

O-296-08

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2413454
BY JAMES LEONARD MILLER TO REGISTER THE TRADE MARK**



IN CLASS 41

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 94470
BY SOCIETE D'EXPLOITATION RADIO CHIC**

TRADE MARKS ACT 1994

**IN THE MATTER OF Application No. 2413454
By James Leonard Miller to register the trade mark
FUN STATION and device in Class 41**

and

**IN THE MATTER OF Opposition thereto under No. 94470
by Societe d'Exploitation Radio Chic**

BACKGROUND


1) On 9 February 2006, James Leonard Miller applied to register the following trade mark:



2) The application was in respect of “[e]ntertainment provided by way of family amusement centres” in Class 41.

3) On 7 July 2006, Societe d'Exploitation Radio Chic filed notice of opposition to the application. The opposition is based on grounds under Section 5(2)(b) and Section 56 of the Trade Marks Act 1994 (“the Act”).

4) The opponent relies upon their earlier Community trade mark (CTM) registration 1293216 and in particular, Class 41 of that registration. The details of his trade mark, insofar as they are relevant to these proceedings are:

Trade Mark	Registration Date	Relevant Specification
	25 September 2000	Education; training; entertainment; sporting and cultural activities; radio entertainment; television entertainment; rental of sound recordings; editing of radio and television programmes; arranging of competitions for education or entertainment; publication of books and magazines; discothèque services; entertainer services; organization of exhibitions for cultural and educational purposes; organization of sports competitions; arranging of colloquiums, conferences and congresses; production of shows; film production.

5) The applicant subsequently filed a counterstatement denying the grounds for opposition and putting the opponent to proof of use in relation to the services relevant to the proceedings.

6) Both sides filed evidence in these proceedings. Only the applicant requested to be heard but the opponent has filed written submissions in lieu of a hearing. Both sides ask for an award of costs. The matter came to be heard on 14 August 2008 when the applicant was represented by Ms Christy Rogers of Counsel instructed by Messrs Bourneo Hughes Martell Solicitors.

Opponent's Evidence

7) This takes the form of two witness statements. The first of these is by Claude Sertorio and is dated 21 June 2007. Mr Sertorio is the CEO of Societe d'Exploitation Radio Chic. He has been employed by the company since 1989 and makes the statement from his own knowledge and from that derived from the company records.

8) Mr Sertorio explains that the Fun Radio station was launched in 1987 and has been used consistently since 1999 in both France and Belgium. It has also been used in Slovakia. A history of the company and the FUN RADIO brand as recorded on Wikipedia (and translated on-line into English) is provided at Exhibit CS1. Despite the poor quality of translation it is possible to ascertain some relevant points. FUN RADIO was created on 2 October 1985 and then followed a series of changes of ownership with RTL Group (the parent company of the opponent) taking full control in 1999. Two studios are recorded, both in France.

9) Mr Sertorio explains that the opponent is a wholly owned subsidiary of RTL Group which is Europe's largest TV, radio and production company. Exhibit CS3 consists of copies of extracts from RTL's website providing information about FUN RADIO. Market share in France fluctuated between 3.1% and 4.5% in the years 1999 to 2005 and in 2003 FUN RADIO enjoyed 3.3 million listeners equating to 3.6% of the market share. Advertising share is indicated as 2.9% to 4.9% of advertising share in the years 2000 to 2005. Annual revenues for the years 1999 and 2000 are reported as €18 million and €22 million respectively.

10) FUN RADIO services are promoted in a number of different ways such as sponsorship of events, through promotional events, movie partnerships, concerts and parties and also through its website or third party websites. Numerous exhibits are submitted providing examples of such promotion. All are in the French language and many clearly relate to France, such as concerts in various locations in France where FUN RADIO is a prominent sponsor. I will not itemise these further, but will refer to them in more detail later as required.

11) Mr Sertorio concludes that the extensive use has resulted in a significant reputation and goodwill in the trade mark FUN RADIO.

12) The second witness statement is by Julius Edward Benedick Stobbs, Trade Mark Attorney and partner of Boulton Wade Tennant, the opponent's representative. This is dated 6 August 2007 and highlights what Mr Stobbs believes is the key elements of Mr Sertorio's evidence. In this respect he highlights the Wikipedia entry to demonstrate consistent use of FUN RADIO during the relevant period, the extracts from the RTL website to demonstrate that the radio station maintained a high audience and advertising share and a high level of annual revenue.

