

O-435-16

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NOS 3079877, 3079861, 3079875 AND
3079864**

**BY THE KEY SUPPORT SERVICES LIMITED TO REGISTER THE TRADE
MARKS**

The logo consists of the word "The" in a small, light blue font above the word "key" in a larger, bold, dark blue font. The "k" in "key" is lowercase and has a distinctive shape.

**The Key
for
School
Leaders**

The logo consists of the word "The" in a small, light blue font above the word "key" in a larger, bold, dark blue font. The "k" in "key" is lowercase and has a distinctive shape.

**The Key
for School
Governors**

VARIOUSLY IN CLASSES 9, 16, 35 AND/OR 41

**AND IN THE MATTER OF CONSOLIDATED OPPOSITIONS THERETO UNDER
NOS 403907, 403910, 403912 AND 403913**

BY CHRISTINE MCGRORY

Background and pleadings

1) The Key Support Services Limited (“the applicant”) applied to register the four trade marks on 3 November 2014. They were accepted and published in the Trade Marks Journal on 5 December 2014.

2) Christine McGrory (“the opponent”) opposed all four marks, sometimes partially and sometimes opposing all of the goods and services listed, on the basis of Section 5(2)(a) and/or (b) of the Trade Marks Act 1994 (“the Act”). These oppositions were on the basis of, variously, three earlier marks. There is some inconsistency in identifying the services relied upon in the earlier marks and in what terms in the applicant’s specifications are actually being opposed. I discussed these with the parties at the hearing with both sides agreeing to an interpretation of the claims that I use as the basis of my decision. I produce below the list of the respective goods and services that reflects the counterstatements as clarified in the discussion at the hearing. At the hearing, the applicant withdrew its application 3079877 and, therefore, the tables do not include this mark:

Application 3079861	
<p>Earlier mark 2531459</p> <p>The Key Filing date: 13 November 2009</p> <p>Date of entry in register: 12 March 2010</p> <p>Class 41: <i>Provision of education and training; educational services; training services; arranging and conducting of shows, conferences, congresses, seminars, symposiums and workshops for educational purposes; organisation of seminars, workshops and conferences in the field of law of attraction, education and training; computer assisted education services; computer based education services; education services relating to vocational training;</i></p>	<p>Services opposed:</p> <p>Class 35: <i>Providing information, advisory and consultancy services relating to the organisation, running and good governance of educational establishments; ...</i></p> <p>Class 41: <i>Provision of education, training and tuition services provided for school</i></p>

information relating to entertainment or education provided on-line from a computer database or the Internet; organisation of shows; presentation of live performances; production of shows; providing digital audio and video (not downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices); provision of information, advisory and consultancy services; consultancy and advice relating to all the aforesaid services.

(this mark is relied upon against all of the applicant's Class 41 services)

Earlier Mark 3045211

The Key

Filing date:

05 March 2014

Date of entry in register:

08 August 2014

Class 35: ... *franchise consultancy services, business and management advice and provision of information relating to franchising and licencing; all relating to educational services in the nature of personal development courses, mentoring, corporate training; excluding any such services relating to publishing, digital publishing, online publishing via the Internet and social media.*

(this mark is relied upon against the Class 35 services detailed in the next column)

The opponent also relies on its earlier mark 3001525 "The Key New Generation", but this does not appear to place it in any better position than when relying upon the above two earlier marks.

governors, head teachers, bursars, school leaders, senior school staff and to teachers; arranging and conducting congresses, conferences, events, seminars, symposiums, lectures, meetings, workshops, courses and fairs; provision of courses of instruction in the governance of educational bodies; electronic publishing services; provision of on-line electronic publications; correspondence courses; instruction services; publishing services; publication of electronic books and journals on-line; provision of information on-line from a computer database or the Internet; publication and distribution of published material, audio and video materials; all the foregoing services and information and advice relating thereto available from computer databases, the Internet or via other communications; information and advisory services; all the aforesaid services relating to the fields of leadership, management and governance in schools, health and social care sectors.

Application 3079875

Earlier mark 2531459

The Key

Services relied upon:

Class 41: ...; computer assisted education services; computer based education services; ...; ... education provided on-line from a computer database or the Internet; ...; providing digital audio and video (not downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices); provision of information, advisory and consultancy services relating to all the aforesaid services.

(this mark is relied upon against the goods in bold in the Opponent's Class 9 and Class 35 specifications)

Earlier Mark 3045211

The Key

Class 35: ..., business and management advice ... relating to ... to educational services in the nature of personal development courses, mentoring, corporate training; excluding any such services relating to publishing, digital publishing, online publishing via the Internet and social media.

(This mark is relied upon against the opponent's underlined Class 35 services)

Services opposed:

Class 9: Electronic publications; publications in electronic form supplied on-line from a database or from facilities provided on the Internet or other networks (including websites); data recorded in electronic, ... form; data carriers; audio and visual recordings; publications in electronic form supplied on-line from database or from facilities provided on the Internet (including web sites); all the aforesaid goods relating to the fields of leadership, management and governance in schools, health and social care sectors.

Class 16: Printed matter; instructional and teaching materials; books, leaflets, pamphlets, brochures, documents, texts, programmes, periodical publications, magazines; newsletters; guides; catalogues; journals; newspapers; printed publications; journals; magazines, news bulletins; all the aforesaid goods relating to the fields of leadership, management and governance in schools, health and social care sectors.

