

O/0777/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 4085224
IN THE NAME OF DANIEL MARSHALL
TO REGISTER THE FOLLOWING TRADE MARK:

spitnights

IN CLASS 41

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 451351
BY SPIT PRODUCTIONS LTD

Background and pleadings

1. Daniel Marshall (“the applicant”) applied to register the trade mark **spitnights** (“the applicant’s mark”) in the UK on 8 August 2024, under number 4085224. It was accepted and published in the Trade Marks Journal on 13 September 2024 in respect of the following services:

Class 41: Arranging for ticket reservations for shows and other entertainment events; Concert booking; Booking of seats for entertainment events; Entertainment; Television entertainment; Musical entertainment; Music entertainment services; Television entertainment services; Education, entertainment and sports; Musical entertainment services; Live entertainment; Booking of entertainment; Popular entertainment services; Corporate hospitality (entertainment); Entertainment, sporting and cultural activities; Live entertainment production services; Arranging of musical entertainment; Provision of live entertainment; Staged light entertainment services; Arranging of festivals for entertainment purposes; Exhibition services for entertainment purposes; Arranging of entertainment shows; Organisation of entertainment services; Conducting of entertainment events; Entertainment services in the form of concert performances; Festivals (Organisation of -) for entertainment purposes; Services providing entertainment in the form of live musical performances; Entertainment in the form of live musical performances (Services providing -); Entertainment in the form of television programmes (Services providing -); Cultural activities; Cultural services; Organizing cultural and arts events; Organisation of cultural events; Organisation of entertainment and cultural events; Conducting of cultural events; Arranging of cultural events; Organisation of exhibitions for cultural or educational purposes; Organising community cultural events; Organization of exhibitions for cultural and educational purposes; Organization of cultural shows; Arranging of festivals for cultural purposes; Arranging of exhibitions for cultural or educational purposes; Organization of events for cultural purposes; Organising events for cultural purposes; Arranging of exhibitions for cultural purposes; Exhibitions (Arranging -) for cultural purposes; Entertainment services in the nature of arranging social entertainment events; Music concerts; Recording of music; Music recording; Music performances; Jazz music entertainment services; Presentation of music

concerts; Performance of music; Live music services; Live music shows; Live musical concerts; Sound recording and video entertainment services; Musical concert services; Writing of texts; Publication of music books; Publication of lyrics of songs in book form; Publishing of music; Publication of music; Writing of texts, other than publicity texts; Texts (Writing of -), other than publicity texts; Writing of texts [other than publicity texts]; Performance of dance, music and drama; Music performance services; Live performance services; Performance of music and singing; Live band performance services; Live stage shows; Live comedy shows; Production of live shows; Live show production services; Production of shows; Performances (Presentation of live -); Live performances (Presentation of -).

2. On 12 December 2024, Spit Productions Ltd (“the opponent”) opposed the trade mark on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). It relies upon its trade mark 4040754 which is a series of two marks, **SPIT** and **Spit**. Since the marks in the series only differ in the use of either upper case or title case, for ease of reference I will refer to them as “**the opponent’s mark**” unless it becomes necessary for me to distinguish between them. The opponent’s mark was filed on 18 April 2024 and became registered on 12 July 2024. It stands registered for a range of services in class 41. For opposition purposes, the opponent relies on the following services only:

Class 41: Music entertainment services; Organisation of cultural events; Organising community cultural events; Organising events for cultural purposes; Conducting of cultural events; Organization of events for cultural purposes; Organizing cultural and arts events; Arranging of cultural events; Festivals (Organisation of -) for entertainment purposes; Music concerts; Recording of music; Music recording; Presentation of music concerts; Performance of music; Live music services; Live musical concerts; Musical concert services; Arranging of musical entertainment; Publishing of music; Publication of music; Performance of music and singing; Organisation of live musical performances; Artistic management of musical shows; Production of music concerts; Direction of music performances.

