

O/470/21

TRADE MARKS ACT 1994

**IN THE MATTER OF THE APPLICATION FOR TRADE MARK NO. 3452217
IN THE NAME OF UNILEVER GLOBAL IP LIMITED FOR THE TRADE MARK**

WONDER MUM

IN CLASS 3

AND

THE OPPOSITION THERETO UNDER NUMBER 420864

BY

DC COMICS (PARTNERSHIP)

Background and pleadings

1. Unilever Global IP Limited (“the applicant”) applied for the trade mark WONDER MUM (number 3452217) on 17 December 2019, for the following goods in Class 3:

Soaps; perfumery; essential oils; deodorants and antiperspirants; hair care products; hair colorants, hair dyes, hair lotions, hair waving preparations, shampoos, conditioners, hair sprays, hair powder, hair dressings, hair lacquers, hair mousses, hair glazes, hair gels, hair moisturisers, hair liquid, hair preservation treatments, hair desiccating treatments, hair oils, hair tonic, hair creams, preparations for the bath and/or shower; non-medicated toilet preparations; skin care preparations; cosmetics.

2. The application was published for opposition purposes in the *Trade Marks Journal*, on 28 February 2020. On 30 July 2020, DC Comics (partnership) filed an opposition to the application under sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”).¹ The section 5(2)(b) and 5(3) grounds are based upon the following earlier registered EU trade mark:²

14275739: filing date 20 June 2015; registered 18 November 2015

WONDER WOMAN

3. For its section 5(2)(b) claim, the opponent relies upon its class 3 goods, set out later in this decision, claiming that because the parties’ goods are identical/highly similar and the marks are highly similar, there will be a likelihood of confusion. Under section 5(3), the opponent claims that its reputation in some of its goods and services in classes 9, 16 and 42 (also set out later in this decision) will cause the relevant public to believe that the parties’ marks are used by the same undertaking or an economically

¹ The statutory deadline under rule 17 of the Trade Marks Rules 2008 (as amended) was extended by rule 75 as a result of the COVID-19 pandemic.

² Although the UK has left the EU, the EUTM is still relevant in these proceedings given the impact of the transitional provisions of The Trade Marks (Amendment etc.) (EU Exit) Regulations 2019 (Tribunal Practice Notice 2/2020 refers).

linked undertaking. The opponent also claims that use of the applicant's mark will tarnish the reputation of the earlier mark, erode its distinctiveness, and give an unfair advantage to the applicant by virtue of the reputation of the earlier mark.

4. The opponent's section 5(4)(a) ground is based upon the sign WONDER WOMAN, The opponent claims that it first used WONDER WOMAN in the UK in about 1942 in relation to a variety of goods and services which fall under classes 3, 9, 16 and 41. It claims that it owns "goodwill in the United Kingdom in WONDER WOMAN and the WONDER WOMAN character more generally as a result of its use in connection with a range of goods and services for an extensive merchandising programme linked to films, publications and entertainment services." The opponent claims that its goodwill entitles it to prevent the use of the applicant's mark under the law of passing off because the use of the applicant's mark will mislead the public into believing that the applicant's goods are those of the opponent; that the parties are connected; or that the opponent has endorsed the applicant's goods.

5. The applicant denies all of the grounds of opposition and puts the opponent to proof of reputation and goodwill.

6. A hearing was held on 22 April 2021 by video conference, at which the opponent was represented by Mr David Stone and Dr Jade MacIntyre, of Allen & Overy LLP. The applicant was represented by Ms Denise McFarland, of Counsel, instructed by Murgitroyd and Company.

The evidence

7. The opponent filed evidence on 23 November 2020 from Mr Jay Kogan, its Senior Vice President of Legal Affairs. Mr Kogan's witness statement is dated 20 November 2020. The witness statement and exhibits total 279 pages.

8. The applicant requested an extension of time of two months, on 25 January 2021, to file evidence, its deadline for doing so expiring that day.³ The reasons given were:

The applicants met with counsel on 6 January to discuss the opponent's evidence. As a result of that meeting, a process of gathering evidence in response has accelerated and will be completed within the additional time requested. This will include a review of internal records and market place consumer behaviour.

It is noted that the opponent's evidence was quite voluminous consisting of a 20 page witness statement plus 27 exhibits running to nearly 300 pages. Analysing that evidence has required significant time and resources but the process is complete and it is not anticipated that further time beyond 25 March will be needed.

Availability of counsel, the Christmas/New Year holiday period and COVID related issues (specifically staff absences) have all impacted in terms of the timeline for undertaking the steps outlined above.

9. The request was refused by the Tribunal, resulting in a case management conference ("CMC") which I held with the aforementioned representatives by telephone, on 11 February 2021. Prior to the CMC, the applicant reduced its extension of time request, saying that it would be able to file evidence by 4pm on 12 February 2021, the day after the scheduled CMC. In fact, the applicant filed its evidence an hour or so prior to the CMC. It consisted of a brief witness statement and a single exhibit from the applicant's Senior IP Counsel, Mr John Brailey. Also filed were the applicant's observations about the opponent's evidence.

10. I refused the extension of time request for filing evidence, confirming my reasons in a letter to the parties dated 12 February 2021, the operative part of which is contained in Annex 1 to this decision. As a consequence, the applicant has no evidence in these proceedings. However, its criticisms of the opponent's evidence were admitted at the CMC.

11. The opponent did not seek to file any further evidence prior to the substantive hearing. The opponent's skeleton argument was received two days prior to the hearing, as is normal practice before the Tribunal. It contained some factual content which had not formed any part of its formal evidence filed earlier in the proceedings. No permission was sought in the skeleton argument for it to be admitted as evidence,

³ By way of a form TM9, the initial request having been made deficiently in a letter dated 19 January 2021.

or for it to be re-filed in acceptable evidential format. I heard submissions from both parties prior to the main submissions on the substantive grounds. Mr Stone, for the opponent, sought its admission (as it was, in the skeleton argument). He submitted that it had only become available in the previous two days and that it would be acceptable in High Court proceedings under the 'disclosure pilot'.

12. Ms McFarland objected to the application for late evidence being made for the first time at the hearing and submitted that the hearing would need to be adjourned to give the applicant a chance to file evidence in reply. She also submitted that there is no automatic disclosure right in proceedings before the registrar. The 'evidence' consisted of images from what the opponent claimed was the applicant's US website, showing how it intends to use its mark. Ms McFarland pointed out that the US entity responsible for the website was not the same entity as the applicant and, further, questioned its relevance as it consisted of images from a US, not a UK, website and was material posted well after the relevant date.

13. I refused the opponent's application to have the 'evidence' contained within the skeleton admitted. I agreed with Ms McFarland's submissions. It was particularly surprising that no permission was sought and no explanation was given prior to the hearing. My decision would have been the same had it been properly formatted as a witness statement.

Decision

Section 5(2)(b)

14. Section 5(2)(b) of the Act states:

"5. (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 of association with the earlier trade mark.”

15. The following principles for determining whether there is a likelihood of confusion under section 5(2)(b) of the Act are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.⁴

The principles

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

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

⁴ Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

(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

16. In comparing the respective specifications, all relevant factors should be considered, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* where the CJEU stated at paragraph 23 of its judgment:

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

17. In *Kurt Hesse v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-50/15 P, the CJEU stated that complementarity is capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the General Court (“GC”) stated that “complementary” means:

“82 ... there is a close connection between [the goods], 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...”.

18. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited (“Treat”)* [1996] R.P.C. 281 for assessing similarity between goods and services also include an assessment of the channels of trade of the respective goods or services.

19. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J said:

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should

not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

20. The parties' goods are as follows:

Earlier mark	Application
<p><i>Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices; cosmetics, namely lipstick, lip gloss and non-medicated lip balm; mascara; nail enamel; face powder, face cream, skin lotion and skin gel; body powder; bath oil, bath gel and non-medicated bath salts; hand cream and lotion; body cream and lotion; sunscreen preparation, namely cream and lotion; shaving cream and after-shave lotion, skin cleanser and non-medicated body soaks; body deodorant, cologne and perfume; soaps, namely, liquid bath soap, gel soap and bar soap; toothpaste; detergent soap, namely, liquid and powder; fabric softener; deodorant soap, skin soap; and</i></p>	<p><i>Soaps; perfumery; essential oils; deodorants and antiperspirants; hair care products; hair colorants, hair dyes, hair lotions, hair waving preparations, shampoos, conditioners, hair sprays, hair powder, hair dressings, hair lacquers, hair mousses, hair glazes, hair gels, hair moisturisers, hair liquid, hair preservation treatments, hair desiccating treatments, hair oils, hair tonic, hair creams, preparations for the bath and/or shower; non-medicated toilet preparations; skin care preparations; cosmetics.</i></p>

<p><i>shampoo and shampoo conditioner; essential oils, hair lotions; mouthwash; non-medicated toilet preparations; bubble bath; shower gel; body cream and lotion; cosmetics all for sale as part of a kit; sachets for perfuming linen; makeup all for sale as part of a kit; nail enamel; nail care and manicure kits (cosmetics); emollient preparations and substances; essential oils, massage oils and lotions all for sale as part of a kit; sun-tanning preparations.</i></p>	
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21. The applicant, in its counterstatement, admits that the goods are identical or similar. As the level of similarity between the goods plays an important role in the global assessment as to whether there is a likelihood of confusion, and in case of an appeal, I will make an assessment as to which goods are identical, which are similar and to what extent they are similar.

22. The law requires that goods/services be considered identical where one party's description of its goods/services encompasses the specific goods/services covered by the other party's description (and vice versa): see *Gérard Meric v OHIM*, Case T-33/05, General Court ("GC"). I find that the following goods are identical, either on the *Meric* principle, or because the parties' respective terms are the same, or nearly so:

Earlier mark	Application
soaps; perfumery; essential oils	soaps; perfumery; essential oils
body deodorant	deodorants and antiperspirants
shampoo and shampoo conditioner; hair lotions	hair care products; shampoos, conditioners, hair lotions
bubble bath; shower gel	preparations for the bath and/or shower
non-medicated toilet preparations	non-medicated toilet preparations
face cream, skin lotion and skin gel	skin care preparations

23. This leaves the following goods in the application: *hair colorants, hair dyes, hair waving preparations, hair sprays, hair powder, hair dressings, hair lacquers, hair mousses, hair glazes, hair gels, hair moisturisers, hair liquid, hair preservation treatments, hair desiccating treatments, hair oils, hair tonic, hair creams*. The opponent has cover for shampoo, shampoo conditioner and hair lotions. Hair lotions seems a wide term which covers the applicant's hair waving preparations, hair dressings, hair mousses, hair glazes, hair gels, hair moisturisers, hair liquid, hair preservation treatments, hair oils, hair tonic and hair creams. If I am wrong about that, the goods are similar in nature, being wet rather than dry; share the purpose of treating or improving the appearance of hair; will be sold cheek by jowl in shops and online retail outlets; and, may be in competition or complementary. They are highly similar, if not truly identical.

24. Hair desiccating treatments appear to be treatments for making the hair appear dry rather than greasy. If so, this term covers dry shampoos, which are intended to make the hair appear less greasy by absorbing oils produced by the scalp. Dry shampoos are a type of shampoo, a term in the earlier mark's specification, and so are identical. If that is not right, they are a product for use in improving the appearance of the hair, will be sold side by side and in competition with the opponent's shampoos, shampoo conditioners and hair lotions. They are highly similar.

25. Hair sprays, hair powder and hair lacquers are for styling hair. Hair colorants and hair dyes are for changing the colour of hair. All of these goods are for improving the appearance of and for managing the hair, as are the opponent's conditioners and hair lotions. They will all be sold on the same shelves in retail establishments and online equivalents. Very similar methods of use are involved with wash-in hair colours and shampoos. Some of these goods may be complementary, such as the opponent's conditioners and hair lotions for preserving colour, once applied. I find that there is at least a medium level of similarity between the applicant's hair sprays, hair powder, hair lacquers, hair colorants and hair dyes and the opponent's shampoo, shampoo conditioner and hair lotions.

The average consumer and the purchasing process

26. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97. The average consumer is the general public. The goods are likely to be purchased reasonably frequently and may be relatively expensive or relatively inexpensive. I bear in mind, though, that the latter does not mean that the goods will necessarily only require a low level of attention during purchase. Consumers will look to ensure that the personal care products are suitable for them. Professional users, e.g. hairdressers and beauticians, are likely to pay attention to the products they use on their customers. I find that the level of attention will be at least normal. The purchase will be overwhelmingly visual, although I do not ignore the potential for an aural aspect to the purchasing process; for example, stores commonly provide assistance in relation to personal care goods.

Comparison of marks

27. 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 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 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.”

28. 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.

29. The marks to be compared are:

Earlier mark	Application
WONDER WOMAN	WONDER MUM

30. Both parties' marks consist of two words, the first of which is WONDER. This word plays an adjectival role in each mark, describing the noun which comprises the second word. Since the first word describes the second word, the overall impression of each of the parties' marks resides in the combination of the words of which they are composed.

31. The single point of visual and aural overlap is the word WONDER. This is the first part of the applicant's mark and is the longest word in each mark. The second words, WOMAN and MUM, share no visual or aural similarity. Balancing the similarities and the differences, there is no more than a medium degree of visual and aural similarity between the marks.

32. Dr MacIntyre submitted the following points in relation to the conceptual comparison:

- Both marks comprise two ordinary English words;
- The applicant is wrong to displace the ordinary meanings of WONDER and WOMAN with the characteristics of the WONDER WOMAN character;
- The correct test is to compare the marks using their ordinary meaning, otherwise a famous mark would never be infringed, which is not the law; and,
- 'mum' is a subset of the broader word 'woman', which makes the marks highly similar, conceptually.

33. The conceptual comparison is about what, if any, meanings will be recognised by average consumers, in the sense of dictionary meanings. Collins Online Dictionary gives the following definitions for 'wonder', 'woman' and 'mum':

WONDER

Verb: "If you wonder about something, you think about it..."

Noun: "...something very surprising and unexpected"; "...a feeling of great surprise and pleasure..."

Adjective: "If you refer, for example, to a young man as a wonder boy, or to a new product as a wonder drug, you mean that they are believed by many people to be very good or very effective."

WOMAN

Noun: "A woman is an adult female human being."

MUM

Noun: "*mainly British* an informal word for mother."

34. A mother or mum has had one or more children, either because she gave birth to them or has brought up children, performing the role of their mother or mum. I consider that to characterise the word 'mum' as a subset of the word 'woman' and, on this basis, to conclude that they are highly similar is syllogistic reasoning. A woman is a human adult who was born female or who identifies as female. The word 'woman' does not tell one anything about relationships with others. In contrast and by definition, the word 'mum' means that that person has a particular relationship with another, or others. Its conceptual impact is one of a particular relationship with children, whereas the conceptual impact of 'woman' is that it informs others as to the gender identity of an adult human. Whilst both nouns denote a female, many women have had no children, but all mums have had or brought up children.

35. Given the construction of the parties' marks, WONDER will be seen as an adjective describing the second word. The conceptual meaning of the opponent's mark is that of a very good or effective woman. The authorities state that reputation has no part to play in the conceptual comparison of marks, save for very exceptional

circumstances, and neither party submitted that this case is exceptional.⁵ On the contrary, for the opponent, Ms MacIntyre submitted that I should consider the ordinary meaning of the words and not to import into my analysis any meanings created by the 'Wonder Woman' character because this would be contrary to law. Approaching the task this way, I find that 'wonder woman' does not tell one what the woman is good or effective at, beyond being a woman, because 'woman' carries no meaning or connotation beyond identifying the person as an adult human female. It is not much different to saying, 'wonder person'. However, the meaning of the applicant's mark is that of a very good or effective mum/mother; i.e. that the mum is very good or effective at raising children.

36. There is, therefore, some conceptual similarity in that both marks convey the impression of someone female who is very good or effective at something. Given the particular connotations of 'mum', which are absent from the opponent's mark, I find that the marks are conceptually similar to a low degree; i.e. there is more that is different about the respective concepts of the marks than is the same.

