

O/703/19

TRADE MARKS ACT 1994

TRADE MARK APPLICATION No. 3171040

BY VIRTUAL JUKEBOX LIMITED

AND

OPPOSITION No. 407703

BY BEATS ELECTRONICS LLC

Background and pleadings

1. This is an opposition filed on 19th October 2016 by Beats Electronics, LLC (“BE”) to an application filed on 23rd June 2016 (“the relevant date”) by Virtual Jukebox Ltd (“VJ”) to register BAR BEATS as a trade mark in relation to a wide range of goods/services in classes 9, 35, 36, 38, 39, 41, 42 & 45. These include musical content in classes 9 and 45, distribution services in classes 38, 39, 42 for music and related content, entertainment services in class 41, and various advertising and financial services in classes 35 and 36. The full list is shown at Annex A below.

2. The grounds of opposition are based on the following 8 earlier trade marks, all of which are registered or protected in the EU:

| Trade Mark | Number | Filing or priority date | Date registered or protected | Proof of use required? | Class(es) relied on |
|-------------|----------------|-------------------------|------------------------------|------------------------|---------------------|
| BEATS | EU 7156061 | 3/06/08 | 13/06/09 | Yes | 9 |
| BEATS | EU 8370819 | 17/06/09 | 20/01/10 | Yes | 9, 38 & 41 |
| CLUB BEATS | EU 8927915 | 29/09/09 | 9/09/13 | No | 9, 35, 38 & 41 |
| BEATSAUDIO | EU 9357451 | 16/03/10 | 18/02/11 | Yes | 9 & 38 |
| BEATS MUSIC | EU 12730214 | 9/10/13 | 20/08/14 | No | 9, 38, 41 & 42 |
| BEATS ONE | EU 14497606 | 24/02/15 | 13/01/16 | No | 38 & 41 |
| BEATS | IR1225897 | 03/02/14 | 6/10/15 | No | 9 ¹ |
| BEATS 1 | IR1280983 | 29/04/15 | 8/11/16 | No | 41 |

¹ The IR was originally protected for a wider range of goods/services, but the entry in the international register was narrowed on 10 September 2018 following a limitation to the US trade mark application on which the IR is based.

3. The opposition is directed at all the goods and services in classes 9, 35, 38, 41, 42 & 45 of the application.

4. BE claims that:

- (i) the respective goods and services are the same or similar;
- (ii) the contested mark is similar to each of the earlier marks;
- (iii) there is a likelihood of confusion on the part of the public, including the risk that the applicant's mark will be mistaken for a sub-brand of the BEATS trade mark.

5. Additionally, BE claims that the earlier marks have a reputation in the EU, particularly in relation to headphones, loudspeakers, audio equipment, and sound reproduction and transmitting apparatus and services. According to BE, use of the contested mark would, without due cause, take unfair advantage of, and/or be detrimental to, the reputation and/or distinctive character of the earlier marks.

6. BE's case is, therefore, that registration of the contested mark would be contrary to s.5(2)(b) and/or s.5(3) of the Trade Marks Act 1994 ("the Act"), which are as follow:

"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.

(3) A trade mark which-

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair

advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

7. VJ filed a counterstatement denying the grounds of opposition. I note that:

- (i) VJ put BE to proof of use of the trade marks which are subject to this requirement as indicated in the table in paragraph 2²;
- (ii) VJ put BE to proof that the earlier marks have a reputation in the EU or UK;
- (iii) Whilst admitting that some of the goods are identical, VJ claims that most of the goods/services covered by the opposed application are either similar to the goods/services covered by the earlier marks to a low degree, or not similar at all.

8. Both sides seek an order requiring the other to contribute to its costs.

9. The parties used the 18-month cooling off period to attempt to reach a settlement. They were also allowed two subsequent stays of proceedings for the same purpose. Unfortunately, no settlement was reached. I note that on 8th May 2019, VJ amended its specification in class 9 by deleting “*speakers and headphones*” from the list. However, BE did not consider that this overcome its objections to the application.

Representation

10. BE is represented by D Young & Co LLP. VJ is represented by Reddie & Grose LLP. Neither side asked to be heard, but I have received written submissions in lieu of a hearing.

² VJ also asked for proof of use of the earlier marks, where applicable, in classes 18 and 25. However, BE does not seek to rely on the registration of the earlier marks in these classes. Consequently, the request for proof of use of the marks in relation to goods in these classes is inappropriate and of no effect.

The evidence

11. BE's evidence consists of a witness statement by Mr Thomas R La Perle (with 16 exhibits). Mr La Perle is the Assistant Secretary of BE and a director of Apple Inc. (which owns BE). His evidence goes to the use and reputation of the earlier marks.

12. VJ's evidence consists of a short witness statement by Ms Justine Lynch of Reddie & Grose. Ms Lynch's evidence simply provides a dictionary definition for the word 'beat' and the results of UK and EU trade mark searches for marks containing that word.

Proof of use of earlier marks EU7156061, EU8370819 and EU9357451

13. Section 6A of the Act states as follows:

"Raising of relative grounds in opposition proceedings in case of non-use

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.

(5) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Union.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

14. Section 100 of the Act states that:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

15. The contested trade mark was published for opposition purposes on 22nd July 2016. BE must therefore show genuine use of trade marks EU7156061 (BEATS), EU8370819 (BEATS) and EU9357451 (BEATSAUDIO) in the EU in the period 23rd July 2011 to 22nd July 2016.

16. VJ does not dispute that the BE's evidence shows use of BEATS in the EU in relation to "*headphones, earphones and speakers*" in class 9. Further, VJ accepts that the BEATS MUSIC mark was used between 2012 and 2015 in relation to a music streaming service in class 38. Apple purchased BE in July 2014. The BEATS MUSIC service ceased in November 2015, after which customers were directed to Apple's music streaming service.

17. Mr La Perle does not clearly state which goods or services have been marketed in the EU under the BEATS marks. Instead he refers to exhibits TLP1 and TLP3 as illustrating the products and services. However, as VJ's representative points out, these show use of BEATS only in relation to headphones, earphones and speakers.

18. According to Mr La Perle, the BEATS MUSIC service was "*available*" to consumers between 2012 and 2015 via the website beatsmusic.com. There is no information about the use of this website by consumers in the EU. There is nothing to show that it was directed at EU consumers. However, Mr La Perle says that despite the transition to Apple's music streaming service, BEATS branding was maintained by the introduction of BEATS 1, a live online broadcast to over 100 countries, including 22 Member States of the EU. The BEATS 1 service has been broadcast from studios in London using UK presenters. Exhibit TLP6 to Mr La Perle's statement includes a copy of a webpage from the BBC website dated 30th June 2015 reporting that "*Apple's BEATS 1 radio station launches.*" The service is available to "*the vast majority*" of subscribers to Apple Music, which by December 2016 amounted to 20 million people.

19. I do not consider that Mr La Perle's evidence shows that the BEATS MUSIC service was directed at consumers in the EU. However, I am satisfied that the BEATS 1 music broadcast service was directed, in part, at EU consumers. VJ says that this was use of BEATS 1 by Apple, not BE. However, as Apple owned BE at this

time, I am prepared to infer that Apple used the mark with BE's consent. In my view, the evidence shows genuine use of BEATS 1 in the relevant period, with BE's consent, in relation to an online music entertainment service.

20. In *Colloseum Holdings AG v Levi Strauss & Co.*³, which concerned the use of one mark with, or as part of, another mark, the Court of Justice of the European Union ("CJEU") found that:

"31. It is true that the 'use' through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas 'genuine use', within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, 'use' within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish 'use' within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the 'use' of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

³ Case C-12/12

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35. Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term ‘genuine use’ within the meaning of Article 15(1)". (emphasis added)

21. The addition of the number "1" to BEATS does not, in my view, alter the distinctive character of BEATS and thereby prevent it from being perceived as indicating services provided under the BEATS trade mark. Consequently, I find that use of BEATS 1 amounts to use of BEATS too. Consequently, I find that BE has established genuine use of BEATS in the EU in relation to the following services in class 41:

Providing online music services, namely, providing pre-recorded music; entertainment services, namely, providing a web site featuring musical performances, musical videos, related film clips, photographs, and other multimedia materials, providing on-line reviews, providing pre-recorded music, information in the field of music, and commentary and articles about music, all on-line via a global computer network.

22. Mr La Perle further claims that BE made use of BEATSAUDIO by licensing the mark to Chrysler for use in relation to car audio systems. However, as VJ's representative points out, there is no evidence that Chrysler used the BEATSAUDIO mark in the EU. I note that pages 283/284 of Mr La Perle's evidence⁴ consist of a copy of an article dated February 2014 from Google.com which claimed that Fiat, the

⁴ See exhibit TLP15

Italian car manufacturer, was to use a BeatsAudio systems in its then-new 500L model⁵. The planned use of BEATSAUDIO systems by Fiat is potentially relevant because it is obvious that there is a substantial EU market for Fiat-branded models. However, Mr La Perle says nothing at all about such use. It is not therefore possible to establish whether the proposed use subsequently occurred, or on what scale, or in relation to exactly which goods, or whether the BEATSAUDIO mark was used by Fiat in a way that was visible to its customers. Consequently, I find that BE has not established use of the BEATSAUDIO mark.

23. I conclude that BE can rely on:

- (i) EU7156061 and EU8370819 in relation to headphones, earphones and audio speakers;
- (ii) EU8370819 in relation to the services in class 41 set out in paragraph 21 above;
- (iii) EU8927915, CLUB BEATS, for the registered goods/services in classes 9, 35, 38 & 41;
- (iv) EU12730214, BEATS MUSIC, for the registered goods/services in classes 9, 38, 41 & 42;
- (v) EU14497606, BEATS ONE, for the registered goods/services in classes 38 & 41;
- (vi) IR1225897, BEATS, for the protected goods in class 9;
- (vii) IR1280983, BEATS 1, for the protected services in class 41.

Reputation of the BEATS trade marks

24. Mr La Perle provides evidence that the BEATS trade mark has a reputation in the EU as follows:

- (i) More than \$150 million worth of products bearing the BEATS marks were sold in the EU in 2015 and 2016;

⁵ I also note that exhibit TLP9 includes a translation of an article dated 3rd January 2012 from an Austrian website which refers to the "*Beats Audio [sound] profile.*" This does not appear to be connected to the claimed use of BEATSAUDIO in relation to car audio systems.

- (ii) More than \$70m of these sales were made in the UK;
- (iii) More than \$20m was spent advertising BEATS products in Europe in 2016;
- (iv) BEATS headphones, earphones and speakers receive extensive press coverage in the EU⁶;
- (v) This includes coverage in UK publications, such as The Independent and Evening Standard;
- (vi) BEATS products are also promoted via social media through a YouTube channel (Officialbeatsbydre), Beats by Dre Facebook and Twitter pages;
- (vii) The products have also received media coverage as a result of collaborations with well-known music celebrities Lady Gaga (2009 – earphones), P Diddy (2010 – DIDDY BEATS earphones) and Justin Bieber (2010 JUSTBEATS headphones);
- (viii) A Merger Procedure report produced by the EU Commission in 2014 found that BE had 10-20% of the EU market for headphones by value and 0-5% by volume;
- (ix) The market share figures for the UK market were similar.

