

**BL O/275/20**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION 3378143**

**BY**

**GLOBAL MEDIA & ENTERTAINMENT LIMITED**

**TO REGISTER THE FOLLOWING TRADE MARK IN CLASSES 38 & 41:**

**RELOADED**

**AND**

**OPPOSITION THERETO (NO. 416791)**

**BY**

**UNIVERSAL MUSIC ARTS & ENTERTAINMENT LTD**

## **Background and pleadings**

1. Global Media & Entertainment Limited (hereafter “the applicant”) applied to register the trade mark:

### **RELOADED**

in the UK on 25 February 2019. It was accepted and published in the Trade Marks Journal on 03 May 2019, in respect of the following services:

**Class 38:** Telecommunications; radio broadcasting services; digital radio broadcasting services; radio broadcasting over the Internet and other communication networks; streaming of radio programmes and audio material on the Internet; streaming of digital content, relating to entertainment, on the Internet; transmitting streamed sound, audio-visual recordings and multimedia content via mobile telephone devices, and wearable gadgets; transmitting audio-visual recordings and multimedia content via the Internet; Internet communication services; communications by computer terminals; news information and agency services; providing access to databases; rental of access time to global computer networks; mobile network communications; broadcasting of radio programmes and of music, sound recordings via communications networks; the provision of discussion forums; consultancy, information and advisory services relating thereto.

**Class 41:** Entertainment; radio entertainment services; organising, arranging and presenting of entertainment; betting and gaming facilities and services; games provided online from a computer database or the Internet; games and competitions provided over a radio station, telephone service, text message service or digital streaming service; organisation of competitions, quizzes, events and games; production of radio programmes; information relating to entertainment provided on-line from a computer database or the Internet; Internet games (non-downloadable); provision of leisure and recreational facilities via the Internet; conducting multiple player games of chance; competitions provided by telephone; organisation of entertainment

competitions; information and advisory services relating to the aforesaid services.

2. Universal Music Arts & Entertainment Ltd (hereafter “the opponent”) opposes all of the services in the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (the Act). Initially the opposition was also based on Sections 5(3) and 5(4)(a) of the Act, however the opponent removed those grounds from its pleadings during the procedural rounds.
3. The opposition is based on earlier UK registration 3048461, filed on 25 March 2014 and registered on 04 July 2014, for the mark:



4. In respect of the following services:

**Class 41:** Education; Providing of training; Entertainment; Sporting and cultural activities; Music Festivals.

5. The opponent’s mark qualifies as an earlier mark in accordance with section 6 of the Act but is not subject to the proof of use provisions contained in section 6A of the Act.
6. The opponent claims that the marks are highly similar given that the dominant distinctive element of the earlier mark is wholly contained within the contested mark. The opponent also states that the class 41 services of the contested mark are identical to those of the earlier mark, and the class 38 services of the contested mark are highly similar and complementary to the opponent’s earlier services. Consequently, there is a likelihood of confusion which includes a likelihood of association.
7. In its counterstatement, the applicant denies that the marks at issue are similar. It states that the marks are visually dissimilar due to the heavy stylisation present in

the earlier mark and the additional word element 'FESTIVAL'. The applicant claims that the marks are conceptually dissimilar due to the inclusion of the word 'FESTIVAL' in the earlier mark, an element not present in the contested application. It added that the marks are aurally dissimilar because of the word 'FESTIVAL' which is in the earlier mark but not in the contested mark. The applicant therefore denies that there is any likelihood of confusion on the part of the public in relation to any of the services in the contested application, whether or not the services in the application are considered identical, similar or complementary to the services of the opponent.

8. Neither party submitted evidence. The applicant filed written submissions which I will not summarise here but will refer to where necessary in my decision.
9. The opponent requested a hearing, which came before me on 01 April 2020. The opponent was represented by Mr Philip Harris of counsel, instructed by Lane IP Limited. The applicant was represented by Ms Abigail Wise of Bristows LLP.
10. Throughout the proceedings the opponent has been represented by Lane IP Limited and the applicant by Bristows LLP.

