

O/0487/23

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK NO UK00003623997

BY TINY MEDICAL APPS LTD

TO REGISTER:

Patient Cloud

AS A TRADE MARK IN CLASS 42

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 427961

BY EGTON MEDICAL INFORMATION SYSTEMS LIMITED

BACKGROUND AND PLEADINGS

1. On 9 April 2021, Tiny Medical Apps Ltd (“the applicant”) applied to register the trade mark on the cover page of this decision in the UK. The application was accepted and published in the Trade Marks Journal on 6 August 2021. The applicant seeks registration for the following services¹:

Class 42: Software as a service (SAAS) for providing access to medical and healthcare records, tracking and advice.

2. On 5 November 2021, Egton Medical Information Systems Limited (“the opponent”) filed a notice of opposition on the basis of section 5(2)(b) of the Trade Mark Act 1994 (“the Act”). The opposition is directed at all the services in the applicant’s specification. The opponent relies on the following trade marks:

Patient

patient

PATIENT

(“series of three”)

UK00003041657

Filing date 10 February 2014; date of entry in register 2 January 2015

Relying on some of the goods and services:

Class 9: Downloadable software for mobile phones and tablet computers; downloadable electronic publications and videos; all relating to medical and healthcare information.

Class 42: Hosting of online content namely, newspapers, leaflets, magazines, directories and blogs; designing, managing and monitoring on-line forums for discussion; providing an electronic database of information; all provided via a medical and healthcare information website.

(“the first earlier registration”)

Patient

patient

¹I note that a Form TM21B was filed on 4 October 2022 requesting the deletion of classes 9 and 44 in the application and the amendment of class 42 to read as above. In an email to the Tribunal dated 26 October 2022, the opponent confirmed that they did not intend to withdraw their opposition.

PATIENT

("series of three")

UK00003092714

Filing date 4 February 2015; date of entry in register 1 May 2015

Relying on some of the goods and services:

Class 44: Medical and healthcare services; provision of medical and healthcare information and advice; health screening and assessment services; all provided via a medical and healthcare information website.

("the second earlier registration")

Patient Access

patient access

PATIENT ACCESS

("series of three")

UK00003041693

Filing date 10 February 2014; date of entry in register 3 October 2014.

Relying on some of the goods and services:

Class 9: Computer software.

Class 42: Design and development of computer hardware and software; computer programming; installation, maintenance and repair of computer software; design, drawing and commissioned writing for the compilation of web sites; electronic data storage.

("the third earlier registration")

3. The opponent submits that there is a likelihood of confusion because the marks are similar and the respective goods and services are either identical or similar. The holder filed a defence and counterstatement denying the claims made and put the opponent to proof of use for all its earlier marks.

4. The opponent is represented by Womble Bond Dickinson; the applicant is represented by Withers & Rogers LLP. No hearing was requested. The opponent filed evidence in chief, which was accompanied by written submissions. The applicant also filed evidence in chief. Both parties filed written submissions in lieu of a hearing. This decision is taken following a careful reading of all the papers.

5. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

Evidence

6. The opponent's evidence in chief was in the form of a witness statement of Idris Issa dated 16 May 2022. Mr Issa is the Digital Chief Technology Officer of the opponent. Mr Issa's statement is accompanied by 15 exhibits.

7. The applicant's evidence was in the form of a witness statement of Mark James Caddie dated 15 November 2022. Mr Caddie is a Chartered Trade Mark Attorney and Partner at the applicant's representative firm. Mr Caddie's statement is accompanied by 5 exhibits.

8. I do not propose to summarise the evidence or the submissions in full at this stage. However, I have taken them all into consideration in reaching my decision and will refer to them below, where necessary.

Proof of use

9. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

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

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

10. Given their filing dates, the opponent's earlier marks qualify as earlier trade marks under the above provisions. I note that in its counterstatement, the applicant sought to put the opponent to proof of use of its marks because all three registrations completed their registration process more than five years before the date of the application at issue. Therefore, they are subject to proof of use pursuant to section 6A of the Act.

11. The relevant statutory provisions are 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.

(1A) In this section "the relevant period" means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier 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 (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), 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 Community 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 Community.

(5A) In relation to an international trade mark (EC) the reference in subsection (1)(c) to the completion of the registration procedure is to be construed as a reference to the publication by the European Union Intellectual Property Office of the matters referred to in Article 190(2) of the European Union Trade Mark Regulation.

(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.”

12. Section 100 of the Act is also relevant, which reads:

“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.”

13. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J (as he then was) summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v*

Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky' [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

14. Pursuant to Section 6A of the Act, the relevant period for assessing whether there has been genuine use of the opponent’s registrations is the 5-year period ending with the date of the application at issue i.e. 8 April 2016 to 9 April 2021.

15. Proven use of a mark which fails to establish that “the commercial exploitation of the marks is real” because the use would not be “viewed as warranted in the economic sector

concerned to maintain or create a share in the mark for the goods or services protected by the mark” is, therefore, not genuine use.²

16. I am also guided by *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use. [...] However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

17. I also note Mr Alexander Q.C.’s comments in *Guccio Gucci SpA v Gerry Weber International AG*, Case BL O/424/14. He stated:

“The Registrar says that it is important that a party puts its best case up front – with the emphasis both on “best case” (properly backed up with credible exhibits, invoices, advertisements and so on) and “up front” (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. [...] The rule is not just “use it or lose it” but (the less catchy, if more reliable) “use it – and file the best evidence first time round – or lose it” [original emphasis]

18. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

² *Jumpman* BL O/222/16

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

Form of the mark

19. In *Colloseum Holdings AG v Levi Strauss & Co*, Case C-12/12, 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 *Nestle*, 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.

