener LLP.

## **Evidence**

10. The opponent filed a witness statement from Alexander Kisch, Executive Vice President, Business Development & Affairs and General Counsel for the opponent. The witness statement is signed and dated on 26 February 2022 and is accompanied by Exhibits AK1 to AK7.
11. In filing evidence, the opponent seeks to demonstrate that its mark has acquired enhanced distinctiveness through use. It also offers evidence as to how its mark is pronounced.
12. I have taken the above evidence into consideration and will refer to it where necessary.

## **DECISION**

13. Section 5(2)(b) of the Act 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.”

14. 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) a European Union 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.”

15. Given its priority date, the trade mark upon which the opponent relies qualifies as an earlier trade mark as defined above. Also, on the basis of its priority date, the mark could be subject to the proof of use provisions contained in section 6A of the Act, but the applicant has not requested proof of use.

### **Section 5(2)(b) – case law**

16. 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 Trade Marks 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.

17. 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 greater degree of similarity between the marks, and vice versa;

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

(i) mere association, in the strict sense that the later mark brings to mind the earlier mark, 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

### **Comparison of the trade marks**

18. 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 (“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.”

19. 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.

20. The opponent’s and the applicant’s marks are shown below:

Opponent’s trade mark	Applicant’s trade mark
VEVO	VIVO

21. In its counterstatement, the applicant argues:

“It is accepted in caselaw that when comparing short words, the difference of even a single letter can be sufficient to distinguish them (*Inter IKEA Systems BV v Office for Harmonisation in the Internal Market (Trade Marks and Designs)*(OHIM) Case T-112/06; Case T-185/02 *Ruiz-Picasso and Others v OHIM – DaimlerChrysler (PICARO)* [2004] ECR I, paragraph 54). The shape of the letters “E” and “I” is different making them easily distinguishable, while the stylization of the contest mark also add to the visual difference.”

22. The opponent takes issue with the applicant’s citing of case law in a footnote to its written submission:

“In Ikea, the word mark element IDEA in the figurative mark applied for was found to be weak and also conceptually wholly different to IKEA. In PICARO, the conceptual differences were found to outweigh the visual and phonetic

similarities - [56]. The considerations in Ikea and Picaro have no application to the issues in the subject case.”

23. I remind myself that there is no special test which applies to the comparison of short marks and that the visual, aural and conceptual similarities must be assessed in the normal way<sup>1</sup>.

24. The opponent’s mark is the plain word “VEVO” which is in block capitals, but notional use of the mark covers the word presented in all lower case. The word is the only thing that contributes to the overall impression.

25. The applicant’s mark is the figurative mark “vivo”. Although the letters are slightly stylised, the stylisation is minimal and contributes very little to the overall impression. Hence it is the word that plays the dominant and most distinctive role in the overall impression.

26. Visually, the word in the opponent’s mark, “VEVO” has four letters, as does the applicant’s mark, “vivo”. The marks share three of the same letters, “V”, “V” and “O” in identical positions within the words. The only substantive difference between the marks is in their second letters, which are both vowels – “E”/“i”. I consider the marks to be highly similar visually.

27. Aurally, the applicant (in paragraph 5 of its counterstatement) contends that:

“The Opponent’s mark is likely to be pronounced with a short “e” sound as in the word “very”. Although the Opponent’s mark could also be pronounced with a long “e” sound as “veevo” this is less likely since in English speakers would normally expect a double “e” to produce this sound.”

28. The opponent disagrees with this analysis of its mark as follows:

“While the letter “e” in, for instance, can properly be pronounced both as open or closed, when preceded by a consonant, for instance the word “devolution”,

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<sup>1</sup> *Robert Bosch GmbH v Bosco Brands UK Limited*, BL O/301/20, paragraph 44

the more natural pronunciation in British English is almost always with a closed or short “e” as in “deevolution.” The opponent also provides evidence from Mr Kisch (witness statement paragraph 22) who says that “VEVO” is pronounced “VEEVO” as in the word “veal”: “I have never heard anyone from the UK pronouncing VEVO otherwise.”

29. I agree with the opponent that the most natural pronunciation of “VEVO” is “VEEVO” as in the word “veto”. Indeed, I do not think that any alternative pronunciation would be made by a significant proportion of average consumers.

