

O/619/18

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION UK00003224179

BY

ALMOGRAN MEDIA ORGANISATION TO REGISTER THE FOLLOWING MARK IN
CLASS 38 AND 41



AND

OPPOSITION THERETO (NO OP000409949) BY

IBRAHIM EL-NOUR

Background and Pleadings

1. ALMOGRAN MEDIA ORGANISATION (the Applicant) applied to register the trade mark shown, on the cover page of this decision for services outlined in classes 38 and 41, on 10th April 2017. It was accepted and published in the Trade Marks Journal on 5th May 2017.

2. IBRAHIM EL-NOUR (the Opponent) opposes the trade mark on the basis of section 5(2)(b) of the Trade Marks Act 1994 (the Act). This is on the basis of his earlier UK Trade Marks “MOGRAN” registration number UK3223220 (Mark 1), and “MOGRUN” registration number UK3223224 (Mark 2), both of which were filed on the 5th April 2017 and registered on the 28th July 2017 respectively. Both are registered in respect of identical services relied upon in class 38 and 41 as below:

CLASS 38: Telecommunications; information about telecommunication; television transmission and broadcasting; broadcasting, transmission and diffusion of television programmes; communication of information by television; broadcast of information by means of television; cable television broadcasting and transmission; broadcasting and transmission of cable television programmes; cable television services; cable television broadcasting information; satellite transmission; satellite television broadcasting; transmission of television programmes by satellite; video-on-demand transmission; broadcasting of television programs via the Internet; streaming of television over the Internet; video, audio and television streaming services; subscription television broadcasting; broadcasting of television programmes via cable or wireless networks; wireless transmission and broadcasting of television programmes; dissemination of television programmes relayed by cable link to television receivers; dissemination of television programmes relayed by microwave link to television receivers; dissemination and relaying of television programmes by extra-terrestrial satellite; broadcasting of motion pictures by television; television broadcasting services for mobile phones;

advice, information and consultancy services relating to all of the aforesaid services.

Class 41: Education; entertainment; sporting and cultural activities; television entertainment; presentation, preparation and production of television programmes; production of television films; editing of television programmes; television show and programme production; television programming [scheduling]; television programme syndication; recording studio services for television; television studio services; audio, film, video and television recording services; development of formats for television programs; production of television features; screenplay writing; scriptwriting, other than for advertising purposes; providing television programmes, not downloadable, via video-on-demand transmission services; production of live television programmes; provision of television news shows; satellite television series and shows; cable television programming [scheduling]; rental of television programmes; rental of motion pictures; film production, other than advertising films; providing films, not downloadable, via video-on-demand transmission services; provision of information relating to television programmes; education information; education services provided by television programmes; entertainer services; entertainment information; entertainment by means of television; providing on-line videos, not downloadable; organisation of competitions [entertainment]; production of television programmes for broadcast on mobile devices; production of animated programmes for use on television and cable; advice, information and consultancy services relating to all of the aforesaid services.

3. The Opponent relies on all the services in class 38 and 41 for which the marks are registered. The Opponent claims that there is a likelihood of confusion because under section 5(2)(b) the trade marks are similar and are to be registered for services identical with or similar to those for which the earlier marks are protected. By way of letter dated 1st September 2017, the Opponent withdrew his grounds under section 3(6), originally pleaded with the section 5(2)(b) ground. The Opponent submits in his

statement of grounds that his marks are “visually, phonetically and conceptually highly similar” to the Applicant’s mark and

“due to the identity and similarity of the services covered by the Application to the goods/services covered by the UKTMs and the similarity of the marks in question, there exists a likelihood of confusion of the part of the public”

4. The Applicant filed a counterstatement denying the claims made and requesting that the Opponent provides proof of use of his earlier trade marks relied upon. The Applicant submits that

“Almogran Media Organization was incorporated in 2016”

“Mogran TV was licensed by Ofcom and the tv channel started broadcasting since March 2017 on EutelSat 7.0 W.”

“Our electronic web page www.mograntv.com is up and active since November 2016 as well as our Mogran TV channel at YouTube, Face, twitter and others. Mogran tv known for wide range of audience world wide.”

“The words Mogran/Mogrun refers to a wide geographical area within the country of Sudan where the Blue Nile and White Nile converge to form the river Nile.”

“Our position is that this term is too generic and unable to be subject of trademark when used alone.”

“Moreover identically and similarity for the services and goods mentioned...is irrelevant.”

“We have found ourselves completely in disagreement with the opponent statement of ground.”

5. The Opponent is represented by Briffa & Co. The Applicant is unrepresented. Neither party filed evidence. Neither party requested a hearing and neither filed written submissions in lieu of a hearing. The decision is taken following a careful perusal of the papers.