### **The Hearing**

11. At the hearing, Mr Harris submitted that there is a high degree of similarity between the marks at issue and the services. He said that the applicant had, in its submissions, focussed to some degree on the inclusion of the word 'FESTIVAL' in his client's earlier mark, but that that element had little distinctive character and would often, within the context of the services to hand, be dismissed to the point that it may often not be articulated. He gave me some examples of festivals in the UK to illustrate this point, including the well-known Glastonbury festival. He suggested that the average consumer of music entertainment services would refer to that event simply as 'Glastonbury'. He added that the word 'FESTIVAL' is not necessarily used in such marks in order to identify the festival concerned and claimed that the word 'FESTIVAL' in his client's mark is of virtually no relevance at all in the assessment of distinctive character and the assessment of the likelihood of confusion.

12. Mr Harris also told me that the contested mark consists simply of the single word 'RELOADED' whilst the primary element in the earlier mark is the word 'RELOAD'. He also said that the word 'RELOAD' is the dominant element and provides the distinctive character in the earlier mark, being presented as a much bigger element than the word 'FESTIVAL'. From a visual perspective, he said that the word 'FESTIVAL' is by far the smaller element in the earlier mark and the element that catches the eye in his client's mark is the word 'RELOADED'. Mr Harris added that the dominance of the element 'RELOAD' in the earlier mark was emphasised by the fact that it is capitalised, whilst the word 'FESTIVAL' is simply cursive script. He suggested that the word 'FESTIVAL' acted simply as a descriptive add-on or afterthought. In terms of visual distinctiveness and dominant distinctive elements, he told me that both marks fundamentally comprised the words 'RELOAD' and 'RELOADED', and that the addition of the letters "ED" in the contested mark did not change much at all between these marks. He stated that the concept, the sound and the look of the marks at issue suggested that they are virtually identical.

13. Mr Harris then referred to the applicant's submissions regarding the difference in the marks in respect of the stylisation of the earlier mark versus the ordinary script of the contested mark. In this regard he referred me to the *La Superquimica* decision<sup>1</sup> and the finding regarding normal and fair use of a mark that is presented in ordinary script. He suggested that the contested mark could be used in the course of normal and fair trade in a stylised manner that might be the same or closely similar to the stylisation found in the earlier mark, rendering the marks highly similar.

14. Turning to the element 'FESTIVAL' in his client's mark, Mr Harris told me that festivals can take place in all sorts of contexts including in fields and open grounds, in festival halls and even over the radio. It is not unusual, he said, for music stations to produce festivals.

15. Conceptually, Mr Harris suggested that the words 'RELOAD' and 'RELOADED' were virtually identical, as they essentially refer to something being put back in, reinstalled or replayed. He told me that there were a number of festivals that look back at e.g. the 1980's and bring on acts from the past to perform on stage. In that regard, he told me that both 'RELOAD' and 'RELOADED' were clever, elusive references to the

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<sup>1</sup> T-24/17 *La Superquimica v EUIPO*

fact that the consumer was looking back in time to a particular era. As such, he suggested that the marks at issue were conceptually very highly similar.

16. Turning to the comparison of the services at issue, Mr Harris referred to the *Gerard Meric*<sup>2</sup> case and submitted that the services at issue in class 41 were effectively identical.
17. In respect of the '*Production of radio programmes*' in the contested class 41 specification, Mr Harris stated that, where those radio programmes formed some sort of entertainment, then if they did not fall under entertainment services at large, they must at least be complementary to entertainment, because the provision of radio entertainment explicitly required the production of a radio programme. Consequently, the two must be fundamentally and inextricably linked to each other.
18. Turning to a comparison of the contested services in class 38 and the earlier class 41 services, Mr Harris referred me to the decision of the Tribunal in 'O2'<sup>3</sup> and stated that the broadcasting of entertainment was often provided by the producer and content creator of entertainment generally, as the BBC, ITV and other major radio operators tended to work. He suggested that these services were therefore inextricably linked.
19. Mr Harris referred to the contested class 38 services: '*streaming of radio programmes and audio material on the internet, streaming of digital content relating to entertainment on the internet, transmitting streamed sound, audio/visual recordings and multimedia content via mobile telephones; transmitting audio/visual recording and multimedia content via the internet*' and stated that these services were clearly linked to entertainment services, by way of broadcasting entertainment using a variety of means, such as a telecommunications network or a standard broadcast network. He added that since it is common that broadcasters both produce and disseminate entertainment, it is inevitable that consumers will consider that there is a link between them and that they come from the same undertaking, if they are provided under the same or a similar trade mark.