Distinctive character of the earlier marks

37. 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.⁶ Under this ground of opposition, I have only the inherent distinctiveness of WONDER WOMAN to consider, taking into account the guidance of the CJEU in *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*.⁷ This is because Mr Stone confirmed at the hearing that the opponent makes no claim to an enhanced level of distinctive character in relation to the goods relied upon for section 5(2)(b), which are its class 3 goods.⁸

⁵ See *Ravensburger AG v OHIM*, Case T-243/08, GC, and *Retail Royalty Company v Harringtons Clothing Limited*, BL O/593/20, Mr Phillip Harris, sitting as the Appointed Person.

⁶ *Sabel BV v Puma AG*, Case C-251/95.

⁷ Case C-342/97.

⁸ The original notice of opposition relied upon all of the many goods and services covered by the earlier mark, but the opponent restricted its reliance under section 5(2)(b) to its class 3 goods by filing an amended form TM7 on 20 August 2020.

38. WONDER WOMAN does not describe or allude to the opponent's goods or a characteristic thereof. The mark conceptualises a woman who is very good or effective at something. Given the Collins English Dictionary examples of 'wonder boy' and 'wonder drug', 'wonder' plus a noun appears to be a recognised construct. I find that the earlier mark has an average degree of distinctive character.

Likelihood of confusion

39. Deciding whether there is a likelihood of confusion is not scientific; it is a matter of considering all the factors, weighing them and looking at their combined effect, in accordance with the authorities set out earlier in this decision. One of those principles states that a lesser degree of similarity between goods and services may be offset by a greater degree of similarity between the trade marks, and vice versa.

40. I do not consider that there is a likelihood of direct confusion, even in relation to the goods which are identical. Although a finding of identical goods is a factor in the opponent's favour, the results of the other comparisons I have made point less strongly towards confusion. The earlier mark is distinctive to an average degree, but no more than that, whilst the high point of the mark comparison resulted in medium visual and aural similarity, but no higher. Importantly, I identified significant conceptual differences between the marks which would mean that different conceptual 'pictures' would be kept in the minds of average consumers. This is unlikely to result in the type of imperfect recollection which typically leads to direct confusion. Average consumers will notice the difference between the marks, even in relation to goods entailing no more than a normal attention level during purchase. The marks will not be directly mistaken for one another.

41. Although there is no direct confusion, I will also consider whether there is a likelihood of indirect confusion. Mr Iain Purvis QC, sitting as the Appointed Person, in *Back Beat Inc v L.A. Sugar (UK) Limited*, BL O/375/10, explained indirect confusion in the following terms:

“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 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).”

42. These are not exhaustive categories and if the applicant’s mark does not fall into these categories, there may nevertheless be something about the marks which will cause the average consumer to consider that they belong to the same or to an economically linked undertaking. Firstly, looking at the three categories, I consider

that the applicant's mark does not fall into (a) or (b). The earlier mark is not strikingly distinctive, or even distinctive to more than an average degree. The additional word MUM is not an addition of a non-distinctive element. There is more to consider under (c). However, it seems to me that the 'changed' element would need to be more obviously a logical brand extension than in the present case. It cannot be said that WONDER retains an independently distinctive role in either mark as it qualifies the second word and creates a unitary concept. Moving from WOMAN to MUM (or vice versa) does not feel like an obvious brand development. One is a formal, official term for an adult human female, the other has an informal, colloquial and 'cosy' ring to it. In *Dirtybird Restaurants Ltd v. Salima Vellani*, BL O/413/18, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, said:

"18. There is no rule or presumption to the effect that the concurrent use of a trade mark and one of its components for identical or similar goods or services will always or necessarily give rise to the perception that the goods or services concerned come from the same or economically linked undertakings. That might or might not be the case. In order to determine whether it is, the decision taker must give as much or as little significance to the visual, aural and conceptual differences and similarities between the marks in issue as the relevant average consumer would have attached to them at the relevant point in time (which in this case was July/August 2015). It is axiomatic that the relevant average consumer is to be regarded as reasonably well-informed and reasonably observant and circumspect. However, (s)he is not to be regarded as a person who normally engages in extended thought processes for the purpose of pairing and matching trade marks or actively considering how they might be developed or appropriated for use as siblings of other marks. Indirect confusion of the kind described by Mr Iain Purvis QC in paras. [16] and [17] of his decision in *L.A. Sugar* is a matter of instinctive reaction to precipitating factors rather than the result of detailed analysis, as emphasised by Mr James Mellor QC sitting as the Appointed Person in *Duebros Ltd v Heirler Cenovis GmbH* (BL O/547/17; 27 October 2017) at para. 81."

43. For the average consumer to reach a conclusion that the undertakings responsible for the marks are linked, they would need to analyse the marks more than a reasonably

observant and circumspect person would normally do and decide that the changed second word must point to a sub-brand or brand extension. I do not think that this is likely; it is stepping over the line of instinctive reaction to one of detailed analysis. There are no other reasons that I am able to identify which would lead to indirect confusion. There is no likelihood of confusion, either directly or indirectly.

Section 5(2)(b) outcome

44. The opposition under section 5(2)(b) fails.

Section 5(3) of the Act

45. Section 5(3) states:

“(3) A trade mark which-

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

(3A) Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected.”

46. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Adidas-Salomon*, [2004] ETMR 10 and Case C-487/07, *L’Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

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

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

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

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

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

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

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

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

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This 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*).

47. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that the earlier mark is similar (or identical) to the applicant's mark. Secondly, the earlier mark must have achieved a level of knowledge/reputation amongst a significant part of the relevant public. Thirdly, it must be established that the level of reputation and the similarities between the marks will cause the relevant public to make a link between them, in the sense of the earlier mark being brought to mind by the later mark. Fourthly, assuming that the first three conditions have been met, section 5(3) requires that one or more of the three types of damage claimed will occur. It is unnecessary that the goods and 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.

48. The first condition of the marks being similar is satisfied: as found earlier in this decision, the earlier mark is visually and aurally similar to the applicant's mark to a medium degree, and conceptually similar to a low degree.

49. The next condition is reputation. Reliance upon this ground requires evidence of a reputation amongst a significant part of the relevant public (*General Motors*). It also requires a reputation as a trade mark in relation to the goods and services for which the earlier mark is registered and upon which the opponent relies, not some general reputation. Mr Kogan, in the first page of his witness statement, says “This statement explains the strong reputation of the WONDER WOMAN character since her launch in 1941”.

50. In *Tulliallan Burlington Ltd v EUIPO*, Case T-123/16, the GC considered whether a UK trade mark, BURLINGTON ARCADE, which was registered in relation to, *inter alia, the bringing together, for the benefit of others, a variety of goods, enabling customers to conveniently view and purchase those goods from general merchandise retail stores*, was entitled to benefit from the reputation of BURLINGTON ARCADE as the name of a well-known shopping arcade in the UK. The court held (at paragraph 27 of its judgment) that:

“It is apparent also from the file that the applicant’s earlier trade marks, which designate services in Classes 35 and 36, are known to a significant part of the public of the relevant market as being the name of a very well-known shopping arcade in the United Kingdom, located in central London, bringing together luxury boutiques within the arcade. Since that reputation of the applicant’s earlier trade marks is not disputed by the parties, the question which arises, in the present case, is ultimately whether that reputation corresponds in fact to the services in Class 35 for which the earlier trade marks have been registered, so that the applicant is properly entitled to benefit from the protection of the reputation in question.”

51. The court went on to find that the services of bringing goods together via third party outlets in a shopping arcade did fall within the scope of the registration. It is clear from the court’s judgment that this was an essential requirement for the trade mark to qualify for protection under article 8(5) of the EU Trade Mark Regulations (which is equivalent to section 5(3) of the Act). I also note that in Case 252/07, *Intel*, one of the factors the CJEU said should be taken into account in order to decide whether the public will make a link between the earlier mark and the later mark is “*The*

nature of the goods or services for which the conflicting marks are registered, or proposed to be registered.” (Emphasis added). The reputation relied on for the purposes of section 5(3) of the Act must therefore be in the goods and services covered by the opponent’s earlier trade mark relied upon in these proceedings.

52. In the present case, the opponent relies upon the following goods and services for its section 5(3) claim:

Class 9: motion picture films featuring comedy, drama, action, adventure and/or animation, and motion picture films for broadcast on television featuring comedy, drama, action, adventure and/or animation; downloadable audio-visual media content in the field of entertainment featuring animated motion pictures, television series, comedies, and dramas.