30. The applicant maintains that its mark could be pronounced with either a short or a long “i” sound. However, I consider that its mark, “vivo”, would be pronounced like the word “vive” (as in “Vive la France!”), hence “VEEVO”. I do not think that any other pronunciation would be made by a significant proportion of average consumers.

31. I find that the marks are aurally identical.

32. The word “VEVO” has no particular meaning and would not convey a particular concept to the average consumer. While “vivo” might have connotations of the concept of life (in line with the applicant’s view that its mark “may be recognized as the Italian word meaning “alive” or “I live”) for some consumers, I do not think that a significant proportion of average consumers would derive any particular concept from the word. On that basis, I find the two marks to be conceptually neutral.

### **Distinctive character of the earlier mark**

33. 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).”

34. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

35. I start with an assessment of the inherent distinctive character of the earlier mark.

36. Being an invented word, “VEVO” is not suggestive or allusive of the services for which it is registered, and I find it to be of high inherent distinctive character.

37. I now move on to consider the opponent’s claim of enhanced distinctiveness acquired through use and the evidence it has filed in support of that claim. The relevant date for this purpose is 24 January 2020.

38. Mr Kisch's witness statement notes that Vevo's music videos were available from December 2009 through dedicated artist music channels on YouTube and then, from May 2018, its music videos were distributed mainly by YouTube. Such videos are typically of a few minutes' duration and are the most common method by which artists promote and derive income from their music other than performing live. The videos are pertinent because the opponent has "Streaming ..." as a term in its specification along with a number of terms relating to music and entertainment.
39. There is also evidence filed which shows that Vevo's videos are available through other platforms, albeit that evidence does not definitively date from up to the relevant date or specifically evidence UK usage.
40. Although the main way of viewing its videos has been via YouTube, Mr Kisch explains in paragraph 15 of his witness statement that "virtually all" of its videos show the "VEVO" mark. By way of illustration, Exhibit AK2 includes a still from a Miley Cyrus video which was premiered on 30 November 2018 with the mark shown in acceptable variant form – in lower case bold – as an "ident" in the bottom right-hand corner of the video. This means that I can be satisfied that a very high proportion of all the videos that consumers see will involve an encounter with the "VEVO" mark.
41. Mr Kisch sets out the extent of Vevo's global reach at the relevant date in terms of numbers of videos available and numbers of views. However, I need to consider use in the United Kingdom. In that respect, while there is no information supplied as to the geographical distribution of its UK consumers, per paragraph 17 of the witness statement shows that Vevo's YouTube content which originated from the UK prior to the relevant date is as follows:

<u>Year</u>	<u>Number of views from the UK</u>
2015	6,149,860,169
2016	8,422,698,463
2017	9,646,756,565
2018	9,186,546,663
2019	9,308,760,293

The opponent supplies figures for its worldwide revenue, the majority of which comes from advertising. However, this revenue is not broken down at UK level and no data is supplied on the relationship between individual views and how this might translate into income. Nor does the opponent show how the individual views relate to the business customers of the services in its specification.

42. The opponent also does not provide evidence of its market share or the amount of money that it has spent on marketing. It does, though, provide evidence of its social media profile. Its number of follows were 257,000 on Vevo's UK Twitter account as of 23 March 2018, 7.9 million on its UK Facebook account as of 21 June 2018, and 190,000 on its UK Instagram page as of 27 June 2018 (Exhibits AK3-AK5). The opponent has also submitted exhibits relating to its collaboration with BBC Radio 1 and its general press coverage (Exhibits AK6 and AK7).
43. The opponent has not provided any figures for UK revenue, market share or marketing spend and consequently has not demonstrated that use of its mark has led to enhanced distinctiveness. In any event, the mark is inherently distinctive to a high degree.



## Comparison of the services

44. When making the comparison, all relevant factors relating to the services in the specifications should be taken into account. In the judgment of the CJEU *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.”

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

- (a) The respective 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.

46. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of ‘dessert sauce’ did not include jam, or because the ordinary and natural description of jam was not ‘a dessert sauce’. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”

47. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term ‘computer software’. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

“...the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded.”

48. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court (“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 for 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.”

49. 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 GC 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 the responsibility for those goods lies with the same undertaking.”

50. In *Sanco SA v OHIM*, Case T-249/11, the GC 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. As Mr Daniel Alexander Q.C. noted, as the Appointed Person, in *Sandra Amelia Mary Elliot v LRC Holdings Limited*, BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.”

While on the other hand:

“... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

51. The contested services are as follows:

<b>Opponent’s services</b>	<b>Applicant’s services</b>
<p><u>Class 35</u> Promoting the interests of musicians, singers, songwriters, musical performers and artists; distribution of musical sound recording and video recordings through the Internet; retail store services and computerized on-line retail store services featuring CD's, cassettes, musical DVD's, videocassettes, musical records, downloadable prerecorded music and audio-visual content, musical event ticketing, clothing, collectibles, posters, prints, books, programs, glass ware, jewelry, calendars, accessories and other merchandise; subscriptions to</p>	<p><u>Class 35</u> Presentation of goods on communication media, for retail purposes; Provision of space on websites for advertising goods and services; On-line advertising on a computer network; Organization of exhibitions for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Providing user reviews for commercial or advertising purposes, in respect of smart phones,</p>

<p>books, reviews, newspapers, electronic journals or comic books in the field of music; preparing audio-visual displays in the field of music and musical entertainment; promoting goods and services of others by arranging for sponsors to affiliate their goods and services with professional sports, entertainment, or other events in the field of music, through the Internet; advertising, including promotion of products and services of third parties through sponsoring arrangements and license agreements relating to international sports, entertainment and music events; providing information about the goods and services of others via a global computer network; musical contests and incentive award programs to promote the sale of products and services of others.</p>	<p>smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Providing user rankings for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Providing user ratings for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Import-export agency services; Sales promotion for others; Provision of an on-line marketplace for buyers and sellers of goods and services; Compilation of information into computer databases; Systemization of information into computer databases; Arranging subscriptions to telecommunication services for others; Updating and maintenance of data in computer databases; Web indexing for commercial or advertising purposes, in respect of smart phones, smart</p>
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	<p>watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Compiling indexes of information for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Commercial information and advice for consumers in the choice of products and services, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Appointment reminder services [office functions]; none of the aforesaid services to be used in respect of consumer goods research, and/or marketing solutions, and/or opinion polling.</p>
<p><u>Class 38</u> Streaming or transmitting streamed audio, video and audio-visual recordings via the internet; providing on line facilities for real-time interaction with other computer users concerning</p>	<p><u>Class 38</u> Cellular telephone communication; Communications by computer terminals; Providing telecommunications connections to a global computer network; Providing internet chatrooms;</p>

<p>music and entertainment; digital and electronic transmission of voice, data, sound, images, audio and video content, and messages in the fields of music and musical entertainment.</p>	<p>Providing access to databases; Voice mail services; Transmission of digital files; Streaming of data; Providing online forums; Radio communication; Radio broadcasting; Rental of telecommunication equipment; Transmission of data by electronic means; Computer aided transmission of messages and images; Transmission of podcasts; Rental of smartphones; News agency services; Paging services [radio, telephone or other means of electronic communication]; Providing information in the field of telecommunications; Teleconferencing services.</p>
<p><u>Class 41</u>  Entertainment services; entertainment services including programs in the fields of music and entertainment distributed on line, mobile communication devices, wireless devices, radio, in the fields of music and entertainment; providing on line entertainment in the fields of music and entertainment; providing online entertainment, namely providing audio, video and audio-visual recordings in the field of music and entertainment; entertainment services, namely providing on line non-downloadable prerecorded musical sound and video recordings via a global computer network; entertainment in the nature of</p>	<p><u>Class 41</u>  Training services; Organization of competitions [education]; Organization of exhibitions for cultural or educational purposes; Arranging and conducting of conferences; Arranging and conducting of congresses; Providing online electronic publications, not downloadable; Photography; Photographic reporting; News reporters services; Club services [education]; Game services provided on-line from a computer network; Teaching; Organization of lotteries; Health club services [health and fitness training]; Toy rental; Games equipment rental; Providing user reviews for cultural</p>

