

**ON APPEAL FROM THE UK INTELLECTUAL PROPERTY OFFICE**

**Friday, 31<sup>st</sup> May 2024**

**Before:**

**MR. GEOFFREY HOBBS KC  
(Sitting as the Appointed Person)  
(VIA MS TEAMS)**  
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**In the Matter of the Trade Marks Act 1994 (as amended)**

**- and -**

**In the Matter of International Trade Mark Registration (UK) No. 1656093 for the mark  
DAY6 in Classes 9, 35, 38 and 41 in the name of JYP Entertainment Corporation  
(Appellant)**

**- and -**

**In the Matter of Opposition No. 600002611 thereto by Victura, Inc  
(Respondent)**  
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**In the Matter of an Appeal to the Appointed Person Mr. Geoffrey Hobbs KC**  
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*(Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,  
2nd Floor, Quality House, 6-9 Quality Court,  
Chancery Lane, London WC2A 1HP  
Telephone No: 020 7067 2900. Fax No: 020 7831 6864  
e-mail: [info@martenwalshcherer.com](mailto:info@martenwalshcherer.com))*  
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**MR. ALAN FIDDES, Patent Attorney (Murgitroyd) for the Appellant**

**MR. MICHAEL DOWNING, Patent Attorney (Downing IP Ltd) for the Respondent**

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**APPROVED DECISION**  
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Transcript of the Stenograph Notes Marten Walsh Cherer Ltd.,  
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.  
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE  
Email: [info@martenwalshcherer.com](mailto:info@martenwalshcherer.com)  
Web: [www.martenwalshcherer.com](http://www.martenwalshcherer.com)

THE APPOINTED PERSON:

1. On 31 October 2022, Victura Inc filed a Notice and Grounds of Opposition to JYP Entertainment Corporation's request for protection of its International Trade Mark Registration No. 1656093 in the United Kingdom. The Opponent objected to the Applicant's request on the basis that it was thereby seeking to protect the trade mark **DAY6** for use in relation to goods and services which were identical or relationally similar to those for which its trade mark **SIX DAYS** was protected in the United Kingdom by prior registration for various forms of computer game software in Class 9 under International Trade Mark Registration No.1593050 dated 2 April 2021.
2. This was a fast-track Opposition which proceeded to determination under section 5(2)(b) of the Trade Marks Act 1994 without evidence from either party and without recourse to a hearing.
3. For the reasons given by Ms. Leanne Fayter on behalf of the Registrar of Trade Marks, in a carefully considered decision issued under reference BL O/0089/24 on 6 February 2024, the Opponent's objection was upheld in relation to the Applicant's request for protection in respect of: "Virtual reality game software; downloadable mobile game software; video game cartridges and cassettes" in Class 9 and "Game services using a 3D printer; gaming services; providing user rankings for entertainment or cultural purposes; providing on-line entertainment in the nature of game tournaments and game shows" in Class 41.
4. The basis on which the Hearing Officer came to that conclusion is sufficiently apparent for present purposes from paragraphs [53] to [57] of her Decision:

“Likelihood of confusion

53. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one IR for the other, while indirect confusion is where the average consumer realises the IRs 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 IRs may be offset by a greater degree of similarity between the respective goods and services and vice versa. It is necessary for me to keep in mind the distinctive character of the earlier IR, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between IRs and must instead rely upon the imperfect picture of them that he has retained in his mind.

54. The following factors must be considered to determine if a likelihood of confusion can be established:

- The IRs are visually and aurally similar to a medium degree.
- I have found all of the IRs to be conceptually similar but only to a low degree.
- I have found the opponent’s IRs to be inherently distinctive to no more than a medium degree.
- I have identified the average consumer for the goods and services to be members of the general public who will select the goods and services primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process.
- I have found the parties’ goods and services to be ranging from identical to similar to no more than a medium degree.

55. The low level of conceptual similarity between the marks could point in favour of the holder. In *Picasso Estate v OHIM*, Case C-361/04 P, the CJEU found that:

“20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear

and specific so that it can be grasped immediately by the relevant public, the conceptual differences observed between those signs may counteract the visual and phonetic similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law.”

56. However, I recognise that conceptual differences do not always overcome visual and/or aural similarities. For example, in *Diramode S.A. v Richard Turnham and Linda Turnham* (BL O/566/19), Mr Geoffrey Hobbs QC, sitting as the Appointed Person, overturned a decision that the conceptual differences between PIMKIE and PINKIE were sufficient to outweigh the visual and aural similarities between them. Mr Geoffrey Hobbs QC found that:

‘Even though one of the marks in issue refers to a clear and immediately apparent concept and the other does not have a clear meaning which can be immediately perceived by the relevant public, the degree of visual and aural similarity between them may still be sufficient to give rise to the existence of a likelihood of confusion’.

57. Whether or not the conceptual differences are sufficient to outweigh the visual and aural similarities must be decided on the facts of each particular case. However, in this case, I consider it unlikely that the conceptual differences between the IRs will offset the visual similarities, particularly in what I have found to be a predominantly visual purchasing process. This is particularly the case bearing in mind that the IRs are very similar inverted versions of each other (SIX DAYS vs DAY6), and the average consumer rarely has the chance to make direct comparisons between IRs and, instead, must rely upon the imperfect picture of them retained in its mind. I therefore consider that the IRs are likely to be mistakenly recalled or misremembered as each other. The average consumer could easily imperfectly recall the order of the elements and overlook the space in the opponent’s IR (which separates the two elements). The consumer could also imperfectly recall the presentation of the number six (SIX vs 6), and overlook the letter “S” at the end of the word DAYS in the opponent’s IR. This results in a likelihood of direct confusion, even where there is no more than a medium degree of similarity between the goods and services, due to the effect of the interdependency principle.”