6. The Opponent's registration consists of two marks "MOGRAN" and "MOGRUN" with identical specifications in class 38 and 41. The earlier trade mark for the word "MOGRAN" is arguably the most visually, aurally and conceptually similar to the Applicant's trade mark. Therefore, this represents the Opponent's strongest case overall and it is on the basis of this trade mark that I shall assess the ground of opposition.

Proof of use

7. The Applicant has raised proof of use regarding the Opponent's earlier marks. The relevant statutory provision regarding proof of use is under s6A of the Act which reads as follows

6A. - (1) This section applies where -

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a),(b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if -

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

An earlier trade mark is defined in section 6 of the Act, which states:

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

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

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

8. In these proceedings, the Opponent is relying upon the UKTM registrations shown above, both of which qualify as earlier trade marks under the above provisions. As these earlier marks were both filed and subsequently registered for less than five years at the date the application was published they are not subject to the proof of use provisions contained in section 6A of the Act. As a consequence, the Opponent is

entitled to rely upon the earlier marks in relation to the services relied upon, without having to establish genuine use.

Decision

9. The opposition is based on section 5(2)(b) of the Act which states:

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

(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”.

10. 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*.

The principles:

(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 services

11. The competing services are as follows:

Opponent's Services:

Class 38: Telecommunications; information about telecommunication; television transmission and broadcasting; broadcasting, transmission and diffusion of television programmes; communication of information by television; broadcast of information by means of television; cable television broadcasting and transmission; broadcasting and transmission of cable television programmes; cable television services; cable television broadcasting information; satellite transmission; satellite television broadcasting; transmission of television programmes by satellite; video-on-demand transmission; broadcasting of television programs via the Internet; streaming of television over the Internet; video, audio and television streaming services; subscription television broadcasting; broadcasting of television programmes via cable or wireless networks; wireless transmission and broadcasting of television programmes; dissemination of television programmes relayed by cable link to television receivers; dissemination of television programmes relayed by microwave link to television receivers; dissemination and relaying of television programmes by extra-terrestrial satellite; broadcasting of motion pictures by television; television

broadcasting services for mobile phones; advice, information and consultancy services relating to all of the aforesaid services.

Class 41: Education; entertainment; sporting and cultural activities; television entertainment; presentation, preparation and production of television programmes; production of television films; editing of television programmes; television show and programme production; television programming [scheduling]; television programme syndication; recording studio services for television; television studio services; audio, film, video and television recording services; development of formats for television programs; production of television features; screenplay writing; scriptwriting, other than for advertising purposes; providing television programmes, not downloadable, via video-on-demand transmission services; production of live television programmes; provision of television news shows; satellite television series and shows; cable television programming [scheduling]; rental of television programmes; rental of motion pictures; film production, other than advertising films; providing films, not downloadable, via video-on-demand transmission services; provision of information relating to television programmes; education information; education services provided by television programmes; entertainer services; entertainment information; entertainment by means of television; providing on-line videos, not downloadable; organisation of competitions [entertainment]; production of television programmes for broadcast on mobile devices; production of animated programmes for use on television and cable; advice, information and consultancy services relating to all of the aforesaid services.

Applicant's Services:

Class 38: Television and radio broadcasting; Television and radio transmission; Audio, video and multimedia broadcasting via the Internet and other communications networks; Broadcast of information by means of television; Broadcast of television programmes; Broadcast transmission by satellite; Broadcasting of audiovisual and multimedia content via the Internet; Broadcasting of programmes by satellite; Broadcasting of programmes via the internet; Broadcasting of radio and television

programmes; Broadcasting of television programs using video-on-demand and pay-per-view television services; Broadcasting of video and audio programming over the Internet; Communication by electronic means; Communication via television transmissions; Electronic transmission and retransmission of sounds, images, documents, messages and data; Simulcasting broadcast television over global communication networks, the Internet and wireless networks; Streaming audio and video material on the Internet; Transmission of news; Transmission of radio and television programmes by satellite; Communication of information by electronic means.

Class 41: Television and radio programme preparation and production; Television and radio programming [scheduling]; Cultural and sporting activities; Education; Entertainment; News programme services for radio or television; News programming services for transmission across the internet; News reporting; Presentation of live entertainment events; Presentation of live performances; Production of television and radio programming; Television programme production; Television scheduling [programming].

12. The Opponent submits that the services are identical or similar. The Applicant submits that “*the identicality and similarity is irrelevant*”. In order to determine whether there is a likelihood of confusion, the parties’ competing specifications must be compared.

13. When conducting a services comparison, all relevant factors should be considered as per the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon Kabushiki Kaisha v Metro Goldwyn Mayer inc* Case C-39/97, where 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”.