25. I find that BEATS had a strong reputation in the EU and the UK at the relevant date in relation to headphones, earphones and audio speakers. It is true that most of the use of BEATS is as part of the mark BEATS BY DRE. However, the average consumer is likely to perceive BEATS as the product name and BY DRE as identifying the undertaking responsible for BEATS. Such use is clearly capable of establishing a reputation in BEATS alone⁷. I note that BEATS has a higher % of the EU market for headphones by value than by volume. This suggests that the goods are relatively high value/quality.

26. There is insufficient evidence to establish that BEATS had a reputation in the EU or UK for any other goods/services.

⁶ See exhibit TLP8

⁷ See, by analogy, *Nestlé v Mars UK, CJEU, Case C-353/03*

Family of marks

27. The evidence shows that, of the marks relied on in this opposition, BEATS and BEATS 1 were present on the UK and EU markets at the relevant date. This is insufficient to establish that BE had a ‘family’ of BEATS marks. It is true that the evidence shows some use of other BEATS-derivative marks, but it does not show whether, or to what extent, these marks were present on the UK or EU markets at the relevant date. Consequently, it is unnecessary to examine any further BE’s case based on the existence of a ‘family’ of BEATS marks.

The section 5(2)(b) grounds

28. EU12730214 (BEATS MUSIC) appears to have the widest scope of protection in terms of goods/services in relevant classes. I will therefore examine the s.5(2)(b) ground based on this mark. In my view, CLUB BEATS and BEATS are the most similar of BE’s earlier marks to the contested mark. It is therefore also necessary to examine the s.5(2)(b) case based on EU12730214, EU7156061, EU8370819, EU8927915 and IR1225897.

EU1273214 – BEATS MUSIC - comparison of goods/services

29. The respective goods/services covered by EU 12730214 and the contested mark are shown below.

| EU12730214 | Contested mark |
|--|---|
| Class 9: Audio recordings featuring music; video recordings featuring music; downloadable audio and video recordings featuring music, music performances, and music videos; pre-recorded music, namely, digital downloads; user interface for television and video on demand communications equipment; Computer software for use in the delivery, distribution and transmission of digital music and entertainment-related audio, video, text and multimedia content; computer software for enabling transmission, storage, sharing, collection, editing, organizing and modifying audio, video, messages, images and other data for use in social networking, online chats and interactive gaming, for use in creating social networking databases and for use in social networking database management; computer | Class 9: Music, sounds, images, text, signals, software, information and code provided by telecommunications networks, by online delivery including by downloading or by streaming; digital music (downloadable or streamable); digital content (downloadable or streamable); video and music recordings, spoken word recordings; audio or video recordings in the form of CDs, DVDs, audio books or downloads; pre-recorded media; electronic publications (downloadable or streamable); podcasts; films, television programmes, radio programmes; motion picture films and programmes featuring comedy, drama, action, adventure and/or animation; motion picture films and programmes for broadcast on television featuring comedy, drama, action, adventure and/or animation; promotional and |

software for creating searchable databases of information and data for peer-to-peer social networking databases; Gift cards, namely, magnetically encoded gift cards.

marketing material in digital form; training aids and instructional material in digital form; interactive multimedia presentations; electronic cards, bracelets and tags, storing information thereon; computer software and applications; interactive computer software; software for use in processing digital music and digital content (downloadable or streamable); software for browsing, searching and content delivery; software to allow users to interact with music or other content being delivered, to make requests, tag tracks, rate tracks; software for handling financial transactions; software relating to the organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, promotion programmes and promotional services; software relating to electronic gift vouchers, voucher codes, gift codes, claim codes, discount offers, promotional offers, printable vouchers, coupons and others tokens of value; computer games; game cartridges; games for mobile phones; computer games software; educational software; apparatus, instruments and media for recording, reproducing, carrying, storing, processing, manipulating, transmitting, broadcasting, retrieving and reproducing music, sounds, images, text, signals, software, information, data and code; multimedia apparatus and instruments; music playing apparatus; MP3 players, media players, PDAs; juke boxes, digital juke boxes; electronic instructional and teaching apparatus and instruments; telecommunications apparatus; data streaming apparatus; telephones, mobile telephones; accessories for telephones; straps, charms, cases, for telephone handsets; ringtones; mobile phone apps; screensavers, picture messages; photographic and cinematographic apparatus and instruments; cameras, camera accessories, cases for cameras; calculators; safety apparatus and appliances, all for protection against accident or injury, cycle helmets, skateboard helmets, ski and snowboard helmets; mouse mats; sunglasses, eyeglasses, and cases and bags adapted therefor; goggles, including goggles for swimming, skiing goggles; binoculars, telescopes, night vision goggles; novelty magnets, fridge magnets; parts and fittings for all the aforesaid goods.

Class 35: Advertising services; promotional services; arranging, producing and managing of advertising, marketing and promotional material; production of digital content for marketing and advertising purposes; advertising and promotion services involving research and selection of music to suit a campaign; Advertising services provided on-line from a computer data base or by means of web pages on the Internet; database

Class 38: Audio and audiovisual broadcasting and transmission of data and of information via electronic communication networks, local and global computer networks and wireless communication networks; streaming of audio and audiovisual content via electronic communication networks, local and global computer networks and wireless communication networks; webcasting services; providing on-line chat rooms and discussion forums for transmission of messages, audio, video, and digital pictures among users in the field of general interest; telecommunications on the Internet, namely, audio and video transmission; Streaming of music, films, television programs, current events news, entertainment news, and sports programs to users online via a communication network.

management services; data management; commercial data analysis; collection and systemisation of data into databases; management of digital content; telecommunication warehousing (computerised data retrieval); computerised data retrieval services for digital text, data, image, audio, and video works; compiling, systemising, indexing, maintaining and updating data into databases; multimedia archive and retrieval services; marketing services; market research services; opinion polling, conducting and analysing market surveys; business consultancy services; provision of business, sales and consumer data analytics; business and consumer evaluation reports services; business consultancy services involving research and selection of music to suit a particular business premises, business event, business sector, retail sector or business or retail promotion; retail services connected with music and entertainment recordings; provision of customer reward scheme services; organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, gift code schemes, promotion programmes and promotional services; electronic retrieval of information regarding analysis of customer preferences and buying patterns; sponsorship services; commercial sponsorship services; operation and management of discount and savings schemes; consultancy, information and advisory services relating to any of the aforesaid services.

Class 38: Communication services; electronic transmission of music, data, digital content, documents, texts and images; delivery, transmission, streaming, broadcasting, webcasting of data and digital content; Data exchange services; music and video recordings data exchange services; digital courier, communication and distribution services; digital courier and distribution of production library music; communication services to broadcasters, advertising agencies and film production companies; communication and transmission of music, artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements in electronic and digital form; providing access to online services for uploading and downloading digital content, movies, video recordings, audio recordings, images, data or software applications, from online digital networks, cloud networks and servers; chat room services; portal services; providing access to blog sites; interactive communications services; providing on-line forums for transmission of messages among computer users; forums [chat rooms] for social networking; providing access to online services enabling

Class 41: Entertainment services, namely, providing online radio and television programs featuring music and entertainment, current event news, entertainment news, entertainment-related programs in the nature of videos of musical performances, and online computer games, all delivered to users via a communication network; providing an online database via a communication network featuring music, film, television programs, current event news, entertainment news, sports, entertainment-related programs and games; music production; providing online computer games; rental of films, video and computer games and music recordings via a communication network.

others to transmit, share, upload, download, forward, access, display, tag and post information, text, images, video and audio content; provision of user access to computer databases; providing access to data, digital content, music, videos, audio recording websites on the Internet; providing access to online services enabling others to upload and download software applications, information, software, media, documents from online digital networks, cloud networks and servers; leasing of telecommunications apparatus, including download stations and digital content delivery apparatus; information, consultancy and advice relating to any of the aforesaid services.

Class 41: Education and entertainment services; music library services; music library research services; rental of music recordings and video recordings; selection and compilation of pre-recorded music for broadcasting by others; selection and compilation of pre-recorded video recordings for broadcasting by others; film, photo, video, audio, games, amusements, literary, book, magazine, newspaper and printed publications library services; archiving, cataloguing, retrieval and distribution of musical, artistic, literary, dramatic, theatrical, photographic and cinematographic works, audio and video recordings, games and amusements; Production, presentation, syndication, distribution and rental of films, television and radio programmes, whether downloadable or not; production, presentation, syndication, distribution and rental of video and audio recordings; production and performance of sound recordings, image recordings, videos, films; entertainment and educational services featuring electronic media, multimedia content, videos, movies, pictures, images, text, photos, games, user-generated content, audio content, and related information via computer and communications networks; Publishing services; online publishing services; publishing in the nature of blogs and vlogs; digital video, audio and multimedia entertainment publishing services; electronic games services provided by means of the Internet or other on-line services; arranging and conducting live events, for entertainment or educational purposes; Theatre productions; arranging and conducting shows, concerts, shows, competitions, contests, games, concerts and tours, all for entertainment or educational purposes; Cinema presentations; Circuses; Disc jockey services; Discotheque and nightclub services; music publishing services; performance of music, dance, comedy, readings, poetry, theatre and circus entertainment, including such services provided on-line from a computer database or the Internet; Amusement parks; Amusements; publication of posters,

Class 42: Providing an interactive online network website, via electronic communication networks, local and global computer networks and wireless communication devices, featuring technology to enable users to program audio, video, movies, text and other multimedia content; providing a website featuring non-downloadable software to enable users to program audio, video, movies, text and other multimedia content in the field of music, video, online radio, entertainment and cultural events; providing search engines and search platforms for obtaining data and content via electronic communication networks, local and global computer networks and wireless communication devices; computer services, namely, creating computer network-based indexes of information, websites and resources available on electronic communication networks, local and global computer networks and wireless communication devices; searching, browsing and retrieving, for others, information, sites, and other resources available on electronic communication networks, local and global computer networks and wireless communication devices.

greetings cards, flyers, pamphlets, promotional literature; information, consultancy and advice about any of the aforesaid services.

Class 42: Creating and maintaining web sites; design and hosting of webpages; hosting of digital content; hosting of online journals and blogs; application service provider (ASP); providing an interactive website featuring technology that allows the management and delivery of the digital content of others; Recovery of computer data including computer data relating to artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works; operation of web-sites relating to multimedia archive and retrieval services; computer programming services, maintenance, rental, leasing, hiring and updating of computer software, computer software design, computer systems analysis; design, development, installation and updating of computer software enabling the processing, uploading and sharing of digital content; design and hosting of interactive advertising material; design and hosting of interactive educational material; graphic and artistic design services; application service provider (ASP) services featuring software for use in connection with the organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, promotion programmes and promotional services; provision of web-sites relating to multimedia archive and retrieval services; provision of web-sites relating to communication and transmission of artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements; telecommunication warehousing (computerised data storage); computerised data storage for digital text, data, image, audio, and video works; electronic storage of information regarding analysis of customer preferences and buying patterns; provision of web-sites relating to couriering and distribution of artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements; consultancy, information and advisory services relating to any of the aforesaid services.