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<sup>2</sup> *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05

<sup>3</sup> O-140-06 [20]

20. In terms of the services '*Telecommunications*' at large, Mr Harris referred me back to the O2 case mentioned previously. By way of example Mr Harris said that nowadays, when one holds a mobile phone and can access all sorts of entertainment media, for example, radio through the BBC Sounds network, on a phone, then telecommunication services could no longer be considered as just a matter of a voice communication, one person to another. They embrace the whole area of broadcast entertainment. As such Mr Harris suggested that the contested services in class 38 are similar, and if not similar, then complementary to, the earlier class 41 services.
21. Turning to the question of the average consumer, Mr Harris noted that the applicant had suggested that the average consumer of the services at issue would be somebody that would make a careful selection. He suggested that whilst some consumers might be quite careful in the selection of such services, many more would not be. He stated that the average consumer of e.g. radio entertainment programmes, would quite often simply tune in to a station with little attention being paid. He told me that whilst there may be some consumers who are particularly discerning, there are many others who are not, and given the risk of imperfect recollection between the marks, it was entirely possible, in this context, that one might be mistaken for the other. He noted that whilst ticket prices to some festivals can be very expensive, this could not be said to be the case for all. In fact, he told me that some festivals were reasonably cheap or even free to attend. Festivals, he said, occur at different levels in society, adding that local councils often put them on, which would support a finding that not all consumers would be particularly discerning.
22. Finally, Mr Harris submitted that there was a risk of direct confusion between the marks, and that indirect confusion may also occur as brands change over time and, given that the dominant and distinctive elements of the marks to hand were virtually identical, it was quite possible that a consumer would think that one mark was a variant on the other or simply a brand extension.
23. Ms Wise responded by referring me to the opponent's very brief statement of grounds filed with the opposition form TM7, and the lack of later submissions or evidence from the opponent, prior to the introduction of Mr Harris's skeleton

arguments and the submissions made by him during the hearing. She told me that many of Mr Harris's arguments and references to earlier decisions of the IPO and case-law, could have been made earlier in the proceedings, potentially saving time and expense. She added that the statement of grounds in the TM7 did not go into any significant detail or analysis of the marks at issue.

24. Ms Wise told me that the examples given by Mr Harris in respect of the issue of the word 'FESTIVAL' and its lack of distinctive character, should not form a part of my assessment of this matter, as this was new information that had not been raised prior to the hearing.
25. Ms Wise stated that the marks should be considered as a whole, and in this regard, the earlier mark should not be assessed simply as a 'RELOAD' mark. The word 'FESTIVAL' could not be disregarded.
26. Turning to the services at issue, Ms Wise conceded that there may be some level of similarity between the class 41 services, however she stated that the average consumer would not necessarily confuse e.g. radio entertainment services with music festival services. With regard to the production of radio programmes, Ms Wise told me that these services dealt with the technical production of radio programmes rather than the content of the programmes being produced. As such, she suggested that these services were neither similar nor complementary to the opponent's services.
27. Turning to the class 38 services of the applicant, Ms Wise stated that the references made by Mr Harris to the O2 decision should not be relied upon, as this information had not been raised prior to the submission of skeleton arguments and during the hearing.
28. Ms Wise stated that telecommunications services and, e.g. internet communication services, communications by computer terminals, news information and agency services, rental of access time to global computer networks, mobile network communications, in the contested class 38 specification, should not be considered similar or complementary to entertainment services in the earlier class 41.



29. Ms Wise told me that the average consumer would pay a greater level of attention to the services at issue. In response to the comments of Mr Harris, she stated that the average consumer would make sure that they tuned into the correct radio station. Likewise, if they were entering a competition or a quiz, they would also take great care in entering the correct telephone number or using the correct email address. She added that in her opinion festival tickets were not every-day purchases and consumers of such entertainment would often be driven to attend a particular festival because of the acts that were playing.
30. Given the above, Ms Wise told me that there was no likelihood of confusion with regards to the contested class 38 services or with the contested production of radio programmes in class 41. Given that likelihood of confusion was absent for those services, she said that the opposition should fail, at least in so far as those services were concerned.
31. Mr Harris responded by referring to the distinction between radio entertainment and music festivals suggested by Ms Wise. He told me that these services are highly similar and complementary, as many of the bigger festivals are broadcast on the radio. He added however, that even if they were not, radio entertainment services are encompassed within the opponent's specification under the broader term 'entertainment'. The opponent has a broad specification covering not just entertainment, but sporting and cultural activities as well, which under the *Meric* principle, would encompass, in his submission, all of the services that are covered by the applicant's Class 41 specification.
32. The parties both requested scale costs, in the event that they were successful in this matter.

