



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2015 TMOB 19
Date of Decision: 2015-01-30

**IN THE MATTER OF AN OPPOSITION
by Virgin Enterprises Limited to
application No. 1,316,254 for the trade-
mark VIRGIN WATER in the name of
City Water International Inc.**

[1] I find it apt to begin this decision with a quote from the Supreme Court of Canada in *Mattel, Inc v 3894207 Canada Inc* (2006) 49 CPR (4th) at 338:

No doubt some famous brands possess protean power (it was submitted, for example, the distinctive red and white “*Virgin*” trade-mark has now been used in connection with such a diversity of goods and services that it knows virtually no bounds), but other famous marks are clearly product specific. “*Apple*” is said to be a well-known trade-mark associated in separate markets simultaneously with computers, a record label and automobile glass...Neither the “*Virgin*” nor “*Apple*” situations are before us and I make no pronouncement on either except to note them as illustrations that surfaced in the course of argument.

[2] In *Mattel*, the issue before the Supreme Court was whether the trade-mark BARBIE’S & Design for use in association with “restaurant services, take-out services, catering and banquet services” would be likely to be confusing with Mattel, Inc.’s trade-mark BARBIE, which was found to be famous in Canada for “dolls and doll accessories”. The Supreme Court found that it would not.

[3] In so finding, the Supreme Court stated that while the fame of the BARBIE brand was a “surrounding circumstance” of importance, the scope of its protection required a consideration of

all of the surrounding circumstances, including the factors enumerated under section 6(5) of the Act [*Mattel, supra* at 354].

[4] While the Court agreed with an earlier quote from Professor McCarthy that “a relatively strong trade-mark can leap vast product line differences at a single bound”, it noted that implicit in this statement is the fact that the “product line” will generally represent a significant obstacle for even a famous mark to leap over [*Mattel, supra* at 355-356]. The Court stated that when all of the surrounding circumstances are taken into consideration, in some cases, some circumstances (such as the difference in goods), will carry greater weight than others [*Mattel, supra* at 354].

[5] The Court recognized the fact that “famous brands” are widely licensed for goods and services which are not necessarily traditionally associated with a particular mark to be a relevant surrounding circumstance [*Mattel, supra* at 357]. However, BARBIE was not found to be famous for anything other than dolls and doll accessories and there was no evidence that licensees were using BARBIE for restaurant related services. The Court therefore found it difficult to see the basis on which a mistaken inference would likely be drawn and found that notwithstanding the fame of the BARBIE trade-mark, it was reasonable to conclude that there was no likelihood of confusion in the marketplace.

[6] According to the parties, it is the VIRGIN trade-marks as referenced in *Mattel* which are now before this Board. As was the case with *Mattel*, the Opponent in this case relies on the fact that the Applicant’s trade-mark bears a high degree of resemblance to its VIRGIN trade-marks and it asserts that due to the fame of its trade-marks, a likelihood of confusion would arise, despite any differences in the nature of the goods and services or the channels of trade of the parties.

[7] Where this case differs from *Mattel*, is that the Opponent asserts that the evidence in this case demonstrates that its trade-marks are widely licensed and that the fame of its trade-marks is not limited to any one particular area or activity. The Opponent submits that it is known for diversification. It submits that when these surrounding circumstances are taken into account along with the other surrounding circumstances which are set out in section 6(5) of the Act, refusal of the Applicant’s application for the trade-mark VIRGIN WATER is justified.

[8] The Supreme Court certainly left the door open for such a finding in *Mattel*. However, the evidence which has been put forward in this case is insufficient for me to make such a finding.

[9] For the reasons that follow, the opposition is unsuccessful.

File History

[10] On September 13, 2006, City Water International Inc. (the Applicant), filed application No. 1,316,254 to register the trade-mark VIRGIN WATER (the Mark). The application is based upon proposed use and it currently covers goods which are described as “water coolers, water filtration systems and coffee” and services which are described as “services of renting, leasing and selling water filtration systems and water coolers”.