<p>ongoing live concerts and performances by musical artists and groups; entertainment services, namely, providing on-line reviews of music, musical artists and music videos; entertainment services, namely, providing prerecorded music, information in the field of music, and commentary and articles about music, all on line via a global computer network; preparing audio-visual displays in the field of music; production, publishing and distribution of audio, video and audiovideo recordings; sweepstake services; entertainment services, namely, conducting contests.</p>	<p>purposes; Providing user rankings for cultural purposes; Providing user ratings for cultural purposes; Conducting guided tours; all the aforementioned services excluding those services concerning: organization of competitions [entertainment], club services [entertainment], party planning [entertainment], providing user reviews for entertainment purposes, providing user rankings for entertainment purposes, providing user ratings for entertainment purposes, organization of concerts and theatre events and production of live entertainment shows, other than production of live radio, web and television entertainment shows.</p>
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Class 35

52. I compare the applicant's "Commercial information and advice for consumers in the choice of products and services, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software" with the opponent's "providing information about the goods and services of others via a global computer network". Both are information services for prospective consumers and although the specifications are worded differently, they cover the same services because they can both provide information in relation to the same goods. These services are identical.

53. The applicant's "Presentation of goods on communication media, for retail purposes" is *Meric* identical to the opponent's " ... computerized on-line retail



store services featuring CD's, cassettes, musical DVD's, videocassettes, musical records, downloadable prerecorded music and audio-visual content, musical event ticketing, clothing, collectibles, posters, prints, books, programs, glass ware, jewelry, calendars, accessories and other merchandise” in that the services designated by the earlier mark are included in a more general category designated by the trade mark application. A service that is a computerized on-line service is a type of communication medium and the goods featured in the description of the opponent’s service are examples of goods in general.

54. The opponent has a term, “advertising, including promotion of products and services of third parties through sponsoring arrangements and license agreements relating to international sports, entertainment and music events.” The text from “including” onwards can be ignored as the word “including” does not serve to exclude anything from “advertising” at large. On that basis, the following of the applicant’s terms are *Meric* identical to the opponent’s term in that the services designated by the trade mark application are included in a more general category designated by the earlier mark: “Provision of space on websites for advertising goods and services”, “On-line advertising on a computer network” and “Sales promotion for others”.

55. Given that the opponent has “advertising” at large, I also find the following of the applicant’s services to be similar to a medium degree: “Organization of exhibitions for commercial or advertising purposes”, “Providing user reviews for commercial or advertising purposes”, “Providing user rankings for commercial or advertising purposes”, “Providing user ratings for commercial or advertising purposes”, “Web indexing for commercial or advertising purposes, and “Compiling indexes of information for commercial or advertising purposes”, all of which are “in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software”. While advertising at large typically consists of creating and communicating advertisements for a wide variety of goods and services, the applicant’s

services consist of services provided for advertising purposes. The services have the same broad purpose – that of making goods and services known to a wider audience – and share the same users – businesses seeking to improve their sales. There would be an overlap of trade channels as the services are likely to be offered by the same providers and an element of complementarity.

56. I compare the applicant's "Provision of an on-line marketplace for buyers and sellers of goods and services" with the opponent's "retail store services and computerized on-line retail store services featuring CD's, cassettes, musical DVD's, videocassettes, musical records, downloadable prerecorded music and audio-visual content, musical event ticketing, clothing, collectibles, posters, prints, books, programs, glass ware, jewelry, calendars, accessories and other merchandise." While both sets of services cover a wide variety of goods (the opponent's term including "other merchandise"), the applicant's online service is a platform for buyers and sellers whereas the opponent's service is a traditional one-way sales offering and has physical as well as virtual form. Consequently, while they are both essentially marketplaces for goods, there are slight differences in their nature, intended purposes and methods of use. As marketplaces, there will be competition between the two services, which are not complementary. I find the services to be of medium similarity.