## **Decision**

### **Section 5(2)(b) of the Act**

33. 5(2)(b) of the Act states:

“(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.”

34. The following principles are gleaned from the decisions of the Court of Justice of the European Union (“the CJEU”) 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 services**

35. In the judgment of the 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”.

36. 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.

37. In *Gerard Meric*, the General Court 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 fur Lernsysteme v OHIM- Educational Services* (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

38. In *Boston Scientific*<sup>4</sup>, the General Court described goods/services as “complementary” in circumstances where “... *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*”. I also take note that in *Kurt Hesse v OHIM*<sup>5</sup>, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods.

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<sup>4</sup> *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

<sup>5</sup> Case C-50/15 P

39. The parties' respective specifications are:

Earlier mark	Contested mark
<p><b>Class 41:</b> Education; Providing of training; Entertainment; Sporting and cultural activities; Music Festivals.</p>	<p><b>Class 38:</b> Telecommunications; radio broadcasting services; digital radio broadcasting services; radio broadcasting over the Internet and other communication networks; streaming of radio programmes and audio material on the Internet; streaming of digital content, relating to entertainment, on the Internet; transmitting streamed sound, audio-visual recordings and multimedia content via mobile telephone devices, and wearable gadgets; transmitting audio-visual recordings and multimedia content via the Internet; Internet communication services; communications by computer terminals; news information and agency services; providing access to databases; rental of access time to global computer networks; mobile network communications; broadcasting of radio programmes and of music, sound recordings via communications networks; the provision of discussion forums; consultancy, information and advisory services relating thereto</p> <p><b>Class 41:</b> Entertainment; radio entertainment services; organising, arranging and presenting of entertainment; betting and gaming facilities and services; games provided</p>

	<p>online from a computer database or the Internet; games and competitions provided over a radio station, telephone service, text message service or digital streaming service; organisation of competitions, quizzes, events and games; production of radio programmes; information relating to entertainment provided on-line from a computer database or the Internet; Internet games (non-downloadable); provision of leisure and recreational facilities via the Internet; conducting multiple player games of chance; competitions provided by telephone; organisation of entertainment competitions; information and advisory services relating to the aforesaid services.</p>
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40. The contested class 38 services: *'Radio broadcasting services; digital radio broadcasting services; radio broadcasting over the Internet and other communication networks; streaming of radio programmes and audio material on the Internet; streaming of digital content, relating to entertainment, on the Internet; transmitting streamed sound, audio-visual recordings and multimedia content via mobile telephone devices, and wearable gadgets; transmitting audio-visual recordings and multimedia content via the Internet; mobile network communications; broadcasting of radio programmes and of music, sound recordings via communications networks; the provision of discussion forums; consultancy, information and advisory services relating thereto'*, are services that provide access to a wide range of information that may be defined either as entertainment or educational in nature. It is the case that some broadcasters make entertainment and educational content that is then delivered to the consumer using their own communications services. Therefore, I find these services have the potential to share producer and channels of trade. These services are also found to be complementary, as the broadcasting, streaming and

transmitting services in the contested mark are important and indispensable to the entertainment and educational services of the earlier mark, and vice-versa. The entertainment and educational services offered by the opponent require a platform for delivery. That platform can often be an electronic one, incorporating radio, television and the internet. The broadcasting, streaming and transmitting services of the applicant are redundant without content available to be delivered to the consumer. It is, however, the case, as Ms Wise submitted during the hearing, that the nature of the contested class 38 services is very much a technical one, related directly to the technicalities involved in getting content to the consumer. That being the case, I find these services to be similar, but only to a very low degree.

41. The contested class 38 services: *'News information and agency services'*, are services that provide the consumer with news information. These services may be provided by several means, including electronically. These services may be considered to be entertaining or educational (or both) in their nature. For the reasons that I have set out in the previous paragraph, I find these contested services to be complementary, and similar to a very low degree, with the opponent's earlier entertainment and education services.