[11] The application for the Mark was advertised for opposition purposes in the *Trade-marks Journal* dated December 14, 2011 and on February 14, 2012, Virgin Enterprises Limited (the Opponent) opposed it by filing a statement of opposition under section 38 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act). The grounds of opposition are based upon sections 30(e), 30(i), 12(1)(d), 16(3)(a), 16(3)(b), 16(3)(c) and 2 of the Act.

[12] The Applicant filed a counterstatement on April, 10, 2012 denying each of the pleaded grounds of opposition.

[13] In support of its opposition, the Opponent filed the affidavits of Christina E. Masouras (the Masouras affidavit) and Victoria Wisener (the Wisener affidavit), both of which were sworn September 10, 2012. The affiants were not cross-examined.

[14] In support of its application, the Applicant filed the affidavit of Gary Kimel, affirmed January 11, 2013 (the Kimel affidavit). Mr. Kimel was cross-examined on his affidavit and the transcript of his cross-examination has been made of record.

[15] As evidence in reply, the Opponent filed the affidavit of Gladys Tibbo Witt, sworn September 30, 2013 (the Tibbo Witt affidavit).

[16] Both parties filed written arguments and attended a hearing.

Onus

[17] The Applicant bears the legal onus of establishing on a balance of probabilities that its application complies with the requirements of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

Overview of the Evidence

Opponent's Evidence

Wisener Affidavit

[18] Ms. Wisener is a trade-mark attorney employed by the Opponent in Geneva, Switzerland. She has been employed by the Opponent since 2011 and is responsible for its worldwide trade-mark portfolio [Wisener affidavit, para 1]. Her affidavit sets out information about the Opponent, its trade-marks and its business operations.

i) The Opponent

[19] The Opponent is a member of a group of companies known collectively as the Virgin group of companies (the "Virgin Group") [Wisener affidavit, para 3]. According to Ms. Wisener, the Virgin Group was originally established as a mail order record selling business by Sir Richard Branson in the United Kingdom in 1970 and it has now grown into an international network of over 300 companies, which trade under the name VIRGIN [Wisener affidavit, para 4].

[20] In paragraph 5 of her affidavit, Ms. Wisener explains that the Opponent is responsible for the ownership, management and protection of all trade-marks and intellectual property in the "Virgin Name", the "Virgin Signature" and "associated marks" (collectively referred to by Ms. Wisener as the "Virgin Marks").

[21] According to Ms. Wisener, the Opponent has a portfolio of trade-mark registrations and applications for its Virgin Marks which span across 150 countries and 45 classes of goods and

services. Attached as Exhibit “A” to Ms. Wisener’s affidavit is a printout of the particulars for the trade-marks which the Opponent owns in Canada. These applications and registrations cover goods and services including airlines, trains, air freight/cargo, air balloons, space vehicles and space tourism, music, games, holidays, hotel services, financial services, gyms, Internet services, clothing, cosmetics and other fashion items.

[22] Attached as Exhibit “B” to Ms. Wisener’s affidavit, is a summary of the Virgin Group’s history which highlights some of the activities, industries and businesses which the Virgin Group is involved in. Some of these include: travel, tourism and transportation services; media, telecommunications and entertainment services; finance and money services; health and wellbeing services; leisure and lifestyle goods and services including computer games and software, books, clothing, cosmetics, jewellery, spas, car racing, IT support services, cinemas, alcoholic and non-alcoholic drinks; as well as social and environmental interests and causes. Notably, much of the summary pertains to international activities, with only a brief mention of Canada in the context of the record business during the 80’s, “Virgin Megastores” in the 90’s and “Virgin Mobile” in 2005.

ii. the Opponent’s licensees

[23] In paragraph 5 of her affidavit, Ms. Wisener states that the Opponent is responsible for the ownership, management and protection of all trade-marks and intellectual property in the Virgin Marks on behalf of the Opponent’s licensees, “over which it has control, both within and outside the Virgin Group, worldwide”.

[24] Ms. Wisener refers to the Opponent as “VEL” throughout her affidavit and I will do the same at times when referencing various parts of her affidavit.

[25] In paragraph 11 of her affidavit, Ms. Wisener states that: “VEL is responsible for licensing the Virgin Marks in relation to various goods and services to companies both within and outside the Virgin Group. VEL currently licenses the Virgin Marks to approximately 60 (sixty) licensees in a wide variety of businesses. In all cases, the use of the Virgin Marks by its licensees is strictly controlled by VEL” [Wisner affidavit, para 11].