Class 35: Providing information, advisory and consultancy services relating to the organisation, running and good governance of educational establishments; information services relating to organisation, running and good governance of educational establishments provided by means of searchable computer databases; all the aforesaid services also provided on-line from a computer database or the Internet; all the aforesaid provided by telephone; Advertising,

<p>Earlier Mark 3001525</p> <p>The Key New Generation</p> <p>Class 35: ..., <i>business and management advice</i></p> <p>Class 41: ...; <i>educational services; ...; computer assisted education services; ...; information relating to ... education provided on-line from a computer database or the Internet; publication of education materials; publication of educational printed matter, educational teaching materials and educational texts; ...; publishing services, including publishing services in relation to electronic publications in ..., education, training ...; providing digital audio and video (not downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices).</i></p> <p>(This mark is relied upon against the underlined Class 9 and 16 goods and Class 35 services)</p>	<p><i>marketing and promotion services; all the aforesaid services relating to the fields of leadership, management and governance in schools, health and social care sectors.</i></p> <p>Class 41: <i>Provision of education, training and tuition services provided for school governors, head teachers, bursars, school leaders, senior school staff and to teachers; arranging and conducting congresses, conferences, events, seminars, symposiums, lectures, meetings, workshops, courses and fairs; provision of courses of instruction in the governance of educational bodies; electronic publishing services; provision of on-line electronic publications; correspondence courses; instruction services; publishing services; publication of electronic books and journals on-line; provision of information on-line from a computer database or the Internet; publication and distribution of published material, audio and video materials; all the foregoing services and information and advice relating thereto available from computer databases, the Internet or via other communications; information and advisory services; all of the aforesaid services relating to the fields of leadership, management and governance in schools, health and social care sectors.</i></p>
--	--

<p>Application 3079864</p>	
<p>Earlier mark 253459</p> <p>The Key</p> <p>Class 41: <i>Provision of education and training; educational services; training services; arranging and conducting of shows, conferences, congresses, seminars, symposiums and workshops for educational purposes; organisation of seminars, in the field of ... education and training;</i></p>	<p>Class 9: <u><i>Electronic publications; publications in electronic form supplied on-line from a database or from facilities provided on the Internet or other networks (including websites); data</i></u></p>

computer assisted education services; ...; information relating to ... education provided on-line from a computer database or the Internet; ...; providing digital audio and video (not downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices); provision of information, advisory and consultancy services; consultancy and advice relating to all the aforesaid services.

(this mark is relied upon against the whole of the opponent's Class 41 specification)

Earlier mark 3001525

The Key New Generation

Class 35: *Franchising and franchise consultancy services, business and management advice and provision of information relating to franchising.*

Class 41: *Provision of education and training; educational services; training services; arranging and conducting of shows, conferences, congresses, seminars, symposiums and workshops for educational purposes; organisation of seminars, workshops and conferences in the field of law of attraction, education and training; computer assisted education services; computer based education services; education services relating to vocational training; information relating to entertainment or education provided on-line from a computer database or the Internet; publication of education materials; publication of educational printed matter, educational teaching materials and educational texts; organisation of shows; presentation of live performances; production of shows; publishing services, including publishing services in relation to electronic publications in the field of law of attraction, education, training and the organisation of seminars; providing digital audio and video (not downloadable) from a global*

recorded in electronic, ... form; data carriers; audio and visual recordings; publications in electronic form supplied on-line from database or from facilities provided on the Internet (including web sites); all the aforesaid goods relating to the fields of leadership, management and governance in schools, health and social care sectors.

Class 16: ...

Class 35: *Providing information, advisory and consultancy services relating to the organisation, running and good governance of educational establishments; information services relating to organisation, running and good governance of educational establishments provided by means of searchable computer databases; all the aforesaid services also provided on-line from a computer database or the Internet; all the aforesaid provided by telephone; Advertising, marketing and promotion services; all the aforesaid services relating to the fields of leadership, management and governance in schools, health and social care sectors.*

Class 41: *Provision of education, training and tuition services provided for school governors, head teachers, bursars, school leaders, senior school staff and to teachers; arranging and conducting congresses, conferences, events, seminars, symposiums, lectures, meetings, workshops, courses and fairs; provision of courses of instruction in the*

<p><i>communications network (including, but not restricted to, the Internet, websites and mobile communication devices).</i></p> <p><i>(this mark is relied upon against some of the opponent's Class 41 services - but the case is no stronger than in respect of earlier mark 253459 - and the underlined Class 9 goods and Class 35 services).</i></p> <p>Earlier mark 3045211</p> <p>The Key</p> <p>Class 35: <i>..., business and management advice ... relating to ... to educational services in the nature of personal development courses, mentoring, corporate training; excluding any such services relating to publishing, digital publishing, online publishing via the Internet and social media.</i></p> <p><i>(this mark is relied upon against the Class 35 services shown in bold)</i></p>	<p><i>governance of educational bodies; electronic publishing services; provision of on-line electronic publications; correspondence courses; instruction services; publishing services; publication of electronic books and journals on-line; provision of information on-line from a computer database or the Internet; publication and distribution of published material, audio and video materials; all the foregoing services and information and advice relating thereto available from computer databases, the Internet or via other communications; information and advisory services; all of the aforesaid services relating to the fields of leadership, management and governance in schools, health and social care sectors.</i></p>
---	---

3) The opponent claims that the respective goods/services are identical or similar and that the respective marks are identical or similar. None of the opponent's earlier marks are subject to proof of use by virtue of all having completed their registration procedures less than five years before the publication of the opposed applications.

4) The applicant filed counterstatements admitting that the earlier marks 2531459 "The Key" and 3045211 "The Key" are similar and that some of its Class 41 services are similar (but does not specify), but denies the other claims made.

5) All four oppositions were subsequently consolidated and both sides filed a single set of evidence covering all four oppositions. This will be summarised to the extent that it is considered appropriate/necessary.

6) A hearing took place on 20 July 2016, the opponent represented herself and the applicant was represented by Mr Philip Johnson of Counsel, instructed by Simons Muirhead & Burton.

Opponent's Evidence

7) This takes the form of a witness statement by Ms McGrory, founder and creator of educational, training, business/leadership, health and personal development programmes provided under the mark THE KEY. Ms McGrory provides details of the services she has provided, but I need not detail these here.

8) At Exhibit 14, Ms McGrory provides copies of online searches for “the key” conducted on 28 December 2015. These show that the opponent’s organisation appears in the first position and the applicant in the second and third positions.

