

O/0947/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NOS. UK00003786763
AND UK00003836792 BY MUSIC TEACHING ROOMS LIMITED
TO REGISTER:

Level Up Music

AND

**LEVEL UP
▶▶ MUSIC**

AS TRADE MARKS IN CLASS 41

AND

IN THE MATTER OF THE OPPOSITIONS THERETO
UNDER NOS. 437199 AND 438007 BY
RADAR SCOPE LTD

BACKGROUND AND PLEADINGS

1. On 11 May 2022, Music Teaching Rooms Limited (“the applicant”) applied to register the trade mark ‘Level Up Music’ (“the applicant’s first mark”) in the UK for the following services:

Class 41: Music concerts; Music instruction; Music-halls; Musical performances; Musical entertainment; Music education; Music performances; Music festival services; Musical education services; Live musical concerts; Live musical performances; Musical entertainment services; Musical instruction services; Teaching of music; Live music concerts; Live music performances; Music group services; Music-hall services; Musical performance services; Music competition services; Instruction in music; Tuition in music; Musical concert services; Live music shows; Music entertainment services; Music performance services; Live music services; Music concert services.

2. On 7 October 2022, the applicant also applied to register the following trade mark in the UK:



(the applicant’s second mark”)

3. While the services applied for under the applicant’s second mark are very similar to those applied for under the first mark, they are not identical. The services applied for are as follows:

Class 41: Music concerts; Musical performances; Music instruction; Music-halls; Music performances; Musical entertainment; Music education; Music festival services; Musical education services; Live musical concerts; Live musical performances; Musical performance services; Musical instruction services; Teaching of music; Live music concerts; Live music performances; Music-hall services; Music transcription services; Music concert services; Music composition services; Music entertainment services; Music competition services; Instruction in music; Tuition in music; Musical concert services; Live music shows; Arranging of musical events.

4. The applicant's first mark was published for opposition purposes on 5 August 2022 and its second was published on 21 October 2022. Both marks were opposed by Radar Scope Ltd ("the opponent"). The opposition against the first mark was brought on 31 October 2022 and the one against the second mark was brought on 13 December 2022. Both oppositions are based upon sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 ("the Act").¹ Under both grounds of both oppositions, the opponent relies on the following trade mark:

LEVEL MUSIC

UK registration no. 3474602

Filing date 12 March 2020; registration date 10 August 2020

Relying on all goods and services, being those set out in the Annex of this decision. ("the opponent's mark").

¹ It is noted that the opponent also sought to bring the opposition under section 5(2)(a) of the Act, which is reserved for identical marks. In the present case, the opponent's responses to the relevant questions in its notices of opposition only make reference to a similarity between the marks, not identity. This, together with the fact that the marks are clearly not identical means that this ground has no merit. I will, therefore, proceed on the basis of the section 5(2)(b) and 5(3) grounds only.

5. Under the section 5(2)(b) ground, the opponent claims that the marks at issue are similar and that the services for which application is sought are identical and/or similar to the opponent's services.² As a result, the opponent argues that there exists a likelihood of confusion between the marks on the part of the public, including a likelihood of association. In addition, the opponent claims that this likelihood is enhanced due to the inherent and acquired distinctiveness of the opponent's mark.

6. Under the section 5(3) ground, the opponent claims that the marks are similar to the point that consumers would believe them to be used by the same undertaking or that there is an economic connection between them. As a result of the similar marks and the repute enjoyed by the earlier mark, the opponent claims that use of the applicant's mark will take unfair advantage of the opponent's mark and that it will cause detriment to the reputation and/or distinctive character of the same. Under the further information section of the notice of opposition in respect of this ground, the opponent makes a claim as to identity of the marks. As I have already discussed above, this is plainly not the case, however, it is not detrimental to the opponent's claim as claims of similarity are plainly made.

7. The applicant filed counterstatements wherein it provided a series of denials to the various grounds raised. I will discuss these points throughout the course of my decision. I note that the applicant sought to put the opponent to proof of use for its mark in respect of the opposition against the second mark only. As I will come to discuss below, the opponent's mark is not subject to the proof of use provisions so this request has no effect.