Class 45: Licensing of music; licensing of video and audio recordings; licensing services relating to performance rights; computer software licensing; online social networking services; personal gift selection for others; licensing recordings, digital content, images to others for promotional activities; consultancy, information and advisory services relating to any of the aforesaid services; advisory services relating to copyright in music and video recordings; advisory

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| | services in relation to intellectual property and database rights; legal advice in relation to the use of pre-recorded music and video recordings; legal advice relating to the protection and exploitation of copyright for use in business. |
|--|---|

30. Although both sides have made general submissions about the identity or similarity of the goods/services, neither side has attempted to specify all the goods/services it considers to be identical, similar or dissimilar to those covered by the other side's mark(s). However, it remains necessary for me to examine this issue. In these circumstances my examination can only take account of matters which are self-evident to me from a comparison of the respective descriptions of goods/services. It is not appropriate for me, as the tribunal, to challenge myself to find all the arguments BE could have made and then to decide on the merit of, in effect, my own arguments.

31. Goods/services can be considered as identical when the goods designated by the earlier mark are included in a more general category of goods/services stated in the trade mark application, or where the goods/services stated in the trade mark application are included in a more general category of goods/services covered by the earlier mark⁸. In assessing the similarity of the goods or services concerned, all the relevant factors must be considered. These factors include, inter alia, the nature of the goods/services, their intended purpose and method of use, as well as whether they are in competition with each other or are complementary⁹. Applying this guidance and grouping the goods/services together appropriately¹⁰, I find as follows:

Class 9 of the contested application

32. I find that:

Audio recordings featuring music; video recordings featuring music; downloadable audio and video recordings featuring music, music performances, and music videos; pre-recorded music, namely, digital downloads; Computer software for use in the delivery, distribution and transmission of digital music and entertainment-related audio, video, text and multimedia content

⁸ *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05

⁹ See *Canon*, Case C-39/97, CJEU

¹⁰ See *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs [30] to [38], CJEU.

- covered by EU12730214 are identical to:

Music, sounds, images, text, signals, software, information and code provided by telecommunications networks, by online delivery including by downloading or by streaming; digital music (downloadable or streamable); digital content (downloadable or streamable); video and music recordings, spoken word recordings; audio or video recordings in the form of CDs, DVDs, audio books or downloads; pre-recorded media; electronic publications (downloadable or streamable); interactive multimedia presentations; computer software and applications; interactive computer software; software for use in processing digital music and digital content (downloadable or streamable); software for browsing, searching and content delivery; software to allow users to interact with music or other content being delivered, to make requests, tag tracks, rate tracks; mobile phone apps

- in Class 9 of the contested application.

33. I find that:

Downloadable audio and video recordings featuring music, music performances, and music videos; Computer software for use in the delivery, distribution and transmission of digital music and entertainment-related audio, video, text and multimedia content

- in class 9 of EU12730214 are highly similar to:

Podcasts; films, television programmes, radio programmes; motion picture films and programmes featuring comedy, drama, action, adventure and/or animation; motion picture films and programmes for broadcast on television featuring comedy, drama, action, adventure and/or animation

- in class 9 of the contested application.

34. I find that:

Gift cards, namely, magnetically encoded gift cards

- in class 9 of EU12730214 are identical or highly similar to:

Promotional and marketing material in digital form; electronic cards, bracelets and tags, storing information thereon; software relating to the organisation, operation, management and supervision of voucher schemes, promotion programmes and promotional services; software relating to electronic gift vouchers, voucher codes, gift codes, claim codes, discount offers, promotional offers, printable vouchers, coupons and other tokens of value

- in class 9 of the contested application.

35. I find that:

User interface for television and video on demand communications equipment; computer software for enabling transmission, storage, sharing, collection, editing, organizing and modifying audio, video, messages, images and other data for use in social networking, online chats and interactive gaming, for use in creating social networking databases and for use in social networking database management; computer software for creating searchable databases of information and data for peer-to-peer social networking databases

- in class 9 of EU12730214 are identical or highly similar to:

Apparatus, instruments and media for recording, reproducing, carrying, storing, processing, manipulating, transmitting, broadcasting, retrieving and reproducing music, sounds, images, text, signals, software, information, data and code; telecommunications apparatus; data steaming apparatus.

- in class 9 of the contested application.

Class 35 of the contested application

36. I find that:

Computer software for enabling transmission, storage, sharing, collection, editing, organizing and modifying audio, video, messages, images and other data for use in social networking, online chats and interactive gaming, for use in creating social networking databases and for use in social networking database management; computer software for creating searchable databases of information and data for peer-to-peer social networking databases

- in class 9 of EU12730214 are similar to a medium degree to:

Database management services; data management; collection and systemisation of data into databases; management of digital content; telecommunication warehousing (computerised data retrieval); computerised data retrieval services for digital text, data, image, audio, and video works; compiling, systemising, indexing, maintaining and updating data into databases; multimedia archive and retrieval services

- in class 35 of the contested application.

This is because the respective goods/services are for related purposes and could be in competition, or complementary in the sense that the goods are for use with the services and average consumers may believe that they originate from the same undertaking.

37. I find that:

Audio recordings featuring music; video recordings featuring music; downloadable audio and video recordings featuring music, music performances, and music videos; pre-recorded music, namely, digital downloads

- in class 9 of EU12730214 are similar to a medium degree to:

Retail services connected with music and entertainment recordings

- in class 35 of the contested application.

This is because the retail services are intended to attract consumers to buy the goods and the services/goods are complementary in the sense that average consumers may believe that they originate from the same undertaking.

38. I find that:

Gift cards, namely, magnetically encoded gift cards

- in class 9 of EU12730214 are similar to a medium degree to:

Promotional services: organisation, operation, management and supervision of voucher schemes, gift code schemes, promotion programmes and promotional services

- in class 35 of the contested application.

This is because the respective goods are for use with one another and complementary in the sense that average consumers may believe that they originate from the same undertaking.

Class 38 of the contested application

39. The services in class 38 covered by EU12730214 are identical or highly similar to all the services in class 38 of the contested application, except for:

Leasing of telecommunications apparatus, including download stations and digital content delivery apparatus

I find that these services are related in purpose and complementary to *user interface for television and video on demand communications equipment* in class 9 of EU12730214. They may also be in competition because one may decide to buy or lease communication equipment. The services and goods are therefore similar to a medium to high degree.

Class 41 of the contested application

40. The services in class 41 covered by EU12730214 are identical or highly similar to all the services in class 41 of the contested application, except for:

Arranging and conducting live events, for entertainment or educational purposes; Theatre productions; Cinema presentations; Circuses; Disc jockey services; Discotheque and nightclub services; Amusement parks; publication of posters, greetings cards, flyers, pamphlets, promotional literature

41. I find that *cinema presentations* are highly similar to *providing an online database via a communication network featuring ...film and rental of film*, which are covered by class 41 of EU12730214. Further, given the practice of live broadcasting on radio and TV programmes, I find that *arranging and conducting live events, for entertainment or educational purposes* are highly similar to *entertainment services, namely, providing online radio and television programs featuring music and entertainment, current event news, entertainment news, entertainment-related programs in the nature of videos of musical performances, and online computer games, all delivered to users via a communication network*.

Class 42 of the contested application

42. I find that the services in class 42 covered by EU12730214 are identical or highly similar to the services covered by the corresponding class of the contested application, except for:

Computer programming services, maintenance, rental, leasing, hiring and updating of computer software, computer software design, computer systems analysis; design, development, installation and updating of computer software enabling the processing, uploading and sharing of digital content; design and hosting of interactive advertising material; design and hosting of interactive educational material; graphic and artistic design services; application service provider (ASP) services featuring software for use in connection with the organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, promotion programmes and promotional services; electronic storage of information regarding analysis of customer preferences and buying patterns.

43. I find that:

Computer programming services, maintenance, rental, leasing, hiring and updating of computer software, computer software design; design, development, installation and updating of computer software enabling the processing, uploading and sharing of digital content

- are similar to a medium to high degree to:

Computer software for use in the delivery, distribution and transmission of digital music and entertainment-related audio, video, text and multimedia content; computer software for enabling transmission, storage, sharing, collection, editing, organizing and modifying audio, video, messages, images and other data for use in social networking, online chats and interactive gaming, for use in creating social networking databases and for use in social networking database management; computer software for creating searchable databases of information and data for peer-to-peer social networking databases

- in class 9 of EU12730214. This is because the services covered by the contested mark are wide enough to include the provision of bespoke software of the kind covered by the earlier mark. The respective services/goods could therefore be similar in purpose and competition, or at least be complementary in the sense indicated in the case law.

Class 45 of the contested application

44. BE's written submissions in lieu of a hearing do not say why the services covered by class 45 of the contested application are similar to the goods/services covered by the earlier marks.

45. I note that EU12730214 covers *pre-recorded music, namely, digital downloads*, as well as certain computer software in class 9, *providing on-line chat rooms and discussion forums for transmission of messages, audio, video, and digital pictures among users in the field of general interest* in class 38.

46. Downloading music may involve a copyright licence. The same applies to computer software. However, I doubt that either amount to licensing music or software as a service. Rather, music and software licencing are business-to-business services. The nature and purpose of the goods/services are different, and they do not appear to be in competition or be complementary. I do not therefore consider these to be similar goods/services. However, *providing on-line chat rooms and discussion forums* in class 38 appear to be highly similar to *online social networking services* in class 45. It is true that the former service is a communication service whereas the latter is a service provided to individuals. However, this distinction in the classification of services does not mean that they are dissimilar. They appear to be highly similar in nature, purpose and method of use. The services

are also likely to be highly complementary. I therefore find that they are highly similar.

47. I see no other similarity between any of the goods/services covered by the contested application and EU12730214.

The average consumer and the selection process

48. 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 question¹¹.

49. I will focus on the goods/services I have found to be identical or similar. VJ's goods in class 9 are mainly recordings and software/hardware for transmitting and re-producing recordings and other data. These goods are usually aimed at the general public, although they could also be marketed to businesses in the entertainment sector. In either event, I find that there is nothing about the goods to indicate that the consumer will pay a lower or higher level of attention than normal during the selection process. Some of VJ's services in class 35, such as business management services, appear to be aimed mainly at businesses, whereas others, such as retail and associated services, are mainly aimed at the general public. In either event, I find that there is nothing about the services to indicate that the consumer will pay a lower or higher level of attention than normal during the selection process. Some of VJ's services in class 38 appear to be used mainly by the general public, e.g. *rental of music recordings and video recordings*. Others are squarely aimed at businesses, e.g. *selection and compilation of pre-recorded music for broadcasting by others*. In either event, I find that there is nothing about the services to indicate that the consumer will pay a lower or higher level of attention than normal during the selection process. Most of VJ's services in classes 42 and 45 appear to be used mainly by businesses. However, some of the services, e.g. *hosting of online journals and blogs and licensing of video and audio recordings*,

¹¹ *Lloyd Schuhfabrik Meyer*, Case C-342/97.

could also be used by the general public. In either event, I find that there is nothing about the services to indicate that the consumer will pay a lower or higher level of attention than normal during the selection process.