9) Ms McGrory provides re-typed copies of emails from three of her clients at Exhibit 26. All attest that confusion would exist between the respective marks.

10) Ms McGrory also makes a number of submissions regarding the similarities between the respective parties’ goods and services. I will not detail these here but I will keep them in mind when making my decision.

Applicant's Evidence

11) This takes the form of a witness statement by Jack David Heywood, a solicitor with Simons Muirhead & Burton, the applicant’s representative in these proceedings.

12) Mr Heywood states that he undertook a further Internet search for “the key” where the opponent’s web page did not appear on the first page. He states that it is well known that such searches depend upon previous searches and is more likely to show hits previously searched.

13) At Exhibit JDH2, Mr Heywood provides a list of other third party marks containing the word “key” obtained from the *TM View* trade mark database.

DECISION

Preliminary issues

14) At the hearing, Mr Johnson informed me that the applicant withdrew its application 3079877. This decision therefore deals with this opposition only in respect of costs.

15) Secondly, some of the statement of grounds identified grounds based upon section 5(2)(a). In her witness statement, Ms McGrory made a request for the section 5(2)(b) grounds to apply in respect of all four oppositions. Whilst the applicant had made no comment on this request, at the hearing Mr Johnson informed me that the applicant does not challenge the requested amendment to the grounds of opposition. I will therefore proceed on the basis that in the three remaining oppositions the opponent relies upon grounds based upon section 5(2)(b) of the Act.

16) Having allowed the amendment to the statement of grounds, I find it convenient to begin by considering the grounds based upon section 5(2)(b).

Substantive decision

17) Sections 5(2)(b) of the Act is as follows:

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

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

18) Because of the nature of the oppositions with different services and different earlier marks being relied upon to challenge different parts of each of the four

challenged marks, I will consider the oppositions against each of the challenged marks in turn.

Application 3079861 “The Key for School Leaders”

Comparison of services

19) In the judgment of the Court of Justice of the European Union in *Canon Kabushika Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“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”.

20) The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity also includes the respective trade channels through which the goods or services reach the market and, in the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves.

21) As referred to by Mr Johnson at the hearing, I also keep in mind the guidance in *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), where Floyd J. (as he then was) stated:

“... 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."

22) In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

"I should add that I see no reason to give the word "cosmetics" and "toilet preparations"... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context."

23) In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

"In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase."

24) At the hearing, Ms McGrory repeatedly relied upon the actual use that she is making of her earlier marks. However, as Mr Johnson submitted, the assessment under section 5(2) of the Act requires that I undertake a notional analysis based upon the services covered by the terms in the respective specifications and not the actual use made of the marks. As I explained to Ms McGrory, this is because marketing strategies can change over time and the marks in question may subsequently be used in respect of goods and services distinct from how they are currently used in the market place.

Class 35

25) The respective services are:

Opponent's services	Applicant's services
<p data-bbox="188 472 507 506">Earlier Mark 3045211</p> <p data-bbox="188 580 775 1111">Class 35: ... <i>franchise consultancy services, business and management advice and provision of information relating to franchising and licencing; all relating to educational services in the nature of personal development courses, mentoring, corporate training; excluding any such services relating to publishing, digital publishing, online publishing via the Internet and social media.</i></p>	<p data-bbox="809 580 1407 835">Class 35: <i>Providing information, advisory and consultancy services relating to the organisation, running and good governance of educational establishments; ...</i></p>

26) The opponent's services of her earlier mark 3045211 include *business and management advice and provision of information relating to franchising and licencing; all relating to educational services in the nature of personal development courses, mentoring, corporate training*. Ms McGrory submitted that any perceived difference between the respective services are negated by the applicant specifying the sector (being the educational sector). This is correct to a degree as the business sector is relevant in assessing similarity. In this class *providing information, advice and consultancy* includes providing business and management information, advice and consultancy relating to the good governance of educational establishments. It is limited in such a way (i.e. to good governance) that it does not include services relating to franchising. Therefore the services are not identical. However, there is similarity because providers of *business and management information, advice and consultancy relating to the good governance of educational establishments* may also provide *business and management advice and provision of information relating to*

franchising and licencing ...relating to educational services... . Therefore, there may be an overlap in trade channels.

27) Further, whilst the applicant's information, advice and consultancy has a different focus to that of the opponent's, nevertheless, the core of the service is the same in nature, namely, they are both business advice and information. Their nature is very similar.

28) Taking all of this into account, I conclude that these respective services share at least a medium level of similarity.

Class 41

29) The respective services are:

Opponent's goods/services	Applicant's services
<p>Earlier mark 2531459</p> <p>Class 41: <i>Provision of education and training; educational services; training services; arranging and conducting of shows, conferences, congresses, seminars, symposiums and workshops for educational purposes; organisation of seminars, workshops and conferences in the field of law of attraction, education and training; computer assisted education services; computer based education services; education services relating to vocational training; information relating to entertainment or education provided on-line from a computer database or the Internet; organisation of shows; presentation of live performances; production of shows; providing digital audio and video (not downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices); provision of information, advisory and consultancy services;</i></p>	<p>Class 41: <i>Provision of education, training and tuition services provided for school governors, head teachers, bursars, school leaders, senior school staff and to teachers; arranging and conducting congresses, conferences, events, seminars, symposiums, lectures, meetings, workshops, courses and fairs; provision of courses of instruction in the governance of educational bodies; electronic publishing services; provision of on-line electronic publications; correspondence courses; instruction services; publishing services; publication of electronic books and journals on-line; provision of information on-line from a computer database or the Internet; publication and distribution of published material, audio and video materials; all the foregoing services and information and advice relating thereto available from computer databases, the Internet or via other</i></p>

<p><i>consultancy and advice relating to all the aforesaid services.</i></p>	<p><i>communications; information and advisory services; all the aforesaid services relating to the fields of leadership, management and governance in schools, health and social care sectors.</i></p>
--	---

30) I am mindful of the following guidance of the General Court (“the GC”) in *Gérard Meric v OHIM*, T-133/05 (*MERIC*):

“29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T- 10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

31) The opponent’s specification includes *Provision of education and training*. This is a broad term that covers many services, including the following of the applicant’s services: *Provision of education, training and tuition services provided for school governors, head teachers, bursars, school leaders, senior school staff and to teachers; ...provision of courses of instruction in the governance of educational bodies; ...correspondence courses; instruction services*. Applying the guidance of the GC in *MERIC*, these terms cover identical services.