3. The opponent is opposing the following services only:

Musical entertainment services; Organisation of cultural events; Organising community cultural events; Organising events for cultural purposes; Conducting of cultural events; Organization events for cultural purposes; Organizing cultural and arts events; Arranging of cultural events; Festivals (Organisation of -) for entertainment purposes; Music concerts; Recording of music; Music recording; Presentation of music concerts; Performance of music; Live music services; Live musical concerts; Musical concert services; Arranging of musical entertainment;¹ Publishing of music; Publication of music; Performance of music and singing; Musical entertainment; Music entertainment services; Provision of live entertainment; Staged light entertainment services; Cultural activities; Cultural services; Organization of cultural shows; Live stage shows; Entertainment services in the nature of arranging social entertainment events; Performance of dance, music and drama.

4. As the filing date of the opponent's mark is earlier than the filing date of the applicant's mark, the opponent's mark constitutes an earlier mark in accordance with section 6 of the Act. However, as it had not been registered for five years or more at the filing date of the application, it is not subject to the proof of use requirements specified within section 6A of the Act. As a consequence, the opponent may rely upon all of the services identified without having to establish genuine use.

5. In its statement of grounds, the opponent argues that the competing marks are similar, and that the parties' services are similar. On this basis, the opponent submits that there is a likelihood of confusion.

6. The applicant filed a counterstatement denying the ground of opposition.

7. Neither party is professionally represented. No hearing was requested, and only the applicant filed submissions, which were filed during the evidence rounds. This decision is taken following careful consideration of all the papers before me.

Preliminary issue 1: grounds

8. The opponent originally indicated on its statement of grounds that it intended to oppose the application based on section 5(2)(b) and section 3(1)(c). On 9 May 2025,

¹ I note that this term is duplicated at question 8 on the Form TM7.

the Registry advised the opponent that it should file evidence in support of its claim under section 3(1)(c). No evidence or submissions were received, and so on 15 August 2025, the Registry confirmed that the ground under section 3 would be struck from the opposition. I have therefore disregarded the parties' submissions made in relation to section 3(1)(c).

Preliminary issue 2: evidence

9. In its submissions filed during the evidence rounds, the applicant filed a screenshot in support of its submissions. However, it was informed by the Registry on 18 December 2025 that the additional material constituted evidence, and that it would need to be submitted with a TM9R and a witness statement on or by 8 January 2026. However, nothing further was received. On this basis, I have not taken into consideration the screenshot or the submissions made in relation to it.

Relevance of EU law

10. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018² requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Section 5(2)(b)

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

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

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

² As amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023

12. Section 5A states: [...] “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.”

13. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*:³

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;
- (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible

³ [2025] UKSC 25

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 the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

Comparison of services

14. In *Canon*,⁴ the Court of Justice of the European Union (“CJEU”) stated, at paragraph 23 of its judgment, that when considering whether services are similar, all the relevant factors relating to the services should be taken into account. The CJEU stated that those factors include their nature, intended purpose, method of use and whether they are in competition with each other or are complementary.

15. The relevant factors identified by Jacob J. (as he then was) in *Treat*⁵ for assessing similarity were:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;

⁴ Case C-39/97

⁵ [1996] R.P.C. 281

- (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.

16. In *Kurt Hesse v OHIM*,⁶ the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between services. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*,⁷ the General Court (“GC”) stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking.”

17. In *Gérard Meric v OHIM*,⁸ the GC confirmed that even if services are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or

⁶ Case C-50/15 P

⁷ Case T-325/06

⁸ Case T- 133/05

where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

18. The services to be compared are as follows:

The opponent's services	The applicant's services
<i>Class 41: Music entertainment services; Organisation of cultural events; Organising community cultural events; Organising events for cultural purposes; Conducting of cultural events; Organization of events for cultural purposes; Organizing cultural and arts events; Arranging of cultural events; Festivals (Organisation of -) for entertainment purposes; Music concerts; Recording of music; Music recording; Presentation of music concerts; Performance of music; Live music services; Live musical concerts; Musical concert services; Arranging of musical entertainment; Publishing of music; Publication of music; Performance of music and singing; Organisation of live musical performances; Artistic management of musical shows; Production of music concerts; Direction of music performances.</i>	<i>Class 41: Musical entertainment services; Organisation of cultural events; Organising community cultural events; Organising events for cultural purposes; Conducting of cultural events; Organization events for cultural purposes; Arranging of exhibitions for cultural purposes; Exhibitions (Arranging -) for cultural purposes; Organizing cultural and arts events; Arranging of cultural events; Festivals (Organisation of -) for entertainment purposes; Music concerts; Recording of music; Music recording; Presentation of music concerts; Performance of music; Live music services; Live musical concerts; Musical concert services; Arranging of musical entertainment; Publishing of music; Publication of music; Performance of music and singing; Musical entertainment; Music entertainment services; Provision of live entertainment; Staged light entertainment services; Cultural activities; Cultural services; Organization of cultural shows; Live stage shows; Entertainment services in</i>