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 of 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)

20. The opponent has three earlier registrations that it is relying on in this opposition. One of those registrations is 'Patient Access' which is a series of three marks and is presented in title, lower and upper case. This registration has been used as registered throughout the evidence. The other two registrations are a series of three marks for the word 'Patient', albeit presented in title, lower and upper case. These registrations have been used as registered throughout the evidence. In addition, the opponent has also used the registration in the following ways:



(Example 1)



(Example 2)

21. The opponent's registrations are word only marks that are registered in black and white. I am of the view that the use of the word 'Patient' in the above examples is in line with the notional fair use of the mark as registered. As per the case of *Colloseum*, use of a mark 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. In my view, the addition of the device elements in the marks shown above means that the use of the opponent's registration is part of a composite mark. Despite being used as a composite mark, I consider that the 'Patient' element will be perceived independently and continue to be viewed as indicative of the origin of the goods and services at issue. As a result, in accordance with *Colloseum*, I consider the marks shown above are examples of use of the opponent's registrations as registered.

Genuine use

22. I note that in its submissions in lieu of a hearing, the applicant states that it does not consider that the evidence submitted by the opponent is sufficient to show genuine use of the registrations. In assessing genuine use, I remind myself that an assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.³

23. The opponent has provided evidence of turnover figures, invoices, marketing expenditure and awards received by the opponent. I note the following in regard to the evidence:

a. Annual turnover figures in relation to the 'Patient' registration:⁴

Financial year	2016	2017	2018	2019	2020	2021
Revenue (£)	£2,107,000	£2,333,000	£1,785,000	£947,000	£1,019,000	£1,192,000

³ *New York SHK Jeans GmbH & Co KG v OHIM*, T-415/09

⁴ The witness statement of Idris Issa paragraph 4.1

- b. Annual turnover figures in relation to the 'Patient Access' registrations:⁵

Financial year	2016	2017	2018	2019	2020	2021
Revenue (£)	£452,000	£5550,000	£1,212,000	£1,573,000	£1,038,000	£1,293,000

- c. 4 invoices that pertain to revenue generated by advertising on the opponent's app and website. The invoices are dated between 20 December 2018 and 14 December 2020 – they fall within the relevant period.⁶
- d. Google Analytics evidence provides the number of users of the opponent's patient.info website during the relevant period. These figures amount to 172.5 million (2016) – 23% from the UK, 160 million (2017) – 22% from the UK, 104 million (2018) – 26% from the UK, 42 million (2019) – 39% from the UK, 81 million (2020) – 37% from the UK and 97.5 million (2021) – 33% from the UK. According to my calculations, the UK proportion of access figures amounts to roughly 39,675,000 (2016), 35,200,000 (2017), 27,040,000(2018), 16,380,000(2019), 29,970,000(2020) and 32,175,000 (2021).⁷
- e. Google Analytics evidence provides the number of users of the opponent's 'Patient Access' website during the relevant period. These figures amount to 10 million (2018) - 97% from the UK, 20.5 million (2019) – 96% from the UK, 34 million (2020) – 96% from the UK and 36 million (2021) – 98% from the UK. According to my calculations, the UK proportion of access figures amounts to roughly 9,700,000 (2018), 19,680,000 (2019), 32,640,000 (2020) and 35,280,000 (2021).⁸
- f. Printouts of the 'Patient Access' App from Google Play and the Apple Store. The opponent states that the app is only available in the UK and therefore the entirety of the 11.7 million (2020) and 14 million (2021) are based in the UK.⁹
- g. Screenshots of Facebook in relation to posts relating to 'Patient' and 'Patient Access' goods and services. The page has 2 million followers, I

⁵ The witness statement of Idris Issa paragraph 4.2

⁶ Exhibit 3 of the Witness statement of Idris Issa

⁷ Exhibit 5 of the witness statement of Idris Issa

⁸ Exhibit 7 of the witness statement of Idris Issa

⁹ Exhibit 8 of the witness statement of Idris Issa

am unable to find any reference within the evidence or the witness statement as to whether these are UK followers.¹⁰

- h. Screenshots of Twitter in relation to a selection of posts relating to the 'Patient' goods and services. The page has 30,000 followers, I am unable to find any reference within the evidence or witness statement as to whether these are UK followers.¹¹
- i. Screenshots of YouTube where the opponent posts content relating to the goods and services bearing the 'Patient' registrations.¹²
- j. Newspaper, magazine and website articles relating to the goods and services under the 'Patient' and 'Patient Access' registrations.¹³
- k. Awards, nominations and accreditations relating to the 'Patient' and 'Patient Access' marks.¹⁴

24. As set out above, the evidence contains a number of sample invoices. I note that the invoices were issued by Patient Platform Limited which the opponent states were the previous owners of the registrations. Having reviewed the evidence, I note that the invoices are within the relevant period. One of the invoices makes reference to the opponent's registrations and the head of the invoices reference the opponent's registrations. The invoices are for 'Patient' advertising and marketplace listing fees. I am mindful that the opponent states in its witness statement that the website and application that it provides to users are free to access/download and that it generates turnover from advertising on its website/application. The opponent states that these invoices are for revenue generated from advertising on the opponent's applications and websites. I recognise that these invoices are only sample invoices, and I will factor that into my assessment.

