

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION No 2202042  
IN THE NAME OF CAPITAL RADIO PLC  
TO REGISTER A TRADE MARK IN  
CLASSES 9, 16, 25, 28, 35, 38 AND 41  
OF THE REGISTER**

**AND**

**IN THE MATTER OF OPPOSITION THERETO UNDER  
No 51031 BY EMAP PERFORMANCE LIMITED**

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**IN THE MATTER OF** Application No 2202042  
**in the name of** Capital Radio Plc to register a  
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**IN THE MATTER OF** Opposition thereto under  
No 51031 by EMAP Performance Limited

## BACKGROUND

1. On 2 July 1999 Capital Radio Plc applied to register the following series of two trade marks in Classes 9, 16, 25, 28, 35, 38 and 41 of the Register:



The applicant claims the colours orange, yellow, green, red, blue and black as an element of the first mark in the series.

2. Registration was sought for the following specifications of goods and services:

### **Class 9**

Computer hardware, computer software, computer firmware, floppy discs, hard discs; video cassettes, audio cassettes, radios, compact discs, CD Rom's; teaching apparatus; computer games for use with televisions.

**Class 16**

Paper; cardboard articles; printed matter; books; journals; magazines; comics; newspapers; photographs; stationery; instructional and teaching material.

**Class 25**

T-shirts, shirts, tops, blouses, shorts, skirts, swimwear, exercise-wear, sportswear, pants, jeans, sweatshirts, jumpers, jumpsuits, sweaters, vests, jackets, coats, raincoats, nightgowns, pyjamas, undergarments, hats, caps, scarves, mufflers, bandannas; shawls, bibs, neckties, aprons; gloves; neckbands, armbands, headbands, sandals, slippers, shoes, tennis shoes, sports shoes, lounge shoes, socks, stockings; belts.

**Class 28**

Toys, games and playthings; gymnastic and sporting apparatus; hand held computers.

**Class 35**

Advertising; business management; business administration; marketing and public relations services; business management and organisational services; registration and composition of written and digital communications; exploitation and compilation of mathematical and statistical data.

**Class 38**

Electronic communication services, radio and television broadcasting, telecommunication services; transmission of messages by telephone and facsimile; communications by telegram, telex, telephones, mobile telephones and network services and computer terminals, by wire, satellite, microwave, cable or satellite; interactive telecommunications services; leasing and rental services in connection with telecommunications apparatus and equipment.

**Class 41**

Publishing services; information services; organisation of entertainment and cultural events; production of radio and television programmes; television and radio entertainment; arranging and conducting of business and commercial conferences and seminars.

3. The application was accepted by the Registrar and published in the Trade Marks Journal.
4. On 31 May 2000 EMAP Performance Limited filed Notice of Opposition. In summary, the grounds of opposition are as follows:
  - (i) **Under Section 3(1)(b) of the Act** - because the mark is devoid of distinctive character as the words PARTY IN THE PARK is the dominant element in the mark, such that the mark is essentially a PARTY IN THE PARK mark. Accordingly, the mark is descriptive of any entertainment event which is held in a park and is descriptive of any goods or services which relate to, or are sold at, or provided in connection with such events.

- (ii) **Under Section 3(1)(c) of the Act** - as it consists exclusively of signs or indications which may serve, in trade, to designate the kind, intended purpose or other characteristic of goods and services in relation to the provision of any entertainment which is held in a park together with associated merchandise being goods or services which relate to or are provided in connection with such events.
- (iii) **Under Section 3(1)(d) of the Act** - because the mark consists exclusively of signs or indications which are customary in the current language or in the bona fide and established practices of trade in relation to any entertainment event which is held at, or in relation to, a park, together with the provision of associated merchandise being goods or services which relate to or are provided in connection with such events.
- (iv) **Under Section 3(6) of the Act** - because the application was made in bad faith in that the applicant was aware of the prior generic and descriptive use by the opponent and others.