	<i>the nature of arranging social entertainment events; Performance of dance, music and drama.</i>
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19. Neither party has highlighted what they feel are the best comparators between the competing services. In its statement of grounds, the opponent submits that “[t]he services that both we (the opposition) and they (the applicant) provide are similar – they have been running both similar and identical activities and events”.⁹ It also argues that both parties “have held cultural events, such as poetry nights, and musical based activities which fall under entertainment and live shows”. It submits that the parties’ services both engage “similar or the same audiences”. In its counterstatement, the applicant states “[w]e deny the claims made by our opponents in the TM7 form”.¹⁰

20. For the purposes of comparing services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons.¹¹ I have therefore assessed the applicant’s services by dividing the terms into groups as per below.

Musical entertainment services; Musical entertainment; Music entertainment services.

21. The applicant’s services are all self-evidently identical with the opponent’s *music entertainment services*. However, as the opponent has only pleaded that the competing parties’ services are similar, I find instead that the services are similar to a very high degree.

Music concerts; Performance of music; Live music services; Live musical concerts; Musical concert services; Presentation of music concerts; Arranging of musical entertainment; Performance of music and singing; Performance of [...] music [...].

22. It is my view that the services are all narrower terms which fall within the opponent’s broader term *musical entertainment services*. They are therefore identical

⁹ At Q9 of the statement of grounds. Whilst the opponent states that the activities and events are similar and identical, it is my view that the core of its overall pleading is that the parties’ services are similar. I have therefore proceeded on this basis.

¹⁰ At section 9. Whilst it does not specifically submit that the parties’ services are dissimilar, it has provided a blanket denial of all the opponent’s claims, including the opponent’s submission that the parties’ services are similar.

¹¹ *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38

under the principle in *Meric*. However, in line with the opponent's pleadings, I find instead that the services are similar to a very high degree.

Organisation of cultural events; Organising community cultural events; Organising events for cultural purposes; Conducting of cultural events; Organization events for cultural purposes; Organizing cultural and arts events; Arranging of cultural events.

23. The applicant's services above are expressed identically to the opponent's respective terms in class 41. However, in line with the opponent's pleadings, I find instead that the services are similar to a very high degree.

Cultural activities; Cultural services; Organization of cultural shows

24. It is my view that the applicant's services above are identical to the opponent's services under the principle in *Meric*. This is on the basis that *cultural activities* and *organization of cultural shows* are all narrower terms which fall within the opponent's broader term *conducting of cultural events*, and that *cultural services* is a wider term which incorporates the opponent's *conducting of cultural events*. Whilst it is my view that the services are therefore identical, in line with the opponent's pleadings I find instead that the services are similar to a very high degree.

Festivals (Organisation of -) for entertainment purposes;

25. The applicant's services are self-evidently identical with the opponent's *festivals (Organisation of -) for entertainment purposes*. However, in line with the opponent's pleadings, I find instead that the services are similar to a very high degree.

Recording of music; Music recording.

26. The applicant's terms are self-evidently identical with the opponent's terms *Recording of music* and *Music recording*. However, in line with the opponent's pleadings, I find instead that the services are similar to a very high degree.

Publishing of music; Publication of music.

27. The applicant's terms are self-evidently identical with the opponent's terms *Publishing of music* and *Publication of music*. However, in line with the opponent's pleadings, I find instead that the services are similar to a very high degree.

Provision of live entertainment.