25. The opponent has provided evidence regarding its turnover, as referenced above. I note that whilst the opponent has broken down the turnover figures into each registration, being 'Patient' and 'Patient Access' respectively and states that the figures are in relation to the goods and services under those registrations, the opponent has not provided a breakdown as to what figures are to be attributed to which goods and services. However, as mentioned above, the website/application are provided free to users and income is generated from advertising. Despite this, the number of users of the website and individuals that

¹⁰ Exhibit 9 of the witness statement of Idris Issa

¹¹ Exhibit 11 of the witness statement of Idris Issa

¹² Exhibit 10 of the witness statement of Idris Issa

¹³ Exhibit 12 of the witness statement of Idris Issa

¹⁴ Exhibits 12-13

downloaded the applications, mentioned above, provides a picture of a business that is successful and used on a broad scale in the UK.

26. Although I do not have any evidence or submissions from either party to assist me on the matter of the size of the UK markets for the goods and services at issue under the registrations, I believe the markets to be substantial. In my view, when compared against the size of the relevant markets, these figures are not insignificant. The figures demonstrate a significant level of turnover that indicate frequent levels of use on a reasonable scale throughout the UK.

27. The opponent states in its witness statement that its expenditure in relation to marketing and advertising was spent on items such as brand development, websites and applications, marketing campaigns and social media pages. However, I do note that no figures in relation to overall expenditure have been provided by the opponent. In relation to the websites, the opponent states that the 'Patient' website promotes the goods and services sold under the 'Patient' registrations. However, whilst printouts of the EMIS page have been provided which references the 'Patient' and 'Patient Access' registrations and highlights successes and development concerning the registrations, I note that printouts of the patient.info website have not been provided, making it difficult for me to assess what was displayed on the website. The opponent states that its 'Patient' domain has been used since July 2002 to promote its goods and services. The Google Analytics pertaining to the 'Patient' domain, mentioned above, demonstrate the level of activity and interest in the opponent's website between 2016 to 2021. Similarly, this is also the case in relation to the opponent's 'Patient Access' registration.

28. A representative selection of UK press articles, dated between 26 November 2015 and 6 May 2020, are in evidence. The articles are from a range of media outlets including *EMIS*, *Digital Health and Mobile Marketing*. The articles discuss the new technology that allows patients to digitally share their medical records with chosen clinicians (under the 'Patient' registrations) and the technology that allows patients to book GP and Pharmacy appointments, assess flu vaccine eligibility via an eligibility tracker and order repeat medications (under the 'Patient Access' registration).

29. There is evidence to demonstrate that the opponent has been active in promoting its 'Patient' and 'Patient Access' registrations on social media. I note that some of the screenshots of the 'Patient' Facebook account shows posts are undated or outside of the

relevant period. The Facebook posts that are dated are from 2 August 2019, 21 August 2019, 17 March 2020 and 20 January 2021. I recognise that the post dated 5 October 2021 is outside of the relevant date, therefore, I will not address this post. It is apparent that the screenshots dated 27 March 2020 and 17 July 2020 are posts related to the 'Patient Access' registration. In addition, there is a post dated either 2 June 2016/2018, I am unable to determine the date due to the blurry nature of the printout provided which relates to the 'Patient Access' registration. I am unsure of the date the screenshots were taken to identify on what date the number of followers or likes of the 'Patient' provided in evidence were recorded, which I will take into consideration. The evidence indicates that 1,201,545 people liked the 'Patient' page and it had 1,189,643 followers. All of the posts display the number of reactions, shares and comments, of those I note that the maximum amount of interaction on any post dated is within the relevant period and reflects 52 reactions, 5 comments and 27 shares. In addition, I am mindful that each post bears either the opponent's 'Patient' or 'Patient Access' registrations.

30. The social media evidence also contains snapshots of the opponent's 'Patient' YouTube channel, which appear to have been accessed 28 April 2022. Whilst I note that this is outside of the relevant period, I will consider the evidence and assess the overall picture provided by the evidence because the snapshots show videos that were posted during the relevant period. The evidence shows content posted which relates to the 'Patient' registrations. The screenshot demonstrates that the channels had 7.05K subscribers. There is evidence of various videos within the relevant period that have been uploaded by 'Patient', with various titles such as 'What is irritable bowel syndrome (IBS)?', a welcome video and various health related videos. The number of views on the videos varies from a minimum of 3.2K views to 255K views on videos published by 'Patient'.

31. There is also evidence of a Twitter page, however, I note that it is unclear what date the screenshots of the Twitter page were taken. The evidence shows content posted under a Twitter handle of the opponent's 'Patient' registrations. The images indicate that the Twitter page has 28.5K followers. Some of the posts are undated. The posts that are dated and fall within the relevant period consist of 16 tweets that are dated between 13 November 2019 to 30 March 2021. The posts consist of links to the 'Patient' website that discuss health related issues such as 'Can apps really help with diabetes management', 'for example.

32. The 'Patient Access' app has been described as the 'most popular health service app'. Mr Issa demonstrates in his evidence that the opponent received a number of awards for its 'Patient' website; the website was voted Best Health Website and Most Popular health

website in the 2015 Website of the Year Awards, received the Silver and Merit award in the Digital Health Awards in 2015, was awarded the Most Trusted Health Information Site in the 2015 Healthcare and Pharmaceutical Awards. They have been awarded other awards in 2015 and have demonstrated awards attributed to the opponent every year since 2010.