32) Further, the opponent’s *arranging and conducting of shows, conferences, congresses, seminars, symposiums and workshops for educational purposes* are self-evidently identical to the applicant’s *arranging and conducting congresses, conferences, events, seminars, symposiums, lectures, meetings, workshops, courses and fairs* or if not identical, highly similar.

33) In respect of the applicant's *electronic publishing services; provision of on-line electronic publications; publishing services; publication of electronic books and journals on-line; provision of information on-line from a computer database or the Internet; publication and distribution of published material, audio and video materials; all the foregoing services and information and advice relating thereto available from computer databases, the Internet or via other communications; information and advisory services; all the aforesaid services relating to the fields of leadership, management and governance in schools, health and social care sectors*, these are all publishing services *per se* or the provision of publications and are either identical to, or highly similar to the following of the opponent's services:

"publication and distribution of published material, audio and video materials; all the foregoing services ... relating thereto available from computer databases, the Internet or via other communications"

34) The applicant's *correspondence courses; instruction services; ... all the foregoing services ... available from computer databases, the Internet or via other communications* are covered by the opponent's broad terms *provision of education and training* and, applying the guidance in *MERIC*, I find that the respective services are identical.

35) Next, I consider the applicant's *provision of information on-line from a computer database or the Internet; ...; all the foregoing information ... available from computer databases, the Internet or via other communications; ...; all the aforesaid services relating to the fields of leadership, management and governance in schools, health and social care sectors*. Information services in this class relate to the types of services proper to the class, namely education, training, entertainment and sporting and cultural activities. The opponent's Class 41 specification includes the term *provision of information, .. services*. This term must be interpreted in the same way and I conclude that the respective terms cover identical services.

36) Similarly, the applicant's *information and advisory services; all the aforesaid services relating to the fields of leadership, management and governance in schools,*

health and social care sectors must be considered to be covered by the opponent's broader terms *provision of information, [and] advisory ... services; ... advice relating to all the aforesaid services* [being all the other services listed in the opponent's Class 41 specification including *provision of education and training* at large and, therefore, it is identical when applying the guidance from *MERIC*.

Comparison of marks

37) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

38) It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

39) The respective marks are shown below:

Opponent's earlier mark	Applicant's Mark
The Key	The Key for School Leaders

40) The opponent's mark consists of, and the applicant's mark contains, the same two words "The" and "Key". Insofar as the opponent's mark is concerned, there is no additional matter and its distinctive character resides in the combination of the two words. However, the word KEY is the dominant distinctive element with the word "the" being less distinctive, functioning as the definite article. The applicant's mark consists of five words and the phrase, as a whole, "hangs together" in such way that the phrase "the key" loses some distinctive character because the words "for school leaders" combines to create an understandable and complete phrase. As a result of this, the distinctive character resides in its totality rather than any individual or group(s) of elements within the mark.

41) Visually, the marks share similarity because the opponent's mark consists of, and the applicant's mark contains, the words "The Key". These words appear at the beginning of the opponent's mark, but as I have already noted, they nevertheless, form part of a phrase. The impact of this is that the words "The Key", despite being at the beginning of the mark, are not visually dominant.. The remaining elements of the applicant's mark are absent in the opponent's mark. Taking all of this into account, I conclude that the respective marks share a low to medium level of visual similarity.

42) Aurally the respective marks share the same two syllables "the" and "key". The applicant's mark additionally contains the four syllables "for", "school", "lee" and "ders" that are absent in the opponent's mark. I conclude that the marks share a low to medium level of aural similarity.

43) Conceptually, both marks consist or contain the noun KEY meaning a shaped piece of metal for lock and unlock something. Other meaning are attributed to the word but it is my view that the consumer is likely to see the marks are a reference to a metaphoric reference to such an article. Both marks also include the definite article THE. The applicant's mark additionally contains the words "for School Leaders". Taking all of this into account, I conclude that the opponent's mark is likely to be interpreted as suggesting access or a solution to desired outcomes of services. The applicant's mark will be perceived as alluding to access to services or a solution for

school leaders. Consequently, there is some conceptual similarity, but also some difference.

Average consumer and the purchasing act

44) 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*.

45) In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

46) At the hearing, Mr Johnson submitted that the average consumer of the applicant's services is persons involved in management and leadership of schools or health or social care. I generally concur with this view, but would add that, as far as the educational-type services in Class 41, it would also include those with an interest and not just those involved in the sector. However, the broad scope of the opponent's Class 41 services results in its earlier 2531459 mark also covering services aimed at the field of management or leadership of schools or health or social care. Consequently, the respective average consumers may be the same. Such educational services involve a reasonable degree of care and attention when procuring them, more than when purchasing everyday goods and services, but still not the highest level. The average consumer in respect of the Class 35 services

covered by the opponent's earlier 3045211 mark will be individuals and businesses involved in, or, with an interest in, franchising and licencing. Mr Johnson submitted that because franchising is a specialist market where potential franchisees need to procure legal advice and be prepared to disclose information including financial information regarding their business or personal circumstances, then the purchasing act is highly considered. Once again, I concur with Mr Johnson and conclude that the purchasing process in respect of such services is likely to be high.