28. It is my view that the opponent's *live musical concerts* are narrower services that fall within the applicant's services. It is therefore my view that the parties' services are identical under the principle in *Meric*. However, in line with the opponent's pleadings, I find instead that the services are similar to a very high degree.

Staged light entertainment services.

29. It is my view that these services share a degree of similarity with the opponent's *live music services*. The services' nature and purpose overlap in that both are types of live entertainment services which are used to entertain the audience. However, they differ as to the exact type, given that the applicant's services specifically relate to light shows, whereas the opponent's services specifically relate to music. The users will broadly overlap in that they will be people interested in live entertainment (and at times will overlap where users enjoy multiple types of performances), but they will differ where users have a specific interest in light or music. In my experience, live entertainment is often marketed through the same trade channels. However, they will differ as light shows and music concerts will often be listed as separate genres of entertainment within those trade channels. The services are not complementary as one is not essential to the other. However, they may be in competition with one another as users may choose between the type of entertainment they would like to see when they are researching options for things to do on a specific date. Taking all of these factors into account, I find that the services are similar to a medium degree.

Live stage shows.

30. It is my view that the opponent's *live musical concerts* (which will be performed as live stage shows) are narrower services that fall within the applicant's wider services. It is therefore my view that the parties' services are identical under the principle in *Meric*. However, in line with the opponent's pleadings, I find instead that the services are similar to a very high degree.

Performance of dance, [...] and drama.

31. It is my view that these services may be included within the applicant's wide term *conducting of cultural events*, which are likely to include dance-based and drama-based performance events. It is therefore my view that the parties' services are identical under the principle in *Meric*. However, in line with the opponent's pleadings, I find instead that the services are similar to a very high degree.

32. However, if I am wrong in this finding, it is my view that the applicant's services are similar to the opponent's *performance of music*. The services' nature broadly overlaps in that both are types of entertainment services related to the arts, although they differ in that the applicant's services are specific to performances of dance and drama, whereas the opponent's services are specific to performances of music. The purpose of both services is to entertain the audience. The users of both services will be used by those interested in the arts (and at times will overlap where users enjoy multiple types of performances), but they will differ where users have a specific interest in dance, drama, or music. In my experience, arts performances are often marketed through the same trade channels. However, they will differ as dance, drama, and music will often be listed as separate genres of entertainment within those trade channels. The services are not complementary as one is not essential to the other. However, they may be in competition with one another as users may choose between the type of entertainment they would like to see when they are researching options for things to do on a specific date. Taking all of these factors into account, I find that the services are similar to a medium degree.

Entertainment services in the nature of arranging social entertainment events.

33. Neither party has suggested a meaning for this term or offered an example to demonstrate what it entails. Based on my own understanding, "social entertainment events" will incorporate events such as speed dating or friendship meet-up groups. It is my view that the applicant's services share a degree of similarity with the opponent's *arranging of cultural events*. The services' nature and purpose broadly overlap in that both are types of event arrangement services, although they differ in that the applicant's services are specific to social entertainment events, whereas the opponent's services are specific to cultural events. The broad purpose of both services

is to arrange events for others. The users will broadly overlap in the sense that both services will be used by those wishing to arrange events, but will differ according to the type of event. It is my view that services relating to the arrangement of events will be marketed through the same trade channels. However, they will differ as they are likely to be listed as separate genres within those trade channels. The services are not complementary as one is not essential to the other. However, given that users are likely to have an idea of what type of entertainment they wish to arrange before they engage with the services, it is my view that the services relating to the arrangement of cultural events are unlikely to be in competition with services relating to the arrangement of social events. Taking all of these factors into account, I find that the services are similar to a low to medium degree.