33. In relation to the 'Patient' registrations, the opponent has not provided any evidence as to the size of the market against which the turnover figures should be compared to. Further, whilst evidence has been provided of turnover figures, this evidence has not been broken down in terms of the attributable goods and services. Regardless of these issues, I am of the view that the user base is somewhat substantial and span the relevant period. I recognise that the user base accrued from advertising on its websites supports the position that the opponent operated a significant business operation. In my view, this demonstrates that there is frequent use of the opponent's registrations. The Google Analytics evidence demonstrates that there is a broad customer base, but I am unable to identify the full geographic scope of consumers from the evidence provided. I note that whilst there is no evidence of spend on marketing/advertising, the presence of social media and news articles indicate that efforts have been made by the opponent in the UK. Taking all of this into account, I am satisfied that the opponent's use of its registrations is warranted in the economic sector concerned such that it has created a share in the markets for the goods and services at issue.

34. In relation to the 'Patient Access' registration, the opponent has not provided evidence of the market size to compare the turnover figures to. Despite this, and a failure to breakdown the turnover figures, I consider that the user base demonstrate a respectable use of the registration in the relevant period. I recognise that the user base accrued from advertising on its websites supports the position that the opponent operated a significant business operation. I note that the use has been consistent throughout the relevant period in the UK, however, I do not that the geographic spread of consumers has not been demonstrated. I note that no advertising figures have been provided in relation to the registration but recognise that the social media, articles and awards demonstrate the efforts made by the opponent to advertise/market its registration. Taking all of the above into account, I consider that the evidence clearly reflects a genuine attempt on behalf of the opponent to generate and maintain a market for its goods and services under the 'Patient Access' registration. Therefore, I am satisfied that the opponent has demonstrated genuine use of its registration in the relevant period in the UK.

FAIR SPECIFICATION

35. I must consider whether, or the extent to which, the evidence shows use of the earlier registrations in relation to the goods and services relied upon. In *Euro Gida Sanayi ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, summed up the law as follows:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

36. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows: “iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria’s Secret UK Ltd* [2014] EWHC 2631 (Ch) (“Thomas Pink”) at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 (“Asos”) at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases,

use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46.

37. In relation to the first earlier registration, the 'Patient' registration, the opponent relies on the following goods and services:

Class 9: Downloadable software for mobile phones and tablet computers; downloadable electronic publications and videos; all relating to medical and healthcare information.

Class 42: Hosting of online content namely, newspapers, leaflets, magazines, directories and blogs; designing, managing and monitoring on-line forums for discussion; providing an electronic database of information; all provided via a medical and healthcare information website.

38. In relation to the second earlier registration, the Patient registration, the opponent relies on the following services:

Class 44: Medical and healthcare services; provision of medical and healthcare information and advice; health screening and assessment services; all provided via a medical and healthcare information website.

39. In relation to the third earlier registration, the Patient Access registration, the opponent relies on the following goods and services:

Class 9: Computer software.

Class 42: Design and development of computer hardware and software; computer programming; installation, maintenance and repair of computer software; design, drawing and commissioned writing for the compilation of web sites; electronic data storage.

40. As the earlier registrations are relying on different goods and services, I will assess what the evidence shows in relation to each of the earlier registrations separately.

41. The evidence is not specifically broken down into the opponent's goods and services, therefore, I must consider the evidence as a whole and compare what is shown within it to the opponent's specification. It would be unfair of me to simply accept that the user figures provided are for the goods and services for which the opponent's registrations have been registered. In relation to the goods and services for which the opponent's registrations are registered, I will now go through the opponent's specifications for the three earlier registrations to determine a fair specification.

First earlier registration

Class 9

Downloadable software for mobile phones and tablet computers; all relating to medical and healthcare information.

42. Firstly, I will deal with the goods in relation to downloadable software for mobile phones and tablet computers. Whilst the opponent's evidence contains a reference to an application that can be downloaded from Google Play and the Apple Store relating to medical and healthcare information, it is in relation to the 'Patient Access' registration rather than the 'Patient' registrations. There is no evidence to suggest that it also applies to the 'Patient' registrations. Taking the above into account and recognising that the user base is not broken down to demonstrate use of the opponent's goods, I am of the view that the opponent has not produced sufficient evidence in respect of the goods. Therefore, the opponent has failed to demonstrate genuine use in relation to "*downloadable software for mobile phones and tablet computers; all relating to medical and healthcare information*".

Downloadable electronic publications and videos; all relating to medical and healthcare information.

43. It is not my view that the opponent has produced evidence of these goods. The opponent has provided evidence that contains a reference to YouTube videos, it is my understanding that whilst videos can be downloaded on this platform if you are a subscriber to its premium service this is not the standard function for non-subscribing users of YouTube. In addition, I have no evidence from the opponent confirming that the videos are downloadable

or figures for the number of downloads made of the opponent's videos. In relation to downloadable electronic publications, it is my view that this term refers to electronic publications such as online articles, magazines, newspapers etc that are able to be downloaded onto the device that is being used to access the publication. The evidence contains reference to electronic publications on the 'Patient' website, which is related to medical and healthcare information, however, no evidence has been provided to indicate that these articles are downloadable or of the number of downloads made. I recognise that the onus is on the opponent to produce sufficient evidence in respect of these services, in my view it has not done this. Therefore, the opponent has failed to demonstrate genuine use in relation to *"downloadable electronic publications and videos; all relating to medical and healthcare information"*.