Class 16: printed matter and paper goods, namely, books featuring characters from animated, action adventure, comedy and/or drama features, comic books, children’s books, strategy guides, magazines featuring characters from animated, action adventure, comedy and/or drama features, coloring books, children’s activity books.

Class 41: entertainment; entertainment services in the nature of live-action, comedy, drama, animated, and reality television series; production of live-action, comedy, drama, animated and reality television series.

53. Some of Mr Kogan’s statement is directed at use of the opponent’s mark outside the UK and the EU. This is not relevant because any reputation that the earlier mark has is one which must cause the UK relevant public to make a link between the marks. Reputation in the US and other areas of the world cannot assist the opponent’s case. Opinions such as “... Wonder Woman, whom I dare say is known universally around the world, including throughout the United Kingdom”, are not reliable evidence, whether or not the applicant has challenged the veracity of the statement.

54. Mr Kogan states that Wonder Woman is a beloved comic book character, exhibiting screenshots from the opponent’s comics website (DC Comics), which has a top level domain of .com. Images from a Dorling Kindersley DC Comics

Encyclopedia relating to Wonder Woman are shown in Exhibit JK(6). The character is a super hero with superhuman powers. It appears that the book was published in both the USA and the UK prior to the relevant date, although I note that the pricing is in dollars. Mr Kogan states that vintage comic collections featuring the Wonder Woman character have been available to buy in the UK. Exhibit JK(11) comprises extracts taken from Amazon.co.uk said to demonstrate the sale of such collections. The prints are all dated 12 September 2020, although the comics themselves appear to be vintage. However, there is no information as to the volume of sales of either the collections or the original comics or, indeed, any comics in the UK or the EU. Some of the collections are advertised at a few pounds, others considerably more so, including at over £100. Turnover figures for comics have been given as worldwide revenue, amounting to several million dollars in the years immediately preceding the relevant date.

55. Mr Kogan states “(the United Kingdom” revenue figures will of course be less, but nevertheless a notable proportion of the whole).” At best, this is Mr Kogan’s opinion, that the proportion of sales attributable to the UK are “notable”. It is not fact. UK/EU figures are important, yet this is a comment relegated to brackets, following the provision of global figures. There are no corroborative figures indicating what the level of sales of comics in the UK/EU has been, or whether the comics were Wonder Woman comics, as opposed to comics which featured the Wonder Woman character. There are too many gaps in the evidence to make a finding that at the relevant date the earlier mark had a qualifying reputation in the UK and/or the EU in comics or any of the other class 16 goods of the registration which are relied upon.

56. Mr Kogan states that the character Wonder Woman appeared in the 2016 film entitled *Batman v Superman: Dawn of Justice*; and in the 2017 films entitled *WONDER WOMAN* and *Justice League*. A film entitled *WONDER WOMAN 1984* was scheduled for release in the UK in December 2020, as a sequel to the 2017 film. The sequel was originally announced in July 2017, with the title confirmed in June 2018. Its release was delayed because of the COVID-19 pandemic. Mr Kogan exhibits at Exhibit JK(13) what he describes as examples of the substantial press coverage of the sequel in the UK. The exhibit comprises two pages of Google hits which have not been expanded. The search criteria was for “wonder woman 1984” before 17 December 2019, which

is the relevant date in these proceedings. I can see that some of the hits are dated 9 and 11 December 2019, only days prior to the relevant date. The others which date from 2018 are from entities which are not known to me as UK websites (unlike the entry from *The Sun*, dated 11 December 2019).

57. Mr Kogan provides figures for the three films released in the UK in 2016 and 2017 (in US dollars): *Batman v Superman: Dawn of Justice* \$53,128,158; *WONDER WOMAN*: \$28,100,000; and, *Justice League*: \$24,097,528. These figures are from “Box Office Mojo”, which Mr Kogan describes as an independent website. Relevant screenshots from the Box Office Mojo website are shown in Exhibit JK(14). It is unclear why the opponent has not provided its own figures. Mr Kogan gives approximate UK figures for DC Comics’ home entertainment sales (i.e. DVDs). In 2018, the figure was \$1million. However, I note that the figures begin in 2015, prior to the cinema release of the three films referred to above. Mr Kogan does not say that the home entertainment figures relate specifically to the three films. Likewise, the references by Mr Kogan to Youtube trailers for the films do not specify how many UK or EU views there were. The viewing figures of over 311 million for three *WONDER WOMAN* trailers seems to suggest views from outside of the UK (at least). The social media evidence also does not show how many posts or ‘likes’ were from the UK (or EU). It is clear some are from the US which use the American spelling of ‘theater’, refer to the ‘fall’ instead of autumn, and use the US date format of the month followed by the day. The screenshots were downloaded on 8 April 2020.

58. Exhibit JK(22) shows that the 2017 *WONDER WOMAN* film won a UK award – The Empire Awards – for “Best Sci-Fi/Fantasy” and was nominated for best film. Exhibit JK(18) comprises two pages of unexpanded Google hits for a search for “wonder woman film” prior to 17 December 2019. I see that there are several hits from *The Guardian*, which shows this was UK publicity. The headline of one of those hits says “Wonder Woman shakes off female superhero curse to top UK box office” (6 June 2017). Examples of full reviews are contained in Exhibit JK(19) from the BBC news website, the London *Evening Standard*, the *Metro* newspaper, the *Mail Online*, *The Independent* and *The Guardian*. The reviews were published in May 2017 and June 2017. I note that there is a short reference to a 1974 TV series. There is another mention of the TV series in *The Independent*, giving a history of the character, but this

appears to be a copy of an article from *The Washington Post*. Mr Kogan refers to the TV series at paragraphs 12, 62 and 63 of his witness statement. He also refers to animated films in which the Wonder Woman character appears. Mr Kogan refers to Exhibit JK(8) in connection with the TV series and animated films. This exhibit is from Wikipedia. There is no information within the extract as to what was aired in the UK. Whereas modern TV streaming platforms frequently show content from the US, that is not an inference that can be made about UK television programming in the 1970s when there were only three terrestrial channels.

59. I note from the witness statement that UK sales figures are given for DVD, Blu-ray and digital sales, as follows:

Year	US\$
2015	650,000
2016	90,000
2017	9,000,000
2018	1,000,000
2019	300,000

60. Mr Kogan explains these figures:

40. These figures cover all of the various WONDER WOMAN Blu-Ray, DVD and digital sales, including the following titles: *WONDER WOMAN* (TV movie); *WONDER WOMAN* (television series 1975-1979); *WONDER WOMAN II* (TV pilot); *The Return of WONDER WOMAN*; *WONDER WOMAN* (2009 animated film); *WONDER WOMAN* (2017 motion picture); and game *LEGO Dimensions: DC WONDER WOMAN Fun Pack* (2015). As can be seen, the total comes to a very large estimated US\$11 million in just the United Kingdom.

61. Earlier, I said that reliance upon section 5(3) of the Act requires evidence of a reputation in the goods and services for which the earlier mark is registered and upon which the opponent relies. It also requires that the earlier mark has been used as a trade mark. This is a key issue in these proceedings because the opponent relies upon a trade mark registration which is the name of a fictional character, who was the subject of the eponymous box-office hit in 2017. The question is whether WONDER

WOMAN served a trade origin function for films or whether it would have only been seen as denoting the subject matter of the films, without also serving as an indicator of trade origin. The issue is highly fact-dependent, as observed by Birss J. 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). It depends on what is shown in the evidence.

62. In *Danjaq LLC v OHIM*, Case T-435/05, the GC did not accept that use of 'Dr No' as the title of a film was trade mark use. Dr No distinguished the artistic work but it was 'James Bond' which was the trade mark which distinguished the trade origin of the series of films to which the film Dr No belonged. In the present proceedings, there was a single cinema motion picture released prior to the relevant date: *WONDER WOMAN*, in 2017. The evidence is thin on the publicity in the UK (or the EU) prior to the relevant date of the sequel, *WONDER WOMAN 1984*. The unexpanded Google results referring to the sequel which are identifiable as UK results (they are in English so are unlikely to be EU member state search results) are dated 9 and 11 December 2019, ten days and less before the contested trade mark application was filed. This would not matter so much if there were other 'Wonder Woman' films identifiable as a series, prior to the relevant date. Although the other 2016 and 2017 films, *Batman v Superman: Dawn of Justice* and *Justice League* featured the character Wonder Woman, the mark does not appear in the titles. The first clearly involved two other characters, Batman and Superman, and it is these words which appear in the title. Exhibits JK(7) and JK(8) show that that the 'Justice League' is a group comprising several super hero characters. 'Wonder Woman' does not appear in the title of that film. The three films may be seen as titles in a DC Comics series of films, but they do not denote a *WONDER WOMAN* series of films. As in the *Danjaq* judgment (paragraph 25), *WONDER WOMAN* may distinguish the 2017 *WONDER WOMAN* film as an artistic work from other titles in the DC Comics series, but it does not indicate its commercial origin.

