

**O-076-17**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION 3143865**

**BY LIIFE LIMITED**

**TO REGISTER THE FOLLOWING TRADE MARK IN CLASSES 9, 38, 41 & 42:**

**LIIFE**

**AND**

**OPPOSITION THERETO (NO. 406593) BY MEDION AG**

## **Background and pleadings**

1. This dispute concerns whether the trade mark identified on the cover page of this decision should be registered. It was filed on 11 January 2016 by Liife Limited (“the applicant”) and was published for opposition purposes on 12 February 2016.
2. Registration of the mark is opposed by Medion AG (“the opponent”). The opponent founds its case on a ground under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), relying on a single earlier trade mark, namely: European Union Trade Mark (“EUTM”) 4585295. The earlier mark was filed on 10 August 2005 and was registered on 9 February 2015.
3. The conflict boils down to a clash between the following marks:

<b>Applicant’s mark and goods<sup>1</sup></b>	<b>Opponent’s mark and goods/services<sup>2</sup></b>
<b>LIIFE</b>	<b>LIFE</b>
<b>Class 9:</b> Software for online social networking, online storage of data, sharing of photos, written information and historical content.  <b>Class 42:</b> Electronic storage of data.	<b>Class 9:</b> Magnetic encoders; magnetic data carriers; optical data media; data-processing apparatus; optical character readers; writing and/or reading implements (data processing); magnetic data carriers; mouse (data processing equipment); optical data carriers; disc exchangers (for computers); scanners [data processing equipment]; memories for data processing installations,

<sup>1</sup> These are the opposed goods/services. I should say that although the opponent’s notice of opposition appeared to direct its opposition against all the goods and services, it is clear from the opponent’s written submission that, in actual fact, the opposition relates only to the goods and services in classes 9 and 42 as above.

<sup>2</sup> The opponent’s mark covers more goods and services, but only those set out in the table are relied upon.

	<p>processors (central processing units); compact discs (read-only memory); compact discs (audio-video); computers; recorded computer programs; computer software [recorded]; games programs for computers; computer operating programs (recorded); computer peripheral devices; computer programs (downloadable); computer keyboards; printers for use with computers; wrist rests for use with computers; interfaces [for computers]; laptops (computers); floppy disc drives; monitors for computers; monitors (computer hardware), navigation apparatus (computer programs) for vehicles (onboard computers); notebooks (computers); computer peripheral devices; computer programs; computer software (recorded); computer game programs; keyboards for computers; make-up removing appliances, electric; grids for electric accumulators, chargers for electric accumulators, plates for electric accumulators, electric accumulators; alarm bells, electric; connection boxes (electricity), display apparatus (electric); electronic display panels; batteries, electric; flat irons, electric; theft prevention installations, electric; electric wires; electrodynamic apparatus for the remote control of railway points; electric cables; electric capacitors; electromagnetic coils; electronic publications [downloadable]; electronic pens [visual display units]; discharge tubes, electric, other than for lighting; anti-interference devices (electricity); batteries, electric, for vehicles; electrodynamic signal remote control apparatus; photocopiers (photographic, electrostatic, thermic); inductance coils (electricity);</p>
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	<p>electric devices for attracting and killing insects; wire connectors (electricity); door bells (electric); chargers for electric batteries; hair-curlers, electrically heated; welding apparatus, electric; soldering irons, electric; solenoid valves (electromagnetic switches); measuring devices, electric; electrically heated hair curlers; locks (electric); transmitters of electronic signals; electronic security tags for goods; socks, electrically heated; electronic pens (visual display units); buzzers electric; electronic pocket translators; electronic organisers; electric door bells; door openers, electric; door closers, electric; monitoring apparatus, electric; compact discs (audio-video); receivers (audio and video); tone arms for record players; head cleaning tapes [recording]; tone arms for record players; sound recording apparatus; tape-recorders; sound locating instruments; sound carriers; sound transmitting apparatus; sound amplifiers; sound-reproducing apparatus; amusement apparatus adapted for use with television receivers; temperature indicators; video telephones; loudspeaker boxes; letter scales; compact disc players; television apparatus; telephone apparatus; motion picture cameras; film cutting apparatus; radiotelephony sets; signalling bells; altimeters; cassette players; compasses; headphones; laser pointers (luminous pointers); microphones; mobile telephones; modems; navigational instruments; lenses (optics); mouse pads (mouse mats); plotters; projection apparatus; projection screens; slide projectors, radios; smartcards (cards with</p>
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integrated circuits); video games adapted for use with television receivers only; walkie talkies; video cameras; video recorders; safety helmets for sports; none of the aforesaid goods being or featuring educational and/or entertainment content intended for general circulation; the aforementioned goods exclusive of board game programs for computers, computer board games and video board games for use with television receivers only, electronic board games, video board games for a connection to a television, board games software, cards/discs/tapes/wires/circuits for bearing or bearing board games and/or games software and/or arcade board games, board gaming machines including slot machines.