5. The applicant filed a counterstatement denying the above grounds. Both sides filed evidence and have asked for an award of costs in their favour. The matter came to be heard on 27 May 2002 when the applicant was represented by Mr Mellow of Counsel instructed by Deckert and the opponent by Dr Turner of Counsel instructed by Urquhart Dykes and Lord.

#### **OPPONENT'S EVIDENCE**

6. This consists of two statutory declarations, one each from Christine Lund-Beck and Timothy Ralph Schoonmaker dated 12 January 2001 and 29 January 2001 respectively.

7. Ms Lund-Beck is a trade mark attorney and partner in the firm Urquhart Dykes & Lord, the opponent's representatives in these proceedings.

8. Ms Lund-Beck states that it is the view of the Trade Marks Registry that the mark PARTY IN THE PARK is descriptive and she says that this view was clearly expressed during the prosecution of trade mark application No 2145765 for the mark PARTY IN THE PARK by EMAP Radio Limited. At Exhibit CLB2 to Ms Lund-Beck's declaration is a copy of a letter from a Trade Marks Registry examiner, dated 21 May 1998, raising late objection to the mark under Section 3(1)(b) and (c) of the Act. Ms Lund-Beck adds that the Trade Marks Registry refused application No 2144558 for the mark PARTY IN THE PARK by Corporate Road Show after a hearing and a copy of the details for this application (taken from the Trade Marks Registry database) are at Exhibit CLB3 to her declaration.

9. In Ms Lund-Beck's view "the presence of the de minimis term 95.8 CAPITAL FM's and the device element" in the mark in suit are not sufficient to overcome the dominance of the words PARTY IN THE PARK and the Registry accepted the application in error.

10. Mr Schoonmaker is Chief Executive of EMAP Performance Limited. He states that his company is well established in the business of radio broadcasting having a number of

commercial radio stations throughout the United Kingdom and accordingly, is well versed in the provision of radio entertainment services together with related areas such as the provision of live entertainment and merchandising.

11. Mr Schoonmaker believes that the trade mark PARTY IN THE PARK ("the mark") was first used by his company's radio stations in relation to a live open air music/entertainment event in 1993, although they are unable to trace any supporting documentation for this date. He adds that the mark has been used in relation to live open air music/entertainment events since 1996, namely:

- (i) A Party in the Park event held in Avenham Park in Preston on 6 & 7 July 1996, organised by the Red Rose Gold and Rock FM music radio stations now owned by EMAP and Preston Borough Council;
- (ii) A Party in the Park event, originally scheduled to be held at the Doncaster Dome, held at the Don Valley Bowl in Sheffield on August 4 1996, organised by Hallam FM music radio station now owned by EMAP;
- (iii) A Party in the Park event held in Temple Newsam park in 1996 organised by the 96.3 Aire FM music radio station now owned by EMAP and Leeds City Council, this is now an annual event;
- (iv) A Party in the Park event held in Heaton Park, Preswich on 22 June 1997 organised by the Key 108 music radio station now owned by EMAP and Manchester City Council;
- (v) A Party in the Park event held at Stockton Riverside on 1 August 1999 organised by the TFM 96.6 music radio station now owned by EMAP.

12. Mr Schoonmaker goes on to state that the trade mark is used in relation to all the activities associated with a live music/entertainment event organised by a radio station, such as radio broadcasting, radio entertainment services and advertising and he adds that the mark also appears on all publicity, advertising and merchandising material produced to support the event. Mr Schoonmaker draws attention to Exhibit TS1 to his declaration which consists of copies of a collection of material showing PARTY IN THE PARK in use in relation to the above mentioned events. He adds that with the exception of the event in Stockton, all were held before the date of 2<sup>nd</sup> July 1999 on which the application in suit was filed and that in relation to the Stockton event, although the event itself took place on 1<sup>st</sup> August 1999, the publicity and advertising for the event would have been in place prior to the date on which the application was filed. Mr Schoonmaker continued by stating that these events were also held prior to the organisation by the applicant of their first event under the mark, PARTY IN THE PARK, which he believes was in 1998. At Exhibit TS2 to Mr Schoonmaker's declaration a copy of a magazine article from "Marketing Week" is shown which refers to the event taking place in 2000 as "Capital FM's third annual Party in the Park".