Class 42

Designing, managing and monitoring on-line forums for discussion; all provided via a medical and healthcare information website.

44. In relation to the above term, it is not my view that the opponent has produced evidence of these services. The opponent has provided evidence that they run a website in relation to the registration, however, I note that no examples of the website have been provided. I note in its additional information page on Facebook, the evidence states that the website has a lively discussion forum where patients can speak to other patients. However, as no examples have been provided of the website and the content that refers to the website is insufficient for me to identify whether the opponent designs, monitors and manages online forums for discussion, the evidence does not support this service being provided by the opponent. Taking all of this into consideration, I am of the view that the opponent has not produced sufficient evidence in respect of these services. Therefore, the opponent has failed to demonstrate genuine use in relation to *"designing, managing and monitoring on-line forums for discussion; all provided via a medical and healthcare information website"*.

Hosting of online content namely, newspapers, leaflets, magazines, directories and blogs; all provided via a medical and healthcare information website.

45. In the absence of any submissions or evidence to the contrary, it is my view that *hosting of online content* refers to a service where the service users' content is made accessible on the internet by providing the technology and resources required for the effective operation of the content. For example, by keeping the servers up and running, implementing security

measures and ensuring that data is transferred to users of the content. Whilst I note that the Facebook post evidence contains a reference to the opponent's website and it also states that the opponent's website provides leaflets, directories and a blog, none of the evidence provided demonstrates the above term. I note that it is the opponent's responsibility to provide evidence to support its goods and services. Looking at the evidence as a whole, it is not my view that the opponent has produced sufficient evidence in respect of the services to demonstrate use of the term. Therefore, the opponent has failed to demonstrate genuine use in relation to *"hosting of online content namely, newspapers, leaflets, magazines, directories and blogs; all provided via a medical and healthcare information website"*.

Providing an electronic database of information; all provided via a medical and healthcare information website.

46. In relation to the above service, the opponent has provided evidence that it provides an electronic database of information. In my view, an electronic database is a computer-based collection or listing of information. All of the articles referenced in the Facebook and Twitter posts produced in the opponent's evidence makes reference to articles that can be accessed on its website pertaining to medical and healthcare information. Given the quantity of the articles referenced, I am content to summarise from the evidence that it is a computer based collection of information. Taking this all into account, I am of the view the evidence is sufficient to support a finding of genuine use of the above term.

Second earlier registration

Medical and healthcare services; all provided via a medical and healthcare information website.

47. It is my view that medical and healthcare services are a very broad range of services that pertain to the prevention or treatment of illness or injuries; however, the presence of the limitation means that the term only applies to those services that are provided via a medical and healthcare information website. I note that the evidence contains examples of links to the opponent's website which relates to various matters of healthcare information. Taking this into account, it is my view that the evidence is sufficient for me to determine that this service is provided by the opponent.

Provision of medical and healthcare information and advice; all provided via a medical and healthcare information website.

48. As mentioned above, the evidence contains examples of links to the opponent's website which is related to various matters of healthcare information. The evidence also indicates that the opponent provides medically trusted information which is presented in the form of information condition leaflets, reference articles and a support directory on its website. Taking this into account, it is my view that the evidence is sufficient for me to determine that the service is provided by the opponent.

Health screening and assessment services; all provided via a medical and healthcare information website.

49. In my view, health screening and assessment services are services where a preventative health check that uses medical and non-invasive tests are carried out to give a current health check and wellbeing overview or assessment. The Facebook evidence provided by the opponent includes a reference on 2 June 2018 to a video physiotherapy assessment that is available to be booked. I would deem these services to be demonstrative of the term, however, I note that whilst this evidence is on the Patient Facebook page it requires the customer to access the Patient Access app in order to book an appointment. This leads me to be of the view that this evidence does not demonstrate use of the term under this registration, rather, it indicates that this service is provided by the 'Patient Access' registration. Further, I note that the service is not provided via a medical and healthcare information website but via a mobile application. Therefore, taking all of this into consideration, I am of the view that the opponent has not produced sufficient evidence in respect of these services. Therefore, the opponent has failed to demonstrate genuine use in relation to "*health screening and assessment services; all provided via a medical and healthcare information website*".

Third earlier registration

Computer software

50. In my view, mobile devices, that run mobile applications, are small portable handheld computers. Therefore, I consider that mobile applications are a form of computer software. The evidence produced by the opponent contains a reference to the opponent's mobile application that is available in Google Play and the Apple Store for customers to download in relation to a medical/healthcare application. Taking the above into account, I am of the view that the opponent has provided sufficient evidence of the good to demonstrate genuine use of

the term. However, I am of the view that a fair representation of the term is “*mobile software; all relating to medical and healthcare*”.

Design and development of computer hardware and software

51. Whilst I am of the view that the opponent has provided evidence of computer software as a good and the mobile application is mentioned frequently throughout the evidence, I am not of the view the evidence produced is sufficient to indicate that the opponent provides the above service. Whilst the software they provide would need to have been designed and developed, the evidence does not indicate that the opponent provides this service in relation to its own good or any other. Further, no evidence has been provided of computer hardware that has been designed or developed under the registration. It is not unusual for such services to be provided by a specialist service provider. I note that it is the opponent’s responsibility to demonstrate use of the service. As insufficient evidence has been produced to indicate that the opponent provides this service it is my view that the opponent has failed to demonstrate genuine use in relation to “*design and development of computer hardware and software*”.