Applicant's Evidence

13) This is a witness statement by the applicant, James Leonard Miller dated 7 November 2007. Mr Miller provides a history of his business and explains the name FUN STATION was first used in December 2002 and now features prominently on four leisure developments in the UK.

DECISION

Proof of use

14) The Trade Marks (Proof of Use, etc) Regulations 2004 apply in this case. The provision reads as follows:

“6A Raising of relative grounds in opposition proceedings in case of non-use

(1) This section applies where –

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within Section 6(1) (a), (b) or (ba) in relation to which the conditions set out in section 5(1),(2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes –

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, ...

(5) In relation to a Community trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

15) The application was published in the Trade Marks Journal on 7 April 2006. The trade mark relied upon by the opponent were registered on 25 September 2000. This earlier trade mark is therefore registered more than five years before the publication date of the applicant’s trade mark and the opponent is therefore required to demonstrate that these trade marks have been put to genuine use in the five year period ending with the date of publication of the application.

16) The requirements for “genuine use” have been set out by the European Court of Justice (ECJ) in its judgment in *Ansul BV v Ajax Brandbeveiliging BV*, Case C-40/01 [2003] RPC 40. The ECJ held as follows:

“35. ... ‘Genuine use’ therefore means actual use of the mark....

36. ‘Genuine use’ must therefore be understood to denote use that is not merely token, serving solely to preserve the rights conferred by the mark. Such use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user...

37. It follows that ‘genuine use’ of the mark entails use of the mark on the market for the goods or services protected by that mark and not just internal use by the undertaking concerned. The protection the mark confers and the consequences of registering it in terms of its enforceability *vis-à-vis* third parties cannot continue to operate if the mark loses its commercial *raison d’être*, which is to create or preserve an outlet for the goods or services that bear the sign of which it is composed, as distinct from the goods or services of other undertakings. Use of the mark must therefore relate to goods or services already marketed or about to be marketed and for which preparations by the undertaking to secure customers are under way, particularly in the form of advertising campaigns...

38. Finally, when assessing whether there has been genuine use of the trade mark, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, in particular whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark.

39. Assessing the circumstances of the case may thus include giving consideration, *inter alia*, to the nature of the goods or service at issue, the characteristics of the market concerned and the scale and frequency of use of the mark. Use of the mark need not, therefore, always be quantitatively significant for it to be deemed genuine, as that depends on the characteristics of the goods or service concerned on the corresponding market.”

17) In accordance with Section 6A (5) of the Act, as the earlier trade mark relied upon by the opponent is a Community trade mark, it must demonstrate that it has been put to genuine use within the European Community. The opponent claims use in France, Belgium and Slovakia. Insofar as the claim relates to Belgium and Slovakia, it is not supported by any evidence and I will not consider use in these territories any further. With regard to use in France, Exhibit CS3 discloses listening figures, market share and advertising share (detailed in paragraph 9 above) in relation to the service of radio broadcasting. In summary, these figures indicate that the radio station known as FUN RADIO enjoys a market share in excess of 3%. In addition, annual revenues are provided for the years 1999 and 2000. Whilst these revenues may relate exclusively to a period prior to the registration date (25 September 2000) of the opponent’s trade mark, in light of the figures referred to above, I am prepared to accept they are indicative of a continuing significant business in France in the field of radio broadcasting.

18) Whilst Mr Sertorio, in his witness statement, makes general statements attesting to the earlier trade mark being used in relation to all the services listed in its Class 41 specification, this wider use is not substantiated in the evidence. The evidence illustrates the trade mark being used in relation to radio broadcasting and also where the radio station supports or organises events. Mr Sertorio refers to numerous exhibits as supporting his statement that FUN RADIO is involved in other, wider activities. These exhibits are copies of French language adverts, leaflets and magazine pages with translations of the relevant text provided by Mr Sertorio. It is normal in such circumstances for independent translations to be provided. Nevertheless, in order to consider the opponent’s best case, I will consider these exhibits and translations at face value. These exhibits illustrate that the radio station is involved in sponsoring a beach party (Exhibit CS5), a comic festival and a number of sporting events (Exhibit CS4). These are merely vehicles for promoting the radio station itself and the trade mark FUN STATION does not identify the origin of these other services. As such, these are not examples of use which reflects the essential function of the trade mark, namely to act as a guarantee of the identity or origin of the services.