13. Mr Schoonmaker states that the live music/entertainment events held under the mark PARTY IN THE PARK and organised by his company's radio stations have been large,

attended by many thousands of people and have also featured many well-known bands and individual performers such as The Spice Girls, 911, Let Loose, All Saints, Jimmy Somerville, Westlife, Lindisfarne and others. He refers to the documentation submitted in Exhibit TS1 and submits that, in view of the size of the events and the well-known nature of the performers, it is unlikely that the applicant was not aware of these events and hence his company's use of and interest in the mark PARTY IN THE PARK.

14. Next, Mr Schoonmaker states that the mark PARTY IN THE PARK is so clearly descriptive of entertainment events held in a park, the mark has been used by third parties to describe their own events. He provided the following examples:

- (i) a Party in the Park event was held as part of the Exeter Festival in 1985;
- (ii) a Party in the Park event was held as part of the Dulwich Festival 14<sup>th</sup> - 21<sup>st</sup> September 1997;
- (iii) The music radio station FM104 in Ireland have been holding a Party in the Park event since 1998;

and in support he draws attention to Exhibit TS3 to his declaration which comprises a collection of material showing the trade mark in use by third parties, including in relation to the above mentioned events which took place prior to the date on which the application in suit was filed.

15. Mr Schoonmaker now turns to use of PARTY IN THE PARK by third parties in relation to entertainment services which are not music concerts and he provides the following examples:

- (i) A car rally in Northern Ireland organised by the Official Northern Ireland MX5/Eunos Roadsters Owners Club on 22<sup>nd</sup> August 1999;
- (ii) A celebratory gathering to congratulate the Olympic rower Steve Redgrave organised by Wycombe District Council;
- (iii) A beer festival in Boston, Lincolnshire organised by CAMRA held on 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> July 2000 and Mr Schoonmaker draws attention to Exhibit TS4 to his declaration which consists of a collection of material showing PARTY IN THE PARK in use in relation to the above mentioned events.

16. Mr Schoonmaker also refers to a search on the Internet which, he says, reveals numerous parties using PARTY IN THE PARK to describe their own particular event.

Mr Schoonmaker realises that this search was conducted after the relevant date but he contends that it demonstrates that PARTY IN THE PARK is in common use and cannot be considered distinctive.

## APPLICANT'S EVIDENCE

17. This consists of a witness statement by Nathalie Schwarz, the Company Secretary of Capital Radio Plc (the applicant), dated 10 August 2001.

18. Ms Schwarz states that the applicant is the UK's leading commercial radio group and that Capital Radio (now 98.5 Capital FM) was launched in October 1973 and remains the longest serving commercial radio station. She goes on to provide a considerable amount of background information on the Capital Group of radio stations, including:

- (i) 95.8 Capital FM has listener figures of approximately 3 million per week;
- (ii) The Group has greater revenues and profits than any other commercial radio group in the UK;
- (iii) The applicant owns 19 analogue radio stations in the UK and in addition digital only stations;
- (iv) The Group broadcasts to an area covering over half of the UK's adult population;
- (v) The Group has won numerous awards within the media industry.

19. Ms Schwarz states that the mark 'Party in the Park' was first used by the Capital Group in Spring 1993 in Birmingham in relation to an open air concert featuring various musical acts. Since then, the various Capital Group stations have hosted numerous such events annually, each under the mark Party in the Park (other than the Power in the Park events). Attached at Exhibit NS7 to Ms Schwarz's declaration is a list of such events, which include:

### Spring 1993

Party in the Square - Centenary Square Birmingham BRMB. Free event 50,000 + attended

### Summer 1994

Party in the Park, Cannon Hill Park Birmingham. Free event 100,000 attended

### Summer 1995

Party in the Park, Cofton Park Birmingham. Free event 60,000 + attended  
Power in the Park I, Southampton Common. Free event approximately 40,000 attended