42. The contested class 38 services: *'Telecommunications; Internet communication services; communications by computer terminals; providing access to databases; rental of access time to global computer networks'*, are also services that provide the consumer with access to content. The nature of that content may be educational or entertaining in nature. Therefore, for the reasons previously set out, I find these services may share channels of trade. These services are therefore considered to be similar, but only to a very low degree, to the opponent's earlier entertainment and education services.

43. The contested class 41 services *'Entertainment; radio entertainment services; organising, arranging and presenting of entertainment; betting and gaming facilities and services; games provided online from a computer database or the Internet; games and competitions provided over a radio station, telephone service, text message service or digital streaming service; organisation of competitions, quizzes, events and games; information relating to entertainment provided on-line from a computer database or the Internet; Internet games (non-downloadable); provision of*

*leisure and recreational facilities via the Internet; conducting multiple player games of chance; competitions provided by telephone; organisation of entertainment competitions; information and advisory services relating to the aforesaid services*'; are all entertainment services of one kind or another. Applying the *Meric* principle, these services are identical to the opponent's earlier 'entertainment'.

44. The remaining contested class 41 services '*Production of radio programmes*', are services which focus on the making and creation of radio programmes. The content of the programmes being produced is not specified and therefore may be entertainment in nature, as generally it can be said that radio programmes are created for the entertainment of the listener. As such, these services can be said to be closely linked to the broader entertainment services of the opponent and they may share producer and channels of trade. They may also be said to be complementary, insomuch as the provision of e.g. radio entertainment relies entirely on the initial production of entertainment material. These services are therefore found to be similar to a medium degree.

45. In conclusion, all of the contested class 38 services have been found to be similar, to a very low degree, to the earlier entertainment and education services of the opponent. The majority of the contested class 41 services have been found to be identical to the entertainment services of the opponent, and the production of radio programmes has been found to be similar to a medium degree to the opponent's earlier entertainment services.

#### **Average consumer and the purchasing act**

46. 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*.

47. 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.”

48. Both parties made submissions regarding the likely average consumer during the hearing and in their skeleton arguments. I have considered those submissions carefully.

49. In my opinion the average consumer of the services at issue will more likely be the general public, however I do not rule out the possibility of a professional consumer in e.g. the field of education or the streaming of radio programmes.

50. The selection of such services will be largely a visual process, however, I do not ignore the aural impact of the marks and the potential for the marks to be spoken, for example, when making a purchase over the telephone, or by word of mouth recommendation, which it is reasonable to assume may be fairly common within the context of entertainment services such as music shows and festivals.

51. Ms Wise suggested that tickets for festivals are an expensive purchase that will be thought through carefully. Mr Harris claimed that whilst some festival tickets were expensive, this could not be said to be the case all of the time. I agree with Mr Harris on this point. I believe that there will be a sliding scale of costs attached to the kind of services provided by both sides and as such, I find that the average consumer of e.g. music entertainment provided at a festival or a particular radio programme, will generally pay a medium degree of attention during their selection. A professional consumer of e.g. educational services may possibly pay a slightly higher degree of attention during the selection of those services.

### **Comparison of marks**


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

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

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

53. 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.

54. The respective trade marks are shown below:

Earlier mark	Contested trade mark
	<p data-bbox="959 1317 1203 1357" style="text-align: center;"><b>RELOADED</b></p>

55. The contested mark is comprised solely of the word ‘RELOADED’ presented in standard typeface. The overall impression of the mark lies in its totality.

56. The earlier mark is a figurative mark comprised of the word elements ‘RELOAD’ and ‘festival’ presented in a combination of capital case and lower-case lettering, with a stylised typeface and in the colours purple and white. As the word ‘RELOAD’ in the earlier mark is presented in a larger typeface and is placed above the smaller word ‘festival’, I find that word to be the more dominant element of the earlier mark. As the word ‘festival’ is likely to be perceived as a descriptive term, given the nature of the

services provided by the opponent, I find that the more distinctive element in the earlier mark is the word 'RELOAD'. As such, the element 'RELOAD' can be said to play the greater role in the overall impression of that mark.