[26] Ms. Wisener explains that most of the VEL licensees are trading entities whose names begin with the Virgin Name, followed by a descriptor denoting the goods or services offered by that particular company. For example, Virgin Mobile, Virgin Radio, Virgin Holidays, etc. A list of examples of current and historical uses of the Virgin Name, with additional words or elements, is attached as Exhibit “C” to Ms. Wisener’s affidavit [Wisener affidavit, para 12].

[27] In paragraph 13, Ms. Wisener states that the majority of the licensees who do not include the Virgin Name in their company name do incorporate it in their consumer facing trading name or use the Virgin Name in relation to their products or services and that this use is also strictly controlled by VEL.

[28] The Applicant submits that there is no evidence that the Opponent’s licensing regime fulfils the requirements of section 50(1) of the Act. In particular, the Applicant submits that there is no evidence of any direct or indirect control over the character or quality of the goods or services which are associated with VEL’s registered trade-marks. The Applicant submits that the Wisener affidavit is sorely lacking in the particularity needed to support distinctive use of a trade-mark in Canada.

[29] Section 50(1) of the Act specifically provides that in order for any trade-mark use by a licensee to enure to the benefit of the trade-mark owner, the owner must have “direct or indirect control of the character or quality of the goods or services” [see section 50 of the Act]. Nowhere in the Wisener affidavit is there a direct statement to this effect. Ms. Wisener states that the Opponent has control over its licensees “both within and outside the Virgin Group” and that the use of the Virgin Marks is strictly controlled by the Opponent, but she does not mention anything about the Opponent having control over the character or quality of the goods and services which are associated with the Virgin Marks.

[30] The jurisprudence suggests that control can sometimes be inferred, if such an inference is supported by the evidence. For example, control has been inferred where: there is evidence that the goods are marked as being manufactured “under license”, there are statements detailing how the owner sets standards which relate to the goods and services; there are details relating to a corporate structure or a reporting relationship which suggests the requisite control; there is evidence that the same person presides in a control position in both the owner and the licensee;

or there is evidence of shared corporate premises between the owner and the licensee [see *Wells' Dairy Inc v UL Canada Inc* (2000), 7 CPR (4th) 77 (FCTD); *BCF SENCRL v Spirits International BV*, 2012 FCA 131; *3082833 Nova Scotia Co v Lang Michener LLP*, 2009 FC 928; *Lindy v Canada (Registrar of Trade-marks)*, [1999] FCJ No. 682 (FCA); *Petro-Canada v 2936661 Canada Inc* (1998), 83 CPR (3d) 129 (FCTD)]; *Borden Elliot Scott & Ayles v House of Kwong Sang Hong International Ltd* 2004 FC 554; and *Air Miles International Trading BV v Cathay Pacific Airways Ltd*, 2014 FC 549].

[31] In addition, section 50(2) of the Act provides that where public notice is given that the use of a trade-mark is licensed and of the identity of the owner, it shall be presumed, unless the contrary is proven, that the use is licensed by the owner of the trade-mark and that the character and quality of the goods or services is under the control of the owner. I note that there are some instances in the exhibits attached to the Wisener affidavit where public notice may be deemed to have been given. Most notably, on the photocopies of the packaging for CD's and DVD's attached as Exhibit "S", there is an indication that the trade-mark is owned by VEL and used under license.

[32] Aside from these limited instances, no other such public notice has been given and there is no clear statement that the Opponent has direct or indirect control over the character or quality of the goods and services, as is required under section 50(1) of the Act.

[33] I am not prepared to draw an inference of the control which is required under section 50(1) of the Act based upon the other limited assertions of fact which are made in the Wisener affidavit. At least some of the licensees are not even part of the Virgin Group and although Ms. Wisener states that the Opponent has control over its licensees "both within and outside the Virgin Group, worldwide", she has not explained what is meant by that or provided any details with respect to how the Opponent is able to exercise such control. It is not intuitive how the Opponent could exercise control over an external and completely unrelated entity and having control over a company's use of a trade-mark does not equate to control over the character and quality of the goods and services it is providing. Furthermore, it is not entirely clear in all instances which of the licensees are part of the Virgin Group and which ones are not.