### Summer 1996

Party in the Park, BRMB, Birmingham. Free event (no attendance figures available)  
Power in the Park II, Southampton Common. Free event approximately 40,000 attended

### Summer 1997

Party in the Park I, Preston Park Brighton. Free event approximately 25,000 attended  
Power in the Park III, Southampton Common. Free event approximately 40,000 attended

Party in the Park, BRMB, Birmingham. Free event (no attendance figures available)

### Summer 1998

Party in the Park II, Preston Park, Brighton. Free event approximately 30,000 attended

Power in the Park IV, Southampton Common. Free event approximately 60,000 attended

Party in the Park, BRMB, Cannon Hill Park, Birmingham. Free event 17,000 attended

Party in the Park I, Cardiff. Free event (no attendance figures available)

Party in the Park, London (with the Prince's Trust). 100,000 attended

### Summer 1999

Party in the Park III, Preston Park Brighton. Free event approximately 40,000 attended

Power in the Park V, Southampton Common. Free event approximately 60,000 attended

Party in the Park, BRMB, Cannon Hill Park, Birmingham. Free event 17,000 attended

Party in the Park I, Cardiff. Free event (no attendance figures available)

Party in the Park, London (with the Prince's Trust). 100,000 attended

and at Exhibit NS8 are press and internet references to some of the Capital Group's PARTY IN THE PARK events.

20. According to Ms Schwarz the PARTY IN THE PARK events in London are now the biggest open air concerts in Europe and they have been held in association with the HRH Prince of Wales' charity, the Prince's Trust.

21. Ms Schwarz goes on to state that THE PARTY IN THE PARK events are broadcast live on all the Capital Group FM radio stations. She also provides considerable information in relation to events and activities which have taken place after the relevant date for these proceedings ie 2 July 1999.

22. In relation to the 1998 and 1999 London (Hyde Park) PARTY IN THE PARK, Ms Schwarz points out that the following well-known artists appeared:

1998

Simple Minds, Lutricia McNeal, The Corrs, Gary Barlow, Julian Lennon, Shania Twain, Tina Arena, Connor Reeves, Boyzone, Eternal, Del Amitri, Natalie Imbruglia, Des'ree, B\*Witched, All Saints, Louise, Whistle Down the Wind, Tom Jones, Lionel Ritchie, The Mavericks, UltraNate and the cast of "Saturday Night Fever"



1999

Boyzone, The Corrs, Culture Club, The Honeyz, Madness, Martine McCutcheon, Roxette, Texas, Shania Twain, UB40, Another Level, Gary Barlow, Mary J. Blige, Blockster, Blondie, Catatonia, Elvis Costello, Eurythmics, Fierce, Geri Halliwell, the cast of "Mama Mia", Ricky Martin, Mike and the Mechanics, Mark Morrison, Pet Shop Boys, NSats'n'Small, Power House, Connor Reeves, S Club 7, Soul Searcher Steps and Westlife

23. Turning to income generated by ticket sales for the London events, Ms Schwarz states that the following figures are a good approximation and have been calculated by multiplying the ticket price by the number of people who attended the event:

1998 : £1,750,000

1999 : £1,750,000

24. Ms Schwarz concluded that as a result of the use made by it by the applicant and the Capital Group, the mark PARTY IN THE PARK is well known to the general public in the UK and is uniquely associated with Capital Radio Plc.

#### **OPPONENT'S EVIDENCE IN REPLY**

25. This consists of a witness statement by Timothy Ralph Schoonmaker dated 8 January 2002.

26. Mr Schoonmaker refers to the claim made in the statement of Ms Schwarz that the mark PARTY IN THE PARK was first used by the Applicant and the Capital Group in Spring 1993 by BRMB in Birmingham and points out that in Exhibit NS7 of Ms Schwarz's statement, this event is referred to as PARTY IN THE SQUARE. He adds that in view of this uncertainty, Spring 1993 cannot be considered as the date of first use of PARTY IN THE PARK by the applicant and the Capital Group.