**Class 42:** Computer programming; conversion of data or documents from physical to electronic media; hiring out data-processing equipment; recovery of computer data; updating of computer software; computer consultancy; copying of computer programs; updating of computer software; computer software design; rental of computer software; consultancy in the field of computers; recovery of computer data; installation of computer programs, maintenance of computer software; computer systems design; systems analysis; design of computer systems; computer software design; design of computer systems; installation of computer programs; conversion of computer programmes and data (other than physical alteration); copying of computer programs; computer software rental; maintenance of computer

	software; recovery of computer data; conversion of data or documents from physical to electronic media; design and maintenance of websites for third parties.
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4. The opponent argues that the goods/services are closely similar and complementary. It argues that the marks are visually, aurally and conceptually very similar and “confusingly similar overall”.

5. The applicant filed a counterstatement denying the grounds of opposition. It argues that:

- The goods and services are not similar. The applicant highlights that the opponent uses its mark MEDION LIFE in relation to a mobile phone whereas it offers an online social network.
- That there is “merely trivial similarity” between the marks.
- That the opponent has cast its net wide in its specification, but, given its history, it is far-fetched to believe that it will move into social networking.
- That the mark LIFE has been a popular trade mark and “has to some degree lost its strength”.
- The additional “I” creates a difference and is a “significant distinguisher”.
- Prints are provided of the respective marks (the opponent’s mark as part of the composite sign MEDION LIFE) in use in relation to the goods/services mentioned at bullet point one.

6. The opponent has been legally represented by Page Hargrave. The applicant has represented itself. Only the opponent filed evidence. Neither side requested a hearing. The opponent filed written submissions in lieu of a hearing, the applicant did not.

## **The evidence**

### ***The opponent's evidence***

7. This consists of a witness statement from Mr Keith Gymer, the opponent's trade mark attorney. The purpose of Mr Gymer's evidence is to introduce 11 decisions into the proceedings which have been issued by various bodies where the opponent has sought to rely on its LIFE earlier mark; they are:

- i) A decision of this tribunal (opposition 95892) involving the mark D-Life.
- ii) A judgment of the Court of Justice of the European Union ("CJEU") involving the mark THOMSON LIFE.
- iii) A decision of the General Court (T-460/07) involving the mark LIFE BLOG.
- iv) A decision of the EUIPO Board of Appeal (R-141/2007-01) involving the mark LIFE BLOG.
- v) A decision of the German Patent Court (29 W (pat) 195/02) involving the mark T-LIFE.
- vi) A decision of the EUIPO Opposition Division involving the mark LifeCLM.
- vii) A decision of the EUIPO Opposition Division involving the mark OXILIFE.
- viii) A decision of the EUIPO Opposition Division involving the mark MOUNTAINLIFE.
- ix) A decision of the EUIPO Opposition Division involving the mark e-Life.
- x) A decision of the EUIPO Opposition Division involving the mark WIKILIFE.
- xi) A decision of the EUIPO Opposition Division involving the mark ERGOLIFE.

8. I do not consider it necessary to summarise the content of the above decisions. This is for a number of reasons, which are, in no particular order:

- Decisions vi) to xi) are from the EUIPO Opposition division and, thus, have limited persuasive value. The same can be said of decision i), an earlier decision of this tribunal.
- All of the decisions, save for i) and vii), were based upon an average consumer outside of the UK.
- The decisions deal more with questions to do with composite marks where the aspect of similarity was the same, as opposed to the type of conflict here, where the common element has a difference (a significant one according to the applicant).
- Each case must be considered on its own merits.

## **Decision**

### **Legislation and main principles**

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

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

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

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

10. The following principles are gleaned from the judgments of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer*



*Inc, Case C-39/97, Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V. Case C-342/97, Marca Mode CV v Adidas AG & Adidas Benelux BV, Case C-425/98, Matratzen Concord GmbH v 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 greater degree of similarity between the marks, and vice versa;

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

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

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

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

### **Comparison of goods/services**

11. When making a comparison, all relevant factors relating to the goods/services in issue should be taken into account. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at paragraph 23 of its judgment:

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

12. Guidance on this issue has also come from Jacob J In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 where the following factors were highlighted as being relevant when making the comparison:

- “(a) The respective uses of the respective goods or services;
  
- (b) The respective users of the respective goods or services;
  
- (c) The physical nature of the goods or acts of service;
  
- (d) The respective trade channels through which the goods or services reach the market;
  
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
  
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”

13. In terms of being complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*), this relates to close connections or relationships that are important or indispensable for the use of the other. In *Boston Scientific Ltd v OHIM* Case T- 325/06, it was stated:

“It is true that goods are complementary if 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, to that effect, Case T-169/03 Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI) [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 P Rossi v OHIM [2006] ECR I-7057; Case T-364/05 Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL) [2007] ECR II-757, paragraph 94; and Case T-443/05 El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños) [2007] ECR I-0000, paragraph 48).”