Distinctive character of the earlier trade mark

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

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

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

48) Mr Johnson conceded that the opponent's mark has some distinctive character but submitted that it only "manages it by a scintilla" because it consists of a phrase commonly used in conversation and is "quite descriptive" because it is a way of indicating an analogy to unlocking/solution for a problem. Whilst I agree with Mr Johnson's characterisation of the meaning that will be attributed to the mark, I do not concur with his assessment of distinctive character. Yes, the mark consists of a phrase that has some relevant allusion, it is not a mark that directly alludes to any characteristic of the services. Whilst it does not share the same high level of distinctive character as an invented word may have, neither does it merely have a "scintilla" of distinctive character. It is somewhere in between and I would characterise it as having a low to medium level of inherent distinctive character.

49) I must also consider if its level of distinctive character has been enhanced through use. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU found that:

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

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

chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)".

50) Mr Johnson submitted that the opponent's business is small and therefore there is no enhanced distinctive character attached to the earlier marks. The opponent states in her evidence that there is awareness of her brand in the education sector and is "generally well known for business, health, leadership and training expertise in a variety of organisations". Exhibits are provided that illustrate that the opponent has had a presence in the education sector and has been using "The Key" brand since 2010 with evidence that parents of a school pupil in Airdrie attended "The Key" workshop, that it has featured in a Channel 4 television programme in 2013 and that a book linked to the opponent's services has sold 4000 copies. However, there is no specific information relating to the specific marks and there is no indication of the market share, how intensive and geographically widespread the use of the mark has been; nor is there information regarding the amount invested by the opponent in promoting the mark or what proportion of the relevant consumer identifies the services as originating from a particular undertaking. Bearing in mind that I am considering enhanced distinctive character across the UK as a whole, I am unable to conclude that the opponent's mark benefits from any enhanced level of distinctive character arising from the use made of it.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

51) The following principles are gleaned from the decisions of the 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:

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

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

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

51) As I stressed to Ms McGrory at the hearing, I must undertake a notional analysis rather than one based upon the current marketing strategies of the parties. The reasons for this were explained in *Devinlec Développement Innovation Leclerc SA v OHIM*, Case C-171/06P, when the CJEU stated that:

“59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks.”

52) In his witness statement, Mr Heywood claims that the opponent is trying to claim a monopoly in the words “the key”. Ms McGrory may rely upon her earlier marks, as registered, (for my considerations here, they are 2531459 “The Key” and 3045211 “The Key”). Whether there is a likelihood of confusion between these marks and the applied for mark being considered depends on the outcome of my assessment of all the relevant factors. Mr Heywood’s submission appears to rely on the point that the applicant’s mark contains additional matter (the words “for School Leaders”) and that Ms McGrory is not entitled to prevent all uses of “The Key” in a trade mark and the penumbra of protection should not extend to the applicant’s mark. On the other hand, at the hearing, Ms McGrory submits that the words “for school leaders” are merely a “tag line”. I do not agree with Ms McGrory’s characterisation. I have already found that the applicant’s mark consists of a complete and understandable phrase and that its distinctive character resides in its totality rather than any individual or group(s) of elements within the mark. In this context, no part of the mark will be perceived as a “tag line”. As a result, I have found that the respective marks share a

low to medium level of visual and aural similarity and that there is some conceptual similarity, but also some difference.

53) In respect of identical services, it follows that the average consumers are the same and I have found that the average consumer, in respect of these identical services, pays a reasonable degree of care and attention. I have also found that the opponent's earlier marks are endowed with a medium level of inherent distinctive character and that this level is not enhanced through use.

54) Taking all of this into account, even where some of the respective services are identical, I find that the average consumer of these services is not likely to believe that they originate from the same or linked undertaking. The phrase "The Key" does not stand out as a distinct element within the applicant's mark, but rather takes on a descriptive role within the phrase of which the mark consists. This has sufficient effect for the average consumer to perceive the mark as a single allusive phrase rather than having any link to services identified by the opponent's mark. I find that there is no likelihood of confusion.

55) In conclusion, I find that there is no likelihood of confusion between the opponent's "The Key" marks and the applicants "The Key for School Leaders" and the opposition fails in its entirety.

Application 3079864 "The Key for School Governors"

56) The opponent's best case, or at least equal best case, resides with its earlier mark 253459 "The Key". This earlier mark and the applicant's mark both cover the identical services "provision of education". The global analysis in respect of these two marks includes many of the same considerations that I have already discussed in respect of the previous opposition in terms of identifying average consumers, the nature of the purchasing act, identity of services and distinctive character of the earlier mark. Once again, no one element of the applicant's mark can be identified as the dominant and distinctive element. Rather, as with the previous mark, its distinctive character resides in the complete phrase.

57) It follows that with the considerations being the same or very similar to those involved in assessing the previous mark, that there is no likelihood of confusion here either. In light of this, this opposition also fails in its entirety.

Application 3079875 “The Key” (stylised)

58) Some of the considerations in respect of this opposition are different to those discussed above, and it is necessary that I consider this opposition in more detail.

Comparison of goods and services

59) The respective goods and services relevant for considering the applicant’s Class 9 goods are as follows:

Services relied upon by the Opponent	Applicant’s goods
<p>Earlier mark 2531459</p> <p>The Key</p> <p>Services relied upon:</p> <p>Class 41: <i>...; computer assisted education services; computer based education services; ...; ... education provided on-line from a computer database or the Internet; ...; providing digital audio and video (not downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices); provision of information, advisory and consultancy services relating to all the aforesaid services.</i></p> <p>(this mark is relied upon against the goods in bold in the Opponent’s specification)</p> <p>Earlier Mark 3001525</p> <p>The Key New Generation</p>	<p>Class 9: <u><i>Electronic publications; publications in electronic form supplied on-line from a database or from facilities provided on the Internet or other networks (including websites); data recorded in electronic, ... form; data carriers; audio and visual recordings; publications in electronic form supplied on-line from database or from facilities provided on the Internet (including web sites); all the aforesaid goods relating to the fields of leadership, management and governance in schools, health and social care sectors.</i></u></p>