50. The selection process is likely to be mainly visual, e.g. selecting the goods/services from advertisements, catalogues, websites etc. However, oral orders and recommendations may play some in the process, so the potential for aural confusion is also relevant.

The distinctive character of the earlier mark

51. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*¹² 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

¹² Case C-342/97

chambers of commerce and industry or other trade and professional associations (see Windsurfing Chiemsee, paragraph 51)."

52. VJ's representative submits that:

"33. The contested sign is a plain word mark BAR BEATS. The contested sign and earlier marks coincide visually and aurally to the extent that they share the word BEATS.

34. The Applicant discussed in its witness statement that the word 'beat' is widely understood in the English language and is defined in the Collins English Dictionary as:-

In music, a beat is a unit of measurement. The number of beats in a bar of a piece of music is indicated by two numbers at the beginning of the piece. (see Exhibit JL 1 for the extract)

35. As a result, the word 'beats' alone might be considered of low inherent distinctiveness because of its ordinary meaning in the English language, particularly when considering in the context of music related goods or services.

36. The other elements present such as CLUB, AUDIO, MUSIC, ONE in the earlier marks and BAR in the contested sign serve to safely distinguish between the signs. There elements do not share any similarities.

37. The derivation of the mark BAR BEATS is such that it suggests "beats that you listen to in a bar" but the mark itself is clearly not directly descriptive. There is no confusion to any of the marks of the Opponent."

53. I note at the outset the argument about BEATS being of low distinctiveness could only apply to goods/services relating to music. Additionally, even in relation to goods/services relating to music, I consider that even though BEATS may allude to musical goods/services, it is not a description of such goods or their characteristics.

Although 'beat' is a unit of music and used in musical notations to indicate the number of beats to a bar of music, the word BEATS cannot be used to describe a musical recording. This is why BEATS MUSIC would not appear, to average consumers, to have any clear descriptive meaning.

54. In my view, although the word 'music' is descriptive of most of the goods/services covered by EU12730214 the term BEATS MUSIC nevertheless possesses a low to medium degree of inherent distinctiveness in relation to the goods/services at issue. As the word MUSIC is descriptive (or at least non-distinctive) in relation to the registered goods/services, the distinctive character of the earlier mark is front loaded onto the word BEATS. I have noted VJ's evidence about the registration of other marks by third parties which consist of, or include, the word BEAT(S). However, the mere registration of such marks does not show that they are in use in the relevant market. Consequently, my finding that BEATS has a low to medium degree of inherent distinctiveness is not undermined by the existence of third-party registrations of BEAT(S) marks.

55. There is no evidence that the earlier mark (or BEATS alone) has been used in relation to any goods/services other than headphones, earphones, speakers and musical entertainment services (as part of BEATS 1). However, EU12730214 does not cover headphones, earphones or speakers and there is insufficient evidence to establish that BEATS has acquired an enhanced distinctive character through use in relation to musical entertainment services. Consequently, the distinctive character of BEATS MUSIC has not been enhanced through use in relation to any of the goods/services covered by EU12730214.

Comparison of BAR BEATS to BEATS MUSIC

56. The CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*¹³ 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

¹³ Case C-591/12P

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.”

57. Visually, both marks consist of two words, one of which is the word BEATS. BEATS is the second word in the contested mark, but the first word in the earlier mark. I earlier found that MUSIC has a lower degree of distinctiveness compared to BEATS in the earlier mark. The distinctive character of BAR BEATS is more evenly distributed between the two words. Neither word is highly distinctive. However, as BAR appears to qualify BEATS, there is more emphasis on BEATS. Overall, I find that there is a medium degree of distinctive visual similarity between the marks.

58. Aurally, the beginnings of the marks are different (BAR v BEATS), although both of these words begin with the same letter ('B'). This and the presence of the word BEATS in both marks means that there is a low to medium degree of overall aural similarity.

59. Conceptually, BEATS MUSIC will cause a significant proportion of consumers to think of music. Most consumers will have heard of the term 'beats to a bar' and know that it is part of the method used to accurately reproduce music from musical notation. Therefore, BAR BEATS is also likely to make a significant proportion of average consumers think of music (despite the reversal of the words). To these consumers there will be a medium degree of conceptual similarity. However, a significant proportion of average consumers may not recognise the musical connotation of BAR BEATS. To these consumers, BAR may call to mind a public bar but BEATS will have no obvious meaning beyond the well-known ones, i.e. to strike or defeat someone. BEATS MUSIC has nothing to do with public bars. Therefore, the marks as wholes will not appear to be conceptually similar to those consumers who fail to see the musical connotation of BAR BEATS.

Likelihood of confusion with EU12730214

60. 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 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.

61. BE contends that there is a likelihood of direct confusion through imperfect recollection and a likelihood of indirect confusion through (mis) association.

62. It is well established that the beginnings of marks generally make more of an impression on consumers than the ends¹⁴. The fact that the marks begin with different words is therefore an important consideration. However, there is no rule that different beginnings necessarily exclude the likelihood of confusion¹⁵. The difference between BAR BEATS and BEATS MUSIC is reduced to a certain extent by the fact that both first words begin with the letter 'B'. In my judgement, if the marks are used

¹⁴ See, for example, *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

¹⁵ See, for example, *CureVac GmbH v OHIM*, Case T-80/08 (similar beginnings not necessarily important or decisive)

in relation to identical goods/services, or goods/services which are similar to a medium degree or greater, there is a likelihood that a significant proportion of average consumers will be confused through imperfectly recollecting one of the marks for the other. This is more likely where both marks trigger a musical connotation to the average consumer. In this case, the word BEATS will dominate the impression created by the earlier mark and the additional word BAR is insufficient to give BAR BEATS a clearly distinct identity.

63. I also find that there is a likelihood of indirect confusion amongst a significant proportion of average consumers. In *L.A. Sugar Limited v By Back Beat Inc.*¹⁶, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

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

64. I note that in *Duebros Limited v Heirler Cenovis GmbH*¹⁷ Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. I have taken that into account. However, in this case, I think it likely that there is a serious risk that the BAR element of the later mark will be taken by a significant proportion of average consumers to indicate goods/services for use in, or by, bars (i.e. public bars). To those consumers, BAR BEATS would be a logical brand extension of BEATS

¹⁶ Case BL O/375/10

¹⁷ BL O/547/17

MUSIC, particularly in relation to goods/services relating to, or including, music or musical recordings.

65. I therefore find that the opposition under s.5(2)(b) based on EU12730214 succeeds in relation to the goods/services shown in grey in the table at paragraph 29 above. The opposition based on EU12730214 fails in respect of the other goods/services because they are not similar to those covered by the earlier mark and there is no likelihood of confusion.

EU8927915 - CLUB BEATS – comparison of goods/services

66. The respective goods/services are shown below.

| EU8927915 | Contested trade mark |
|---|--|
| <p>Class 9: Audio and video equipment; audio and video components, home theatre equipment and components, cellular phones, portable electronic devices and related accessories, personal computers, digital equipment, computer hardware, computer peripherals.</p> | <p>Class 9: Music, sounds, images, text, signals, software, information and code provided by telecommunications networks, by online delivery including by downloading or by streaming; digital music (downloadable or streamable); digital content (downloadable or streamable); video and music recordings, spoken word recordings; audio or video recordings in the form of CDs, DVDs, audio books or downloads; pre-recorded media; electronic publications (downloadable or streamable); podcasts; films, television programmes, radio programmes; motion picture films and programmes featuring comedy, drama, action, adventure and/or animation; motion picture films and programmes for broadcast on television featuring comedy, drama, action, adventure and/or animation; promotional and marketing material in digital form; training aids and instructional material in digital form; interactive multimedia presentations; electronic cards, bracelets and tags, storing information thereon; computer software and applications; interactive computer software; software for use in processing digital music and digital content (downloadable or streamable); software for browsing, searching and content delivery; software to allow users to interact with music or other content being delivered, to make requests, tag tracks, rate tracks; software for handling financial transactions; software relating to the organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, promotion programmes and promotional services; software relating to electronic gift vouchers, voucher codes, gift codes, claim codes, discount offers, promotional offers, printable vouchers, coupons</p> |

Class 35: Retail store services and online retail store services in the field of consumer electronics, clothing, footwear and headgear.

and others tokens of value; computer games; game cartridges; games for mobile phones; computer games software; educational software; apparatus, instruments and media for recording, reproducing, carrying, storing, processing, manipulating, transmitting, broadcasting, retrieving and reproducing music, sounds, images, text, signals, software, information, data and code; multimedia apparatus and instruments; music playing apparatus; MP3 players, media players, PDAs; juke boxes, digital juke boxes; electronic instructional and teaching apparatus and instruments; telecommunications apparatus; data streaming apparatus; *telephones, mobile telephones; accessories for telephones; straps, charms, cases, for telephone handsets; ringtones*; mobile phone apps; screensavers, picture messages; photographic and cinematographic apparatus and instruments; cameras, camera accessories, cases for cameras; calculators; safety apparatus and appliances, all for protection against accident or injury, cycle helmets, skateboard helmets, ski and snowboard helmets; mouse mats; sunglasses, eyeglasses, and cases and bags adapted therefor; goggles, including goggles for swimming, skiing goggles; binoculars, telescopes, night vision goggles; novelty magnets, fridge magnets; parts and fittings for all the aforesaid goods.

Class 35: Advertising services; promotional services; arranging, producing and managing of advertising, marketing and promotional material; production of digital content for marketing and advertising purposes; advertising and promotion services involving research and selection of music to suit a campaign; Advertising services provided on-line from a computer data base or by means of web pages on the Internet; database management services; data management; commercial data analysis; collection and systemisation of data into databases; management of digital content; telecommunication warehousing (computerised data retrieval); computerised data retrieval services for digital text, data, image, audio, and video works; compiling, systemising, indexing, maintaining and updating data into databases; multimedia archive and retrieval services; marketing services; market research services; opinion polling, conducting and analysing market surveys; business consultancy services; provision of business, sales and consumer data analytics; business and consumer evaluation reports services; business consultancy services involving research and selection of music to suit a particular business premises, business event, business sector, retail sector or business or retail promotion; retail services connected with music

Class 38: Providing online bulletin boards in the fields of media, music, video, film, book and television for the transmission of messages among users.

Class 41: Publishing services in the nature of music publishing.

and entertainment recordings; provision of customer reward scheme services; organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, gift code schemes, promotion programmes and promotional services; electronic retrieval of information regarding analysis of customer preferences and buying patterns; sponsorship services; commercial sponsorship services; operation and management of discount and savings schemes; consultancy, information and advisory services relating to any of the aforesaid services.