57. I compare the applicant's "Compilation of information into computer databases", "Systemization of information into computer databases" and "Updating and maintenance of data in computer databases" with the opponent's "... computerized on-line retail store services ...". All internet and computer network-based services utilise computer databases. However, the creation and maintenance of databases is a back-office function, whereas the opponent's service is customer-facing. Considering the opponent's on-line retail store service, the respective services differ in nature, the one being a website, the other a back-end database. They also differ in purpose, the one having the purpose of selling goods and services via the internet, the other

being a way of building and maintaining infrastructural data. In respect of method of use, the former involves clicking on various pages and making purchases, the latter using database tools to create and maintain linked tables. The former would be used by end consumers, the latter by companies that needed to have databases built and maintained. Regarding trade channels, the retail store would be offered through search engines where a particular or general retail website was looked for. The database services would be something that would require a focused web search for IT companies specialising in database building and maintenance. The respective services are not in competition. They are also not complementary. The respective services satisfy the first limb of the complementarity test – the one is indispensable to the other. However, looking at the second limb of the test, they have different user communities. The end consumer would be unaware of the back-end data infrastructure of the retail website and consequently would not think that the responsibility for the respective services lies with the same undertaking. I find the services to be dissimilar.

58. The applicant's "Import-export agency services" entail offering to act as an agent for companies seeking to import and export goods – dealing with the customs paperwork for example. I cannot see how this service has anything in common with the opponent's services and I find it to be dissimilar.
59. The applicant's "Appointment reminder services [office functions]" entail either virtually or literally reminding people about impending appointments. I cannot see how this service has anything in common with the opponent's services and I find it to be dissimilar to the opponent's services.
60. There is a limitation applied at the end of the applicant's Class 35 services: "none of the aforesaid services to be used in respect of consumer goods research, and/or marketing solutions, and/or opinion polling." However, this limitation does not materially affect my findings as to the level of similarity of the applicant's Class 35 services by comparison with the opponent's services. This is because, where the limitation is relevant, it is in the context of the

applicant's services that feature "advertising". The degree of similarity that I have found still applies to common or garden advertising services – promoting awareness of particular products and services – even where the service is not to be offered in any market assessment context such as consumer goods research, market testing, or opinion polling.

### Class 38

61. The applicant's "Providing internet chatrooms" and "Providing online forums" are *Merici* identical to the opponent's "providing on line facilities for real-time interaction with other computer users concerning music and entertainment" in that the service designated by the earlier mark is included in the more general categories designated by the trade mark application.
62. The applicant's "Transmission of digital files" and "Transmission of data by electronic means" are *Merici* identical to the opponent's "digital and electronic transmission of voice, data, sound, images, audio and video content, and messages in the fields of music and musical entertainment" in that the services designated by the earlier mark are included in the more general categories designated by the trade mark application.
63. The applicant's "Computer aided transmission of messages and images" are *Merici* identical to the opponent's "digital and electronic transmission of ... images ... and messages in the fields of music and musical entertainment" in that the services designated by the earlier mark are included in the more general category designated by the trade mark application.
64. The applicant's "Streaming of data" is *Merici* identical to the opponent's "Streaming or transmitting streamed audio, video and audio-visual recordings via the internet" in that the service designated by the earlier mark is included in a more general category designated by the trade mark application.

65. The applicant's "Radio communication" and "Radio broadcasting" are *Merix* identical to the opponent's Class 41 "entertainment services including programs in the fields of music and entertainment distributed ... [via] radio, in the fields of music and entertainment" in that the service designated by the earlier mark is included in the more general categories designated by the trade mark application.

66. The applicant's "Transmission of podcasts" is highly similar to the opponent's "digital and electronic transmission of voice, data, sound, ... audio ... content in the fields of music and musical entertainment".

67. I compare the applicant's "Cellular telephone communication" with the opponent's Class 41 "entertainment services including programs in the fields of music and entertainment distributed ... [via] mobile communication devices ...". The former service is a mobile phone network, whereas the latter is entertainment content, and so their core purposes differ. In terms of method of use, they differ in that a mobile phone network is a utility that one connects to, while the primary method of use of entertainment services is to view and listen to them. While both services will be used by the general public, the trade channels differ in respect of purchasing mobile phone connectivity and purchasing entertainment services. The services are not in competition. Nor are they complementary. A mobile phone network is important in accessing entertainment content on a mobile device, but the consumer will not think that the responsibility for the respective services lies with the same undertaking. I find the services to be dissimilar.