### **Visual similarity**

57. Visually, the marks are similar inasmuch as they share the letters 'RELOAD' presented in the same order. They differ in the additional letters 'ED' which form the ending of the contested mark, and in the word 'festival' of the earlier mark. They also differ visually in the colour and stylised typeface present in the earlier mark, which has no counterpart in the contested mark. As I have found previously, the element 'RELOAD' of the earlier mark plays the greater role in that mark, as it is presented in larger typeface than the word 'festival' and is placed directly above that smaller element. As such, the marks can be said to share beginnings, notwithstanding the stylised presentation of the earlier mark. The marks are therefore considered to be visually similar to a medium degree.

### **Aural similarity**

58. The contested mark will be articulated as *REE/LOWD/ED*. The earlier mark will be pronounced as *REE/LOWD/FEST/IV/AL*. Given the nature of the services at issue, as submitted by Mr Harris, it is quite possible that the average consumer will not articulate the word 'FESTIVAL' in the earlier mark. For that part of the relevant public which would not articulate the word 'FESTIVAL' the marks differ phonetically only in the third and final syllable 'ED' of the contested mark. For that consumer group, the marks can be said to be aurally similar to a high degree. For the consumer that would articulate the word 'festival' in the earlier mark, it remains the case that the marks share identical beginnings and can be said to be aurally similar to at least a low degree.

### **Conceptual similarity**

59. The word 'RELOAD' of the earlier mark is defined as '*putting something into an object such as a gun or a camera, so that it is ready to use again*'.<sup>6</sup> The word 'RELOADED' of the contested mark therefore refers to something that has been

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<sup>6</sup> <https://www.macmillandictionary.com/dictionary/british/reload>

previously used but is now ready to be used again. The word 'FESTIVAL' of the earlier mark is defined as '*a series of performances of films, plays, music, or dancing that is usually organized in the same place at the same time each year; an event that is held to celebrate a particular thing or activity*'.<sup>7</sup>

60. Both marks share a concept centred around the meaning of the word 'RELOAD', which will be readily perceived and understood by the average consumer. The earlier mark will be understood conceptually, to refer to an event or performance of some kind, involving entertainment by way of e.g. music, film or theatre. The addition of the word 'RELOAD' in the earlier mark is likely to create the concept of such an event incorporating something from the past, that has been used previously and is now ready to be used again. This concept can be said to be shared by the contested mark 'RELOADED' when that mark is considered within the context of entertainment services. As such, I conclude that the marks are conceptually similar to at least a medium degree.

61. In conclusion, the marks have been found to be visually similar to a medium degree, aurally similar to either a high degree or at least a low degree, and conceptually similar to at least a medium degree.

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

62. 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).

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<sup>7</sup> <https://www.macmillandictionary.com/dictionary/british/festival>

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).”

63. The opponent has made no claim that its earlier mark has acquired an enhanced degree of distinctive character. I must therefore assess the earlier mark purely on its inherent distinctive character.

64. In *Kurt Geiger v A-List Corporate Limited*, BL O/075/13, Mr Iain Purvis Q.C., sitting as the Appointed Person, observed 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.”

65. The word ‘FESTIVAL’ within the earlier mark may be considered by the average consumer of the services at issue, to be descriptive of entertainment services that involve or are linked to a festival. The word ‘RELOAD’ has no clear link or association with the services at issue but may allude to something from the past

being brought back or used again. Combined with the stylisation in the mark, I conclude that the earlier mark can be said to be inherently distinctive to a medium degree.

### **Likelihood of Confusion**

66. The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

67. Confusion can be direct (which effectively occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same but puts the similarity that exists between the marks/services down to the responsible undertakings being the same or related).

68. I have found that:

- the respective Class 41 services are identical or similar to a medium degree, and the contested Class 38 services are similar to a very low degree;
- the marks are visually similar to a medium degree, aurally similar to either a high degree or at least a low degree, depending on the perception of the word 'FESTIVAL' in the earlier mark; and conceptually similar to at least a medium degree;
- the average consumer will generally be a member of the general public, but may also be a professional consumer;
- the consumer will generally pay a medium degree of attention when selecting the services, however a professional consumer may display a slightly higher degree of attention;
- the visual and aural assessments of the marks are both important;
- the earlier mark has a medium degree of inherent distinctiveness.