63. Turning to the DVD, Blu-ray and digital turnover figures for the UK, I do not think that they improve the position and show that, at the relevant date, the mark had come indicate that consumers had become accustomed to the mark denoting a series, and therefore trade origin, rather than the subject matter. Mr Kogan does not say what the

sales figures were for the various titles. They cannot all have involved all of the titles because some were not released until later than 2015. The *WONDER WOMAN* TV movie aired in 1974 (according to Mr Kogan in paragraph 11 of his witness statement) and the TV series between 1974 and 1979. The sales figures Mr Kogan has given start in 2015, which was the year in which *LEGO Dimensions: DC WONDER WOMAN Fun Pack* (2015) was released. The figures show sales of US\$650,000 in that year, so it is not possible to know how much of this was due to the *LEGO* release. The presentation of this title means that it is more likely that *LEGO* was the distinguishing trade mark and that *DC Wonder Woman* was seen as description of the content. The figures dropped to US\$90,000 the following year. They increased 100-fold in 2017 to US\$9,000,000. This was the year in which the major *WONDER WOMAN* film was screened in UK cinemas. The film was in cinemas in June 2017, according to the press reports. Therefore, this large leap in figures is more than likely to reflect DVD sales of that film later in 2017. The figures dropped the following year to \$1,000,000; again, it is not possible to say what proportion of these were sales of the 1970s, 2015 or 2017 releases. In 2019, they had dropped again to US\$300,000. I find that the figures are not explained in such a way that I can decide whether the DVD, Blu-ray and digital sales had come to denote a series, and trade mark use, or whether because of the release dates and the way in which the *LEGO* title is presented that they were seen as one-off titles or descriptive of the content.

64. Even if there was evidence that showed the 1974 -1979 TV series had aired in the UK and could be factored into whether *WONDER WOMAN* denoted a series of works which had come to be perceived as indicating trade origin, the TV series finished some 40 years prior to the relevant date and 38 years prior to the 2017 screening in the UK of the *WONDER WOMAN* film. Reputation for section 5(3) of the Act requires knowledge by a significant part of the relevant public, which is the general public. To show that the TV series of the 1970s contributes to a qualifying reputation in 2019 would require cogent evidence, especially given the gap between the dates when there was little apparent use of the mark in the UK (or the EU) in relation to goods and services relied upon in classes 9 and 41 (I have already found insufficient reputation for the class 16 goods).

65. I find that the opponent has not made out its claim under section 5(3) of the Act. This is because, despite 279 pages of evidence, the shortcomings and lack of UK/EU focus in that evidence means that I am unable to conclude that the opponent had a sufficient reputation in the earlier mark in relation to the Class 9 and 16 goods and the class 41 services relied upon, either in the UK or the EU, at the relevant date. Mr Kogan states that the opponent restricted its evidence in the interests of proportionality but it had more evidence available. It is for the opponent to choose how to support its case. More pages of ill-focussed evidence will not do the job any more effectively.

66. The opponent has provided a small amount of evidence regarding other goods (not relied upon for this ground) which could be regarded as of the kind which TV and film companies sell (or license) as merchandising. That may have been relevant in bridging the distance between dissimilar goods and services had I found reputation and a consequent link. I will say more about this part of the evidence below in consideration of the section 5(4)(a) ground. However, for the purposes of section 5(3), without a qualifying reputation in the goods and services relied upon for this ground, there can be no link made by the UK relevant public. Without a link, there can be no damage to the earlier mark or unfair advantage to the applicant. For completeness, even if I had found a qualifying reputation in relation to films, TV and comics, I would have rejected the section 5(3) claim because the relevant public would not make a link between WONDER WOMAN and WONDER MUM. The differences between the marks and the goods and services are too great. The section 5(3) ground fails.

Section 5(3) outcome

67. The ground of opposition under section 5(3) of the Act fails.

Section 5(4)(a) of the Act: passing off

68. Section 5(4)(a) states:

“A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b)...

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark.”

69. The three elements which the opponent must show are well known. In *Discount Outlet v Feel Good UK* [2017] EWHC 1400 (IPEC), Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56 In relation to deception, the court must assess whether “a substantial number” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

70. Guidance is given in paragraphs 184 to 188 of Halsbury’s Laws of England (4th Edition) Vol. 48 (1995 reissue) with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that:

“To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

(a) the nature and extent of the reputation relied upon;

(b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;

(c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;

(d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances."

In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted

with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

71. The applicant has not filed any evidence that it has used its mark. This means that the position must be assessed at the date when the applicant applied to register its trade mark: 17 December 2019.⁹

72. Part of the pleaded case is that the opponent owns “goodwill in the United Kingdom in WONDER WOMAN and the WONDER WOMAN character more generally as a result of its use in connection with a range of goods and services for an extensive merchandising programme linked to films, publications and entertainment services.” Specifically, at paragraph 3 of its statement of case, the opponent relies upon its goodwill in relation to a long list of goods and services in classes 3, 9, 16 and 41, which are contained in Annex 2 to this decision. Goodwill is “the attractive force which brings in custom.”¹⁰ For this ground, it is necessary that there are customers in the UK. A reputation elsewhere in the world will not help.¹¹

73. I have already explained that there are no turnover figures apportionable to the UK for comics. The only UK evidence in relation to comics are the Amazon.co.uk screen prints, downloaded after the relevant date. There are no sales figures to show how many of the collections were sold to UK customers.

74. Mr Kogan states that a search for WONDER WOMAN on Amazon.co.uk gives tens of thousands of results in over 35 Amazon departments including health and personal care; beauty; clothing; toys and games; books; videos; and the Prime and Kindle stores. Exhibit JK(24) is said to support this statement. Mr Kogan has also cited a weblink. It is not for the Tribunal to investigate weblinks, the content of which may have changed since Mr Kogan made his statement. When the Tribunal invited

⁹ *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O/410/11, Mr Daniel Alexander QC, sitting as the Appointed Person.

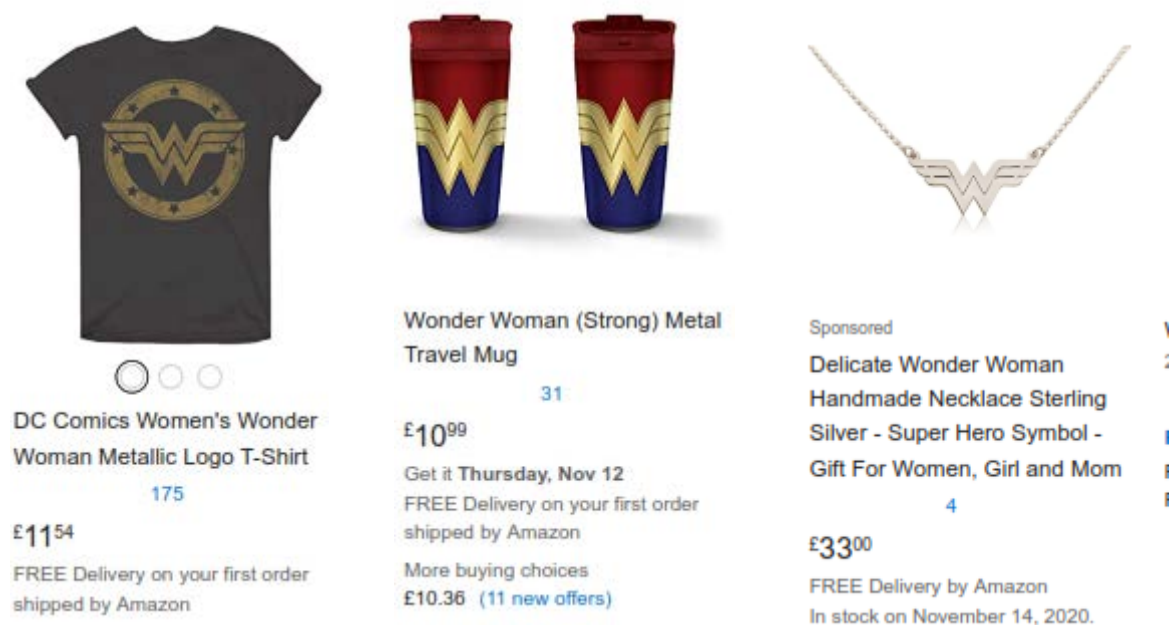
¹⁰ *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217, at paragraph 223.