Class 35: ..., *business and management advice*
...[relating to franchising]

Class 41: ...; *educational services; ...; computer assisted education services; ...; information relating to ... education provided on-line from a computer database or the Internet; publication of education materials; publication of educational printed matter, educational teaching materials and educational texts; ...; publishing services, including publishing services in relation to electronic publications in ..., education, training ...; providing digital audio and video (not downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices).*

(this mark is relied upon against the underlined goods, in Class 9)

60) Insofar as earlier mark 2531459 “The Key” is relied upon, the application is challenged only in respect of its *data recorded in electronic, ... form; data carriers; audio and visual recordings; publications in electronic form supplied on-line from database or from facilities provided on the Internet (including web sites); all the aforesaid goods relating to the fields of leadership, management and governance in schools, health and social care sectors.* Firstly, I will consider the applicant’s *data recorded in electronic form, ... relating to the fields of leadership, management and governance in schools, health and social care sectors.* The opponent’s services are essentially (i) education services provided via computer, (ii) providing audio and video via a computer, and (iii) advice and consultancy relating thereto. There is a fundamental difference between the respective goods and services because of the different nature of goods compared to services, however, the applicant’s data includes data relating to *education* in the fields of leadership, management and governance in schools, health and social care sectors, and consequently, these goods may form part of the computer based education covered by the opponent’s specification. It is likely that a provider of one will also provide the other and, as

such, the respective goods and services are likely to share the same trade channels. There will be similarity of purpose in that both the applicant's goods and the opponent's services can be for the purpose of imparting educational information.

61) Further, there is complementarity in that where the applicant's goods relate to education they are likely to be complementary to some of the opponent's services in that there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking (see the comments of the GC in *Boston Scientific Ltd v OHIM* - T-325/06).

62) I conclude that there is a moderately high level of similarity. However, even if I am wrong and if the applicant's term does not include *education* in the fields of leadership, management and governance in schools, health and social care sectors there is, nonetheless, similarity in that there may be commonality of trade channels and average consumers between the opponent's services (being a broad term that includes computer based education relating to leadership, management and governance in schools, health and social care sectors) and the applicant's goods. Here there would be a reasonable level of similarity.

63) In respect of the applicant's *audio and visual recordings; publications in electronic form supplied on-line from database or from facilities provided on the Internet (including web sites)*, as with the other services in the specification, these are limited in that they all relate to the fields of leadership, management and governance in schools. Once again, this limitation does not exclude such goods relating to *education* in the fields of leadership, management and governance in schools and, consequently, the same considerations exist as discussed in my previous two paragraphs. I conclude that there is a moderately high level of similarity, but if I am wrong regarding the scope of the limitation, as discussed in the previous paragraph, there is still a reasonable level of similarity.

64) In addition, the applicant's *audio and visual recordings and publications in electronic form* may be the subject of the opponent's service of providing digital

audio and video. Consequently, there is similarity of trade channels and users. There is a moderately high level of similarity.

65) The opponent also relies upon its earlier mark 3001525 “The Key New Generation” that is directed against the whole of the applicant’s Class 9 goods except *data carriers*. Whilst the opponent relies upon the list of services shown in the table above, it is my view that her best case lies with *computer assisted education services, publication of education materials*. In respect of electronic publications, data and audio and visual recordings insofar as they relate to education, then there is similarity with the opponent’s services. Whilst they are different in nature, one being a service the other goods, they share some similarity of purpose (to impart education upon the consumer). Methods of use are closely linked because such goods are regularly provided during the opponent’s services. Further, it is also likely that these goods and services would be provided by the same undertaking therefore creating an expectation on the part of the consumer that the respective goods and services are provided by the same undertaking. I conclude that there is a reasonably high level of similarity.

66) The respective goods and services relevant for considering the applicant’s Class 16 goods are as follows:

Services relied upon by the Opponent	Applicant’s goods
<p data-bbox="188 1404 459 1435">Earlier Mark 3001525</p> <p data-bbox="188 1496 496 1527">The Key New Generation</p> <p data-bbox="188 1588 770 1666">Class 35: ..., <i>business and management advice</i> ... [relating to franchising]</p> <p data-bbox="188 1727 775 1986">Class 41: ...; <i>educational services; ...; computer assisted education services; ...; information relating to ... education provided on-line from a computer database or the Internet; publication of education materials; publication of educational printed matter, educational teaching materials</i></p>	<p data-bbox="809 1588 1382 1800">Class 16: <i>Printed matter; instructional and teaching materials; ... all the aforesaid goods relating to the fields of leadership, management and governance in schools, health and social care sectors.</i></p>

<p><i>and educational texts; ...; publishing services, including publishing services in relation to electronic publications in ..., education, training ...; providing digital audio and video (not downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices).</i></p>	
---	--

67) The opposition is directed only against the applicant's *printed matter; instructional and teaching materials*. The opponent's best case lies with its *publication of education materials, publication of educational printed matter, educational teaching materials and educational texts and publishing services, including publishing services in relation to electronic publications in ..., education [and] training*. Once again, there is a fundamental difference in nature between goods and services, but there is a medium level of similarity arising from the overlap of subject matter in respect of the applicant's goods and the industry that the opponent's services are directed to. There is a close link between the producer of printed matter and the publisher of the same and the consumer will expect a trade connection. Further, there is complementarity in the sense articulated by the GC in *Boston Scientific* because such publishing services are essential for the existence of these goods.

68) The respective services relevant for considering the opposition against the applicant's Class 35 services are as follows:

<p>Services relied upon by the Opponent</p>	<p>Applicant's services</p>
<p>Earlier mark 2531459</p> <p>The Key</p> <p>Services relied upon:</p> <p>Class 41: <i>...; computer assisted education services; computer based education services; ...; ... education provided on-line from a computer database or the</i></p>	<p>Class 35: <u><i>Providing information, advisory and consultancy services relating to the organisation, running and good</i></u></p>

Internet; ...; providing digital audio and video (not downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices); provision of information, advisory and consultancy services relating to all the aforesaid services.