27. Next, Mr Schoonmaker refers to Exhibit NS7 to Ms Schwarz's statement where it is claimed that a single event was held in Birmingham under the mark PARTY IN THE PARK in 1994 and 1995 and he points out that no further evidence has been provided to support this claim. He goes on to say that an event under the mark PARTY IN THE PARK was organised in 1994 and 1995 by Radio Aire FM 96.3, a radio station owned by his company, in conjunction with Leeds City Council. Attached as Exhibit TS6 to his declaration are copies of promotional material relating to use of the mark in relation to this event. He adds that Exhibit TS3 of his evidence shows that the mark PARTY IN THE PARK was also being used in 1995 by the organisers of the Exeter Festival.

28. Staying with Exhibit NS7, Mr Schoonmaker refers to the assertion that a single event under the mark PARTY IN THE PARK was held in Birmingham in 1996 but he points out that no further evidence is provided to support this claim. Referring to Exhibit TS1 of his evidence he states that an event under the mark PARTY IN THE PARK was organised in Sheffield (approx attendance 25,000), on 4 August 1996 by the radio station Hallam FM,

owned by his company, in conjunction with Sheffield City Council. In addition two events were held under the mark in Preston on 6<sup>th</sup> and 7<sup>th</sup> July 1996 which were organised by Red Rose Rock FM and Red Rose Gold, which are radio stations owned by his company, in conjunction with Preston Borough Council.

29. Mr Schoonmaker next refers to the claim in NS7 that two events were held in 1997 under the mark PARTY IN THE PARK, one in Brighton and one in Birmingham and he again states that no further evidence is provided to support this claim. He adds that Exhibit TS1 of his evidence shows that an event under the mark PARTY IN THE PARK was organised in Manchester (approx attendance 35,000), on 22 June 1997 by the radio station Key 103 Radio, a radio station owned by his company, in conjunction with Manchester City Council and that, in addition, Exhibit TS3 of his evidence shows the mark was also used by the organisers of the Dulwich Festival in 1997.

30. Mr Schoonmaker is also critical of NS7 in relation to 1998 and 1999 events and he points out that the 1999 and subsequent events referred to by the applicant all fall after the relevant date for these proceedings ie 2 July 1999.

31. Mr Schoonmaker now turns to Exhibit NS8 to Ms Schwarz's statement, a collection of references from the press and Internet use of PARTY IN THE PARK by the applicant and the Capital Group. He states that references coded A to H all refer to events which took place after the date on which the Application No 2202042 was filed which was 2 July 1999 and as such cannot be taken into account. He adds that reference I mentions an event which took place in July 1999 in Birmingham but does not say when, although Reference J mentions an event which took place in Birmingham on July 25 1999, presumably the same event, but which took place after the application date. However, Reference K gives a date of 5 June 1999 for the event as does Reference K. There is some confusion as to the date but as Reference J is taken from a newspaper article reporting the actual event and the other dates are taken from future events lists one can assume the event took place on July 25 1999 after the application date. Reference M refers to an event held in London under the mark PARTY IN THE PARK on July 4 1999 which was after the date of application. Reference N refers to the programme of events for the Cardiff Festival of 1998 and mentions the RED DRAGON PARTY IN THE PARK event but this does not indicate that any such event was actually held. Reference P refers to advance notice of events to be held under the mark PARTY IN THE PARK during 1999, Birmingham (5 June) although it would appear that this event was actually held on 25 July, and Southampton (13 June), however this event is also referred to as POWER IN THE PARK in Exhibit NS7 and there is no evidence that this event took place; also in Brighton (27 June) and Cardiff (7 August 1999) although this final event was scheduled to take place after the application date. References Q, R, S, T, U, V and W all refer to an event in Birmingham on 16 May 1998, although Reference T also refers to the event as THE PEOPLE'S PARTY and as such there is clear uncertainty as to the name under which this event was held.