¹¹ *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2015] UKSC 31.

the opponent to file evidence, by way of a letter dated 21 September 2020, the letter specifically stated:

“Any evidence must be in durable form, such as a print-out, a hard-disk etc; if it is not, it will be disregarded in accordance with rules 62(2) and (3). References to weblinks are not sufficient as the Hearing Officer will not undertake any independent research. Therefore, any evidential material that you wish to be considered by the Hearing Officer must be clearly set out and presented in, or as, an exhibit to a witness statement, statutory declaration or affidavit.”¹²

75. Exhibit JK(24) contains nine pages of listings on Amazon.co.uk which were downloaded on 10 November 2020, nearly eleven months after the relevant date. Not all of the listings are for WONDER WOMAN goods (e.g. there is a listing for a ‘Wonderbra’). Although the descriptions of the goods refer to WONDER WOMAN, these appear to have been added after the relevant date. I note several of the listings do not show WONDER WOMAN affixed to the goods but, instead, a logo; for example:



76. Some of the other use will be perceived as decorative:

¹² Rule 62(2)(b) refers.

DC Comics Wonder Woman Classic Text Logo Girls Pullover Hoodie | Official Merchandise | Ages 5-14,....

£14⁹⁹

DC Comics Makeup Bag for Ladies and Teenagers, Wonder Woman Make Up Brush Set with Hair Brush, Cosmetic Case, Eyeshadow Brushes And Contour Brush, Gifts For Women

Brand: DC Comics

Price: **£11.99** & **FREE Delivery** on your first eligible order to UK or Ireland. [Details](#)

Pay ~~£11.99~~ **£1.99**; get a **£10 Amazon Gift Card** on approval for the Amazon Platinum Mastercard. Terms apply. **Note:** This item is eligible for **click and collect**. [Details](#)

New (2) from **£11.99** & **FREE Shipping** on orders over £20.00

- WONDER WOMAN MAKEUP BAG:** This fantastic set includes a makeup bag with 4 makeup brushes and 1 hair brush. The makeup case is golden with a blue zip and the Wonder Woman blue, red and gold logo on the front. A beautiful girls make up set for teenagers and adults
- THE MAKEUP SET INCLUDES:** 1 x makeup bag, 1 x hair brush, 1 x fan contour brush, 1 x concealer brush, 1 x eyeshadow brush and 1 bronzer brush
- WONDER WOMAN MERCHANDISE:** These makeup brushes sets and cosmetic bag have been designed exclusively for F & F Stores and fully licensed by DC Comics. Ideal

£11.99 & **FREE Delivery** on your first eligible order to UK or Ireland. [Details](#)

Arrives: **Wednesday, Oct 7**
Fastest delivery: **Tomorrow**
Order within 3 hrs 12 mins [Details](#)

In stock.

Quantity: 1

[Add to Basket](#)

[Buy Now](#)

[Secure transaction](#)

Sold by **F & F Stores and Fulfilled by Amazon.**

Add gift options

[Select delivery location](#)

[Add to List](#)

New (2) from **£11.99** & **FREE Shipping** on orders over £20.00

[Share](#)





Have one to sell?
[Sell on Amazon](#)

77. One issue with this evidence is that none of these listings are from prior to the relevant date. There are no invoices to show sales to, presumably, the opponent's licencees. It is not possible to say how many of the opponent's various licensed goods (which it refers to as merchandising) were sold in the UK prior to the relevant date or what appeared upon them. I do not think, given the examples in Exhibit JK(24) and below, that it is safe to infer that any or all of these goods used WONDER WOMAN to designate the commercial origin of the goods, as opposed to decoration or a logo without the words. Mr Kogan provides some royalty figures for 2015 to 2019, as follows:

UK Sales	USD
Accessories	110,000
Apparel & Footwear	775,000
Food & Beverage	10,000
Gifts, Collectibles and Decor	50,000
Home & Housewares	250,000
Stationery & Paper Goods	40,000
Toys Games & Audio	1,200,000
Grand totals (Est.)	2,435,000

He states that the 'grand total' figure is for WONDER WOMAN merchandise, but the examples he then provides do not show WONDER WOMAN as the sign distinguishing the opponent's goods:



 <p>Revlon WW84 Kiss Melting Shine Lipstick Hot Spirited</p> <p>★★★★★ (0)</p> <p>Spend £15 on selected Cosmetics get VSL Touch... 3 for 2 on selected Cosmetics Lines...</p> <p>Free Micro Fibre Cloth when you buy 3 Cosmeti...</p> <p>£8.99</p> <p>1 Add</p>	 <p>Revlon WW84 Super Lustrous Lipstick Strike First</p> <p>★★★★★ (1)</p> <p>Spend £15 on selected Cosmetics get VSL Touch... 3 for 2 on selected Cosmetics Lines...</p> <p>Free Micro Fibre Cloth when you buy 3 Cosmeti...</p> <p>£7.99</p> <p>1 Add</p>	 <p>Revlon WW84 Super Lustrous Lipstick Justice for All</p> <p>★★★★★ (0)</p> <p>Spend £15 on selected Cosmetics get VSL Touch... 3 for 2 on selected Cosmetics Lines...</p> <p>Free Micro Fibre Cloth when you buy 3 Cosmeti...</p> <p>£7.99</p> <p>1 Add</p>	 <p>Revlon WW84 Super Lustrous Lipstick Truth Seeker</p> <p>★★★★★ (0)</p> <p>Spend £15 on selected Cosmetics get VSL Touch... 3 for 2 on selected Cosmetics Lines...</p> <p>Free Micro Fibre Cloth when you buy 3 Cosmeti...</p> <p>£7.99</p> <p>1 Add</p>
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78. Mr Kogan refers to a “Brand Assurance Report” for the EU, including the UK, which he states contains images of products branded with the WONDER WOMAN character and licensed for sale in the EU and the UK between 2013 and 2018. Mr Kogan describes the four pages comprising Exhibit JK(25) as a fraction of the report. The four images shown comprise a vest from March 2016; a maternity shirt from April 2016; socks from May 2016; and slippers from July 2016:



79. In my view, the perception of the words WONDER WOMAN on the vest, maternity shirt and the socks will be decorative rather than for the purpose of distinguishing the commercial origin of the goods.¹³ The use of WONDER WOMAN on the packaging for the slippers looks more like use showing commercial origin because the words appear on the label rather than as decoration on the slippers. However, this is one image from one month in one year, with no other evidence to show sales of slippers in the UK. Exhibit JK(26) comprises an extract from another brand report from an entity called Star Labs in relation to cosmetics and toiletries. This does show that the territory in which some of the goods were to be sold was the UK, and in well-known stores such as Boots and Primark. A lot of the details date from 9 and 13 December 2019, a few days before the relevant date. Others date from July of 2019, five months before the relevant date. The majority of the images of the goods in this exhibit do not show the words WONDER WOMAN or else the words are not used in such a way that they would be perceived as indicating commercial origin:

¹³ *Wild Child Trade Mark* [1998] RPC 455, Mr Geoffrey Hobbs QC, sitting as the Appointed Person.