14. I am also guided by the relevant factors for assessing similarity identified by Jacob J in *Treat*, [1996] R.P.C. 281 namely:

- (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.

15. In addition, in *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J 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."

16. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, where 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 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".

17. In determining the similarity or identical nature of the services, one party's description of its services are either identical in wording to the other, or they incorporate the other party's description as per the decision in *Merica*.

18. I have displayed in the table below those services which I conclude are identical and where appropriate those that I find are identical according to the case of *Merica*:

Class 38

Applicant	Opponent
Television broadcasting; Broadcast of information by means of television; Broadcast of television programmes; Television transmission; Broadcast of television programmes; Transmission of news;	Television transmission and broadcasting; Broadcasting, transmission and diffusion of television programmes;
Transmission of television programmes by satellite; Broadcast transmission by satellite; Broadcasting of programmes by satellite;	Transmission of television programmes by satellite; Satellite transmission; Satellite television broadcasting;

	Dissemination and relaying of television programmes by extra-terrestrial satellite;
Broadcasting of television programs using video-on-demand and pay-per-view television services;	Subscription television broadcasting;
Broadcasting of audiovisual and multimedia content via the Internet; Audio, video and multimedia broadcasting via the Internet and other communications networks; Broadcasting of programmes via the internet; Broadcasting of video and audio programming over the Internet; Simulcasting broadcast television over global communication networks, the Internet and wireless networks; Electronic transmission and retransmission of sounds, images, documents, messages and data;	Broadcasting of television programs via the Internet; Broadcasting of television programmes via cable or wireless networks; Wireless transmission and broadcasting of television programmes; Dissemination of television programmes relayed by cable link to television receivers; Dissemination of television programmes relayed by microwave link to television receivers; Broadcasting and transmission of cable television programmes; Cable television services; Cable television broadcasting information; Video-on-demand transmission;
Streaming audio and video material on the Internet;	Streaming of television over the Internet; Video, audio and television streaming services;
Communication by electronic means; Communication via television transmissions; Communication of information by electronic means;	Communication of information by television; Broadcast of information by means of television;

Class 41

Applicant	Opponent
Education;	Education;
Entertainment; Presentation of live entertainment events; Presentation of live performances;	Entertainment; Television entertainment;

Cultural and sporting activities;	Sporting and cultural activities;
Television and radio programme preparation and production; Television and radio programming [scheduling]; Production of television and radio programming; Television programme production; Television scheduling [programming].	Presentation, preparation and production of television programmes; Television programming [scheduling]; Television show and programme production; Audio, film, video and television recording services;
News programme services for radio or television; News programming services for transmission across the internet; News reporting;	Provision of television news shows; Production of live television programmes;

19. In Class 38, with the exception of radio services, there is a substantial overlap between the Applicant's services and the Opponent's services. Where they are not identically worded, they use an alternative way of saying the same thing or are identical according to the principles outlined in *Meric*. In relation to "*radio broadcasting/transmission*", in the Applicant's specification, I must consider whether "*Telecommunications; television broadcasting/transmission*" in the Opponent's specification, is identical, identical according to *Meric* or similar services. They are competing services: - one medium is purely auditory, whilst the other is both visual and auditory.

20. Telecommunications is the broad generic term encompassing the transmission or broadcasting of information (audio, video or digital) over a distance, from a radio or television station to a home receiver, by means of radio waves, optical signals, cable, wire, or digital streaming. Consumers use "converging technologies" (the use of all types of devices for different functions) to view or listen to programmes and often bundle the services together from one single provider. Whilst the medium through which the user listens or views the service is different eg radio set, television, smartphone or computer, the process and product of transmission is highly similar, if not identical. I therefore find that "*radio broadcasting/transmission*" is identical to "*telecommunications*" as per *Meric*. If I am wrong about that, I find that they are highly similar because they share intended purpose, channels of trade (the BBC is an

example of the same undertaking providing both radio and television broadcasting services), and are in competition (one may choose to listen to the news on the radio or the television, for example).

Average consumer

21. When considering the opposing trade marks I must determine first of all who the average consumer is for the services and the method of selecting these services.

22. 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.”

23. The parties have made no submissions on the average consumer or the purchasing process for the services in question. The services provided by both will be to members of the general UK public, interested in viewing or downloading the various telecommunication programmes, through various technological mediums auditory or visual. They could also be business users; corporations or television networks bidding for the channel. The most probable method by which the services are selected is likely to be visual via the internet but could also be through aural means; telesales and aural recommendations. I would consider therefore the visual process the most important.

The degree of care for purchasing the services will also vary depending on the consumer. The general member of the viewing public will pay less attention in selecting the service as opposed to a business user. The level of attention paid therefore would depend on the type of consumer; low to medium for the general audience selecting a channel and medium for the business user.