Class 38: Communication services; electronic transmission of music, data, digital content, documents, texts and images; delivery, transmission, streaming, broadcasting, webcasting of data and digital content; Data exchange services; music and video recordings data exchange services; digital courier, communication and distribution services; digital courier and distribution of production library music; communication services to broadcasters, advertising agencies and film production companies; communication and transmission of music, artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements in electronic and digital form; providing access to online services for uploading and downloading digital content, movies, video recordings, audio recordings, images, data or software applications, from online digital networks, cloud networks and servers; chat room services; portal services; providing access to blog sites; interactive communications services; providing on-line forums for transmission of messages among computer users; forums [chat rooms] for social networking; providing access to online services enabling others to transmit, share, upload, download, forward, access, display, tag and post information, text, images, video and audio content; provision of user access to computer databases; providing access to data, digital content, music, videos, audio recording websites on the Internet; providing access to online services enabling others to upload and download software applications, information, software, media, documents from online digital networks, cloud networks and servers; leasing of telecommunications apparatus, including download stations and digital content delivery apparatus; information, consultancy and advice relating to any of the aforesaid services.

Class 41: Education and entertainment services; music library services; music library research services; rental of music recordings and video recordings; selection and compilation of pre-

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|--|--|
| | <p>recorded music for broadcasting by others; selection and compilation of pre-recorded video recordings for broadcasting by others; film, photo, video, audio, games, amusements, literary, book, magazine, newspaper and printed publications library services; archiving, cataloguing, retrieval and distribution of musical, artistic, literary, dramatic, theatrical, photographic and cinematographic works, audio and video recordings, games and amusements; Production, presentation, syndication, distribution and rental of films, television and radio programmes, whether downloadable or not; production, presentation, syndication, distribution and rental of video and audio recordings; production and performance of sound recordings, image recordings, videos, films; entertainment and educational services featuring electronic media, multimedia content, videos, movies, pictures, images, text, photos, games, user-generated content, audio content, and related information via computer and communications networks; Publishing services; online publishing services; publishing in the nature of blogs and vlogs; digital video, audio and multimedia entertainment publishing services; electronic games services provided by means of the Internet or other on-line services; arranging and conducting live events, for entertainment or educational purposes; Theatre productions; arranging and conducting shows, concerts, shows, competitions, contests, games, concerts and tours, all for entertainment or educational purposes; Cinema presentations; Circuses; Disc jockey services; Discotheque and nightclub services; music publishing services; performance of music, dance, comedy, readings, poetry, theatre and circus entertainment, including such services provided on-line from a computer database or the Internet; Amusement parks; Amusements; publication of posters, greetings cards, flyers, pamphlets, promotional literature; information, consultancy and advice about any of the aforesaid services.</p> <p>Class 42: Creating and maintaining web sites; design and hosting of webpages; hosting of digital content; hosting of online journals and blogs; application service provider (ASP); providing an interactive website featuring technology that allows the management and delivery of the digital content of others; Recovery of computer data including computer data relating to artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works; operation of web-sites relating to multimedia archive and retrieval services; computer programming services, maintenance, rental, leasing, hiring and updating of computer software, computer software design, computer systems analysis; design, development,</p> |
|--|--|

| | |
|--|---|
| | <p>installation and updating of computer software enabling the processing, uploading and sharing of digital content; design and hosting of interactive advertising material; design and hosting of interactive educational material; graphic and artistic design services; application service provider (ASP) services featuring software for use in connection with the organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, promotion programmes and promotional services; provision of web-sites relating to multimedia archive and retrieval services; provision of web-sites relating to communication and transmission of artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements; telecommunication warehousing (computerised data storage); computerised data storage for digital text, data, image, audio, and video works; electronic storage of information regarding analysis of customer preferences and buying patterns; provision of web-sites relating to couriering and distribution of artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements; consultancy, information and advisory services relating to any of the aforesaid services.</p> <p>Class 45: Licensing of music; licensing of video and audio recordings; licensing services relating to performance rights; computer software licensing; online social networking services; personal gift selection for others; licensing recordings, digital content, images to others for promotional activities; consultancy, information and advisory services relating to any of the aforesaid services; advisory services relating to copyright in music and video recordings; advisory services in relation to intellectual property and database rights; legal advice in relation to the use of pre-recorded music and video recordings; legal advice relating to the protection and exploitation of copyright for use in business.</p> |
|--|---|

Class 9 of the contested application

67. I find that:

Audio and video equipment; audio and video components, home theatre equipment and components

- in class 9 of EU8927915 are similar to a medium degree to:

Video and music recordings, spoken word recordings; audio or video recordings in the form of CDs, DVDs, audio books; pre-recorded media

- in class 9 of the contested application.

This is because the respective goods are for use with one another and complementary in the sense that average consumers may believe that they originate from the same undertaking.

68. I find that the same goods in class 9 of EU8927915 plus:

Portable electronic devices and related accessories, personal computers, digital equipment

- are identical or highly similar to:

Apparatus, instruments and media for recording, reproducing, carrying, storing, processing, manipulating, transmitting, broadcasting, retrieving and reproducing music, sounds, images, text, signals, software, information, data and code; multimedia apparatus and instruments; music playing apparatus; MP3 players, media players, PDAs; juke boxes, digital juke boxes

- in class 9 of the contested application.

69. I find that:

Personal computers, digital equipment, computer hardware, computer peripherals, portable electronic devices and related accessories

- in class 9 of EU8927915 are similar to a medium degree to:

Computer software and applications; interactive computer software; software for use in processing digital music and digital content (downloadable or streamable); software for browsing, searching and content delivery; software to allow users to interact with music or other content being delivered, to make requests, tag tracks, rate tracks; software for handling financial transactions

- in class 9 of the contested application.

This is because the software and electronic storage devices covered by the contested application may be for use with the wide range of hardware covered by the earlier trade mark and complementary in the sense that average consumers may believe that they originate from the same undertaking.

70. I find that:

Digital equipment, computer hardware, computer peripherals, portable electronic devices and related accessories

- in class 9 of EU8927915 are identical or highly similar to:

Electronic cards, bracelets and tags, storing information thereon

- in class 9 of the contested application.

71. I find that:

Digital equipment, computer hardware, computer peripherals, portable electronic devices and related accessories

- in class 9 of EU8927915:

- covers computer hardware for playing games, which is similar to a medium degree to:

Computer games; game cartridges; games for mobile phones; computer games software

- in class 9 of the contested application.

This is because the respective goods are for use with one another and complementary in the sense that average consumers may believe that they originate from the same undertaking.

72. I find that:

Cellular phones, portable electronic devices and related accessories, personal computers, digital equipment, computer hardware, computer peripherals.

- in class 9 of EU8927915 are identical or highly similar to:

Telecommunications apparatus; data streaming apparatus; telephones, mobile telephones; accessories for telephones; straps, charms, cases, for telephone handsets

- in class 9 of the contested application.

73. I find that:

Cellular phones, portable electronic devices and related accessories

- in class 9 of EU8927915 are similar to a medium degree to:

Ringtones; mobile phone apps

- in class 9 of the contested application.

This is because the respective goods are for use with one another and complementary in the sense that average consumers may believe that they originate from the same undertaking.

74. I find that:

Portable electronic devices and related accessories, digital equipment, computer hardware

- in class 9 of EU8927915 are wide enough terms to cover goods that are identical or highly similar to:

Electronic instructional and teaching apparatus and instruments; photographic and cinematographic apparatus and instruments; cameras, camera accessories, cases for cameras; calculators

- in class 9 of the contested application.

75. It follows that the same goods in class 9 of EU8927915 are similar to a medium degree to *educational software* and *training aids and instructional material in digital form* in class 9 of the contested application. This is because the respective goods could be for use with one another and complementary in the sense that average consumers may believe that they originate from the same undertaking.

Class 35 of the contested application

76. I find that:

Retail store services and online retail store services in the field of consumer electronics, clothing, footwear and headgear

- in class 35 of EU8927915 are similar to a low degree to:

Retail services connected with music and entertainment recordings; provision of customer reward scheme services; organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, gift code schemes, promotion programmes and promotional services; operation and management of discount and savings schemes

- in class 35 of the contested application.

This is because the respective retail services are similar in purpose and nature, even though they relate to different goods. And the provision of customer reward schemes etc. are complementary to retail services and these services not limited to retail services in relation to particular categories of goods. They therefore cover schemes used in connection with the retailing of consumer electronics, clothing etc.

Class 38 of the contested application

77. I find that the services covered by class 38 of the contested application, save for *leasing of telecommunications apparatus, including download stations and digital content delivery apparatus*, are identical or highly similar to:

Providing online bulletin boards in the fields of media, music, video, film, book and television for the transmission of messages among users

- in class 38 of EU8927915.

78. I find that:

Cellular phones, portable electronic devices and related accessories, digital equipment, computer hardware, computer peripherals

- in class 9 of EU8927915 are similar to a medium degree to:

Leasing of telecommunications apparatus, including download stations and digital content delivery apparatus

This is because the respective goods/services are similar in purpose and may be in competition because one may decide to buy or lease telecommunications apparatus.

Class 41 of the contested application

79. I understand *music publishing services* to cover services whereby music is made available to the public¹⁸. On this basis I find that:

Publishing services in the nature of music publishing

- covered by class 41 of EU8927915 are identical or highly similar to:

Entertainment services; music library services; music library research services; rental of music recordings and video recordings; selection and compilation of pre-recorded music for broadcasting by others; selection and compilation of pre-recorded video recordings for broadcast by others; audio, video and printed publications library services; archiving, cataloguing, retrieval and distribution of musical works, audio and video recordings; production, presentation, syndication, distribution and rental of video and audio recordings; production and performance of sound recordings, videos; entertainment services featuring electronic media, multimedia content, videos, audio content via computer and communications networks; publishing services; online publishing services; publishing in the nature of vlogs; digital video, audio and multimedia entertainment publishing services; music publishing services; performance of music, including such services provided on-line from a computer database or the Internet.

- in class 41 of the contested application.

Class 42 of the contested application

80. I find that:

Publishing services in the nature of music publishing

- in class 41 of EU8927915 are similar to a medium degree to:

Provision of web-sites relating to communication and transmission of musical works; provision of web-sites relating to couriering and distribution of musical works

- in class 42 of the contested application.

This is because the respective services are for use with one another and complementary in the sense that average consumers may believe that they originate from the same undertaking.

¹⁸ According to the Oxford English Dictionary, 'publishing' means 'to make available to the public.'

Class 45 of the contested application

81. I see no similarity between the services in class 45 of the contested application and any of the goods/services covered by EU8927915.

Average consumer and the selection process

82. I will again focus on the goods/services I have found to be identical or similar. VJ's goods in class 9 are mainly hardware for transmitting and re-producing recordings and other data. These goods are usually aimed at the general public, although they could also be marketed to businesses in the entertainment sector. In either event, I find that there is nothing about the goods to indicate that the consumer will pay a lower or higher level of attention than normal during the selection process. VJ's services in class 35 appear to be retail and associated services, which are aimed mainly at the general public. I find that there is nothing about the services to indicate that the consumer will pay a lower or higher level of attention than normal during the selection process. Some of VJ's services in class 38 appear to be used mainly by the general public, e.g. *chat room services; portal services; providing access to blog sites*. Others are squarely aimed at businesses, e.g. *selection and compilation of pre-recorded music for broadcasting by others*. In either event, I find that there is nothing about the services to indicate that the consumer will pay a lower or higher level of attention than normal during the selection process. Most of VJ's services in class 42 appear to be used mainly by businesses. However, some of the services, e.g. *hosting of online journals and blogs and licensing of video and audio recordings*, could also be used by the general public. In either event, I find that there is nothing about the services to indicate that the consumer will pay a lower or higher level of attention than normal during the selection process.