(this mark is relied upon against the goods in bold in the applicant's specifications)

Earlier Mark 3045211

The Key

Class 35: *..., business and management advice ... relating to ... to educational services in the nature of personal development courses, mentoring, corporate training; excluding any such services relating to publishing, digital publishing, online publishing via the Internet and social media.*

(this mark is relied upon against the opponent's underlined services)

Earlier Mark 3001525

The Key New Generation

Class 35: *..., business and management advice [relating to franchising]*

Class 41: *...; educational services; ...; computer assisted education services; ...; information relating to ... education provided on-line from a computer database or the Internet; publication of education materials; publication of educational printed matter, educational teaching materials and educational texts; ...; publishing services, including publishing services in relation to electronic publications in ..., education, training ...; providing digital audio and video (not*

governance of educational establishments; information services relating to organisation, running and good governance of educational establishments provided by means of searchable computer databases; all the aforesaid services also provided on-line from a computer database or the Internet; all the aforesaid provided by telephone; Advertising, marketing and promotion services; all the aforesaid services relating to the fields of leadership, management and governance in schools, health and social care sectors.

downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices).

(this mark is relied upon against the underlined Class 35 services)

69) In respect of the applicant's *providing information, advisory and consultancy services relating to the organisation, running and good governance of educational establishments; all the aforesaid services also provided on-line from a computer database or the Internet; all the aforesaid provided by telephone*, there is some inconsistency in that there are two limitations, the first limiting the services to being provided on-line, the second limiting to provision by telephone. I will assume that the intention was to indicate that the services are to be provided by both methods of delivery, but I do not consider this to be determinative in any way in assessing the level of similarity to the opponent's services.

70) The opponent's best case lies with its reliance upon its earlier mark 3045211 "The Key" insofar as it includes *business and management advice ... relating to ... to educational services in the nature of personal development courses, mentoring, corporate training; excluding any such services relating to publishing, digital publishing, online publishing via the Internet and social media*. The parties' services include advice relating to organisation, running and good governance of educational establishments on the one hand and certain educational services on the other. The nature and method of use of the services is identical with both being in the form of advice. Their intended purpose is also very similar, but not identical because the exact subject of the advice varies. That said, both parties services are provided to the field of education provision. There is also a likelihood that there is an overlap of trade channels because the provider of business advice on the organisation, running and good governance of educational establishments may also provide business advice in respect of educational services. I find that the respective services share a reasonably high level of similarity.

71) I do not believe there is any great distinction between providing advice and the provision of information and consultancy services. These latter services are likely to


be provided with advice services and, further, advice services may actually include the provision of information and consultancy services. Consequently, I find that these services also share a reasonably high level of similarity to the opponent's services.

72) The opposition is also directed at the applicant's *information services relating to organisation, running and good governance of educational establishments provided by means of searchable computer databases; all the aforesaid services also provided on-line from a computer database or the Internet*. These differ to the applicant's information services discussed above by way of being limited as being "provided by means of searchable computer databases". Such a limitation does not impact upon my considerations above, regarding the *information services* not so limited because this second *information services* is merely a subset of the first. Consequently, the level of similarity will be the same, namely, they share a reasonably high level of similarity.

73) The opposition to this application is not directed at the Class 41 services.

Comparison of marks

74) The respective marks are shown below:

Opponent's earlier mark	Applicant's Mark
The Key The Key New Generation	

Similarity to the opponent's mark "The Key"

75) In respect of the opponent's mark "The Key" (it's "first mark"), I have already commented at paragraph 40, above that there is no embellishment of the mark and its distinctive character resides in the combination of the two words. However, the word KEY is the dominant distinctive element with the word "the" being a less distinctive, being the definite article.

76) The applicant's mark contains an element of colour and stylisation and with the word KEY appearing in significantly larger typeface than the word "THE", it is the former word that dominates the mark. It is the dominant and distinctive element.

77) Visually, the respective marks consist of the same words "The Key". Whilst there is stylisation and colour present in the applicant's mark, it remains visually a "The Key" mark and I conclude that the respective marks share a high degree of similarity.

78) In respective marks are aurally identical. The stylisation of the applicant's mark has no bearing on this. Similarly, in respect of conceptual identity, both marks will have the same meaning (this meaning was discussed in paragraph 43), with the stylisation of the applicant's mark playing no part in its conceptual identity.

Similarity to the opponent's mark "The Key New Generation"

79) The opponent's mark "The Key New Generation" (it's "second mark") readily breaks into two parts with the first part comprising of "The Key" and the second part comprising the words "New Generation". "The Key", being the first of these two parts to appear in the mark, may have a slightly higher dominance within the mark, but that said, both elements have a roughly equal impact.

80) From a visual perspective, when comparing the applicant's mark to the opponent's second mark, they share the same word elements "The Key", but differ in that the opponent's mark is absent the stylisation and additionally includes the word "New Generation". Whilst the applicant's mark is in colour, the opponent's mark may also be used in the same colour and, consequently, colour has no impact upon the

similarity of the marks. Taking these similarities and differences into account, I conclude that the respective marks share a medium level of visual similarity.

81) Aurally, the opponent's first mark consists of the seven syllables THE-KEE-NU-GEN-ER-A-TION, the first two of which are identical to those of the applicant's mark. In other respects, the marks differ and I conclude that they share a medium level of aural similarity.

82) Conceptually, both marks contain the same definite article and noun "The Key" that is likely to be understood as a metaphoric reference to a shaped piece of metal for locking and unlocking something. The opponent's mark also contains an additional concept created by the words "New Generation" that is likely to be understood as a reference to a new version of the services provided under the mark or to the target consumer or subject of the services. Consequently, there is some similarity, but also some difference.