8. Upon the filing of the counterstatement in respect of the applicant's second mark, the Tribunal, utilising the power granted to it by Rule 62 of the Trade Marks Rules

² Though I note that in its notice of opposition, the opponent opted to rely on all of its goods and services.

2008, consolidated these proceedings. This was communicated to the parties via written correspondence on 27 January 2023.

9. The opponent is represented by JOSHI-IP.LAW and the applicant is unrepresented. Both parties filed evidence in chief. Despite the opponent declaring an intention to file evidence in reply, no such evidence was received. No hearing was requested and neither party filed written submissions in lieu of the same. This decision is taken after careful consideration of the papers.

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 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) 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.

EVIDENCE

11. The opponent's evidence came in the form of the witness statement of Manish Joshi dated 29 August 2023. Mr Joshi is a representative of Warner Music Group and its affiliates (which includes the opponent). Mr Joshi's evidence is accompanied by five exhibits, being MJ1 to MJ5, and was adduced to prove the opponent's claims to enhanced distinctiveness and reputation. It is also noted that the statement itself includes a significant amount of submission.

12. The applicant's evidence came in the form of the witness statement of Boma Benjamin-Stowe dated 21 November 2023. Mr Benjamin-Stowe is the director of the applicant, being a position he has held since April 2022. The statement consists of a significant amount of submission and was adduced in response to the various claims of the opponent. It is accompanied by 11 exhibits, being BBS1 to BBS11.

13. I do not intend to summarise the evidence filed by the parties in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

DECISION

Section 5(2)(b): legislation and case law

14. 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.”

15. Section 5A of the Act states as follows:

“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.”

16. The opponent’s mark qualifies as an earlier trade mark under the above provisions because it was applied for prior to the filing date of the applicant’s mark. As above, the applicant sought to put the opponent to proof of use for the second opposition.

However, the opponent's mark did not complete its registration process more than five years prior to the filing date of the applicant's mark so it is not subject to the use provisions. As a result, the opponent can rely on all of the goods and services that it highlighted in its notice of opposition.

17. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) ("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 impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

18. The applicant's services can be found at paragraph one above. The opponent's goods and services can be found in the Annex of this decision.

19. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the

Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

“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”.

20. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- (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.

21. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court (“GC”) stated that:

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

22. In its counterstatements, the applicant made a series of arguments in respect of what services the parties actually provide. In making this argument, the applicant referred to its own activities as a music school that provides on-site music instrument tuition and music composition, amongst other things. It claims not to be involved in providing audio material, concert information or musical publishing materials, amongst others. While this is noted, the actual intention of the applicant in how it provides its services (or how the opponent actually uses its mark) has no bearing on the assessment I am required to make. When considering the likelihood of confusion under section 5(2)(b), the assessment must be based, in fact, on the concept of 'notional and fair use' which involves carrying out the comparison of the goods and services based on the specifications before me, not the goods and services effectively provided by the parties.³

23. In addition to the above issue, I note that the applicant's evidence sets out that its services are provided in person at its school and not via an online platform. While this may be how the applicant actually operates, it is not reflected in the specifications before me. As set out above, my assessment is to be based on the actual specifications before me so this argument is of no assistance to the applicant.

³ *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06 at [66] and *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 at [22]

24. As I have discussed above, the applicant's marks' specifications are highly similar. I will begin my assessment by focusing on the services that overlap before moving to consider the terms specific to each of the applicant's marks.

25. One last point I wish to address before proceeding with my assessment is that the opponent's class 41 services (which I will focus on here) include a limitation that all of the services relate to the music industry. While noted, no such limitation exists in the applicant's specification meaning that those services can equally relate to the music industry.⁴ As such, this limitation has no effect for the purpose of my present assessment.

The services in both of the applicant's specifications

Music instruction; music education; instruction in music; teaching of music; tuition in music; musical education services; musical instruction services.

26. Regardless of how they are worded, I note that all of the above terms are different types of musical education services. The opponent's specification includes the term "providing education in the field of music through live and online workshops". Both parties' terms cover musical educational services and because the opponent's term is more limited in its scope than the applicant's terms, it can be said to fall within them. As such, I find that these services are identical under the principle outlined in *Meric*.