Distinctive character of the earlier mark

83. I adopt the analysis set out in paragraphs 53- 55 above. There is no evidence of use of CLUB BEATS. Consequently, the distinctive character of the mark has not been enhanced through use.

Comparison of CLUB BEATS and BAR BEATS

84. Visually, both marks consist of two words, the second one of which is BEATS. The distinctive character of CLUB BEATS and BAR BEATS is distributed between the two words. Neither word is highly distinctive. However, as CLUB and BAR appear to qualify BEATS, there is more emphasis on BEATS. Overall, I find that there is a medium degree of distinctive visual similarity between the marks.

85. Aurally, the beginnings of the marks are different (CLUB v BAR), but the result of the common word BEATS is a low to medium degree of overall aural similarity.

86. Conceptually, most consumers will have heard of the term 'beats to a bar' and know that it is part of the method used to accurately reproduce music from musical notation. Therefore, BAR BEATS is likely to make a significant proportion of average consumers think of music (despite the reversal of the words). Having said that, a significant proportion of average consumers may not recognise this meaning. To those consumers, BAR may bring to mind a public bar and BEATS will have no obvious meaning beyond the well-known ones, i.e. to strike or defeat someone. In the same way that the word BAR in BAR BEATS is likely to call to mind a public bar to a section of the relevant public, the word CLUB in CLUB BEATS is likely to call to mind a club to a significant proportion of average consumers. To these consumers, the marks as wholes will have no overall concept.

Likelihood of confusion

87. BE contends that there is a likelihood of direct confusion through imperfect recollection and a likelihood of indirect confusion through (mis) association.

88. It is well established that the beginnings of marks generally make more of an impression on consumers than the ends¹⁹. The fact that the marks begin with different words is therefore an important consideration. However, there is no rule that

¹⁹ See, for example, *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

different beginnings necessarily exclude the likelihood of confusion²⁰. In my judgement, if the marks are used in relation to identical goods/services, or goods/services that are similar to a medium degree or more, there is a likelihood that a significant proportion of average consumers will be confused through imperfectly recollecting one of the marks for the other. This is because the first words – CLUB and BAR – appear to qualify the common second word - BEATS – and one of the most obvious meanings of CLUB and BAR are closely related. Admittedly, there is less likelihood of confusion through imperfect recollection amongst consumers who associate BAR BEATS with ‘beats to a bar’ (because this meaning is absent from CLUB BEATS). However, even amongst this section of the public, there will be many for whom the association between BAR BEATS and ‘beats to a bar’ is too weak to entirely offset the more obvious similarity between the meanings of the words BAR [BEATS] and CLUB [BEATS].

89. Where the goods/services are identical or similar to a medium degree or more, I also find that there is a likelihood of indirect confusion amongst a significant proportion of average consumers. In *L.A. Sugar Limited v By Back Beat Inc.*²¹, Mr Iain Purvis Q.C., as the Appointed Person, explained that instances of such confusion are most likely to fall into one of the following 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.).

²⁰ See, for example, *CureVac GmbH v OHIM*, Case T-80/08 (similar beginnings not necessarily important or decisive)

²¹ Case BL O/375/10

(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).”

90. I find a significant section of the relevant public will take the BAR element of the later mark to indicate goods/services for use in, or by, bars (i.e. public bars). To those consumers BAR BEATS would be a logical brand extension of CLUB BEATS. Where the goods/services are the same, or similar to a medium degree or more, this is likely to result in a significant proportion of average consumers believing that the users of the marks are the same, or economically connected.

91. I therefore find that the opposition under s.5(2)(b) based on EU8927915 succeeds in relation to the goods/services shown in grey in the table at paragraph 66 above. The opposition based on EU8927915 fails in respect of the other goods/services shown in that table. This is because they are not similar to those covered by the earlier mark, or insufficiently similar to create a likelihood of confusion.

EU7156061, EU8370819 and IR1225897 – BEATS – Comparison of goods/services

92. The respective goods/services are shown below.

| EU7156061, EU8370819 and IR1225897 | Contested trade mark |
|---|---|
| <p>Class 9: Headphones, earphones and audio speakers; speaker stands; protective cases for speakers; remote controls for speakers; plug adaptors; chargers for use with headphones and speakers; carrying cases for headphones and portable speakers; portable speaker mount for bicycles; computer software, namely, software for updating wireless speakers and headphones; handheld devices for controlling speakers; computer software for use in controlling speakers, amplifiers; downloadable audio and video recordings featuring music, music performances, and music videos; prerecorded music, namely, digital downloads; computer software for use in the delivery, distribution and transmission of digital music and entertainment-related audio, video, text and multimedia content.</p> | <p>Class 9: Music, sounds, images, text, signals, software, information and code provided by telecommunications networks, by online delivery including by downloading or by streaming; digital music (downloadable or streamable); digital content (downloadable or streamable); video and music recordings, spoken word recordings; audio or video recordings in the form of CDs, DVDs, audio books or downloads; pre-recorded media; electronic publications (downloadable or streamable); podcasts; films, television programmes, radio programmes; motion picture films and programmes featuring comedy, drama, action, adventure and/or animation; motion picture films and programmes for broadcast on television featuring comedy, drama, action, adventure and/or animation; promotional and marketing material in digital form; training aids and instructional material in digital form; interactive multimedia presentations; electronic cards, bracelets and tags, storing information thereon; computer software and applications;</p> |

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| | <p>interactive computer software; software for use in processing digital music and digital content (downloadable or streamable); software for browsing, searching and content delivery; software to allow users to interact with music or other content being delivered, to make requests, tag tracks, rate tracks; software for handling financial transactions; software relating to the organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, promotion programmes and promotional services; software relating to electronic gift vouchers, voucher codes, gift codes, claim codes, discount offers, promotional offers, printable vouchers, coupons and others tokens of value; computer games; game cartridges; games for mobile phones; computer games software; educational software; apparatus, instruments and media for recording, reproducing, carrying, storing, processing, manipulating, transmitting, broadcasting, retrieving and reproducing music, sounds, images, text, signals, software, information, data and code; multimedia apparatus and instruments; music playing apparatus; MP3 players, media players, PDAs; juke boxes, digital juke boxes; electronic instructional and teaching apparatus and instruments; telecommunications apparatus; data streaming apparatus; telephones, mobile telephones; accessories for telephones; straps, charms, cases, for telephone handsets; ringtones; mobile phone apps; screensavers, picture messages; photographic and cinematographic apparatus and instruments; cameras, camera accessories, cases for cameras; calculators; safety apparatus and appliances, all for protection against accident or injury, cycle helmets, skateboard helmets, ski and snowboard helmets; mouse mats; sunglasses, eyeglasses, and cases and bags adapted therefor; goggles, including goggles for swimming, skiing goggles; binoculars, telescopes, night vision goggles; novelty magnets, fridge magnets; parts and fittings for all the aforesaid goods.</p> <p>Class 35: Advertising services; promotional services; arranging, producing and managing of advertising, marketing and promotional material; production of digital content for marketing and advertising purposes; advertising and promotion services involving research and selection of music to suit a campaign; Advertising services provided on-line from a computer data base or by means of web pages on the Internet; database management services; data management; commercial data analysis; collection and systemisation of data into databases; management of digital content; telecommunication warehousing (computerised</p> |
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| | <p>data retrieval); computerised data retrieval services for digital text, data, image, audio, and video works; compiling, systemising, indexing, maintaining and updating data into databases; multimedia archive and retrieval services; marketing services; market research services; opinion polling, conducting and analysing market surveys; business consultancy services; provision of business, sales and consumer data analytics; business and consumer evaluation reports services; business consultancy services involving research and selection of music to suit a particular business premises, business event, business sector, retail sector or business or retail promotion; retail services connected with music and entertainment recordings; provision of customer reward scheme services; organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, gift code schemes, promotion programmes and promotional services; electronic retrieval of information regarding analysis of customer preferences and buying patterns; sponsorship services; commercial sponsorship services; operation and management of discount and savings schemes; consultancy, information and advisory services relating to any of the aforesaid services.</p> <p>Class 38: Communication services; electronic transmission of music, data, digital content, documents, texts and images; delivery, transmission, streaming, broadcasting, webcasting of data and digital content; Data exchange services; music and video recordings data exchange services; digital courier, communication and distribution services; digital courier and distribution of production library music; communication services to broadcasters, advertising agencies and film production companies; communication and transmission of music, artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements in electronic and digital form; providing access to online services for uploading and downloading digital content, movies, video recordings, audio recordings, images, data or software applications, from online digital networks, cloud networks and servers; chat room services; portal services; providing access to blog sites; interactive communications services; providing on-line forums for transmission of messages among computer users; forums [chat rooms] for social networking; providing access to online services enabling others to transmit, share, upload, download, forward, access, display, tag and post information, text, images, video and audio content; provision of user access to computer databases; providing access to data, digital</p> |
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Class 41: Providing online music services, namely, providing pre-recorded music; entertainment services, namely, providing a web site featuring musical performances, musical videos, related film clips, photographs, and other multimedia materials, providing on-line reviews, providing pre-recorded music, information in the field of music, and commentary and articles about music, all on-line via a global computer network.

content, music, videos, audio recording websites on the Internet; providing access to online services enabling others to upload and download software applications, information, software, media, documents from online digital networks, cloud networks and servers; leasing of telecommunications apparatus, including download stations and digital content delivery apparatus; information, consultancy and advice relating to any of the aforesaid services.

Class 41: Education and entertainment services; music library services; music library research services; rental of music recordings and video recordings; selection and compilation of pre-recorded music for broadcasting by others; selection and compilation of pre-recorded video recordings for broadcasting by others; film, photo, video, audio, games, amusements, literary, book, magazine, newspaper and printed publications library services; archiving, cataloguing, retrieval and distribution of musical, artistic, literary, dramatic, theatrical, photographic and cinematographic works, audio and video recordings, games and amusements; Production, presentation, syndication, distribution and rental of films, television and radio programmes, whether downloadable or not; production, presentation, syndication, distribution and rental of video and audio recordings; production and performance of sound recordings, image recordings, videos, films; entertainment and educational services featuring electronic media, multimedia content, videos, movies, pictures, images, text, photos, games, user-generated content, audio content, and related information via computer and communications networks; Publishing services; online publishing services; publishing in the nature of blogs and vlogs; digital video, audio and multimedia entertainment publishing services; electronic games services provided by means of the Internet or other on-line services; arranging and conducting live events, for entertainment or educational purposes; Theatre productions; arranging and conducting shows, concerts, shows, competitions, contests, games, concerts and tours, all for entertainment or educational purposes; Cinema presentations; Circuses; Disc jockey services; Discotheque and nightclub services; music publishing services; performance of music, dance, comedy, readings, poetry, theatre and circus entertainment, including such services provided on-line from a computer database or the Internet; Amusement parks; Amusements; publication of posters, greetings cards, flyers, pamphlets, promotional literature; information, consultancy and advice about any of the aforesaid services.