19) The exhibits also illustrate organising of DJ tours, organising parties and concerts in night clubs (Exhibit CS5) and running competitions on the radio where movie tickets can be won. Mr Sertorio refers to these competitions as “movie partnerships” (Exhibit CS6). Taking the evidence as a whole, the clear impression is that these services are peripheral to the main activity of radio broadcasts and are undertaken to promote the core activity. Nonetheless, I am content that there has been genuine use in relation to these services. As such, I conclude that for the purposes of Section 6A of the Act, the opponent has demonstrated genuine use in

relation to “Radio entertainment services; entertainment in the form of beach parties, DJ tours, night club parties and concerts and radio competitions”.

Section 5(2) (b)

20) The opposition is founded upon Section 5(2) (b) of the Act. This reads:

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

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

(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.”

21) In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the ECJ in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,

(b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG*, 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*,

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*,

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki*

Kaisha v Metro-Goldwyn-Mayer Inc.,

(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma AG*,

(g) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(i) further, 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; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(j) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*

Comparison of services

22) I intend to approach the comparison of services question based upon this more narrow scope upon which the opponent has demonstrated genuine use, namely “Radio entertainment services; entertainment in the form of beach parties, DJ tours, night club parties and concerts and radio competitions” and for convenience, I reproduce both the applicant’s list of goods below and the opponents revised list of services:

Applicant's services	Opponent's revised list of services
Entertainment provided by way of family amusement centres	Radio entertainment services; entertainment in the form of beach parties, DJ tours, night club parties and concerts and radio competitions

23) In assessing the similarity of services, it is necessary to apply the approach advocated by case law and to take account of all the relevant factors relating to the services in the respective specifications. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the ECJ stated at paragraph 23:

‘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 end users and their method of use and whether they are in competition with each other or are complementary.’

24) Other factors may also be taken into account such as, for example, the distribution channels of the goods concerned (see, for example, paragraph 53 of the judgment of the Court of First Instance (CFI) in Case T-164/03 *Ampafrance v OHIM – Johnson & Johnson (monBeBé)*).

25) At a certain level of generality the applicant's and opponent's services can be considered to be the same in that they are both “entertainment services”. However, upon closer inspection the nature of these services is quite different. The opponent's core services are accessed via radio apparatus, the other by visiting the physical premises of the proprietor. One is enjoyed ostensibly by listening, the other by physical interaction with the apparatus provided. As such the method of use of these respective services is also quite different. Certainly they are not in competition with each other in any way. The opponent's peripheral activities are accessed via attendance at a particular venue and in this respect they are closer to the applicant's services. In its written submissions, the opponent contends that “family amusement services could include music, dance, karaoke or even DJ services”. No evidence has been provided by the opponent to support its contention. The applicant, on the other hand, claims that he plays no music at his premises. In the absence of evidence to support this point, I cannot conclude that “family amusement services” are similar to the opponent's peripheral services beyond the general assertion that they are both entertainment services. Therefore, I find that the respective services have a low level of similarity as they are used in totally different ways, are not in competition with, or even complementary to each other and with respect to the opponent's core activity are accessed in different ways.

The average consumer

26) As matters must be judged through the eyes of the average consumer (*Sabel BV v. Puma AG*, paragraph 23) it is important that I assess who the average consumer is for the services at issue. For the services for which the opponent has demonstrated genuine use,

the average consumer is the general public. The applicant's service is "entertainment provided by way of family amusement centres". The average consumer for such services is, once again, the general public. The purchasing act differs between the respective services in that to access the radio broadcast services provided by the opponent, the consumer will, in most cases, be required to undertake the act of tuning-in to the radio channel and will require a reasonable level of attention in doing so. The purchasing act in respect to the applicant's services will generally also require a reasonable level of attention. It is likely that there will be less of a consideration as to which provider is chosen as it is more likely that only a single provider of such services will exist at each location. This may result in a lower level of attention being required during the purchasing act for such services compared with the act of choosing a radio station from a wide range of stations. In relation to the opponent's peripheral services, the purchasing act is brought closer to that required to access the applicant's services as the respective services will both require the consumer to go to the relevant location or premises.

27) Both the opponent's and the applicant's entertainment services are readily accessible to the general public and I therefore conclude the relevant average consumer for both sets of services is an ordinary member of the public. In respect to the opponent's radio broadcast services, the consumer pays a reasonable degree of attention when choosing the service, and in respect to the applicant's family amusement centres the degree of attention may be somewhat less but not necessarily the lowest level of attention.