Music concerts; musical performances; musical entertainment; music performances; music festival services; live musical concerts; live musical performances; live music concerts; live music performances; musical performance services; music competition services; musical concert services; live music shows; music entertainment services; music concert services.

⁴ On this point, the applicant's evidence states that its services are aimed at local communities and the performing arts. However, this is of no assistance here as its terms are not limited to reflect this argument.

27. The above terms of the applicant are all various types of services relating to the provision of different types of musical entertainment. The wording of the terms are sufficiently broad so as to cover the provision of such services online. On this point, I am of the view that they can all cover live musical events that are provided to the consumer via livestreams (being something that, as far as I understand it, became increasingly common during the COVID-19 pandemic). As a result, I am of the view that the above services are all broad enough to encompass the term “entertainment services in the nature of providing online, non downloadable audio and video featuring musical performances” in the opponent’s specification. As a result, I find that these services are identical under the principle outlined in *Meric*.

Music-halls; Music-hall services.

28. It is my view that the above services can cover the provision of concerts from music-hall venues. As a result, I see no reason why the same finding of identity reached above cannot apply here. Therefore, I find that these services are identical under the principle outlined in *Meric* with “entertainment services in the nature of providing online, non downloadable audio and video featuring musical performances” in the opponent’s specification. In the event that I am wrong to reach a finding of identity on the basis that the above services are provided in person to customers *at* a music hall then I still find them to be similar. I say this because while the method of use may differ, they are all entertainment services for the purpose of providing music to the end consumer. As such, there is some overlap in nature and purpose. Further, the trade channels are likely to overlap on the basis that a provider of music-hall services is also likely to seek to provide music-hall entertainment services online by way of posting videos of events on streaming platforms. Lastly, the user is likely to overlap as the services are all aimed at the general public at large. Taking all of this into account, if the services are not identical then they are similar to a high degree.

Services exclusive to the applicant's first mark

Live music services; Musical entertainment services; Music group services; Music performance services.

29. I am of the view that the comparison of the above services in the applicant's first mark's specification is the same as the one made at paragraph 27 above. Therefore, I find that these services are identical under the principle outlined in *Meric* with "entertainment services in the nature of providing online, non downloadable audio and video featuring musical performances" in the opponent's specification.

Services exclusive to the applicant's second mark

Arranging of musical events.

30. Following the same logic I have adopted at paragraphs 27 and 29 above, I find that these services are identical under the principle outlined in *Meric* with "entertainment services in the nature of providing online, non downloadable audio and video featuring musical performances" in the opponent's specification.

Music transcription services.

31. It is my view that the above service covers the transcription of music to either produce written lyrics or sheet music (or both). While both music lyrics and sheet music are plainly information regarding music, I am not convinced that the transcription service itself is the same as the opponent's "providing [...] information about music albums [and] songs, via a website". I say this because the opponent's term only covers the provision of this information as opposed to the actual transcription service itself. While I do not consider the services to be identical, they are similar. I say this because while the nature and method of use may differ, there

is some overlap in purpose and trade channels. This on the basis that both services' core purpose is to provide information regarding music and the undertaking that provides the transcription is also likely to also provide it to consumers.⁵ In respect of the user for these services, I do not consider that they directly overlap as those looking for transcription of music are likely to be producers/musical artists whereas the information is likely to be sought by members of the public that listen to the music. That being said, I appreciate that there may be some overlap because a consumer looking for information regarding music (such as music lyrics) that may not already be available online may seek the transcription service provider to undertake the transcription. Further, I consider that there is a degree of complementarity between these services on the basis that the transcription of lyrics, for example, is important to the actual provision of the lyrics themselves. I consider that this relationship is one that will lead consumers to believe that the services are provided by the same undertaking, i.e. the undertaking that transcribes the music is also the one that provides the information to the end consumer.⁶ Taking all of this into account, I find that these services are similar to a medium degree.

Music composition services.

32. The above service is for the provision of compositions of music where the customer will approach the provider to compose music on their behalf. As far as I understand it, composition of music is part of the process for the production of music. This is on the basis that a music producer is likely to be involved in the composition of the artists' music. As a result, I consider that the above term of the applicant readily falls within the opponent's term of "production, distribution, and presentation of sound and video recordings in the field of music". As a result, I find that these services are identical under the principle outlined in *Merix*.