32. Mr Schoonmaker goes on to comment about the ticket sales for the applicant's 1999 event held in Hyde Park which, he says, merely reflect the fact that the public wished to attend a large pop concert and do not indicate distinctiveness in relation to a PARTY IN THE PARK trade mark.

33. Mr Schoonmaker concludes that the applicant's evidence does not show that the "generic term "party in the park" has become associated only with the applicant", adding that the term is widely used by third parties without any confusion.

34. This completes my summary of the evidence filed in this case. I now turn to the decision.

## **DECISION**

35. Mr Turner dropped the Section 3(6) ground of opposition prior to the commencement of the hearing.

36. The relevant parts of Section 3(1) of the Act are as follows:-

“3.-(1) The following shall not be registered -

- (a) .....
- (b) trade marks which are devoid of any distinctive character,
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,
- (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* and established practices of the trade.”

37. Accordingly, I must consider the acceptability of the marks in suit in the *prima facie* in the light of the requirements of Section 3(1)(b), (c) and (d) of the Act.

38. Both parties were in agreement that the applicant's marks must be considered in their totality. In essence, Dr Turner expressed the view that the dominant element of the mark consisted of the descriptive, indeed generic, words PARTY in the PARK and the remaining elements were insufficient to enable the marks as a whole to function as trade marks and indicate the origin of goods or services associated with open air entertainment events. Mr Mellor submitted that the only relevant issue was whether the marks in their totality met the requirements of the Act and that this did not necessitate the consideration of whether individual elements, in particular the words PARTY IN THE PARK, were descriptive and/or generic.

39. While the outcome of this opposition must ultimately rest upon whether the marks in suit in their individual totality meets the requirements of Section 3(1), it seems to me that a full and proper approach to this question involves a consideration of the individual elements comprised in the marks including, the dominant components, the descriptive elements and the distinctive elements and then, taking into account the goods and services and the particular

customer for the relevant goods and services, undertaking a global appreciation as to whether in totality the marks meet the requirements laid down in the Act.

40. At the hearing Dr Turner commenced the opposition with his submissions on the Section 3(1)(b) ground and it was accepted that the tests set out in the decision of Geoffrey Hobbs QC sitting as the Appointed Person in *Cycling Is ...*[2002] RPC 37, are relevant. In particular, I find paragraphs 66 to 71 of that decision, set out below, to be of particular assistance:

*“66. That brings me to the question of whether the signs possess a distinctive character enabling them to fulfil the essential function of a trade mark in relation to goods and services of the kind specified in the application for registration. (The goods and services comprise “clothing footwear and headgear” in Class 25 and “advertising all relating to the cycling industry” in Class 35).*

*67. The case for allowing registration rests upon the proposition that the signs are cryptic to a degree which makes it more likely than not that they would carry connotations of trade origin (whatever other connotations they might also carry) in the minds of the relevant class of persons or at least a significant proportion thereof.*

*68. The case for refusing registration rests upon the proposition that the signs are visually and linguistically meaningful in a way which is more likely than not to relate the goods and services to the activity of cycling without also serving to identify trade origin in the minds of the relevant class of persons.*

*69. The difference between these two positions resides in the question whether the perceptions and recollections the signs would trigger in the mind of the average consumer of the specified goods and services would be origin specific or origin neutral.*

*70. The relevant perspective is that of the average consumer who does not know there is a question, but who is otherwise reasonably well-informed and reasonably observant and circumspect.*

*71. I do not suppose that such a person would pause to construe the signs when encountering them in any of the different settings (including advertising and promotional settings) in which they might be used. Even so, the degree of attention required to take note of the signs in the first place would be sufficient, in my view, to leave a well-informed and reasonably observant and circumspect person with the clear impression that the signs were being used with reference to goods and services related to cycling.”*

41. In my considerations of the Section 3(1)(b) ground I firstly consider the nature of the words PARTY IN THE PARK which I believe Dr Turner to be correct in submitting is the dominant element within the mark applied for. These words have an obvious meaning in describing parties (entertainments) taking place in parks and the evidence clearly shows that prior to the relevant date for these proceedings (2 July 1999) a number of undertakings, including the applicant, the opponent and third parties had organised/held Party in the Park

events in various UK locations. On this basis I have no hesitation in concluding that the words PARTY IN THE PARK are, in themselves, “origin neutral” and thus, “devoid of distinctive character” in relation to entertainment services and associated services and goods.