Use and distinctive character of the earlier trade mark

28) I have to consider whether the opponent's trade mark has a particularly distinctive character either arising from the inherent characteristics of the trade mark or because of the use made of it. It contains the words FUN and RADIO. The first of these describes humour or amusement and in relation to entertainment services it has a very low level of distinctive character. The word RADIO is also highly descriptive in relation to radio broadcasting services. Taking the words as a whole, the opponent's trade mark describes a radio station or radio programme featuring humour and amusement. The addition of the oval and circular device elements provides the trade mark with some distinctive character, but when viewed as a whole, I find that the level of inherent distinctive character is no more than low in respect to the services where genuine use has been demonstrated.

29) The effect of reputation on the global consideration of a likelihood of confusion under Section 5(2)(b) of the Act was considered by David Kitchen Q.C. sitting as the Appointed Person in *Steelco Trade Mark* (BL O/268/04). Mr Kitchen concluded at paragraph 17 of his decision:



"The global assessment of the likelihood of confusion must therefore be based on all the circumstances. These include an assessment of the distinctive character of the earlier mark. When the mark has been used on a significant scale that distinctiveness will depend upon a combination of its inherent nature and its factual distinctiveness. I do not detect in the principles established by the European Court of Justice any intention to limit the assessment of distinctiveness

acquired through use to those marks which have become household names. Accordingly, I believe the observations of Mr. Thorley Q.C in *DUONEBS* should not be seen as of general application irrespective of the circumstances of the case. The recognition of the earlier trade mark in the market is one of the factors which must be taken into account in making the overall global assessment of the likelihood of confusion. As observed recently by Jacob L.J. in *Reed Executive & Ors v Reed Business Information Ltd & Ors*, EWCA Civ 159, this may be particularly important in the case of marks which contain an element descriptive of the goods or services for which they have been registered. In the case of marks which are descriptive, the average consumer will expect others to use similar descriptive marks and thus be alert for details which would differentiate one mark from another. Where a mark has become distinctive through use then this may cease to be such an important consideration. But all must depend upon the circumstances of each individual case.”

30) The opponent’s evidence has demonstrated that its FUN RADIO trade mark has a significant reputation in France and in respect of radio broadcasting services. However, no evidence has been submitted to illustrate any enhanced reputation in the UK and I conclude that the trade mark’s inherent distinctive character has not been enhanced in the UK by its reputation.

Comparison of marks

31) I will now go on to consider the similarities and differences between the trade marks themselves and the impact of any differences upon the global assessment of similarity. When assessing this factor, I must do so with reference to the visual, aural and conceptual similarities between the respective trade marks bearing in mind their distinctive and dominant components (*Sabel BV v. Puma AG*, para 23). The trade marks to be compared are:

Trade mark of Societe d’Exploitation Radio Chic	Trade mark of James Leonard Miller
	

32) Firstly, I will consider the visual similarities between the respective trade marks. The earlier trade mark consists of the words FUN and RADIO with the word FUN being within a circle. This appears to be superimposed over the left side of a larger oval containing the word RADIO. The applicant’s trade mark consists of the words FUN and STATION with what I would describe as a disk-like device being dissected by these words. A red circle appears in this disc at a point where the dot above the letter “i” would appear.

33) Both trade marks share the word FUN, but the second words in the respective trade marks share no visual similarity. The respective device elements can both loosely be described as disc- like and as such bring the trade marks slightly closer together in terms of

visual similarity, but the differences between the trade marks are so different that the level of increased similarity is marginal. I conclude that there is a lowish level of visual similarity.

34) Considering the respective trade marks from an aural perspective, both share the common first word FUN but differ from each other in respect to the second word. RADIO and STATION are aurally distinct of each other. Taking these points into consideration, when viewed as a whole, the respective trade marks have both similar and dissimilar components resulting in a low level of aural similarity.

35) From a conceptual perspective the applicant's trade mark when used in relation to the applicant's services will convey the meaning of a place or location of amusement when perceived by the average consumer of the services of interest to the applicant. The opponent's trade mark on the other hand, when used in relation to radio broadcasting and other services used to promote the radio station, will convey to its relevant average consumer the concept of a radio station or radio programme featuring mirth and amusement. As such, whilst the conceptual identities of the respective trade marks share the idea of "amusement", when taken as a whole, and viewed in respect to the relevant services of each party, the concepts are distinct of each other.

36) The words FUN and STATION in the applicant's trade mark are ordinary dictionary words that when used together create a combination, albeit an unusual one, that will be understood to allude to a place that provides amusement. The opponent's contention that STATION is non-distinctive for a radio station is little relevance as the applicant's services do not include radio broadcasting.