Computer programming; installation, maintenance and repair of computer software

52. Similarly to the preceding paragraph, no evidence has been produced to demonstrate that the opponent provides the above services. I note that it is the opponent’s responsibility to demonstrate use of the services. Looking at the evidence as a whole, it is not my view that the opponent has produced sufficient evidence in respect of the services to demonstrate use.

Design, drawing and commissioned writing for the compilation of web sites

53. Whilst, as discussed above, the opponent has provided evidence of health and medical articles that it has on its website to provide information and advice to users, the inference of the average consumer would be that any commissioned writing would be provided by medical professionals. There is nothing to indicate that these articles have been designed, drawn or commissioned writing for the compilations of websites. I note that it is the opponent’s responsibility to demonstrate use of the services. Looking at the evidence as a whole, it is not my view that the opponent has produced sufficient evidence in respect of the services to demonstrate use.

Electronic data storage.

54. Whilst I note that the opponent provides various articles, leaflets etc to provide healthcare and medical information and advice to its customers and will need to store data electronically in order to provide that service, the evidence produced does not demonstrate the provision of electronic data storage as a service provided to customers. I note that it is the responsibility of the opponent to demonstrate use of the services. Looking at the evidence as a whole, it is not my view that the opponent has provided sufficient evidence in respect of the services to demonstrate use.

55. I find a fair representation of the earlier registrations to be as follows:

First earlier registration

Class 42: Providing an electronic database of information; all provided via a medical and healthcare information website.

Second earlier registration

Class 44: Medical and healthcare services; provision of medical and healthcare information and advice; all provided via a medical and healthcare information website.

Third earlier registration

Class 9: Mobile applications; all relating to medical and healthcare.

SECTION 5(2)(B): legislation and case law

56. Section 5(2)(b) of the Act reads as follows:

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

(a) ...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood or association with the earlier trade mark.”

57. Section 5A of the Act is as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

58. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impression created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

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

(i) mere association, in the strict sense that the later mark brings to mind the earlier mark, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

COMPARISON OF THE GOODS AND SERVICES

63. The parties' goods and services that are opposed are set out below (with the opponent's goods and services are limited further to my findings under a fair specification).

The applicant's service	The opponent's goods and services
<p>Class 42: <i>Software as a service (SAAS) for providing access to medical and healthcare records, tracking and advice.</i></p>	<p><u>The first earlier registration</u></p> <p>Class 42: <i>Providing an electronic database of information; all provided via a medical and healthcare information website.</i></p> <p><u>The second earlier registration</u></p> <p>Class 44: <i>Medical and healthcare services; provision of medical and healthcare</i></p>

	<p><i>information and advice; all provided via a medical and healthcare information website.</i></p> <p><u>The third earlier registration</u></p> <p><i>Class 9: Mobile applications; all relating to medical and healthcare.</i></p>
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59. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In *Canon*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market

research companies, who of course act for industry, put the goods or services in the same or different sectors.”

61. I bear in mind the following applicable principles of interpretation from *Sky v Skykick* [2020] EWHC 990 (Ch), paragraph 56 (wherein Lord Justice Arnold, in the course of his judgment, set out a summary of the correct approach to interpreting broad and/or vague terms):

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

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

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

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

62. The goods and services relied upon by the opponent are different in relation to each of the earlier registrations. I will address the comparison between the applicant’s service and the opponent’s three earlier registrations in turn, starting with the first earlier registration.

The first earlier registration

63. In the absence of any submissions or evidence to the contrary, and bearing in mind the case of *Skykick* referenced above, it is my view that “*software as a service (SAAS) for providing access to medical and healthcare records, tracking and advice*” in the applicant’s specification is a type of service that an undertaking provides whereby the user subscribes to or pays a licence fee that allows them to access software that is hosted on the provider’s server in relation to medical and healthcare records. I compared the term to “*providing an electronic database for information; all provided via a medical and healthcare information website*”. In the absence of any submissions or evidence to the contrary, it is my view that this refers to a computer based collection of information, in this case it is limited to being provided via a medical and healthcare information website. I consider that there is an overlap in users, this is on the basis that the limitations for both services are rather specific and as a result may target the same user base. In particular, the parties’ terms are broad terms but they are limited to

healthcare – the medical professional would use both software as a service and databases within their work. However, I consider that there is only a superficial overlap in trade channels. I consider that whilst software as a service is likely to be provided by a specialist provider, providing databases can be provided by admin teams in a healthcare setting that may create a simple database to be used within the medical practice. I do not consider that the services share nature, purpose, method of use and are neither in competition nor complementary. Whilst I am of the view that there is an overlap in users, I consider that any overlap in trade channels is merely superficial. Taking this into account, it is my view that this is insufficient to substantiate similarity. Therefore, I find the services to be dissimilar.

The second earlier registration

65. I was unable to find any similarity between “*software as a service (SAAS) for providing access to medical and healthcare records, tracking and advice*” in the applicant’s specification and “*medical and healthcare services*” and “*provision of medical and healthcare information and advice*” (both being limited by the term ‘*all provided via a medical and healthcare information website*’) in the opponent’s registration. Whilst all the services do pertain to medical and healthcare that is where the similarity between the services ends. Therefore, I find the services to be dissimilar.