68. I compare the applicant's "Rental of smartphones" with the opponent's Class 41 "entertainment services including programs in the fields of music and entertainment distributed ... [via] mobile communication devices ...". The former is a rental service for smartphones which are used for a multiplicity of purposes, whereas the latter is content for the purposes of entertainment. In terms of method of use, they differ in that a smart phone is hand held and operated, whereas entertainment services are viewed and listened to. While

both services will be used by the general public, the trade channels differ in respect of renting smart phones and purchasing entertainment services. The services are not in competition. Nor are they complementary. A rented smart phone would be an important way of accessing entertainment content on a mobile device, but the consumer will not think that the responsibility for the respective services lies with the same undertaking. I find the services to be dissimilar.

69. I compare the applicant's "Providing telecommunications connections to a global computer network" with the opponent's "Streaming or transmitting streamed audio, video and audio-visual recordings via the internet". The services differ to the extent that the applicant's service provides connectivity to a global computer network while the opponent's service is that of streaming content while connected to the internet. In respect of method of use, the former involves making use of the technical infrastructure of a global computer network, the latter accessing and viewing content. The trade channels are different in terms of purchasing connectivity and buying streamed content. The respective services are not in competition, nor are they complementary. While the opponent's service provides access to a global computer network upon which the provision of streamed content depends, the consumer will not think that the responsibility for the respective services lies with the same undertaking. I find the respective services to be dissimilar. I make the same finding for the applicant's "Communications by computer terminals".

70. The applicant's "Rental of telecommunication equipment" and "Providing information in the field of telecommunications", together with its Class 35 "Arranging subscriptions to telecommunication services for others" are at even further a remove from the opponent's streaming services analysed above. I find these services to be dissimilar also.

71. For the reasons given in paragraph 57, I find the applicant's "Providing access to databases" to be dissimilar to the opponent's services.

72. The applicant's "News agency services" are dissimilar to the opponent's services.

73. The applicant's "Voice mail services", "Paging services [radio, telephone or other means of electronic communication] and "Teleconferencing services" are typically office services aimed at business people and are dissimilar to the opponent's services. While the opponent does offer some audio-based and electronic transmission services, paging is a very specific service whereby an individual person is contacted which is very different from the opponent's entertainment services which are aimed at mass audiences.

#### Class 41

74. The applicant's "Game services provided on-line from a computer network" is *Merix* identical to the opponent's "entertainment services" in that the services designated by the trade mark application are included in a more general category designated by the earlier mark.

75. The applicant's "Organization of lotteries" is highly similar to the opponent's "sweepstake services".

76. I compare the applicant's "Providing online electronic publications, not downloadable" with the opponent's Class 35 "subscriptions to ... electronic journals ... in the field of music". While the services have the same core nature, the applicant's publications are not downloadable, while the opponent's publications probably would be. The applicant's publications cater to a variety of audiences, while the opponent's publications relate to music. Both services will be used by the general public and will be sold through broadly the same trade channels. There could be an element of competition where the applicant's publications were music publications. The respective services are not complementary. I find them to be of medium similarity.

77. I compare the applicant's "Organization of competitions [education]" with the opponent's "entertainment services, namely, conducting contests". I note that the applicant has sought to limit its specification for its services by saying that they exclude the "organization of competitions [entertainment]". However, a contest is defined by the Collins online dictionary as "a competition or game in which people try to win". As such, while such competitions might have the aim of being educational or entertaining, they have the same structured format and competitive element and so they are identical in nature. Both types of competition could be sourced through the same trade channels, albeit there will be websites that specialize in educational quizzes and those that specialize in the entertaining prospect of winning a prize. It could be argued that all competitions are both educational and entertaining to some degree, but the services are not strictly in competition with each other. Nor are they complementary. However, overall, I find that the services are of medium similarity.