⁵ In my view, this is also likely to cover the provision of the information online as, as far as I understand it, sheet music and music lyrics are commonly sought online by consumers.

⁶ *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

The average consumer and the nature of the purchasing act

33. As the case law set out above indicates, it is necessary for me to determine who the average consumer is for the respective parties' services. I must then decide the manner in which these services are likely to be selected by the average consumer in the course of trade. 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.”

34. The average consumer for the services at issue will, for the most part, be members of the general public at large. However, I appreciate that some services are likely to be aimed at certain subsections of the general public with a specific interest in music. Further, some other services may be aimed at professional users within the music industry. Regardless of who the consumer is, the services are likely to be available via a range of providers, be that specific music or entertainment providers or specialists operating in those fields. Those providers may also offer the services via their own websites. In my view, visual considerations will dominate the selection process due to the fact that the marks will be encountered on lists of services on placards, in pamphlets or signage at physical stores. Alternatively, when encountered online, the marks will be seen on lists from drop down menus and images on websites. As a result, I find that visual considerations will dominate the

selection process. That being said, aural considerations will also play a role in the form of advice from sales assistants or word of mouth recommendations.

35. The selection of the services will range in frequency and cost. I say this because some consumers will attend concerts on a frequent basis whereas others may not. The costs for such services will also vary depending on the type of concert being attended. Further, publication of music services may be those that are selected on a less frequent basis and at a relatively expensive cost. The range of factors that the consumer will consider when selecting the services at issue will also vary quite significantly. For example, when attending a concert, the consumer will consider the venue, the headline act, the support act, location and transportation/parking options at the venue. Such considerations are likely to result in a medium degree of attention being paid. For music educational services, the consumer is likely to consider previous testimonials of former students, the type of music taught, what course materials are used and the methodology of the teaching/instruction. Again, I think these considerations result in a medium degree of attention being paid. Lastly, the music services aimed at professional users are likely to be more considered selections due to the importance of those services to the consumer's career. Such services are, in my view, likely to attract between a medium and high degree of attention.

Comparison of the marks


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

37. 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.”

38. 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.

39. The respective trade marks are shown below:

The opponent's mark	The applicant's mark
<p>LEVEL MUSIC</p>	<p>Level Up Music ("the applicant's first mark")</p>  <p>("the applicant's first mark")</p>

40. While neither party filed submissions, both parties did make comment on the similarity of the marks in their evidence as filed. I do not intend to discuss these

comments in full here but can confirm that I have given them due consideration in considering the following comparison.

Overall Impression

41. The applicant's first mark is a word only mark consisting of the words 'Level Up Music'. As the services at issue all relate to music, the last word in the mark will be viewed as descriptive and, therefore, plays a lesser role in the overall impression of the mark. It follows that the words 'Level Up' will play the greater role in the overall impression of the mark. As for the applicant's second mark, this is a figurative mark that consists of word and device elements. The words are 'LEVEL UP' presented in a standard black typeface above the word 'MUSIC' which is presented in the same colour and typeface. Before the word 'MUSIC' is two purple shapes that appear in the form of a 'fast-forward' device. Following a similar finding to that of the applicant's first mark, I find that 'LEVEL UP' plays the greater role in the overall impression of the mark with 'MUSIC' and the device element playing lesser roles (due to it being a fairly banal device element and bearing in mind that consumers' eyes tend to be drawn to parts of marks that can be read).

42. The opponent's mark is a word only mark consisting of the words 'LEVEL MUSIC'. As was the case with the applicant's marks, the word 'MUSIC' is descriptive of the services. Therefore, I find that the word 'LEVEL' plays the greater role in the overall impression of the mark with 'MUSIC' playing a lesser role.

Visual Comparison

The applicant's first mark and the opponent's mark

43. While the marks are presented in different cases (the applicant's mark being in title case and the opponent's being in upper case), they are word only marks. As such, the use of different cases is of no impact to the visual comparison. This is because

word only marks are protected for use in any standard typeface and this extends to either upper- or lower-case letters or any customary combination of the two. The marks share the words 'LEVEL', which is the first word of both marks, and the word 'MUSIC', which sits at the end of both marks. The marks differ in the presence of the word 'UP' in the middle of the applicant's mark. While 'MUSIC' plays a lesser role in the applicant's mark, it will still contribute to the visual comparison. Taking into account the identical beginnings and ends of the marks together with the fact that only point of different is a two-letter word in the middle of the applicant's mark, I consider that these marks are similar to a high degree.