42. My above finding on the words PARTY IN THE PARK is, or course, by no means the end of the matter, in that the marks in suit also contain the numbers, words and letters 95.8 CAPITAL FM’S and the device of a rising/setting sun with a smiling face above tree tops.

43. At the hearing Mr Mellor submitted that 95.8 CAPITAL FM’S went to denote origin of the goods and services and that the evidence provided in Ms Schwarz’s witness statement assisted in highlighting this element further as it went to show the form and exposure of CAPITAL FM in the field of entertainment. Here I find myself in sympathy with Mr Mellor’s submissions. It seems to me that the numbers, words and letters 95.8 CAPITAL FM’S are in a prominent position within the marks (top, central) and although relatively small in size, they have been emboldened. Furthermore, as Mr Mellor pointed out the numbers, words and letters terminate with a possessive apostrophe S which goes to stress origin in relation to 95.8 CAPITAL FM. I also bear in mind that the device element in the mark is distinctive in its own right.

44. Taking the marks in suit as a whole, it seems to me that the additional distinctive elements ie. 95.8 CAPITAL FM’S and the device of a smiling sun over tree tops, is sufficient to enable the average consumer (those who attend outdoor entertainments and who may purchase goods associated with such entertainments) ie. the general public, to perceive the marks as being origin specific.

45. In my view the marks as a whole possesses distinctive character and the opposition under Section 3(1)(b) of the Act fails.

46. At the hearing Dr Turner, correctly in my view, expressed the opinion that the opponent’s case under Section 3(1)(c) and (d) was no stronger than the Section 3(1)(b) case. Nevertheless, I now go on to consider the remaining grounds.

47. My earlier findings in relation to the descriptive nature of the words PARTY IN THE PARK remain relevant to the assessment of the acceptability of the marks in suit under Section 3(1)(c) and Section 3(1)(d) of the Act.

48. Turning to Section 3(1)(c), I find the recent judgement of the European Court of Justice (ECJ) in Case C-383/99P (Proctor and Gamble v OHIM) - the “BABY-DRY” case to be of particular assistance. Here at paragraph 39 the ECJ said:

*“39. The signs and indications referred to in Article 7(1)(c) of Regulation No 40/94 are thus only those which may serve in normal usage from a consumer’s point of view to designate, either directly or by reference to one of their essential characteristics, goods or services such as those in respect of which registration is sought. Furthermore, a mark composed of signs or indications satisfying that definition should not be refused registration unless it comprises no other signs or indications and, in addition, the purely descriptive signs or indication of which it is composed are*

*not presented or configured in a manner that distinguishes the resultant whole from the usual way of designating the goods or services concerned or their essential characteristics.”*

49. Taking the marks in suit as a whole, it seems to me that the presence of the numbers, words and letters 95.8 CAPITAL FM'S and the device of a smiling sun above tree tops (for essentially the same reasons as stated earlier in paragraphs 42 and 43 of this decision), means that the marks are presented in a manner which distinguishes the resultant whole from the usual way of designating the goods or services concerned or their essential characteristics. The opposition under Section 3(1)(c) fails.

50. Finally, Section 3(1)(d). Here, once again the opposition must fail in light of my earlier findings in relation to the presence in the marks of the numbers, word and letters 95.8 CAPITAL FM'S and the device element and their impact upon the perception of the marks in their totality. The marks as a whole contain sufficient surplus or capricious addition to the words PARTY IN THE PARK to justify registration.

51. As the opposition to the application has failed the applicant is entitled to a contribution towards costs. I order the opponent to pay the applicant the sum of **£1750**. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 14<sup>TH</sup> day of October 2002**

**JOHN MacGILLIVRAY**  
**For the Registrar**  
**the Comptroller-General**