78. The applicant seeks to limit its "Providing user reviews for cultural purposes", "Providing user rankings for cultural purposes" and "Providing user ratings for cultural purposes" by saying that the aforementioned services are excluding those services concerning "providing user reviews for entertainment purposes", "providing user rankings for entertainment purposes" and "providing user ratings for entertainment purposes". However, the opponent's Class 35 "subscriptions to ... reviews ... in the field of music" touch on the applicant's services. Such reviews would be print publications consisting largely of full-length articles written by professional journalists, as distinct from short reviews and ratings generated by members of the public across the whole cultural field. I find the respective services to be of low similarity.

79. I compare the applicant's "Organization of exhibitions for cultural or educational purposes" with the opponent's "Entertainment services". Both are used by the general public. Exhibitions that have a cultural or educational purpose share a purpose to the extent that one of the aims of cultural activity aims to entertain. The applicant's service is quite specific whereas the



opponent's service is very broad in nature. The overlap in trade channels would be slight. The services are not complementary. Competition would only occur between the wide variety of consumer options for entertainment and the niche product that is a cultural exhibition. I find the services to be of low similarity.

80. I compare the applicant's "Conducting guided tours" with the opponent's "Entertainment services". Both are used by the general public. While guided tours can be for entertainment, such as a tour of a film studio, they can also be primarily instructional, such as a tour of a museum. The applicant's service is quite specific whereas the opponent's service is very broad in nature. The trade channels overlap and the services compete to a limited degree in that there are a wide variety of consumer options relating to entertainment, while guided tours are a niche product. The services are not complementary. I find them to be of low similarity.

81. The applicant's "Training services" and "Teaching" are dissimilar to the opponent's services.

82. The applicant's "Arranging and conducting of conferences" and "Arranging and conducting of congresses" are dissimilar to the opponent's services.

83. The applicant's "Photography", "Photographic reporting", "News reporters services", "Club services [education]", "Health club services [health and fitness training]", "Toy rental" and "Games equipment rental" are dissimilar to the opponent's services.

84. As some degree of similarity between the services is required for there to be a likelihood of confusion<sup>2</sup>, the opposition must fail in respect of the following goods in the applicant's specification:

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<sup>2</sup> *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

- Class 35      Compilation of information into computer databases;  
Systemization of information into computer databases; Updating  
and maintenance of data in computer databases; Import-export  
agency services; Appointment reminder services [office  
functions]; Arranging subscriptions to telecommunication  
services for others; none of the aforesaid services to be used in  
respect of consumer goods research, and/or marketing  
solutions, and/or opinion polling.
- Class 38      Cellular telephone communication; Rental of smartphones;  
Providing telecommunications connections to a global computer  
network; Communications by computer terminals; Rental of  
telecommunication equipment; Providing information in the field  
of telecommunications; Providing access to databases; News  
agency services; Voice mail services; Paging services [radio,  
telephone or other means of electronic communication];  
Teleconferencing services.
- Class 41      Training services; Teaching; Arranging and conducting of  
conferences; Arranging and conducting of congresses;  
Photography; Photographic reporting; News reporters services;  
Club services [education]; Health club services [health and  
fitness training]; Toy rental; Games equipment rental; all the  
aforementioned services excluding those services concerning:  
organization of competitions [entertainment], club services  
[entertainment], party planning [entertainment], providing user  
reviews for entertainment purposes, providing user rankings for  
entertainment purposes, providing user ratings for entertainment  
purposes, organization of concerts and theatre events and  
production of live entertainment shows, other than production of  
live radio, web and television entertainment shows.

## **The average consumer and the nature of the purchasing act**

85. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' services. I must then determine the manner in which the goods are likely to be selected by the average consumer. 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.”

86. In respect of the services that are in conflict – retail services for a variety of consumer goods, the purchase of entertainment content, the organisation of exhibitions, guided tours and competitions, and the provision of reviews, the customer will be a member of the general public. For such services, prices will vary from low to mid-market with prices rarely being charged at the very high end. Some consideration will need to be given to the type or quality of the service and so on average I would place the level of attention to be paid at medium.

87. Purchasing the above services will entail primarily visual considerations with verbal factors playing a very minor role.

88. Advertising services would be purchased by businesses and the costs incurred would range from medium to high according to the proposed reach and length of the advertising campaign. Prospective purchasers of the

services would also need to pay attention to what the advertising company was offering in respect of such things as creative ideas, use of media and so on. Overall, I would gauge the level of attention to be paid as medium.