The applicant's second mark and the opponent's mark

44. Like the marks assessed above, these share use of the words 'LEVEL' and 'MUSIC', being the beginning and ends of each marks' verbal element, and differ in the presence of the word 'UP' in the applicant's mark. The marks differ further in the presence of the 'fast-forward' device element. While this plays a lesser role in the overall impression of the applicant's mark, it is still a point of visual difference. As a word only mark,⁷ the opponent's mark is capable of use in the exact same standard typeface as used by the applicant in its second mark. Therefore, this is not a point of visual difference between them. Taking all of the above into account, I find that the marks are similar to between a medium and high degree.

Aural Comparison

45. The device element in the applicant's second mark is not capable of being pronounced meaning that, aurally, it is identical to the applicant's first mark. Therefore, can deal with the aural comparison as one. Despite 'MUSIC' being descriptive in both parties' marks, I consider that it will still be pronounced. In making this finding, I refer to the case of *Purity Hemp Company Improving Life as*

⁷ Which, as above, is protected for use in any standard typeface.

Nature Intended (Case BL O/115/22) wherein Mr Phillip Harris, as the Appointed Person, set out that just because a word may be descriptive, it does not mean that it is aurally invisible. As a result, the parties' marks will be pronounced in full and in the ordinary way. The applicant's marks are five syllables in length whereas the opponent's mark is four syllables in length. The first two syllables are identical, as are the last two. The only point of aural difference comes in the middle syllable of the applicant's marks. Given the similar lengths and identical beginnings and ends, I find that the marks are aurally similar to a high degree.

Conceptual Comparison

46. The words 'LEVEL UP' in both of the applicant's marks will be understood as two ordinary dictionary words with obvious meanings. When viewed in combination, they will form a phrase that means *to improve or increase*.⁸ I am of the view that when 'LEVEL UP' is viewed in the context of the mark as a whole (i.e. together with the descriptive word 'MUSIC'), it will be understood as a reference to *levelling up someone's music or musical skills*. Turning to the opponent's mark, I find that the word 'LEVEL' in the opponent's mark will be understood as an ordinary dictionary word that has a number of different meanings depending on the context in which it is used. While 'MUSIC' is descriptive, I consider that it gives context to the meaning of the word 'LEVEL'. As such, I find that the opponent's mark, when viewed as a whole, albeit presented in an unusual structure/order, will be understood as a reference to the *volume level of music or music that is level* (i.e. music that is equal or similar).

47. In comparing the concepts, I appreciate that there is a shared use of the word 'LEVEL'. However, this does not carry an identical concept in the context of the marks as wholes and, as such, is not an overly compelling point of conceptual similarity. In addition, while there is a shared reference to music across both

⁸ <https://dictionary.cambridge.org/dictionary/english/level-up>

parties' marks, this is not significant due to its descriptive nature.⁹ Overall, I consider that the marks are conceptually similar to between a low and medium degree.

Distinctive character of the opponent's mark

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

⁹ While I appreciate that, as per the case of *EMILIANA* (BL O/054/22), conceptual comparisons are usually undertaken without reference to the goods/services at issue. However in the present case, I consider that the fact that the services at issue all relate to music will mean that the descriptive nature of the word 'MUSIC' will still have an impact.

49. Registered trade marks possess varying degrees of inherent distinctive character, perhaps lower where a mark may be suggestive or allusive of a characteristic of the goods or services for which it is registered, ranging up to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it. In the present case, the opponent has pleaded that its mark enjoys an enhanced degree of distinctive character and has filed evidence to that effect. Before considering the evidence, I will first assess the inherent position.