Average consumer and the purchasing act

34. In *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*,¹² the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)*,¹³ where he pointed out that:

- (a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;
- (b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;
- (c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;

¹² [2025] UKSC 25

¹³ [2024] EWCA Civ 262

- (d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by enabling courts and tribunals to determine such issues so far as possible without the need for evidence;
- (e) The average consumer's level of attention varies according to the category of goods or services in question; and
- (f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

35. The average consumer for the services will be the general public. The cost of purchase is likely to vary greatly, depending on the type of services at issue, and the type of entertainment package that the consumer wishes to purchase. Several factors may influence consumers, such as the expertise and reputation of the organisation providing the entertainment services, the availability of the provider, and the suitability for their needs. Taking into account all of these factors, it is my view that the average consumer is likely to pay at least a medium degree of attention. The consumer will choose the services after seeing the mark on signage or on the premises. They may also select the services after seeing advertisements or reviews in printed publications or online via websites and/or social media. The visual component is therefore likely to dominate the selection process, but I also do not discount the role that aural selection may play, especially when receiving word-of-mouth recommendations and when discussing the services with others via the telephone.

Comparison of marks

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

created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*¹⁴ 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.”

37. It would be wrong, therefore, to dissect the trade marks artificially, 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.

38. The respective trade marks are shown below:

The opponent's mark	The applicant's mark
SPIT	spitnights
Spit	

39. Neither party comments on the competing marks' distinctive and dominant elements or the marks' overall impressions.

40. The opponent's mark is a series of plain word marks which consist exclusively of the word “SPIT”/“Spit”. In the first mark of the series, the word is written in upper case and in the second mark of the series, the word is written in title case. As word-only marks with no additional elements, I find that the overall impression lies in the word “SPIT”/“Spit”.

41. The applicant's mark is a plain word mark which consists exclusively of the word “spitnights”. As a word-only mark with no additional elements, I find that the overall impression lies in the conjoined word “spitnights”. However, for those services that

¹⁴ Case C-591/12P

‘nights’ is allusive in relation to, for reasons discussed within the conceptual comparison below, the overall impression will be predominated by the distinctive ‘spit’ element. The ‘nights’ element still contributes, but to a lesser degree.

My approach

42. As the opponent’s marks only differ as to the type of case, for ease of reference, I will focus my assessment on the mark “Spit” in the series of two. However, for the avoidance of doubt, the same findings will also apply to the opponent’s other mark “SPIT”. This is because word marks are protected regardless of the case type, as shown in *LA Superquímica v European Union Intellectual Property Office (EUIPO)*,¹⁵ in which the GC held at [39] that word-only marks protect the word or words contained in the mark in whatever case, colour or typeface. The difference in capitalisation between “Spit” and “SPIT” is therefore not significant. I will therefore continue to refer only to the opponent’s mark “Spit”.

Visual comparison

43. The opponent does not make any submissions in relation to the competing marks’ visual similarity. In its counterstatement, the applicant submits that the competing marks are “visually... different”.¹⁶

44. The competing marks are visually similar as the opponent’s mark is ‘Spit’, which is visually identical to the first four letters ‘spit’ in the applicant’s mark. As previously explained, word-only marks are protected whatever the case, colour, or typeface, and therefore the difference in case is not significant. The competing marks differ visually as the applicant’s mark also contains the five-letter word ‘night’.

45. Bearing in mind my analysis of the marks’ overall impressions, I am of the view that the marks are visually similar to a medium degree.

¹⁵ Case T-24/17

¹⁶ Q8 of counterstatement

Aural comparison

46. The opponent does not make any submissions in relation to the competing marks' aural similarity. In its counterstatement, the applicant submits that the competing marks are "phonetically... different".¹⁷

47. The opponent's mark is a one-syllable word 'Spit', which will be pronounced in the ordinary way. The applicant's mark is a two-syllable conjoined word 'spitnight', which will be pronounced as 'spit-night'. The competing marks are aurally similar as the opponent's mark is 'Spit', which is aurally identical to the first four letters 'spit' in the applicant's mark. The competing marks differ aurally as the applicant's mark also contains the one-syllable word 'night', which does not feature in the opponent's mark.

48. Bearing in mind my analysis of the marks' overall impressions, I am of the view that the marks are aurally similar to a medium degree.

Conceptual comparison

49. The opponent does not make any submissions in relation to the competing marks' conceptual similarity. In its counterstatement, the applicant submits that the competing marks are "conceptually different".¹⁸ It also submits that "[t]he mark spitnights remains... conceptually distinct from SPIT and functions as a separate coined term".¹⁹

50. The Cambridge Dictionary defines "spit" in several ways, including as a noun which means "saliva, especially when it is outside the mouth", which is consistent with my own understanding of the word. It is my view that the opponent's mark "Spit" will be understood based on this dictionary definition by a significant proportion of consumers.