5. The Applicant now appeals to an Appointed Person under section 76 of the 1994 Act, contending that the Hearing Officer’s decision was wrong and should be set aside for the reasons summarised in the following terms in the Grounds of Appeal in its Form TM55P dated 4 March 2024:

“Whilst the applicant accepts that the goods for which the application has been refused in Classes 9 and 42 (sic) are the same as and/or similar to those for which the opponent’s mark is registered in Class 9, the applicant does not agree that the applicant’s mark DAY6 is confusingly similar to the opponent’s mark SIX DAYS such that the public is likely to confuse one mark for the other. The applicant therefore submits that the decision of the hearing officer to refuse registration of the applicant’s mark for the above-mentioned goods and services in Classes 9 and 42 (sic) in this case is wrong, taking into account the provisions of Section 5(2)(b) of the Trade Marks Act, 1994 and the relevant case law. Even taking into account imperfect recollection on the part of purchasers, the marks are so obviously different visually, aurally and conceptually, with the mark applied for referring to one specific day using a word with a numeral, with the whole mark having no gaps, whilst the opponent’s mark refers to a span of time of six days using those words, without any numerals and with the normal gap between the two words, that purchasers are unlikely to confuse the two. Neither the words “DAY/DAYS” nor the numeral/word “6/SIX” are distinctive by themselves, so any distinctiveness lies in the combinations as filed by the parties. The applicant therefore disagrees with the hearing officer’s conclusion that the marks would be confused one for the other as the numeral 6 is visually different from the word SIX, even if they mean the same thing. Any alleged confusion would thus have the customer have to 1) reverse the order of the words; 2) confuse the number of days; 3) confuse a mark of one word with that of two and vice versa. Given the number of steps that this alleged confusion would involve, the applicant submits that there are enough differences between the marks compared overall that even the most casual of purchasers would think twice before making a purchase and ensure that they were acquiring the correct product which they are seeking. The applicant accordingly requests that the hearing officer’s decision to partially refuse the applicant’s mark in respect of the goods and services in Classes 9 and 42 (sic) be reversed and that the applicant’s mark be permitted to proceed to acceptance. The applicant further requests that the award of costs in favour of the opponent be reversed and that costs be awarded in the applicant’s favour.”

6. These reasons were further developed in written and oral submissions at the hearing before me. They boil down to the proposition that the Hearing Officer attached too much significance to the similarities and not enough significance to the differences between the marks in issue. However, that could only be a sufficient basis for setting aside what was a factual determination made from a legally correct perspective if the

Hearing Officer's assessment was rationally insupportable. That cannot be said to be the case.

7. The Hearing Officer's task under section 5(2)(b) was to make a realistic appraisal of the net effect of the similarities and differences between the marks and the goods and services in issue, giving the similarities and differences as much or as little significance as the relevant average consumer (who is taken to be reasonably well-informed and reasonably observant and circumspect) would have attached to them at the relevant point in time, which in this case was the Applicant's priority date of 22 July 2021.
8. It was necessary to consider as part of that process how the interplay between the visual, aural and conceptual aspects of the marks in issue would affect the way in which they were liable to be perceived and remembered. This was important. The outcome of the Opposition ultimately depended upon whether the marks were or were not **sufficiently different** from a conceptual point of view to be regarded as **insufficiently similar** from a visual or aural point of view to give rise to the existence of a likelihood of confusion. I put the matter in that way in order to accommodate the consideration that conceptual differences do not always or necessarily serve to eliminate the effect of other similarities, as can be illustrated by considering the potential for a likelihood of confusion to be precipitated by, for example, concurrent use of the word marks **CENTURY** and **SENTRY** or the word marks **PIMKIE** and **PINKIES**.
9. The Hearing Officer was fully entitled to adopt the position she did in relation to the conceptual aspects of the marks as set out in paragraph [57] of her decision (see above). It is clear to me as it was to her that the marks would quite easily become

tangled up with one another in the perceptions and recollections of consumers exposed to concurrent use of them for goods and services of the kind with respect to which she found them to be in conflict. I do not accept that it requires any process of mental gymnastics or dismemberment of the marks in issue in order to arrive at that view.

10. All things considered, I am satisfied that it was open to the Hearing Officer to come to the conclusion she did under section 5(2)(b) of the Act and that the appeal from her determination must be dismissed.

**(Proceedings continued, please see separate transcript)**

11. Approaching the question of costs in the way that I ordinarily do in accordance with my decision in AMARO GAYO COFFEE Trade Mark, I think it would be fair and reasonable to order the unsuccessful Applicant to pay £1,500 by way of contribution to the costs of the successful Opponent on this appeal. That sum is to be paid within 21 days of today's date and paid in addition to the sum of £450 awarded by way of costs in respect of the Registry proceedings by the Hearing Officer in the tribunal below.

**(Proceedings continued)**