14. In relation to complementarity, I also bear in mind the guidance given by Mr Daniel Alexander QC, sitting as the Appointed Person, in case B/L O/255/13 *LOVE* where he warned against applying too rigid a test:

“20. In my judgment, the reference to “legal definition” suggests almost that the guidance in Boston is providing an alternative quasi-statutory approach to evaluating similarity, which I do not consider to be warranted. It is undoubtedly right to stress the importance of the fact that customers may think that responsibility for the goods lies with the same undertaking. However, it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together. I therefore think that in this respect, the Hearing Officer was taking too rigid an approach to Boston.”

15. In relation to understanding what terms used in specifications mean/cover, the case-law informs me that “in construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of the trade”<sup>3</sup> and that I must also bear in mind that words should be given their natural meaning within the context in which they are used; they cannot be given an unnaturally narrow meaning<sup>4</sup>. I also note the judgment of Mr Justice Floyd (as he then was) in *YouView TV Limited v Total Limited* where he 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) (IPTRANSLATOR)* [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

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<sup>3</sup> See *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281

<sup>4</sup> See *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267

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.”

16. Goods/services can be considered identical if one term falls within the ambit of the other, as per the decision in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case 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 trade mark application (Case T-388/00 *Institut fur Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

17. In its counterstatement the applicant denies similarity on the basis of what the parties actually provide in the marketplace. It also argues that the opponent is unlikely to expand into the field in which the applicant operates. There are three main problems with this argument. First, whilst in some cases an earlier mark may only be relied upon to the extent to which it has been used, this is not applicable to the opponent’s mark. This is because it had been registered for less than five years when the applicant’s mark was published, so meaning that the use conditions set out in section 6A of the Act are not applicable to it. Consequently, the opponent is entitled to rely on all the goods and services for which its mark is registered. Second, it is the notional use of the trade marks that must be considered, i.e. notional use in relation to the goods/services for which they are registered/applied, not the actual trade that may have been conducted. Third, there is no requirement to make an assessment as to the probability of the opponent trading in the same field as the applicant. As already stated, the opponent is able to rely on its mark for all of its registered goods and services, regardless of whether the applicant considers that the opponent has cast its net too wide.

18. Despite the long list of goods and services covered by the opponent's mark in classes 9 and 42 (as detailed in the table at the beginning of this decision), it highlights in written submission certain goods and services which it says:

“..encompass all of the Applicant's specified software in Class 9, irrespective of function, and the Class 42 services in relation to electronic data storage, explicitly and substantially identical, and/or as very closely related goods/services.”

19. The highlighted goods and services are:

**Class 9:** Magnetic data carriers; optical data media; data processing apparatus; optical data carriers; recorded computer programs; computer software [recorded]; computer operating programs (recorded; computer programs (downloadable); electronic publications [downloadable].

**Class 42:** Conversion of data or documents from physical to electronic media; recovery of computer data; conversion of computer programmes and data (other than physical alteration); recovery of computer data; conversion of data or documents from physical to electronic media.

20. The point the opponent makes regarding the applicant's class 9 goods is a good one. The applicant's class 9 goods are:

**Class 9:** Software for online social networking, online storage of data, sharing of photos, written information and historical content.

21. Although the software is for a particular specified purpose, this does not matter because the opponent's specification covers computer software (recorded) at large. Consequently, the applied for software falls within the ambit of the software of the earlier mark. On the principle outlined in the *Meric* case, the goods are to be considered identical.

22. That then leads to the applicant's class 42 services, which are:

## **Class 42: Electronic storage of data.**

23. The opponent submits that the services are “explicitly and substantially identical”. This can only be on the basis of a term in the opponent’s corresponding class 42 specification. However, I struggle to see how the services are identical. The opponent’s services are either for the conversion (of data, documents and programs) or recovery of computer data. This, quite clearly, is not the same as data storage. Therefore, the real question is whether there is similarity.

24. It is not helpful that the opponent has not given any submissions (or evidence) on this matter, beyond its assertion that the services (and goods) are similar and that there is a complementary relationship. Nevertheless, I must still take a view on the matter. It seems to me that the opponent’s best case is in respect of its class 42 services which cover, essentially, conversion of data/document/programmes from physical to electronic media and recovery of computer data. Whilst I accept that, in comparison to such services, electronic storage of data is different in strict purpose and method of use, they are all engaged in looking after and protecting one’s data. Further, whilst they are not competitive, I agree that there does appear to be a complementary relationship in play. It is no stretch of the imagination to expect a business that converts data (from physical to electronic) to provide the means to safely store that data, and, also, for a service provider which stores data to also provide data recovery services. I consider there to be a medium level of similarity.