51. As for the applicant's mark, the conjoined word 'spitnights' is not dictionary defined and I have no evidence regarding how it will be understood by consumers. As such, I consider it in totality to be an invented word. However, I keep in mind that being an invented word does not exclude the possibility that it is endowed with a meaning.²⁰ The average consumer will invariably break down an invented word into components

¹⁷ Q8 of counterstatement

¹⁸ Q8 of counterstatement

¹⁹ Page 1 of the applicant's submissions

²⁰ For example, see *Usinor v OHIM — Corus UK (GALVALLOY)*, T-189/05, para 65

that suggest a meaning or resemble known words,²¹ and therefore, an invented word may still be capable of conveying a conceptual message.

52. I am of the view that, when encountering the conjoined term “spitnights”, the average consumer will extrapolate the two individual words ‘spit’ and ‘nights’, given that both words are dictionary-defined words that will be readily recognised by consumers. Spit being understood as I have outlined above, and nights being defined by Cambridge Dictionary as “at night, especially every night”. Given that ‘nights’ is a common everyday word, it is my view that a very significant proportion of consumers will understand the word in this way. Whilst this may strongly allude to the concept of entertainment being conducted at night (as opposed to matinee performances), I am of the view that the word “nights” is not allusive in relation to all of the applicant’s services. This is because services such as those relating to the recording or publication of music are typically conducted during regular daytime working hours, and therefore “nights” is not allusive of night-time performances in relation to them. It is also my view that the words ‘spit’ and ‘nights’ do not combine to form a unitary meaning which differs in totality from the meaning of the individual words. Rather, each word retains its individual dictionary-defined meaning.

53. The competing marks are therefore conceptually similar as they both share the identical dictionary-defined concept of “spit”. The competing marks differ conceptually due to the inclusion of the additional concept “nights” in the applicant’s mark. Taking these factors into account, it is my view that the marks are conceptually similar to a medium degree.

Distinctive character of the earlier mark

54. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*,²² 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

²¹ *Vitakraft-Werke Wührmann v OHIM – Krafft (VITAKRAFT)*, Case T-356/02, para 51, and *Mundipharma v OHIM*

²² Case C-342/97

goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

55. Registered trade marks possess various degrees of inherent distinctive character; marks which are suggestive or allusive of a characteristic of the services tend to be at the lower end of the scale, whereas invented words with no allusive qualities tend to be at the higher end of the scale. A range of marks will fall in between, such as dictionary words with no obvious connection to the services.

56. Although the distinctiveness of a mark can be enhanced by virtue of the use made of it, the opponent has not filed any evidence of use. As such, I have only the inherent position to consider.

57. Neither party has commented on the level of inherent distinctiveness of the earlier mark.²³ As stated previously, the word "Spit" will be understood as meaning "saliva, especially when it is outside the mouth". Without evidence to the contrary, it is my view that this will be understood as arbitrary and unrelated to the services, as it does not appear to be descriptive, non-distinctive, or otherwise allusive in relation to them.

²³ Whilst the opponent discusses the distinctiveness on section D of the statement of grounds and the applicant responds to this at Q8 of the counterstatement, these comments were made in relation to the ground under section 3(1). As explained earlier in the preliminary issues section of this decision, I cannot take these submissions into account.

Overall, I find that the opponent's mark in totality has a medium level of inherent distinctive character.

Global assessment – conclusions on likelihood of confusion

58. 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 services down to the responsible undertakings being the same or related. There is no set formula for establishing a likelihood of confusion between marks; it is a global assessment where a number of factors need to be borne in mind.

59. One such factor is the interdependency principle, i.e. a lesser degree of similarity between the competing marks may be offset by a greater degree of similarity between the respective services, and vice versa. As mentioned above, it is necessary for me to keep in mind the distinctive character of the applicant's mark, the average consumer for the services, and the nature of the purchasing process. In doing so, I must be mindful 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 they have retained in their mind.