[34] Based upon the limited information that is contained in Ms. Wisener's affidavit, I am not prepared to infer that the Opponent has direct or indirect control over the character or quality of the goods and services which are being offered in association with the Virgin Marks.

[35] I will discuss the impact of this finding in more detail in my confusion analysis below.

iii. Domain Names and Social Media

[36] Ms. Wisener states that the Opponent is the owner of over 4,500 domain names that incorporate the Virgin Name, including *www.virgin.com*. A list of some of these domain names is attached as Exhibit "D" to Ms. Wisener's affidavit [Wisener affidavit, para 16].

[37] According to Ms. Wisener, the Virgin Group began operating the website *www.virgin.com* in June 1996 [Wisener affidavit, para 17]. This website provides general corporate and specific regional information on the Virgin Group, as well as links to specific webpages and websites for most of the companies in the Virgin Group. Sample printouts of selected web pages extracted from *www.virgin.com* in 2007, said to be representative of the manner in which the website appeared in previous years and in 2012, are attached as Exhibits "E1" and "E2". Many of the Virgin Marks can be seen in the printouts.

[38] In paragraph 21, Ms. Wisener sets out the annual number of visitors to *www.virgin.com* between 2008 and September 2011. There were between 4.8 and 9.6 million visitors yearly from the European Union; and between 2 and 11.9 million visitors yearly from 24 selected countries worldwide. The number of visitors from Canada was comparatively lower, varying between approximately 131,000 in 2008 and 936,000 in 2010. However, these are still fairly substantial numbers.

[39] In addition to *www.virgin.com*, Ms. Wisener explains that there are many additional websites related to the Virgin Group that collectively receive millions of hits worldwide, including those registered in the Canadian top level domain ".ca" such as *www.virgin-altantic.ca*, *www.virgin.ca* and *www.virginmobile.ca*. Ms. Wisener also provides a list of Facebook and Twitter sites used by the Virgin Group and Richard Branson to connect with consumers around the world [Wisener affidavit, para 21]. The list includes references to "virginmobilecan", as well

as Virgin Radio in Vancouver, Montreal and Calgary. Ms. Wisener has not provided any breakdown with respect to how many Canadian hits each of these sites has on an annual basis.

iv. Virgin Group Activities

[40] According to Ms. Wisener, the Virgin Group has operated in a wide variety of businesses since the 1970s and has continued to expand into various spheres of activity around the world.

a. Water, Wine, Drinks, etc. – Canada and Elsewhere

[41] According to Ms. Wisener, the Virgin Group sells and/or distributes third parties' drinks in Virgin retail stores around the world, including Virgin Megastores, through Virgin Cafés (in Canada at one point), Virgin stores (in several Canadian airports) and on international Virgin flights [Wisener affidavit, para 29].

[42] Ms. Wisener states that the Virgin Group is also involved in the drinks industry. Virgin Cola Company Limited (now The Virgin Drinks Company Limited) was launched in the United Kingdom in 1994 and it distributes various beverage products in countries around the world [Wisener affidavit, paras 30 and 179-187, Exhibits "Z"- "AA"].

[43] Ms. Wisener states that Virgin soft drinks were actively sold in Canada up until 2001 [Wisener affidavit, para 182]. However, no Canadian sales figures have been provided and the Opponent's registrations for its beverage related trade-marks in Canada were expunged in whole or in part for non-use a number of years ago.

[44] According to Ms. Wisener, a range of wines branded under the name Virgin Vines are distributed in Canada. Virgin Vines were featured at the Ottawa Wine Show in 2006, which attracted over 26,000 customers. The Virgin Vines were also featured at the Toronto Gourmet Wine & Food Show in 2006, which attracted over 30,000 customers [Wisener affidavit, paras 188-194, Exhibit "BB"]. There is no information regarding how long the wines have been available in Canada and no sales figures have been provided. There is also no promotional information provided for any years other than 2006, despite the fact that Ms. Wisener's affidavit was not sworn until 2012.