25. The goods of the earlier mark put the opponent in no better position. Indeed, any similarity with goods such as data processing apparatus and software is slim at best. The other goods have no apparent connection.

### **Average consumer and the purchasing act**

26. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer’s level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97. 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.”

27. Where the goods/services conflict, they do so in an area where technical considerations apply. However, the goods/services could be used by the general public or by businesses. For example, data storage services could be used by businesses to store documents or records or, alternatively, by the general public to store photographs, music or other media. Similar considerations apply in respect of the software for facilitating electronic storage. In relation to software for social networking, this is commonly used by the general public, but also by businesses as a way to engage potential customers. Overall, be it a member of the general public, or a business person, the selection process will be undertaken with an average level of care and attention, not materially higher or lower than the norm. I accept, though, that a business person is likely to adopt a slightly higher level of care and attention.

28. The goods/services are most likely to be encountered visually, through the internet, advertising, selecting the goods from shelves (or the online equivalents). However, the aural impact of the marks should not be overlooked completely, given that advice may be taken over the telephone, and because of word of mouth recommendations.

### **Comparison of marks**

29. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual



similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in 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.”

30. 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. The competing marks are:

## **LIFE v LIIFE**

31. In terms of overall impression, both marks are made up of just one word LIFE/LIIFE, so those respective words make up the sole element of their overall impressions.

32. In terms of visual similarity, the marks are of similar length (4 and 5 letters respectively) and have four letters in common, with the common letters running in the same order. There is, though, one point of difference, an additional letter I. Despite this difference, the similarities are strong and will strike the eye as such. I consider that there is a reasonably high degree of visual similarity.

33. Aurally, I consider that no attempt will be made by the average consumer to articulate the double I in LIIFE. I consider that that the mark will be articulated in exactly the same way as the word LIFE. The marks are aurally identical.

34. Conceptually, the word LIFE has a number of clear and obvious meanings. The average consumer is likely to approximate the word LIIFE to the word LIFE given that it is so reminiscent. Given this, the concepts are identical or, if not, highly similar.

### **Distinctive character of the earlier mark**

35. The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark, based either on inherent qualities or because of use made, the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). 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).”

36. No evidence of use has been filed of the earlier mark, so I have only its inherent qualities to consider. The applicant stated in its counterstatement that LIFE is a popular

trade mark and that it “has to some degree lost its strength”. However, despite making this claim the applicant has provided no evidence to make this point good. That being said, the word LIFE is an ordinary English word with connotations such as lifestyle. It may, therefore, make some allusive nods as to the capacity of the goods/service to be used as part of everyday life etc. This, though, is a fairly mild nod. I consider the mark to be possessed of a moderate (between low and medium) level of inherent distinctive character.

### **Likelihood of confusion**

37. The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

38. I will consider the matter in relation to the identical class 9 goods in the first instance. As already observed, the goods are identical and thus the software in question has the capacity to be used in exactly the same field. When this is considered and when the similarity between the marks is borne in mind, I consider that there is a likelihood of confusion. Whilst the earlier mark has just a moderate (but not low) level of distinctiveness, this is not enough to avoid confusion. The applicant highlights in its counterstatement the impact of the double I in its mark and that this is a “significant distinguisher”. Whilst I understand the point being made, I must also bear in mind the concept of imperfect recollection which means that this difference could well be overlooked. My finding is that there is a likelihood of confusion in relation to the class 9 goods.

39. That then leads to the class 42 services for which I have found a medium degree of similarity. Although the interdependency principle is borne in mind, I still consider that the degree of mark and service similarity is sufficient for confusion to arise. The mark would still indicate that the services are the responsibility of the same or a related undertaking.

## **Conclusion**

40. The opposition succeeds. Subject to appeal, the mark is to be refused in respect of the opposed goods and services, but may proceed to registration in respect of the residue of the specifications, namely:

**Class 38:** Provision of forums for online social networking and sharing of content such as photos, written information and historical content.

**Class 41:** Online photo services.

## **Costs**

41. The opponent having been successful, it is entitled to a contribution towards its costs. My assessment is set out below:

*Official Fee - £100*

*Preparing a statement and considering the counterstatement - £300*

*Filing evidence - £100<sup>5</sup>*

*Written submissions - £400*

***Total - £900***

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<sup>5</sup> This is below the scale minima, but represents the fact that the opponent simply provided copies of previous decisions involving its earlier mark.

42. I order Liife Limited to pay Medion AG the sum of £900 within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 17<sup>th</sup> day of February 2017**

A handwritten signature in black ink, appearing to be 'O. Morris', written in a cursive style.

**Oliver Morris**

**For the Registrar,**

**The Comptroller-General**