60. In its statement of grounds, the opponent does not give further submissions regarding the likelihood of confusion beyond indicating that it believes the competing marks to be similar²⁴ and that the parties' services are similar.²⁵

61. In its submissions, the applicant submits that use of "spitnights" will not result in a likelihood of confusion on the basis that "there are a number of other live events and creative projects in the UK and abroad that use the word "Spit" within their names or branding".²⁶ It argues that this therefore demonstrates that "the term is not exclusive to any single entity within the arts or entertainment sector, and that audiences are accustomed to differentiating between such uses".

²⁴ By virtue of ticking the '5(2)(b)' box at Q1 of the statement of grounds

²⁵ At Q9, which I have already referred to earlier in this decision

²⁶ Applicant's submissions, page 2

62. At paragraph 73 of *Zero Industry Srl v OHIM*,²⁷ the GC stated that:

“As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word ‘zero’, it should be pointed out that the Opposition Division found, in that regard, that ‘... there are no indications as to how many of such trade marks are effectively used in the market’. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word ‘zero’ is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 *GfK v OHIM – BUS(Online Bus)* [2005] ECR II-4865, paragraph 68, and Case T-29/04 *Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH)* [2005] ECR II-5309, paragraph 71). “

63. As the applicant has not provided any evidence that there are multiple businesses currently using the term “Spit” within the industry, these submissions cannot have any bearing on whether there exists a likelihood of confusion between the opponent’s mark and the applicant’s mark. Moreover, the mere fact that there may be other businesses using the term “Spit” cannot be taken as evidence per se that they are peacefully coexisting or that confusion will not occur in the future. In addition to this, the applicant has also not provided any proof that audiences are accustomed to differentiating between instances of the word “Spit” in other businesses’ names.

64. Earlier in this decision I found that the applicant’s services range from being similar to a low to medium degree to a very high degree²⁸ to the opponent’s services. The average consumer of the services will be the general public. The average consumer is likely to pay at least a medium degree of attention when selecting the class 41 services. The services will primarily be selected through visual means, although I do not discount an aural element to the selection process. I have found the marks to be

²⁷ Case T-400/06

²⁸ In line with the opponent’s pleadings

visually, aurally, and conceptually similar to a medium degree. The earlier mark has a medium level of inherent distinctive character.

65. It is my view that, even when accounting for imperfect recollection, I consider that the average consumer, when paying at least a medium degree of attention, would not directly confuse the competing marks. This is because the additional element “nights” within the applicant’s mark constitutes a reasonably significant difference between the competing marks in respect of their visual, aural and conceptual identities, and it is unlikely that the average consumer would overlook it. It is my view that this additional element is therefore likely to be sufficient to prevent the average consumer from mistaking one mark for the other. Consequently, I find that there is no likelihood of direct confusion, even in respect of services which are similar to a very high degree.

66. I now go on to consider indirect confusion. In *L.A. Sugar Limited v By Back Beat Inc*,²⁹ Mr Iain Purvis Q.C., as the Appointed Person, explained that:

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

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that

²⁹ BL O/375/10

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.).

(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)."

67. I bear in mind that these categories are not intended to be an exhaustive list. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*,³⁰ Arnold LJ approved Mr Purvis's formulation but added:

"13. As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/219/16) at [16] 'a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion'. Mr Mellor went on to say that, if there is no likelihood of direct confusion, 'one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion'. I would prefer to say that there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion."

68. It is not sufficient that a mark merely calls to mind another mark (as per *Duebros Limited v Heirler Cenovis GmbH*).³¹ This is mere association not indirect confusion. A finding of indirect confusion should not be made merely due to a shared element within marks. As per *L.A. Sugar Limited v By Back Beat Inc*³² (set out above), indirect confusion should be identified in cases where the average consumer is likely to notice

³⁰ [2021] EWCA Civ 1207

³¹ BL O/547/17

³² BL O/375/10

the differences between the competing marks but assume an economic link between the two undertakings based on their similarities.