The third earlier registration

64. I consider that “*Software as a service (SAAS) for providing access to medical and healthcare records, tracking and advice*” in the applicant’s specification is similar to “*mobile applications; all relating to medical and healthcare*” in the opponent’s specification. Whilst the opponent’s term is limited to medical and healthcare, the opponent’s term could include mobile applications for providing access to medical and healthcare records, tracking and advice; consequently, there may be overlap in terms of purpose and user. I recognise that the goods and services differ in nature and that there may be some difference in the methods of use. However, there may be overlap in trade channels. I consider that the goods and services may be in competition, this is on the basis that a user may wish to pay for one piece of software or subscribe to an ongoing service. However, I do not find them to be complementary. Taking all the above into account, I find the goods and services to be similar to be similar to a medium degree.

65. As I have failed to find any similarity between the applicant’s services and the services in the first and second earlier registration, this is where the oppositions relying on these

registrations will fall away. This is on the basis that for an opposition based on section 5(2)(b) there must be at least some similarity between the goods and services for there to be a finding of a likelihood of confusion.¹⁵ The opposition will continue on the basis of the third earlier registration.

AVERAGE CONSUMER AND THE PURCHASING PROCESS

66. As the law above indicates, it is necessary for me to determine who the average customer is for the parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J (as he then was) described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

67. In respect of the goods and services at issue, I find that the average consumer will be members of the public at large and business users. The goods and services will be selected visually from an online store or the premises of a specialist provider. For example, an IT provider or provider of specialist services in relation to software as a service. Consequently, I do not discount aural considerations in the form of advice received from providers of specialised services or word of mouth recommendations.

68. The cost and frequency of the purchase/selection of the goods and services will range from inexpensive, for mobile applications that are purchased relatively frequently by a member of the public to more expensive, for example software as a service which will be purchased more infrequently by business users but will likely involve an ongoing 'licence' or 'subscription' fee. When selecting the goods and services, I consider that the average consumer will

¹⁵ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

consider factors such as the reliability, ease of use, suitability and price of the goods and services.

69. Taking the above into account, I find the average consumer will pay a medium degree of attention when purchasing the mobile applications that relate the healthcare and medicine. In relation to software as a service, I consider that the average consumer will pay an above medium degree of attention (but not the highest) for the services.

COMPARISON OF THE MARKS

70. The marks to be compared are as follows:

The applicant's mark	The opponent's registrations
Patient Cloud	Patient Access patient access PATIENT ACCESS ("series of three")

71. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of trade marks must be assessed by reference to all the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated, at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

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

73. The applicant's mark consists of the word 'Patient Cloud'. I note that the opponent submits that the dominant element of the applicant's mark lies in the word 'Patient' on the basis of the word 'Cloud' being highly descriptive and non-distinctive of the goods and services at issue. I disagree with the opponent and note that both 'Patient' and 'Cloud' are allusive of the goods and services. I consider that the overall impression of the mark lies in the words 'Patient Cloud' as a whole.

74. The opponent's registration is a series of three word marks of the word 'Patient Access' presented in lower upper and title case respectively. Given that the word only marks cover use of the mark in any standard typeface/font, the same comparison will apply to all three marks in the registration. I note that the opponent submits that the average consumer will place greater emphasis on the first part of the trade mark and are likely to recall the element 'patient'. Further, the opponent submits that the second element of the mark, being 'Access' is a highly descriptive and non-distinctive word in the context of the nature of the goods and services of the earlier registration. Consequently, the opponent submits that 'Access' is less memorable and is less likely to be noticed by consumers and the dominant element of 'Patient Access' is the word 'Patient'. I disagree with the opponent. Contrary to the opponent's submissions the words 'Patient' and 'Access' are both allusive of the goods at issue. It is my view that the average consumer will perceive that the distinctive character of the mark lies in the mark as a whole.

75. Visually, the marks share the word 'Patient'. The marks differ in the second words which are 'Cloud' and 'Access' respectively. Taking this into account, I find the marks to be similar to a medium degree.

76. Aurally, the marks will be pronounced in the ordinary way and the common element 'Patient' will be pronounced identically. The differing elements of 'Cloud' and 'Access' in the respective marks create a point of aural difference. Taking this into account, I consider the marks to be aurally similar to a medium degree.

77. Conceptually, I consider that the average consumer will attribute the meaning of the word 'Patient' to its ordinary dictionary definition as a person receiving medical treatment. This is particularly the case given that both parties' marks are limited to the medical and healthcare field, as a result, this would directly avoid any thought of patient being reference to an acceptance to tolerate delays without becoming anxious. As for the addition of the word

'Cloud' in the applicant's mark, I consider that 'Patient Cloud' will strongly allude to a form of online healthcare services which utilises cloud technology, "the cloud" being a data centre where files and programs can be stored and quickly accessed, over the internet, rather than on physical data centres and hard drives. I have noted that I must be cautious with this approach, and have taken into consideration the decision in *Chorkee Ltd v Cherokee Inc.*, Case BL O/048/08, where Ms Anna Carboni as the Appointed Person described the limits to which judicial notice can be used in order to find that the average consumer is aware of the particular facts. In relation to the opponent's registration, I am of the view that 'Patient Access' will strongly allude to a healthcare service where the patient is able to control their access to healthcare. Taking all the above into account, due to the shared concept of patient and its connotation with healthcare, I find the marks to be conceptually similar to a medium degree.

DISTINCTIVE CHARACTER OF THE EARLIER REGISTRATIONS

78. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

"22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C- 108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant Section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)."

79. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the

goods or services, to those with a high inherent distinctive character, such as invented words which have no allusive qualities.