50. While I consider that the opponent's mark does carry a concept and said concept relates to music (and, therefore, allusive to the services relied upon), its structure is somewhat unusual. I say this because 'LEVEL MUSIC' does not carry a unitary meaning, in the same way that 'MUSIC LEVEL' would, for example. Instead, it is a combination of two ordinary dictionary words and while those words may very well qualify each other, their order will be viewed as unusual. All of this being said, as hinted at above, the mark is clearly allusive to the fact that the services at issue relate to music and, as such, its distinctiveness will sit on the lower end of the scale. Taking this into account but bearing in mind the unusual structure of the mark, I consider that the inherent distinctiveness sits somewhere between a low and medium degree.

51. I move now to consider the position in respect of the opponent's claim that its mark enjoys an enhanced degree of distinctive character. I note that the opponent has filed evidence in support of this claim, and that the relevant market for assessing enhanced distinctiveness is the UK market. The opponent's evidence sets out that it is a company that is part of the Warner Music Group ("WMG"). In making reference to use of the mark, the evidence repeatedly refers to WMG as opposed to the opponent directly. Before proceeding, I wish to briefly confirm that given the relationship between the companies, I am content to conclude that any use by WMG is with the consent and under the authorisation of the opponent, being the

actual proprietor of the mark at issue here. For the avoidance of doubt, I will proceed with my assessment by making reference to any use as being use by the opponent.

52. The evidence begins by stating that the opponent has used its mark since as early as 31 March 2018. A printout taken from the internet archive facility, The Wayback Machine, is provided that shows the opponent's website www.levelmusic.com as it appeared on 19 June 2018.¹⁰ The opponent explains that the opponent's mark is the name of its online music distribution services, specifically an online platform built for and services the needs of independent artists.

53. The opponent's evidence confirms that its website levelmusic.com was registered on 29 February 2012¹¹ and a second printout showing the website is provided.¹² This does not appear to be dated or obtained from the Wayback Machine so I can only take it as being reflective of the website as at the date of the witness statement, being 29 August 2023. This is after the relevant date meaning that this website printout is of no assistance here. While I appreciate that the website may have been registered in 2012, there is nothing to suggest that the website was active at any point prior to 31 March 2018, which is when the opponent states it began using its mark.

54. Under a section of the evidence titled 'DISTINCTIVE CHARACTER OF THE EARLIER TRADE MARK', Mr Joshi states the following:

"The distinctiveness of "LEVEL MUSIC" is crucial to evaluating confusion likelihood. Taking into account the mark's intrinsic characteristics, market foothold, frequency of use, geographical span, promotional endeavours, and

¹⁰ See MJ1. It is noted that the opponent's evidence confirms that this is also how the page appeared as at 31 March 2018.

¹¹ See MJ5 which confirms this, however, there is nothing to suggest when the website was first used and, in light of the evidence regarding the launch of the platform, it appears unlikely that this website had any function prior to 31 March 2018.

¹² MJ4.

the populace segment linking services with the mark, it's transparent that "LEVEL MUSIC" embodies a potent distinctive quality."

55. In addition, and while this is not directly applicable to the assessment I must make here, I note that the opponent's evidence sets out in the 'REPUTATION AND GOODWILL' section of Mr Joshi's witness statement states as follows:

"The Opponent clearly shows earlier and continuing use of the "LEVEL MUSIC" mark, and as a result it has acquired a significant reputation and goodwill in the market, and therefore it bolsters the case against registration of the "LEVEL UP MUSIC" applications."

56. While these statements are noted, they are wholly unsupported by the evidence before me. The only evidence that is even capable of supporting the opponent's claimed use of its mark is in the form of a printout of the opponent's website from 2018 that I have discussed above. While the website is noted, the opponent has not provided any information confirming how many UK customers visited it between 31 March 2018 and the relevant date or whether any sales of goods/services stemmed from visits to the website. Without anything further, the presence of one printout of a .com website in no way suggests any level of use in the UK prior to the relevant date.

57. As above, the website is the only evidence before me that may be capable of pointing to use. However, for the sake of completeness I wish to point out that the opponent has failed to provide any evidence as to the level of sales or turnover it has made in respect of the relevant services under the mark at issue. In addition, it has not provided any evidence as to advertising efforts or expenditure prior to the relevant date. While lack of such evidence is not always fatal to a claim of enhanced distinctiveness, I consider that it is here. This is because there is absolutely nothing before me to suggest any use in the UK at all, let alone at a level that could even begin to point to a finding of enhanced distinctiveness.