80. I have noted the following from this exhibit which could point more towards use of WONDER WOMAN as a sign to distinguish the commercial origin of the goods:

Face gems, to be sold in Primark:



81. The date of the brand report for the face gems is 19 July 2019. This is five months prior to the relevant date and there is no information about how many of these goods were sold. I have also noted the following toilet bags from the exhibit:



82. The branding information for these toilet bags dates from June and July 2017. However, unlike the other goods details in this exhibit, no territory is specified and the "LMSI" office is given as the United States. This does not show sales were made in the UK or even that the goods were intended for sale in the UK. Exhibit JK(27) comprises screenshots of a catalogue from 2017 from an undertaking called Half Moon Bay, in Bath. The pages depict goods which are not relied upon for this ground,

such as tea towels, aprons, mugs, shopping bags and glasses. There is also no information about how many of these goods were sold.

83. As regards the claimed use of its sign in relation to class 3 goods, the opponent's case under this section is worse than its section 5(2)(b) claim. This is because the section 5(2)(b) claim was predicated on the basis of notional use of the class 3 goods of the earlier registration, whereas the use relied upon for section 5(4)(a) is either not use as a sign indicating commercial origin; or, there is no evidence of sales in the UK before the relevant date for goods in relation to which the sign can be said to indicate commercial origin; or, such sales as there were are not quantifiable which is important given the closeness in time to the relevant date.

84. There is no use that can be relied upon for goods which correspond to those listed under class 16 in the statement of case. I have already explained the issue with the film and TV related goods and services in classes 9 and 41. The use is not of a sign which denotes commercial origin in the UK.¹⁴ There is no use in the UK in relation to any of the other services listed in the pleadings under class 41. The same is true of most of the goods which correspond to those listed under class 9 in the statement of case. However, there is one last category of goods in class 9 featured in the evidence which I need to address: computer games.

85. Mr Kogan points to Exhibit JK(8), from Wikipedia. He states that this exhibit "... lists at least 14 computer games in which Wonder Woman features, many of which have been available in the United Kingdom". There are at least two problems with this statement. The first is that the information is vague as to what was 'available' in the UK: if there were sales in the UK, and how much was sold.

86. The second problem is that, as explained earlier in this decision, entertainment which features a character does not equate to use denoting trade origin. Mr Kogan refers to a game called *Injustice: Gods Among Us*, which he states features a number of DC Comics characters including Wonder Woman. Another game was called *DC*

¹⁴ See paragraph 8-128 of *The Law of Passing-Off: Unfair Competition by Misrepresentation* 5th Edition

Universe Online, a free-to-play multiplayer online game. Mr Kogan states that in this game "... Wonder Woman appears in various episodes". A third game referred to which was released in 2019, the same year as the contested application was filed, is entitled *Lego Super-Villains*. None of this would be perceived as use of WONDER WOMAN as an indicator of the trade source of the goods. Mr Kogan also refers to the 2015 game *LEGO Dimensions: DC Wonder Woman Fun Pack*. I have referred earlier in this decision to this title and my finding that WONDER WOMAN will not be perceived as the sign indicating trade origin: this is a *LEGO* game.

87. I conclude that the opponent's claim to goodwill is unsubstantiated. Stepping back from this, overarching all of the various goods and services for which the opponent claims goodwill and misrepresentation, is the same issue the opponent faces under section 5(2)(b). This ground is not about whether the later mark will bring to mind the earlier mark; instead, it is necessary for a substantial number of the opponent's customers, or potential customers, to believe that the applicant's goods are those of the opponent or an undertaking which is commercially linked to the opponent. Although the average consumer test is not strictly the same as the 'substantial number' test, in the light of the Court of Appeal's judgment in *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41 it seems doubtful whether the difference between the legal tests will (all other factors being equal) produce different outcomes. This is because they are both normative tests intended to exclude the particularly careless or careful, rather than quantitative assessments.

88. In relation to the class 3 goods of the application, all other factors are at least equal; in fact, the section 5(2) claim is stronger as it is based upon notional use, as I said earlier. If the use had been impressive, the assessment as to how distinctive the sign was of the opponent's business at the relevant date might have differed from the inherent (as opposed to enhanced) position under section 5(2)(b). Given the entertainment sector's commercial practice of merchandising, impressive use in relation to the goods and services relied upon might have been a factor outside of those considered under section 5(2)(b), despite the distance between some of the parties' goods and services.¹⁵ As it is, the opponent has failed to make out its case.

¹⁵ *Harrods Limited v Harrodian School Limited* [1996] RPC 697.

The burden is on the opponent to show that its business had sufficient goodwill which was distinguished by use of WONDER WOMAN at the relevant date so that it can be concluded that misrepresentation would occur and damage follow. It has not done that. Some of the gaps which I have identified in the opponent's evidence were the subject of the applicant's written observations of 11 February 2021, which I admitted at the CMC. The opponent made no application to file further evidence under rule 20(4) of the Trade Marks Rules 2008 (as amended) to meet those criticisms.

89. Even if I had found that the opponent had established goodwill attached to WONDER WOMAN, given the difference between the earlier sign and the contested mark, it is unlikely that the opponent's customers or potential customers would believe that WONDER MUM class 3 goods were those of the opponent, or from the same source as the WONDER WOMAN films, comics or merchandise, or that they featured the opponent's copyright works featuring WONDER WOMAN. The section 5(4)(a) ground fails. As a result, it is unnecessary for me to address the applicant's submissions about the relationship and ownership of any goodwill between the opponent, its affiliate Warner Bros. Entertainment Inc. and their parent company, Warner Media LLC.

Overall outcome

90. The opposition fails. The application may proceed to registration.

Costs

91. The applicant has been successful and is entitled to a contribution towards its costs, based upon the published scale.¹⁶ Although the applicant filed no evidence, it had to consider the opponent's evidence. I have included an amount in respect of that work. In respect of the CMC at which I refused the applicant's extension of time, I make no set-off in the opponent's favour. This is because the opponent caused extra work for the applicant in dealing with the skeleton argument issue. The two sides' procedural issues have cancelled each other out. Mr Stone referred to the applicant's

¹⁶ Tribunal Practice Notice 2/2016.

request to suspend these proceedings pending its revocation action against the opponents' earlier EUTM and the costs which that request had caused the opponent. The applicant's misconceived request was swiftly dealt with by the Tribunal without correspondence from the opponent.¹⁷ No costs set-off will be made in respect of this issue.

92. The breakdown of the cost award is as follows:

Considering the notice of opposition and filing the counterstatement	£350
Considering the opponent's evidence	£800
Attending a hearing	£800
Total	£1950

93. I order DC Comics (partnership) to pay to Unilever Global IP Limited the sum of **£1950**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 21st day of June 2021

Judi Pike

**For the Registrar,
the Comptroller-General**

¹⁷ The request was refused because the earliest possible date from which the earlier mark could be revoked was 19 November 2020. The earlier mark would still have been a live right at the relevant date, thus having no bearing on these proceedings; *per Cooper International Spirits and Others*, C-622/18 (CJEU) and Professor Ruth Annand's decision, sitting as the Appointed Person, in *Tax Assist* BL O/220/12.

Annex 1

“My decision is to refuse the applicant’s (reduced) extension of time request insofar as it relates to evidence, but to admit the written observations which were filed shortly before the CMC took place. The reasons originally provided on 19 January 2021 were vague. The letter from the Registry of 25 January 2021 pointed out to the applicant that a request for an extension of time, in addition to being filed on a form TM9, would “need to be fully supported with the reasons, explanations as to not only what has been done to date but, more particularly, what is left to do and how long it will take to produce the evidence. The Tribunal will also need to be satisfied that the extra time is warranted in the context of the pleaded grounds and what is necessary to determine the case efficiently and fairly.” This is taken from paragraph 2 of Tribunal Practice Notice (“TPN”) 2/2011. The response from the applicant on the same date was to file its TM9, repeating verbatim its request of 19 January 2021.

Although the Covid-19 pandemic has caused disruption, this is the case for most, if not all, businesses and individuals. It is not a panacea for obtaining further time. The Tribunal currently has over 3,500 live sets of proceedings before it, many of which are in the evidence rounds. Many parties have found ways to file evidence without requiring more time. In those cases where extra time is requested, the Tribunal requires more detail from parties wishing to cite the pandemic as a reason why they have not been able to comply with a deadline. I agree with Ms McFarland that revealing details about personal medical and private circumstances is, generally, not appropriate. However, information about what it is that the party wishes to file, whether that evidence is available digitally, and, if it is not, what the problems are with accessing the information, for example, is necessary. General references to the pandemic are insufficient and likely to result in a refusal for more time.