Class 42: Creating and maintaining web sites;

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| | <p>design and hosting of webpages; hosting of digital content; hosting of online journals and blogs; application service provider (ASP); providing an interactive website featuring technology that allows the management and delivery of the digital content of others; Recovery of computer data including computer data relating to artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works; operation of web-sites relating to multimedia archive and retrieval services; computer programming services, maintenance, rental, leasing, hiring and updating of computer software, computer software design, computer systems analysis; design, development, installation and updating of computer software enabling the processing, uploading and sharing of digital content; design and hosting of interactive advertising material; design and hosting of interactive educational material; graphic and artistic design services; application service provider (ASP) services featuring software for use in connection with the organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, promotion programmes and promotional services; provision of web-sites relating to multimedia archive and retrieval services; provision of web-sites relating to communication and transmission of artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements; telecommunication warehousing (computerised data storage); computerised data storage for digital text, data, image, audio, and video works; electronic storage of information regarding analysis of customer preferences and buying patterns; provision of web-sites relating to couriating and distribution of artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements; consultancy, information and advisory services relating to any of the aforesaid services.</p> <p>Class 45: Licensing of music; licensing of video and audio recordings; licensing services relating to performance rights; computer software licensing; online social networking services; personal gift selection for others; licensing recordings, digital content, images to others for promotional activities; consultancy, information and advisory services relating to any of the aforesaid services; advisory services relating to copyright in music and video recordings; advisory services in relation to intellectual property and database rights; legal advice in relation to the use of pre-recorded music and video recordings; legal advice relating to the protection and exploitation of copyright for use in business.</p> |
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93. As the outcome of the opposition under s.5(2)(b) based on the BEATS marks does not affect the overall outcome (as set out in paragraph 108 below), I will simply set out my conclusions about the similarity of the respective goods/services. I find that the goods/services shown on a grey background in the specification of the contested application are identical or similar, to at least a medium degree, to the goods/services for which the earlier BEATS marks are entitled to protection.

94. The highlighted goods in class 9 of the contested application are identical or similar to at least a medium degree to the goods in the corresponding class of the earlier BEATS marks.

95. The highlighted retail services in class 35 of the contested application are similar to a medium degree to *downloadable audio and video recordings featuring music, music performances, and music videos; prerecorded music, namely, digital downloads* in class 9 of IR1225897.

96. The highlighted services in class 41 of the contested application are identical or similar to at least a medium degree to the services in the corresponding class of the earlier BEATS marks.

97. The highlighted services in class 38 of the contested application are similar to at least a medium degree to *computer software for use in the delivery, distribution and transmission of digital music and entertainment-related audio, video, text and multimedia content* in the class 9 of the earlier BEATS marks and/or the services in class 41 for which EU8370819 is entitled to protection.

98. The highlighted services in class 42 of the contested application are similar to *computer software for use in the delivery, distribution and transmission of digital music and entertainment-related audio, video, text and multimedia content* in the class 9 of the earlier BEATS marks and/or the services in class 41 for which EU 8370819 is entitled to protection.

Average consumer and the selection process

99. I will again focus on the goods/services I have found to be identical or similar. VJ's goods in class 9 are mainly audio and video content, hardware for reproducing audio content, software for controlling such hardware, software for receiving and processing recordings and other data. These goods are usually aimed at the general public, although they could also be marketed to businesses in entertainment sector. In either event, I find that there is nothing about the goods to indicate that the consumer will pay a lower or higher level of attention than normal during the selection process. VJ's services in class 35 appear to be retail and associated services, which are aimed mainly at the general public. I find that there is nothing about the services to indicate that the consumer will pay a lower or higher level of attention than normal during the selection process. Some of VJ's services in class 38 appear to be used mainly by the general public, e.g. *providing access to online services enabling others to transmit, share, upload, download, forward, access, display, tag and post information, text, images, video and audio content*. Others could be aimed at businesses, e.g. *electronic transmission of music, data, digital content, documents, texts and images*. In either event, I find that there is nothing about the services to indicate that the consumer will pay a lower or higher level of attention than normal during the selection process. Most of VJ's services in classes 42 appear to be used mainly by businesses. However, some of the services, e.g. *provision of web-sites relating to communication and transmission of artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works*, could also be used by the general public. In either event, I find that there is nothing about the services to indicate that the consumer will pay a lower or higher level of attention than normal during the selection process.

Distinctive character of the earlier mark

100. I adopt the analysis set out in paragraphs 53 – 55 above. There is evidence that BEATS was highly distinctive at the relevant date through use in relation to headphones, earphones and audio speakers. I will take this into account.

Comparison of BEATS and BAR BEATS

101. Visually, the earlier mark consists of one word – BEATS - whereas the later mark has two, one of which is also the word BEATS. The distinctive character of the earlier mark is therefore entirely dependent on that of the word BEATS. The distinctive character of BAR BEATS is more evenly distributed between the two words. Neither of those words is highly distinctive. However, as BAR appears to qualify BEATS, there is more emphasis on BEATS. Overall, I find that there is a medium degree of distinctive visual similarity between the marks.

102. Aurally, the beginnings of the marks are different (BAR v BEATS), but the result of the common word BEATS is a low to medium degree of overall aural similarity.

103. Most consumers will have heard of the term 'beats to a bar' and know that it is part of the method used to accurately reproduce music from musical notation. Therefore, BAR BEATS is likely to make a significant proportion of average consumers think of music (despite the reversal of the words). BEATS alone does not have this meaning, or at least it is less apparent than in BAR BEATS. Therefore, to those consumers who see BAR BEATS as having a musical connotation, there will be no conceptual similarity with BEATS, or only a weak conceptual similarity. A significant proportion of average consumers may not recognise the musical connotation in BAR BEATS. To those consumers, BAR may bring to mind a public bar (as VJ contends) but BEATS will have no obvious meaning beyond the well-known ones, i.e. to strike or defeat someone. In that scenario, BAR BEATS will have no overall concept, but BEATS will have the same meaning that it has in BAR BEATS. The mark will therefore appear to have a limited degree of conceptual similarity.

Likelihood of confusion

104. It is well established that the beginnings of marks generally make more of an impression on consumers than the ends²². The fact that the marks begin with different words is therefore an important consideration. However, there is no rule that

²² See, for example, *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

different beginnings necessarily exclude the likelihood of confusion²³. The difference between BEATS and BAR BEATS is reduced to a certain extent by the fact that the first letter of both marks begins with the letter 'B'. However, given that the earlier mark consists of one word and the later mark two words, I find there is no likelihood of direct confusion between BEATS and BAR BEATS.

105. Where the goods are the same or similar, I find that there is a likelihood of indirect confusion amongst a significant proportion of average consumers. I think it likely that the BAR element of the later mark will be taken by a significant proportion of average consumers to indicate goods/services for use in, or by, bars (i.e. public bars). To those consumers, BAR BEATS would be a logical brand extension of BEATS.

106. I therefore find that the opposition under s.5(2)(b) based on EU7156061, EU8370819 and IR1225897 EU succeeds in relation to the goods/services shown in grey in the table at paragraph 92 above. The opposition based on these marks fails in respect of the other goods/services covered by the contested mark. This is because they are not similar to those covered by the earlier marks and there is no likelihood of confusion.

Outcome of opposition under s.5(2)(b)

107. I find that none of the other earlier marks relied on by BE improves its position over the marks I have considered. This is because either the marks, or the goods/services, are less similar to those covered by the contested application than the ones I have considered.

108. The opposition under s.5(2)(b) succeeds, except in relation to:

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| Class 9: Software relating to the organisation, operation, management and supervision of incentive schemes, loyalty schemes; screensavers, picture messages; safety apparatus and appliances, all for protection against accident or injury, cycle helmets, skateboard helmets, ski and snowboard helmets; mouse mats; sunglasses, eyeglasses, and cases and bags adapted therefor; goggles, including goggles for swimming, skiing goggles; binoculars, telescopes, night vision goggles; novelty magnets, fridge magnets; parts and fittings for all the aforesaid goods. |
|---|

²³ See, for example, *CureVac GmbH v OHIM*, Case T-80/08 (similar beginnings not necessarily important or decisive)

Class 35: Advertising services; arranging, producing and managing of advertising, marketing and promotional material; production of digital content for marketing and advertising purposes; advertising and promotion services involving research and selection of music to suit a campaign; Advertising services provided on-line from a computer data base or by means of web pages on the Internet; marketing services; market research services; opinion polling, conducting and analysing market surveys; business consultancy services; provision of business, sales and consumer data analytics; business and consumer evaluation reports services; business consultancy services involving research and selection of music to suit a particular business premises, business event, business sector, retail sector or business or retail promotion; provision of customer reward scheme services; organisation, operation, management and supervision of incentive schemes, loyalty schemes; electronic retrieval of information regarding analysis of customer preferences and buying patterns; sponsorship services; commercial sponsorship services; operation and management of discount and savings schemes; consultancy, information and advisory services relating to any of the aforesaid services.

Class 41: Theatre productions; Circuses; Disc jockey services; Discotheque and nightclub services; Amusement parks; Amusements; publication of posters, greetings cards, flyers, pamphlets, promotional literature; information, consultancy and advice about any of the aforesaid services.

Class 42: Computer systems analysis; design and hosting of interactive advertising material; design and hosting of interactive educational material; graphic and artistic design services; application service provider (ASP) services featuring software for use in connection with the organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, promotion programmes and promotional services; electronic storage of information regarding analysis of customer preferences and buying patterns; consultancy, information and advisory services relating to any of the aforesaid services.

Class 45: Licensing of music; licensing of video and audio recordings; licensing services relating to performance rights; computer software licensing; personal gift selection for others; licensing recordings, digital content, images to others for promotional activities; consultancy, information and advisory services relating to any of the aforesaid services; advisory services relating to copyright in music and video recordings; advisory services in relation to intellectual property and database rights; legal advice in relation to the use of pre-recorded music and video recordings; legal advice relating to the protection and exploitation of copyright for use in business.

The opposition under s.5(3)

109. The relevant case law can be found in the following judgments of the CJEU: *Case C-375/97, General Motors*, *Case 252/07, Intel*, *Case C-408/01, Addidas-Salomon*, *Case C-487/07, L'Oreal v Bellure* and *Case C-323/09, Marks and Spencer v Interflora*. The law appears to be as follows.

- a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors, paragraph 24*.
- (b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors, paragraph 26*.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman, paragraph 29* and *Intel, paragraph 63*.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This cover, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure*).

110. The earlier BEATS mark has a qualifying reputation in the EU in relation to headphones, earphones and speakers.

Procedural economy

111. In the interests of procedural economy, and subject to the points made in paragraphs 120/121 below, I will focus my consideration of the s.5(3) ground on the registration of BAR BEATS in relation to those goods/services which have survived the opposition under s.5(2)(b). These are shown in the table in paragraph 108 above.

Link

112. As I noted above, my assessment of whether the public will make the required mental 'link' between the marks must take account of all relevant factors. The factors identified in *Intel* are:

The degree of similarity between the conflicting marks

113. Paragraphs 101-103 above set out my findings in relation to the degree of similarity between BEATS and BAR BEATS. In short, I found that the marks are

visually similar to a medium degree, aurally similar to a low to medium degree and conceptually similar to a certain degree.