Average consumer and the purchasing act

83) As I have already concluded at paragraph 46, above, the average consumer of the applicant's services is persons involved in management and leadership of schools or health or social care. Further, I concluded that because of the broad scope of the opponent's Class 41 services in its earlier 2531459 mark, the same average consumer exists in respect of these services also. For such services, I concluded that the purchasing act involves a reasonable degree of care and attention. The average consumer in respect of the Class 35 services covered by the opponent's earlier 3045211 mark will be individuals and businesses involved in, or with an interest, in franchising and licencing.

Distinctive character of the earlier trade mark

84) As I concluded at paragraphs 48 and 50 that the opponent's mark "The Key" has a moderate level of inherent distinctive character, and does not benefit from any enhanced level of distinctive character arising from the use made of it.

85) In respect of the opponent's mark "The Key New Generation", as I have already discussed, is likely to be perceived as the two phrases "The Key" and "New Generation". The second of these add little to the first in terms of distinctive character. It is a term that merely indicates that the services take a modernised form or are targeted at a new generation of consumers. I conclude that the mark is endowed with a moderate level of inherent distinctive character. For the same reasons as expressed in paragraph 50, it does not benefit from any enhanced level of distinctive character.

GLOBAL ASSESSMENT – Conclusions on likelihood of confusion

86) In respect of the opposition insofar as it is based upon its earlier marks 2531459 and 3045211, both in respect of the word mark "The Key", I have found that the respective marks share a high level of visual similarity and are aurally and conceptually identical. In respect of comparing the goods and services of the application with the services of the opponent's 2531459 and 3045211 marks "The Key", I found that the following of the applicant's goods and services share a reasonably high level of similarity with various of the opponent's services:

Class 9: *Electronic publications; publications in electronic form supplied on-line from a database or from facilities provided on the Internet or other networks (including websites); data recorded in electronic, ... form; ...; audio and visual recordings; publications in electronic form supplied on-line from database or from facilities provided on the Internet (including web sites); all the aforesaid goods relating to the fields of leadership, management and governance in schools, health and social care sectors.*

Class 35: *Providing information, advisory and consultancy services relating to the organisation, running and good governance of educational establishments; information services relating to organisation, running and good governance of educational establishments provided by means of searchable computer databases; all the aforesaid services also provided on-line from a computer database or the Internet; all the aforesaid provided by telephone; Advertising, marketing and promotion services; all the aforesaid*

services relating to the fields of leadership, management and governance in schools, health and social care sectors.

87) I found that the following of the applicant's goods share a medium level of similarity to various of the opponent's services:

Class 16: *Printed matter; instructional and teaching materials; ... all the aforesaid goods relating to the fields of leadership, management and governance in schools, health and social care sectors.*

88) In addition, I also found that all of the applicant's Class 9 goods (other than *data carriers* and *data recorded in ... optical or magnetic form*) share a reasonably high level of similarity to various of the opponent's services of its earlier mark 3001525 "The Key New Generation": In respect of this mark, I found that it shares a medium level of visual and aural similarity and that it shares some conceptual similarity but also some conceptual difference when compared to the applicant's mark. In reaching these conclusions, I kept in mind that "The Key" and "New Generation" function as separate elements within the opponent's mark.

89) Common to all the earlier marks and the application, I have also found that the average consumers pay a reasonable degree of care and attention. I have also found that the opponent's earlier marks are endowed with a moderate level of inherent distinctive character and that this level is not enhanced through use.

90) Taking all of this into account, I find that the average consumer of the goods and services, where I have found similarity to the opponent's services, is likely to be confused with regards to the origin of the goods and services. The opponent's marks consist of the words "The Key" or "The Key" together with the term "New Generation". In the latter, "The Key" is a distinctive part of the mark. Unlike in the other two oppositions discussed earlier, "The Key" stands out as the dominant part of the applicant's mark and the consumer will make a link to the opponent's services and will either directly confuse the marks (keeping imperfect recollection in mind) or, if the differences are perceived, there remains a likelihood that the consumer will think the goods and services provided under the respective marks originate from the

same or linked undertaking. I conclude that there is a likelihood of confusion against all of these goods and services.

Conclusions

91) Opposition 403910 against application 3079861 “The Key for School Leaders” and Opposition 403913 against application 3079864 “The Key for School Governors” both fail in their entirety.

92) Opposition 403912 against application 3079875 “The Key” (stylised) succeeds in its entirety, i.e. in respect of the following list of goods and services:

Class 9: *Electronic publications; publications in electronic form supplied on-line from a database or from facilities provided on the Internet or other networks (including websites); data recorded in electronic, ... form; ...; audio and visual recordings; publications in electronic form supplied on-line from database or from facilities provided on the Internet (including web sites); all the aforesaid goods relating to the fields of leadership, management and governance in schools, health and social care sectors.*

Class 16: *Printed matter; instructional and teaching materials; ... all the aforesaid goods relating to the fields of leadership, management and governance in schools, health and social care sectors.*

Class 35: *Providing information, advisory and consultancy services relating to the organisation, running and good governance of educational establishments; information services relating to organisation, running and good governance of educational establishments provided by means of searchable computer databases; all the aforesaid services also provided on-line from a computer database or the Internet; all the aforesaid provided by telephone; Advertising, marketing and promotion services; all the aforesaid services relating to the fields of leadership, management and governance in schools, health and social care sectors.*

93) Opposition 403907 against application 3079877 effectively succeeds in its entirety in light of the applicant withdrawing the application at the hearing.

COSTS

94) The opponent has been successful in respect of the opposition to application 3079877 because the applicant withdrew the application at the hearing. In respect of the opposition against 3079875, the opponent has been successful against all of the opposed goods and services. The other two oppositions, against applications 3079861 and 3079864 both failed in their entirety. These outcomes result in the honours being even between the parties and I direct that both sides bear their own costs.

Dated this 14th day of September 2016

Mark Bryant
For the Registrar,
The Comptroller-General