80. The opponent has not pleaded that its registration has acquired enhanced distinctive character through use, despite this, I have considered the evidence in support of enhanced distinctiveness.

81. The earlier registration consists of the words 'Patient Access'. They are both ordinary dictionary words. Given that the goods at issue have been limited to health and medical care, I find the registration will be perceived by the average consumer as an allusive term that suggests goods used for the provision of healthcare, i.e. 'a patient accessing healthcare'. I find that the registration has a low degree of inherent distinctive character.

86. I do not consider that the evidence is sufficient to demonstrate a claim in regard to the opponent's registrations in the UK. Enhanced distinctiveness must be established in relation to the UK market because the test for confusion will be in reference to the average consumer who is a member of the UK general public. Whilst I recognise that the opponent has provided evidence of the user base in the UK, I note that I am unable to identify whether the use of the registration was geographically widespread within the UK. Further, I am mindful that the opponent submits in its witness statement that its expenditure in relation to marketing and advertising was spent on items such as brand development, websites and apps, marketing campaigns and social media pages. This alongside the evidence of Google Analytics of the marketing and social media evidence indicates that effort has been undertaken in promoting the registration. However, I recognise that no figures in relation to expenditure have been provided by the opponent. Further, I note that the user base evidence suggests that use of the registration has been intensive but not longstanding. In addition, the opponent has provided no evidence of the proportion of the relevant class of persons who, because of the mark, identify goods or services as originating from a particular undertaking nor has it provided any evidence of the market share of the opponent's registration. Taking this all into account, it is my view that the opponent's evidence does not point to the registration having acquired any enhanced distinctiveness throughout the UK through use.

LIKELIHOOD OF CONFUSION

82. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer

realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle, i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services or vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer of the goods and services and the nature of the purchasing process. In doing so, I must be mindful of the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

83. I have found the marks to be visually, aurally and conceptually similar to a medium degree. I have found the opponent's registration to be inherently distinctive to a low degree. I have found the services to be similar to a medium degree. I have found that the average consumer will pay an above medium degree of attention (but not the highest) in relation to the services at issue and a medium degree of attention in relation to the goods at issue. I have found the purchasing process to be predominantly visual, however, I do not discount that there will be aural considerations.

84. Taking all the above and the principle of imperfect recollection into account, I do not consider that the parties' marks will be mistakenly recalled or misremembered for one another. I recognise that the marks share the same common element, being 'Patient' which is in favour of the opponent. Despite this, I consider that the visual and aural differences between the marks, particularly the words 'Cloud' and 'Access' at the end of the parties' marks will be sufficient to enable the average consumer to differentiate between them. This will allow average consumers to sufficiently recall the marks. Consequently, I consider there to be no likelihood of direct confusion between the marks.

85. Indirect confusion involves recognition by the average consumer of the difference between the marks. Mr Purvis QC in the *L.A Sugar Limited* case sets out three main categories of indirect confusion and that indirect confusion 'tends' to fall in one of them.¹⁶ The three categories are as follows:

¹⁶ Paragraphs 16 & 17 of *L.A Sugar Limited v By Black Beat Inc*, Case BL-O/375/10

“(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.). BL O/375/10 Page 15 of 16

(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).”¹⁷

86. Whilst I note that the examples set out by Mr Purvis are not exhaustive, I note the recent case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*,¹⁸ wherein Arnold LJ referred to the comments of James Mellor QC sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he stated that a finding of a likelihood of indirect confusion is not a consolidation prize and that there needs to be a reasonably special set of circumstances in order to get indirect confusion where there is no likelihood of direct confusion. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

87. While I have found the opponent’s registration to have a low degree of inherent distinctive character, being a factor in the applicant’s favour, this does not automatically give rise to a finding of no likelihood of indirect confusion between the parties.¹⁹ Upon recognising the differences, I do not consider that there is a basis for the average consumer to believe that an undertaking ‘Patient Access’ would rebrand itself as, or create the sub-brand of, ‘Patient Cloud’ or vice versa. I consider that the shared element ‘Patient’ in the marks will be seen as purely coincidental and no more than a bringing to mind of the other’s mark in a situation as envisaged by Mr James Mellor Q.C. in *Duebros Limited v Heirler Cenovis GmbH*.²⁰ It is my view that the average consumer is likely to assume that the use of the common element ‘Patient’ is a coincidence due to its allusive nature, rather than there being a connection between the undertakings responsible for the marks. I do not consider that the average

¹⁷ Ibid, Paragraph 17

¹⁸ [2021] EWCA Civ 1207

¹⁹ *L’Oréal SA v OHIM*, Case C-235/05 P

²⁰ Case BL O/547/17

consumer would believe that the opponent only will be using the word 'Patient' to describe its undertaking in relation to healthcare and medical goods and services. This is especially the case given that I have found that the average consumer will pay between a medium to above medium degree of attention. Taking all the above factors into account, I do not consider there to be a likelihood of indirect confusion between the marks.

CONCLUSION

88. The opposition has failed. As a result, the application will proceed to registration.

COSTS

89. The applicant has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the sum of £950 as a contribution towards its costs. The sum is calculated as follows:

Preparing a counterstatement, considering the other side's statement and drafting submissions	£350
Preparing evidence and considering and commenting on the other side's evidence	£600
Total	£950

90. I, therefore, order Egton Medical Information Systems to pay Tiny Medical Apps Ltd the sum of £950 as a contribution towards its costs. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 26th day of May 2023

A KLASS

For the registrar