The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public

114. There is an overlap between the users of headphones, earphones and speakers and some of the services in the table at paragraph 108 above, e.g. theatre productions, but the respective goods/services are wholly dissimilar.

The strength of the earlier mark's reputation

115. The BEATS mark has a strong reputation in the UK.

The degree of the earlier mark's distinctive character, whether inherent or acquired through use

116. The earlier mark is highly distinctive through use in relation to headphones, earphones and speakers.

Whether there is a likelihood of confusion

117. There is no likelihood of confusion if BAR BEATS is used in relation to the goods/services listed in the table in paragraph 108 above.

Outcome of s.5(3) ground of opposition

118. In my view, the dissimilarity between the respective goods/services combined with the differences between the marks means that then public are unlikely to make a link between the earlier mark and BAR BEATS. Consequently, use of BAR BEATS in relation to the goods/services shown in the table at paragraph 108 above will not

take unfair advantage of, or be detrimental to, the reputation or distinctive character of the BEATS mark.

119. It follows that if my findings under s.5(2)(b) are correct, the s.5(3) ground adds nothing to the opposition.

If my findings under s.5(2)(b) are wrong

120. If it had been relevant, I would have found that the relevant public would nevertheless make a link between BEATS, with its reputation for headphones, earphones and speakers, and BAR BEATS when used in relation to associated hardware. This means the following goods in class 9 of the contested application:

Apparatus, instruments and media for recording, reproducing, carrying, storing, processing, manipulating, transmitting, broadcasting, retrieving and reproducing music, sounds, images, text, signals, software, information, data and code; multimedia apparatus and instruments; music playing apparatus; MP3 players, media players, PDAs; juke boxes, digital juke boxes; electronic instructional and teaching apparatus and instruments; telecommunications apparatus; telephones, mobile telephones; accessories for telephones.

121. I would have found that use of BAR BEATS in relation to these goods would, without due cause, take unfair advantage of the reputation of the earlier BEATS mark. This is because the image of high quality associated with the earlier mark would transfer to the BAR BEATS mark and make it easier to sell such goods.

Overall outcome

122. The opposition succeeds, except in relation to the goods/services listed in paragraph 108 above. The BAR BEATS mark will be registered for these goods/services, as well as the unopposed goods/services in classes 36 and 39.

Costs

123. BE has been more successful than VJ and is therefore entitled to a contribution towards its costs. I assess these as follows:

- (i) £200 official fee for notice of opposition;
- (ii) £400 for preparing the notice of opposition and considering VJ's counterstatement;
- (iii) £1100 for filing evidence and considering VJ's evidence;
- (iv) £250 for filing written submissions.

124. I therefore order Virtual Jukebox Ltd to pay Beats Electronics LLC the sum of £1950. This to be paid within 21 days of the end of the period allowed for appeal or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings (subject to any order of the appellate tribunal)

Dated this 21st November 2019

Allan James

For the registrar

Annex A

Class 9

Music, sounds, images, text, signals, software, information and code provided by telecommunications networks, by online delivery including by downloading or by streaming; digital music (downloadable or streamable); digital content (downloadable or streamable); video and music recordings, spoken word recordings; audio or video recordings in the form of CDs, DVDs, audio books or downloads; pre-recorded media; electronic publications (downloadable or streamable); podcasts; films, television programmes, radio programmes; motion picture films and programmes featuring comedy, drama, action, adventure and/or animation; motion picture films and programmes for broadcast on television featuring comedy, drama, action, adventure and/or animation; promotional and marketing material in digital form; training aids and instructional material in digital form; interactive multimedia presentations; electronic cards, bracelets and tags, storing information thereon; computer software and applications; interactive computer software; software for use in processing digital music and digital content (downloadable or streamable); software for browsing, searching and content delivery; software to allow users to interact with music or other content being delivered, to make requests, tag tracks, rate tracks; software for handling financial transactions; software relating to the organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, promotion programmes and promotional services; software relating to electronic gift vouchers, voucher codes, gift codes, claim codes, discount offers, promotional offers, printable vouchers, coupons and others tokens of value; computer games; game cartridges; games for mobile phones; computer games software; educational software; apparatus, instruments and media for recording, reproducing, carrying, storing, processing, manipulating, transmitting, broadcasting, retrieving and reproducing music, sounds, images, text, signals, software, information, data and code; multimedia apparatus and instruments; music playing apparatus; MP3 players, media players, PDAs; juke boxes, digital juke boxes; electronic instructional and teaching apparatus and instruments; telecommunications apparatus; data streaming apparatus; telephones, mobile telephones; accessories for telephones; straps, charms, cases, for telephone handsets; ringtones; mobile phone apps; screensavers, picture messages; photographic and cinematographic apparatus and instruments; cameras, camera accessories, cases for cameras; calculators; safety apparatus and appliances, all for protection against accident or injury, cycle helmets, skateboard helmets, ski and snowboard helmets; mouse mats; sunglasses, eyeglasses, and cases and bags adapted therefor; goggles, including goggles for swimming, skiing goggles; binoculars, telescopes, night vision goggles; novelty magnets, fridge magnets; parts and fittings for all the aforesaid goods.

Advertising services; promotional services ; arranging, producing and managing of advertising, marketing and promotional material; production of digital content for marketing and advertising purposes; advertising and promotion services involving research and selection of music to suit a campaign; Advertising services provided on-line from a computer data base or by means of web pages on the Internet; database management services; data management; commercial data analysis; collection and systemisation of data into databases; management of digital content; telecommunication warehousing (computerised data retrieval); computerised data retrieval services for digital text, data, image, audio, and video works; compiling, systemising, indexing, maintaining and updating data into databases; multimedia archive and retrieval services; marketing services; market research services; opinion polling, conducting and analysing market surveys; business consultancy services;

provision of business, sales and consumer data analytics; business and consumer evaluation reports services; business consultancy services involving research and selection of music to suit a particular business premises, business event, business sector, retail sector or business or retail promotion; retail services connected with music and entertainment recordings; provision of customer reward scheme services; organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, gift code schemes, promotion programmes and promotional services; electronic retrieval of information regarding analysis of customer preferences and buying patterns; sponsorship services; commercial sponsorship services; operation and management of discount and savings schemes; consultancy, information and advisory services relating to any of the aforesaid services.

Class 36

Issue and redemption of tokens and vouchers; financial payment services; consultancy, information and advisory services relating to any of the aforesaid services.

Class 38

Communication services; electronic transmission of music, data, digital content, documents, texts and images; delivery, transmission, streaming, broadcasting, webcasting of data and digital content; Data exchange services; music and video recordings data exchange services; digital courier, communication and distribution services; digital courier and distribution of production library music; communication services to broadcasters, advertising agencies and film production companies; communication and transmission of music, artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements in electronic and digital form; providing access to online services for uploading and downloading digital content, movies, video recordings, audio recordings, images, data or software applications, from online digital networks, cloud networks and servers; chat room services; portal services; providing access to blog sites; interactive communications services; providing on-line forums for transmission of messages among computer users; forums [chat rooms] for social networking; providing access to online services enabling others to transmit, share, upload, download, forward, access, display, tag and post information, text, images, video and audio content; provision of user access to computer databases; providing access to data, digital content, music, videos, audio recording websites on the Internet; providing access to online services enabling others to upload and download software applications, information, software, media, documents from online digital networks, cloud networks and servers; leasing of telecommunications apparatus, including download stations and digital content delivery apparatus; information, consultancy and advice relating to any of the aforesaid services.

Class 39

Transport services; transportation logistics services; courier and distribution services; courier and distribution of production library music, games, amusements, pre-recorded media, CD's, CD-Roms, videos, audio and video cassettes, tapes, exposed cinematographic film and non-printed publications, printed publications and artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements; provision of consultancy, information and advisory services relating to any of the aforesaid services; courier and

distribution services to broadcasters, advertising agencies and film production companies; information, consultancy and advice relating to any of the aforesaid services.

Class 41

Education and entertainment services; music library services; music library research services; rental of music recordings and video recordings; selection and compilation of pre-recorded music for broadcasting by others; selection and compilation of pre-recorded video recordings for broadcasting by others; film, photo, video, audio, games, amusements, literary, book, magazine, newspaper and printed publications library services; archiving, cataloguing, retrieval and distribution of musical, artistic, literary, dramatic, theatrical, photographic and cinematographic works, audio and video recordings, games and amusements; Production, presentation, syndication, distribution and rental of films, television and radio programmes, whether downloadable or not; production, presentation, syndication, distribution and rental of video and audio recordings; production and performance of sound recordings, image recordings, videos, films; entertainment and educational services featuring electronic media, multimedia content, videos, movies, pictures, images, text, photos, games, user-generated content, audio content, and related information via computer and communications networks; Publishing services; online publishing services; publishing in the nature of blogs and vlogs; digital video, audio and multimedia entertainment publishing services; electronic games services provided by means of the Internet or other on-line services; arranging and conducting live events, for entertainment or educational purposes; Theatre productions; arranging and conducting shows, concerts, shows, competitions, contests, games, concerts and tours, all for entertainment or educational purposes; Cinema presentations; Circuses; Disc jockey services; Discotheque and nightclub services; music publishing services; performance of music, dance, comedy, readings, poetry, theatre and circus entertainment, including such services provided on-line from a computer database or the Internet; Amusement parks; Amusements; publication of posters, greetings cards, flyers, pamphlets, promotional literature; information, consultancy and advice about any of the aforesaid services.

Class 42

Creating and maintaining web sites; design and hosting of webpages; hosting of digital content; hosting of online journals and blogs; application service provider (ASP); providing an interactive website featuring technology that allows the management and delivery of the digital content of others; Recovery of computer data including computer data relating to artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works; operation of web-sites relating to multimedia archive and retrieval services; computer programming services, maintenance, rental, leasing, hiring and updating of computer software, computer software design, computer systems analysis; design, development, installation and updating of computer software enabling the processing, uploading and sharing of digital content; design and hosting of interactive advertising material; design and hosting of interactive educational material; graphic and artistic design services; application service provider (ASP) services featuring software for use in connection with the organisation, operation, management and supervision of voucher schemes, incentive schemes, loyalty schemes, promotion programmes and promotional services; provision of web-sites relating to multimedia archive and retrieval services; provision of web-sites relating to communication and transmission of artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements; telecommunication warehousing (computerised data storage); computerised data storage for digital text, data,

image, audio, and video works; electronic storage of information regarding analysis of customer preferences and buying patterns; provision of web-sites relating to couriering and distribution of artistic, literary, musical, dramatic, theatrical, photographic and cinematographic works, games and amusements; consultancy, information and advisory services relating to any of the aforesaid services.

Class 45

Licensing of music; licensing of video and audio recordings; licensing services relating to performance rights; computer software licensing; online social networking services; personal gift selection for others; licensing recordings, digital content, images to others for promotional activities; consultancy, information and advisory services relating to any of the aforesaid services; advisory services relating to copyright in music and video recordings; advisory services in relation to intellectual property and database rights; legal advice in relation to the use of pre-recorded music and video recordings; legal advice relating to the protection and exploitation of copyright for use in business.