37) The average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The visual, aural and conceptual similarities of the trade marks must, therefore, be assessed by reference to the overall impressions created, bearing in mind their distinctive and dominant components. Consequently, I must not engage in an artificial dissection of the trade marks, although I need to take account of any distinctive and dominant components. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but 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.

38) In this case, I believe that in both trade marks the distinctive and dominant components are the word elements, FUN RADIO and FUN STATION respectively. The ECJ have commented in *Shaker* that it is only permissible to make the comparison of trade marks on the basis of the dominant element only when all other components are negligible. In the current case, the device elements in both marks are not negligible and the trade marks must be considered in their entirety.

39) The opponent, in his written submissions, refers to a decision issued by the OHIM to support its contention that FUN RADIO and FUN STATION are similar. This decision is in respect of opposition proceedings B554420. Only a French language version of the decision is provided and the opponent's representative provides his own translation of certain extracts to conclude that the OHIM found there to be phonetic and conceptual similarities. It is also suggested that the OHIM found both visual similarities and differences but because the FUN

STATION trade mark in question contained a device element that is different to the current FUN STATION trade mark, this was of less relevance. I would go further and suggest that all the information provided about this decision is of little relevance as the opponent provides no information as to the respective services and also because the relevant consumer in those proceedings may be French speaking resulting in a conclusion that the English word “fun” is more distinctive for those consumers than for those in the current proceedings. Therefore, I can only conclude that the global assessment required by the case law may have been quite different than that required in the current circumstances.

40) In summary, I consider that there is some conceptual similarity in that both trade marks refer to FUN but that when viewed as a whole they are conceptually dissimilar. Taking account of the similarities and differences in the visual and aural impressions, I find that there is a low level of visual similarity and a lowish level of aural similarity and, overall, I find there is a low level of similarity between the respective trade marks especially when considered in relation to the respective services.

Likelihood of confusion

41) I have found that the respective trade marks share some aural similarity but have a low visual similarity and that there is no conceptual similarity when considering the respective services of interest to the parties. Some similarity arises from the common word FUN that is present in both trade marks, but that this word is not distinctive for entertainment services. Further, the earlier trade mark possesses a low degree of distinctive character that has not been enhanced by its reputation. I have also found that the respective services are not similar beyond the general level that they are both a form of entertainment service and that the average consumers are the same. I must now make an assessment as to whether these factors combine to create a likelihood of confusion.

42) In taking a balanced view and adopting the global approach advocated by case law, I find that the impact of the visual, aural and conceptual differences between the respective trade marks when considered together with the respective services to be such as to not lead the relevant public to confuse the trade marks or to be led into believing that the respective services originate from the same source. I find there is no likelihood of confusion and the opposition under Section 5(2) (b) fails.

Section 56

43) Section 56 of the Act reads:

“(1) References in this Act to a trade mark which is entitled to protection under the Paris Convention or the WTO agreement as a well known trade mark are to a mark which is well-known in the United Kingdom as being the mark of a person who-

(a) is a national of a Convention country, or

(b) is domiciled in, or has a real and effective industrial or commercial establishment in, a Convention country,

whether or not that person carries on business, or has any goodwill, in the United Kingdom.

References to the proprietor of such a mark shall be construed accordingly.

(2) The proprietor of a trade mark which is entitled to protection under the Paris Convention or the WTO agreement as a well known trade mark is entitled to restrain by injunction the use in the United Kingdom of a trade mark which, or the essential part of which, is identical or similar to his mark, in relation to identical or similar goods or services, where the use is likely to cause confusion.

...”

44) Section 56 (2) requires that the respective trade marks are at least similar, involve similar services and where use is likely to cause confusion. Owing to my finding under Section 5(2) (b) of the Act that there is no likelihood of confusion between the respective trade marks, this ground of opposition must also fail.

COSTS

45) At the hearing, Ms Rogers made submissions in support for a contribution of costs on a compensatory basis, but I see no unusual circumstances in these proceedings that require me to consider going off scale. Accordingly, the opposition having failed, the applicant is entitled to a contribution towards its costs. I award costs on the following basis:

Consideration of TM7	£200
Statement of case in reply	£300
Preparing and filing evidence	£400
Considering evidence	£200
Preparation for, and attendance at Hearing	£400
TOTAL	£1500

46) I order Societe d'Exploitation Radio Chic to pay James Leonard Miller the sum of £1500. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 30th day of October 2008

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