The TPN stipulates that the Tribunal will also need to be satisfied that the extra time is warranted in the context of the pleaded grounds and what is necessary to determine the case efficiently and fairly. The evidence in question is the applicant’s evidence. There is no requirement upon the applicant, for example, to prove

reputation, or use, or a reason for filing the trade mark application. Therefore, it was important for the caseworker to be able to tell from the extension request what it was, in the context of the pleaded grounds, that the applicant wanted to file. The reference to market place consumer behaviour, in relation to everyday consumer goods in class 3, was very vague.

As it happens, the evidence, sent to the Tribunal shortly before the CMC took place, was very brief and consisted of hardly any facts. The only facts were how the applicant intends to use its mark. This is irrelevant to (at least) section 5(2)(b) of The Trade Marks Act 1994 (as amended). The remainder consists of an individual's opinion as to whether there will be confusion. This is neither here nor there: it is for the hearing officer to decide whether there is a likelihood of confusion. Ms McFarland submitted that if there was a question as to admissibility, this was for another day and should not form part of my deliberations about whether to allow the requested extra time. I disagree: I need to be satisfied that the extra time is warranted in the context of the pleaded grounds and what is necessary to determine the case efficiently and fairly. Holding another CMC to decide upon admissibility is not a good use of anyone's time and certainly is not giving the case an appropriate share of the Tribunal's resources. I am of the firm view that the applicant's evidence is irrelevant, is not warranted in the context of the pleaded grounds, is unnecessary to determine the case efficiently and fairly, and that this is another reason to refuse the extension of time request for the filing of evidence, over and above what I have already said in this letter.

The applicant's written submissions/observations are admitted. It is more efficient and fairer that they be admitted now, given that the opponent has now seen them, rather than being made for the first time at the end of proceedings in lieu of a hearing, or at a hearing."

Annex 2

Class 3: *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices; cosmetics, namely lipstick, lip gloss and non-medicated lip balm; mascara; nail enamel; face powder, face cream, skin lotion and skin gel; body powder; bath oil, bath gel and non-medicated bath salts; hand cream and lotion; body cream and lotion; sunscreen preparation, namely cream and lotion; shaving cream and after-shave lotion, skin cleanser and non-medicated body soaks; body deodorant, cologne and perfume; soaps, namely, liquid bath soap, gel soap and bar soap; toothpaste; detergent soap, namely, liquid and powder; fabric softener; deodorant soap, skin soap; and shampoo and shampoo conditioner; essential oils, hair lotions; mouthwash; non-medicated toilet preparations; bubble bath; shower gel; body cream and lotion; cosmetics all for sale as part of a kit; sachets for perfuming linen; makeup all for sale as part of a kit; nail enamel; nail care and manicure kits (cosmetics); emollient preparations and substances; essential oils, massage oils and lotions all for sale as part of a kit; sun-tanning preparations.*

Class 9: *scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; compact discs, dvds and other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment, computers; computer software; fire-extinguishing apparatus; motion picture films featuring comedy, drama, action, adventure and/or animation, and motion picture films for broadcast on television featuring comedy, drama, action, adventure and/or animation; audio video discs, and digital versatile discs featuring music, comedy, drama, action, adventure, and/or animation; stereo headphones; batteries; cordless telephones; cd players; cd rom computer game discs; telephone and/or radio pagers; compact disc players; radios; mouse pads; eyeglasses, sunglasses and cases therefore; downloadable software for use in playing online computer games, downloadable computer game software; computer game software for use on mobile and cellular phones; video and computer game programs; video game cartridges; computer and video games which are designed for hardware platforms, namely, game consoles and personal computers; cd-rom and digital versatile computer game discs and computer*

programs, namely, software linking digitized video and audio media to a global computer information network; downloadable audio-visual media content in the field of entertainment featuring animated motion pictures, television series, comedies, and dramas; computer software, namely, computer software for streaming audio-visual media content via the internet, computer software for streaming and storing audio-visual media content, downloadable audio and video players for media content with multimedia and interactive functions, video search and annotation software, content protection software, database management software, database synchronization software; computer programs for accessing, browsing and searching online databases, software that enables users to play and program entertainment-related audio, video, text and multi-media content; computer application software for streaming and storing audio-visual media content; computer application software for streaming audio-visual media content via the internet; downloadable computer software for streaming audio-visual media content via the internet; downloadable computer software for streaming and storing audio-visual media content; downloadable publications in the nature of books featuring characters from animated, action adventure, comedy and/or drama features, comic books, children's books, strategy guides, magazines featuring characters from animated, action adventure, comedy and/or drama features, coloring books, children's activity books and magazines in the field of entertainment; cellular telephone accessories, namely hands-free accessories, cellular telephone covers and cellular telephone face covers; encoded magnetic cards, namely, phone cards, credit cards, cash cards, debit cards and magnetic key cards; and decorative magnets.

Class 16: *paper, cardboard; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers' type; printing blocks; printed matter and paper goods, namely, books featuring characters from animated, action adventure, comedy and/or drama features, comic books, children's books, strategy guides, magazines featuring characters from animated, action adventure, comedy and/or drama features, coloring books, children's activity books; stationery, writing paper, envelopes, notebooks, diaries, note cards, greeting cards, trading cards; lithographs; pens, pencils, cases therefor, erasers, crayons, markers, colored pencils, painting sets, chalk and chalkboards; decals, heat transfers; posters; adhesive plastic film with removable paper for mounting images for decorative purposes; mounted and/or unmounted photographs; book covers, book marks, calendars, gift wrapping paper; paper party favors and paper party decorations, namely, paper napkins, paper place mats, crepe paper, invitations, paper table cloths, paper cake decorations; printed transfers for embroidery or fabric appliqués; printed patterns for costumes, pajamas, sweatshirts and t-shirts; printed publications, pamphlets,*

brochures, newspapers, journals and magazines, manuals, magazines, printed matter and paper goods, namely, maps; paper doilies; metal money clips; non-metal money clips.

Class 41: *education; providing of training; entertainment; sporting and cultural activities; entertainment services, namely, providing online video games, providing online computer games, providing temporary use of non-downloadable video games; production of video and computer game software; entertainment services in the nature of live-action, comedy, drama, animated, and reality television series; production of live-action, comedy, drama, animated and reality television series; distribution and display of live-action, comedy, drama and animated motion picture theatrical films; production of live-action, comedy, drama and animated motion picture theatrical films; theatrical performances both animated and live action; providing information via an electronic global computer network in the field of entertainment relating specifically to games, music, movies, and television; providing a web site featuring film clips, photographs and other multimedia materials; providing news about current events and entertainment, and information related to education and cultural events, via a global computer network; and providing information for and actual entertainment via an electronic global communications network in the nature of live-action, comedy, drama and animated programs and production of live-action, comedy, drama and animated motion picture films for distribution via a global computer network; providing a computer game that may be accessed by a telecommunications network; and electronic publishing services, namely, publication of text and graphic works of others on-line featuring articles, novelizations, scripts, comic books, strategy guides, photographs and visual materials; amusement parks services; amusement park rides; live or pre-recorded shows and/or movies; entertainment and/or recreation information; entertainment club services; education and entertainment services provided via a global computer network; information relating to education and entertainment provided on-line from a computer database or the internet; electronic games services provided via a global computer network; providing on-line publications (non-downloadable); on-line publication of electronic books and journals (non-downloadable) publication and distribution of printed media and recordings; provision of live entertainment; production of live entertainment; audio-visual display presentation services for entertainment purposes; organising of events, exhibitions and shows for entertainment purposes; production of audio entertainment; production of entertainment shows featuring dancers and singers; provision of entertainment services on cruise ships; video arcade services; providing amusement arcade services; theme park services; amusement park services with a theme of films; amusement park services with a theme of radio productions; amusement park services with a theme of television productions; education and training services relating to the establishment, operation, administration, management and conduct of amusement and theme parks; movie studios; recording studio services; television*

entertainment featuring comedy, drama, action, adventure and/or animation; cinema services; providing cinema and theatre facilities; rental of cinematographic and motion picture films; distribution of cinematographic and motion picture films; editing of cinematographic and motion picture films; showing of cinematographic and motion picture films; providing on-line computer databases and on-line searchable databases in the field of entertainment.