58. As a result of the above, I find that the opponent's mark does not enjoy any degree of enhanced distinctive character. Therefore, the inherent position applies. Before proceeding, I wish to briefly discuss the fact that the applicant has filed evidence to counter the opponent's claim of use. While I do not discount this evidence outright, I see no reason to assess it in light of the fact that I have found that the opponent's evidence falls far short of the threshold for proving enhanced distinctiveness of its mark.

Likelihood of confusion

59. 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 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 services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's mark, the average consumer for the 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 trade marks and must instead rely upon the imperfect picture of them that they have retained in their minds.

60. I have found the parties' services to be identical or similar to a high or medium degree. I have found the average consumer for the services to be members of the general public at large or, in some instances, professional users such as musicians. I have also found that the consumers will select the services primarily

via visual means (though I do not discount the aural component). In respect of the level of attention paid, I have found that for the most part, the consumer will pay a medium degree of attention. However, I have found that some professional users will pay between a medium and high degree of attention. In respect of the similarity of the marks at issue, I have found the opponent's mark is visually similar to a high degree with the applicant's first mark and visually similar to between a medium and high degree with its second mark. As for aural and conceptual similarities, I have found that all marks are aurally similar to a high degree and conceptually similar to between a low and medium degree mark. Lastly, the opponent's mark is inherently distinctive to between a low and medium degree.¹³

61. Taking all of the above into account and bearing in mind the principle of imperfect recollection, I am of the view that regardless of the conceptual impact that the word 'UP' makes when comparing the marks, consumers are likely to misremember or inaccurately recall the parties' marks for one another due to their high visual and aural similarities. On this point, I remind myself that while conceptual differences between marks may counteract visual and aural similarities,¹⁴ the marks at issue here are not conceptually different so that principle is not directly applicable in the present case. Even if the marks were conceptually different, I note the case of *PIMKIE* (Case BL O/566/19) wherein Mr Geoffrey Hobbs Q.C., sitting as the Appointed Person, set out that visual and aural similarity between conceptually different marks may still be sufficient to give rise to the existence of a likelihood of confusion.¹⁵

62. In the present case, my finding is primarily made on the basis that the word elements of all of the marks share identical beginnings and ends, being 'LEVEL'

¹³ While this level of distinctiveness is not considered to be outright weak, it is on the weaker end of the scale. On this point, I refer to the case of *L'Oréal SA v OHIM*, Case C-235/05 P wherein the CJEU set out that weak distinctive character of an earlier mark does not preclude a likelihood of confusion.

¹⁴ See *Picasso Estate v OHIM*, Case C-361/04 P

¹⁵ Further, I refer to the case of *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03, wherein the GC set out that where goods or services are selected with primarily visual considerations, the visual similarity between marks will, generally, be more important. I consider this to be the case here.

and 'MUSIC', respectively. On this point, I refer to both the cases of *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02 *Bristol Global Co Ltd v EUIPO*, T-194/14 which support findings that similar beginnings and also similar ends are capable of leading to a finding of confusion. In the present case, I am of the view that both the identical beginnings and ends are significant factors that support a finding that the consumer is unlikely to notice the word 'UP' when confronted by the marks.¹⁶ I consider this particularly the case given that 'UP' is subsumed into the middle of the verbal elements of the applicant's marks. In respect of the fast-forward device in the applicant's second mark, I consider that as a fairly banal element, this is also likely to be overlooked. Again, I wish to clarify once more that this finding is reached whilst bearing in mind the principle of imperfect recollection and not a side-by-side direct comparison of the marks. Consequently, I consider that there exists a likelihood of direct confusion, even in circumstances where the consumer pays between a medium and high degree of attention on the basis that the identity of the beginnings and ends of the marks are such that confusion will still arise.

63. My finding above means that the opposition succeeds in full. However, for the sake of completeness, I will proceed to consider the section 5(3) ground.

Section 5(3)

64. Section 5(3) of the Act states:

“5(3) A trade mark which –

is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or

¹⁶ Even though 'MUSIC' may be descriptive, it will still be noticed as a point of visual and aural identity.

international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.”

65. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Adidas-Salomon*, Case C-487/07, *L’Oreal v Bellure*, Case C-323/09, *Marks and Spencer v Interflora*, Case C383/12P, *Environmental Manufacturing LLP v OHIM*. The law appears to be as follows:

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

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

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

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph

68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77* and *Environmental Manufacturing, paragraph 34*.

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

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

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

Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure).

66. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that the marks are similar.¹⁷ Secondly, the opponent must show that its mark has achieved a level of knowledge/reputation amongst a significant part of the public. Thirdly, it must be established that the level of reputation and the similarities between the parties' marks will cause the public to make a link between them, in the sense of the earlier mark being brought to mind by the applicant's mark. Finally, assuming the first three conditions have been met, section 5(3) requires that one or more of the types of damage will occur. It is unnecessary for the purposes of section 5(3) that the services be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

67. I can deal with this ground very briefly. I do so because I have already discussed the opponent's evidence above. To briefly repeat what I have said under my enhanced distinctiveness assessment, there is no evidence before me that points to any use in the UK whatsoever. Without any evidence of use or anything that can be said to point to a level of awareness amongst a relevant section of the relevant public, the opponent's reliance upon the section 5(3) ground fails at the first hurdle.

CONCLUSION

68. The opposition succeeds in full and, subject to any successful appeal of my decision, the applicant's marks are refused registration for all services.

¹⁷ Given my findings under the section 5(2)(b) ground, I am satisfied that there is a degree of similarity between them.

COSTS

69. As the opponent has succeeded, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. However, in light of the opponent's evidence being of no assistance whatsoever, I see no reason to make any costs award in relation to the same or for any costs associated with the consideration of the applicant's evidence. That being said, the evidence did introduce submission and, instead, I will make a costs award under that category. In the circumstances, I award the opponent the sum of £900 as a contribution towards its costs. The sum is calculated as follows:

Filing a notice of opposition and considering the applicant's counterstatement (x2):	£400
Written submissions:	£300
Official fees:	£200
Total:	£900

70. I hereby order Music Teaching Rooms Limited to pay Radar Scope Ltd the sum of £900. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 3rd day of October 2024

A COOPER
For the Registrar

ANNEX

Class 9

Computer software to enable music artists and music labels to market and distribute their music; downloadable mobile applications for interacting with and funding artists and creators; computer software to facilitate the collection of royalties and revenues related to the foregoing; computer software for accessing information related to musical recordings; software for managing databases of recorded music files; computer programs for data analytics for the music industry; computer software for use in the delivery, distribution and transmission of musical recordings and related content; Downloadable musical sound recordings; all the aforesaid services relating to the music industry.

Class 36

Payment services in the nature of collecting money from individuals on an ongoing basis for music related artists and creators; Collection of royalties; Financial analysis, namely, compiling and analysing statistics, data and other sources of information for financial purposes; all the aforesaid services relating to the music industry.

Class 38

Providing access to digital music web sites on the internet; broadcasting and transmission of streamed, uploadable and downloadable music, audio, video and other multimedia content; webcasting services; providing community forums for the transmission of information and messages between users, in the field of music related entertainment; providing access to websites and databases on the Internet that presents artists, music albums and songs, entertainment services, namely, music related current events and entertainment news and that allow customers to programme audio, text, video and other multimedia content, including music related concerts, news, cultural events on a website and in mobile applications; all the aforesaid services relating to the music industry.

Class 39

Distribution of music audio, video and other multimedia content; all the aforesaid services relating to the music industry.

Class 41

Providing audio material, concert information, and information about music albums, artists and songs, via a website; entertainment news and information in the field of music, provided via a website; entertainment services, namely, the provision of streamed, uploadable, non downloadable, or downloadable music, to online users via global or local computer networks; Entertainment services in the nature of providing online, non downloadable audio and video featuring musical performances; production, distribution, and presentation of sound and video recordings in the field of music; music and musical publishing services; providing education in the field of music through live and online workshops; all the aforesaid services relating to the music industry.

Class 45

Online social networking services in the field of music provided through a website; providing social networking services for purposes of commentary, comparison, collaboration, consultation, evaluation, advice, discussion, research, information sharing, indexing, information location, entertainment, and pleasure, all as they relate to music, video and other multimedia content; services for the exploitation of intellectual property or industrial property rights; all the aforesaid services relating to the music industry.