69. Regarding the issue of new information introduced by Mr Harris in his skeleton and during the hearing, I have considered the point Ms Wise made at the hearing and I

appreciate that the specific examples given, namely: Glastonbury, Reading, T in the Park and Monsters of Rock; should perhaps not play any part in my assessment of the opponent's mark. However, in my preparation for the hearing, and specifically in my thinking as to the role played by the word 'FESTIVAL' in the earlier mark, the example of Glastonbury was one that came to my mind. Therefore, whilst I might dismiss Mr Harris's submission on this particular matter, I am able, independently, to introduce the Glastonbury example as an illustration of a situation where, when the services involved are e.g. festival services, or music entertainment more generally, I know from my own experience as an ordinary member of the public that the word 'FESTIVAL' is commonly not articulated by consumers when referring to an event.

70. Regarding the wider point that Ms Wise made about the brevity of the statement of grounds from the opponent, and the lack of additional submissions or evidence prior to the hearing; again I appreciate the point being made, however, it is the case that the opponent did refer to the similarities between the marks and the services at issue in its statement of grounds, and also referred to the distinctive and dominant aspects of the earlier mark. Whilst not specifically detailing the non-distinctive, weak nature of the element 'FESTIVAL' in the earlier mark, the opponent did make clear that it believed that certain aspects of its mark were more dominant and distinctive than others. The opponent did not set out any arguments regarding the average consumer or the nature of the purchasing process in the statement of grounds, however this is not particularly unusual, and it is perfectly acceptable to make a more detailed statement in respect of those areas later in proceedings, including during a hearing.

71. Taking all of the aforesaid into account and reminding myself of the principles set out above in paragraph 34, in particular the fact that the average consumer 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, I find, in respect of the contested class 41 services, that direct confusion is likely to occur.

72. The words 'RELOAD' and 'RELOADED' are visually, phonetically and conceptually very similar. During the purchase process the average consumer may not enunciate the word 'FESTIVAL' in the earlier mark and may simplify the mark, referring only to the word 'RELOAD'. As I have found previously, the aural impact of the marks during

the selection process cannot be discounted and I conclude that certainly during an aural selection, the similarities would lead to the average consumer mistaking one mark for the other. I believe that visually, direct confusion is also likely to occur, bearing in mind the notion of imperfect recollection.

73. I do not find the same to be true when considering the contested class 38 services.

The contested class 38 services are technical in nature and serve to provide access to content through telecommunications networks including radio, television and the internet. The nature of the content being delivered is not relevant to the technical services being provided by the applicant under class 38. I have found these services to be similar to the opponent's earlier education and entertainment services, but to only a very low degree. Mr Harris submitted that certain large organisations such as the BBC, produce entertainment content and also deliver that content through their own communications networks. I have accepted that this does occur, and that some large players in these industries may provide both kinds of services, however, there is no evidence before me to suggest that the average consumer generally expects this to be the case. It is unlikely that a member of the general public using a mobile phone to watch e.g. a music festival online, or listen to a podcast, would expect their telephone network provider to be the party also responsible for the creation or production of the entertainment content being watched or listened to.

74. I therefore find that the differences between these services and the earlier class 41 services, combined with the differences between the marks; when taken together and factored into a global analysis, lead me to conclude that there is no likelihood of confusion in respect of the contested class 38 services.

75. In the event that I am found to be wrong in my finding of direct confusion in respect of the class 41 services at issue, I now go on to consider the matter in respect of indirect confusion.

76. Mr Iain Purvis QC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10 noted that:

"16. ...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.

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).”

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

78. In considering the comments made by Mr Purvis, I believe that the potentially high degree of aural similarity between the marks, combined with the visual and conceptual similarities, and the identity/similarity between the class 41 services at issue, all serve to ensure that the average consumer will assume that they are variant marks from the same brand group or a brand extension, and that such services bearing these marks will come from the same, or an economically linked, undertaking.

79. I conclude therefore, that indirect confusion is likely to occur in respect of the class 41 services at issue. For the reasons given in paragraph 73 above, I do not believe that indirect confusion will occur in respect of the contested class 38 services.

### **Conclusion**

80. As I have found that there is a likelihood of confusion in respect of the class 41 services at issue, the opposition is partially successful. Subject to appeal, the application is refused for all of the class 41 services. The application may proceed to registration in respect of all of the class 38 services applied for.

### **Costs**

81. The opponent has been only partially successful and, as both parties have enjoyed an equal measure of success, I do not consider a costs award to be necessary. Both parties shall bear its own costs.

**Dated this 11<sup>th</sup> day of May 2020**

**Andrew Feldon**

**For the Registrar**

**The Comptroller-General**