69. Having recognised the differences between the competing marks, consumers will also notice that the marks contain the identical element 'spit'. I am of the view that consumers are likely to view the applicant's mark as being a sub-brand or brand extension of the opponent's 'spit' mark. This is because, as discussed above at paragraph 52, the word 'nights' strongly alludes to the concept of night-time performances in relation to the entertainment services (as opposed to matinee performances), and as such, 'nights' would be fairly non-distinct for some of the services. Consequently, I find that there exists the likelihood of indirect confusion on this basis in relation to the following services:

Musical entertainment services; Organisation of cultural events; Organising community cultural events; Organising events for cultural purposes; Conducting of cultural events; Organization events for cultural purposes; Organizing cultural and arts events; Arranging of cultural events; Festivals (Organisation of -) for entertainment purposes; Music concerts; Presentation of music concerts; Performance of music; Live music services; Live musical concerts; Musical concert services; Arranging of musical entertainment; Performance of music and singing; Musical entertainment; Music entertainment services; Provision of live entertainment; Staged light entertainment services; Cultural activities; Cultural services; Organization of cultural shows; Live stage shows; Entertainment services in the nature of arranging social entertainment events; Performance of dance, music and drama.

70. However, the finding above does not apply to all of the applicant's class 41 services. This is because it is my view that the word 'nights' is not allusive or meaningful in relation to the remaining services in class 41, namely:

Recording of music; Music recording; Publishing of music; Publication of music.

71. Nevertheless, if I am wrong in this finding, and moreover, for the services that I have found that 'nights' would not be allusive of, I acknowledge that the categories set out in *L.A. Sugar* are not exhaustive, I therefore also consider the relevance of *Medion*

*v Thomson*³³ and the subsequent case law. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another*,³⁴ Arnold J. (as he then was) considered the impact of the CJEU's judgment in *Bimbo*,³⁵ on the court's earlier judgment in *Medion*. The judge said:

"18. The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19. The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20. The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21. The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It

³³ Case C-120/04

³⁴ [2015] EWHC 1271 (Ch)

³⁵ Case C-591/12P

remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

72. Having recognised the differences between the competing marks, consumers will also notice that the marks contain the identical element ‘spit’. It is my view that the average consumer in the UK would not understand the applicant’s mark “spitnights” as a complete phrase formed by combining the two words “spit” and “nights” to convey a unitary meaning with its own independent meaning that differs from that of the individual words. As the words “spit” and “nights” are both recognisable dictionary-defined words, I am of the view that the average consumer will understand the two words within the applicant’s mark as being independent of each other. Consequently, the ‘spit’ element retains its independent and distinctive role.

73. As such, I do not consider that consumers on seeing the ‘spit’ element will believe it to be merely coincidental. Instead, the marks may be confused as a result of the moderately distinctive shared element ‘spit’ which is identical to the opponent’s mark and retains an independent distinctiveness within the applicant’s mark. Consequently, it is more likely that consumers will believe that the applied for mark is a logical brand extension or sub-brand containing the house mark ‘spit’, with the sub-brand ‘nights’. For these reasons, I am of the view that the average consumer, even when paying at least a medium level of attention, may perceive the use of the word ‘spit’ as indicating a commercial connection between the respective undertakings. On this basis, I find that there is a likelihood of indirect confusion, notwithstanding the difference between the competing marks. I find this to be the case even for the services which are similar only to a low to medium degree due to the identical nature of the shared element and the interdependency principle.

Conclusion

74. The opposition under section 5(2)(b) has been successful in its entirety. Subject to any successful appeal, the application will be refused registration for all of the opposed terms. It will therefore continue to registration for the unopposed terms only.

Costs

75. As the opposition has been successful, ordinarily the opponent would be entitled to an award of costs. However, as it has not instructed professional representatives, it was invited by the Tribunal to indicate whether it intended to make a request for an award of costs, including accurate estimates of the number of hours spent on a range of given activities relating to defending the proceedings. It was made clear by letter dated 5 March 2026 that, if the pro-forma was not completed by 2 April 2026, costs may not be awarded. The opponent did not return a completed pro-forma to the Tribunal and, on this basis, no costs are awarded.

Dated this 25th day of August 2026

K SERRAVALLE

For the Registrar