Comparison of the trade marks

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

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

26. The trade marks to be compared are as follows:

Applicant's Mark	Opponent's Mark1
	<p data-bbox="1007 360 1155 394">MOGRAN</p>

27. The Opponent's mark comprises a single word "MOGRAN", presented in plain block capitals. The overall impression of the mark resides in the totality of the word.

28. The Applicant's trade mark consists of two main components; a stylised device in the shape of a circle and the stylised words "MOGRAN TV" beneath in blue and yellow. The circle contains a complex visual picture with a number of colourful elements depicting 2 peaks in white and blue. The style of the peaks is reflected in the letter M of the word "MOGRAN" which enhances the visual effect. Neither the device nor the word "MOGRAN" exclusively dominates the mark. Neither play the more important role in the overall impression and can be said to make a comparable contribution to the mark.

Visual Similarity

29. The only point of visual similarity between the competing marks is the word "MOGRAN". The Applicant's mark is more complex than the earlier mark consisting of the words MOGRAN TV and the coloured device. There is therefore a medium degree of visual similarity between the two.

Aural Similarity

30. The aural similarities lie in the word “MOGRAN”, which is identical in both marks, and is the only articulated element present in the earlier mark. The Applicant’s mark consists of a further verbal element “TV”. Bearing this in mind, I consider there to be a good degree of aural similarity between “MOGRAN” and “MOGRAN TV” because “MOGRAN” is the first word which will be heard.

Conceptual Similarity

31. There is no formal evidence in the proceedings from either party as to whether the average consumer would have any understanding of the meaning of “MOGRAN”.

32. In the earlier mark the word “MOGRAN” will be seen as an invented word and therefore, is conceptually neutral.

33. The Applicant states in its counterstatement

“that Mogran is a wide geographical area within Sudan where the Blue Nile and the White Nile converge to form the river Nile”

There is however no formal evidence to support this, and even if there had been it is the perception of the UK average consumer which is key. I bear in mind the totality of the Applicant’s mark and the other elements, the device with the blue and white peaks and the word “TV”. “TV” being well known to the average consumer as meaning television. However, to the average consumer neither the device nor the word “TV” provide any conceptual link with the word “MOGRAN”.

34. As the marks are conceptually neutral, they have no conceptual similarity.

Distinctiveness

35. The Opponent has not filed any evidence that he has used his mark. I must therefore consider the matter on inherent characteristics. 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).”

36. Registered marks possess varying degrees of inherent distinctiveness on a scale of low to high. Some are suggestive or allusive of a characteristic of the goods or services and others have no such qualities if they are made up or invented and with no particular link between the mark and the service provided.

37. The earlier Mark 1 consists of one word, MOGRAN. There is no evidence filed associating the word with the services covered by the registration. It has no apparent allusive or suggestive quality. Since the word will be considered to be invented it will have a high degree of inherent distinctiveness.

Likelihood of confusion

38. There are two types of relevant confusion to consider. Direct confusion is where one mark is mistaken for the other and indirect confusion is where the similarities between the marks lead the consumer to believe that the respective services stem from the same or related source.

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

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

40. In determining whether there is a likelihood of confusion there are a number of factors to bear 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 services 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 services and the nature of the purchasing process. In doing so, I must consider that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

41. Taking into account the impact of the device in the Applicant's mark, I think it unlikely that the application would be directly confused with the earlier word only mark. However, the only and therefore dominant element of the earlier mark is "MOGRAN", and it is highly distinctive. I have also found that it features equally with the device in the application. It is well established that where a mark consists of a combination of words and visual components that it is by the words that the mark is more likely to be referred. TV will not be particularly distinctive to the average UK consumer and considered to be merely descriptive of the services covered by the application. The words "MOGRAN" in both marks are identical. Furthermore, the services are identical. In my view, this falls squarely within the explanation given above in the *LA Sugar* case about indirect confusion. I consider that the average UK consumer will believe that the respective services come from the same or related trade source. There is a likelihood of confusion.

Outcome

42. The opposition under section 5(2)(b) therefore succeeds. Subject to any successful appeal, the application is refused.

Costs

43. As the Opponent has been successful he is entitled to a contribution toward his costs. Awards of costs in proceedings are based upon the scale as set out in Tribunal Practice Notice 2 of 2016. Applying that guidance, I award costs to the Opponent on the following basis:

Preparing a Notice of Opposition	£200
and reviewing the Counter statement:	
Official fee:	£200
Total:	£400

44. I order ALMOGRAN MEDIA ORGANISATION to pay IBRAHIM EL-NOUR the sum of £400. The sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 4th day of October 2018

Leisa Davies

Leisa Davies

For the Registrar