89. Visual factors would predominate during the purchasing process for advertising services, with verbal aspects playing a secondary role.

### **Likelihood of confusion**

90. 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 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 vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade 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 they have retained in their mind.

91. I have found the respective marks to be highly similar visually, aurally identical, and conceptually neutral.

92. I have found the parties' services to be identical, highly similar, of medium similarity, of low similarity, or to be dissimilar. For most of the services under consideration, the average consumer will be a member of the general public who will pay a medium level of attention during the purchasing process and visual considerations will predominate during that process. For the purchase

of advertising services, the average consumer will be a business paying a medium level of attention, with visual factors again predominating.

93. Given how close the marks are and taking into account the other factors that I must consider, including the fact that the earlier mark is highly distinctive, I am satisfied that there is a likelihood of direct confusion, including for the services that I have found to be similar to a low degree.

## **CONCLUSION**

94. The opposition has succeeded in relation to the following services, for which the application is refused:

Class 35      Presentation of goods on communication media, for retail purposes; Provision of space on websites for advertising goods and services; On-line advertising on a computer network; Organization of exhibitions for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Providing user reviews for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Providing user rankings for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Providing user ratings for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area

network/wireless headsets and software; Sales promotion for others; Provision of an on-line marketplace for buyers and sellers of goods and services; Web indexing for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Compiling indexes of information for commercial or advertising purposes, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; Commercial information and advice for consumers in the choice of products and services, in respect of smart phones, smart watches, smart glasses, smart phone accessories, wireless personal area network/wireless speakers, wireless personal area network/wireless headsets and software; none of the aforesaid services to be used in respect of consumer goods research, and/or marketing solutions, and/or opinion polling.

- Class 38 Providing internet chatrooms; Transmission of digital files; Streaming of data; Providing online forums; Radio communication; Radio broadcasting; Transmission of data by electronic means; Computer aided transmission of messages and images; Transmission of podcasts.
- Class 41 Organization of exhibitions for cultural or educational purposes; Conducting guided tours; Organization of competitions [education]; Providing online electronic publications, not downloadable; Providing user reviews for cultural purposes; Providing user rankings for cultural purposes; Providing user ratings for cultural purposes; Game services provided on-line from a computer network; Organization of lotteries; all the aforementioned services excluding those services concerning:

organization of competitions [entertainment], club services [entertainment], party planning [entertainment], providing user reviews for entertainment purposes, providing user rankings for entertainment purposes, providing user ratings for entertainment purposes, organization of concerts and theatre events and production of live entertainment shows, other than production of live radio, web and television entertainment shows.

95. The application will proceed to registration, subject to appeal, in respect of the following services:

- Class 35      Compilation of information into computer databases;  
Systemization of information into computer databases;  
Arranging subscriptions to telecommunication services for others; Updating and maintenance of data in computer databases; Import-export agency services; Appointment reminder services [office functions]; none of the aforesaid services to be used in respect of consumer goods research, and/or marketing solutions, and/or opinion polling.
- Class 38      Cellular telephone communication; Rental of smartphones;  
Providing telecommunications connections to a global computer network; Communications by computer terminals; Rental of telecommunication equipment; Providing information in the field of telecommunications; Providing access to databases; News agency services; Voice mail services; Paging services [radio, telephone or other means of electronic communication]; Teleconferencing services.
- Class 41      Training services; Teaching; Arranging and conducting of conferences; Arranging and conducting of congresses;  
Photography; Photographic reporting; News reporters services;

Club services [education]; Health club services [health and fitness training]; Toy rental; Games equipment rental; all the aforementioned services excluding those services concerning: organization of competitions [entertainment], club services [entertainment], party planning [entertainment], providing user reviews for entertainment purposes, providing user rankings for entertainment purposes, providing user ratings for entertainment purposes, organization of concerts and theatre events and production of live entertainment shows, other than production of live radio, web and television entertainment shows.

## **COSTS**

96. The parties have had approximately the same degree of success in this case.  
On that basis, each party will bear its own costs.

**Dated this 28<sup>th</sup> day of November 2022**

**JOHN WILLIAMS**  
**For the Registrar**