[45] According to Ms. Wisener, in 2012 (the same year in which these opposition proceedings were commenced and almost five years after the filing date of the application for the Mark), the Opponent expanded into the home water purification business under the name Virgin Pure in the United Kingdom and Ireland, “with additional countries targeted for expansion at a later stage” [Wisener affidavit, paras 31 and 32, Exhibit “F”]. There is no indication that the Opponent’s plans for expansion include Canada.

b. Travel, Tourism, Transportation – Canada and Elsewhere

[46] In 1984, the Virgin Group launched Virgin Atlantic, an airline service that carries over four million passengers every year from the UK to other destinations, including Canada. Canadian flights initially began in 2001 but were interrupted shortly thereafter until 2012 [Wisener affidavit, paras 35 and 36]. Attached as Exhibits “G” and “K” to Ms. Wisener’s affidavit are printouts from *www.virgin-atlantic.com* bearing the Virgin Marks where Canadian consumers are said to be able to book Virgin Atlantic flights to various destinations, including Vancouver. According to Ms. Wisener, 40,000 customers were expected to travel between London and Vancouver in 2012 alone [Wisener affidavit, para 36].

[47] Ms. Wisener states that the Virgin Marks have been used by Virgin Atlantic as identifiers for the airline and its aircrafts and that they can be seen on printed materials, flight attendant uniforms, at check-in counters and offices and on in-flight goods. Attached as Exhibits “H”, “I” and “J” to Ms. Wisener’s affidavit are examples of in-flight catalogues showing various articles bearing the Virgin Marks, examples of travel packs which are distributed to customers and articles relating to a lip product branded with the Virgin Atlantic and Virgin signature marks.

[48] There is also a Virgin Atlantic cargo service in operation in Canada. Printouts from *www.cargo-virgin-atlantic.com* showing the address of the Canadian office is attached as Exhibit “L” to Ms. Wisener’s affidavit. No information has been provided with respect to how well utilized the cargo service is amongst Canadian consumers.

[49] In October 2004, the Virgin Group entered into an agreement to license the technology to develop the world’s first privately funded spaceships to carry commercial passengers on space flights, Virgin Galactic, due to begin operating space flights from New Mexico in 2013/2014

[Wisener affidavit, para 48]. According to Ms. Wisener, booking of space flights is open to Canadians at *www.virgingalactic.com* [Wisener affidavit, para 49]. Copies of articles from third party websites, including Yahoo! Canada News, are attached as Exhibit “M” to Ms. Wisener’s affidavit. No information regarding the number of Canadians who would have accessed these articles has been provided.

[50] In 1985, Virgin Holidays was formed to offer package holidays to destinations serviced by Virgin Atlantic, including Canada [Wisener affidavit, para 51]. Printouts from *www.virginholidays.com* showing information on holiday destinations including Canadian locations, said to be accessible to Canadian customers, are attached as Exhibit “N” to Ms. Wisener’s affidavit. No information on the number of Canadians who would have accessed the websites or purchased packages has been provided.

[51] There is also a Virgin Holidays Cruises which specialises in holidays with cruises and a Virgin Limited Edition, which is a portfolio of luxury resorts around the world [Wisener affidavit, paras 55-58]. Ms. Wisener states that Canadians have reserved and stayed at Virgin Limited Edition properties over the years, with 71 room/nights sold to Canadians between 2004 and 2006 [Wisener affidavit, paras 59-60]. Virgin Limited Edition’s services are said to be advertised via its website [Wisener affidavit, para 61]. No information on the number of Canadians who would have accessed the websites has been provided.

[52] Other regional travel and transportation services offered in association with the Virgin Marks include:

- (a) Virgin Vacations - provides Virgin Atlantic’s US customers international vacation packages;
- (b) Virgin Trains - operates a domestic rail franchise in the UK and reservations are said to be available to Canadians;
- (c) Virgin America - operates a domestic airline in the United States that also flies to Mexico;
- (d) Virgin Australia - operates a domestic airline in Australia that also offers flights to parts of the Pacific region as well as Montreal, Toronto, Ottawa and Vancouver;
- (e) Virgin Limobike - operates a motorcycle taxi service in London;

- (f) Virgin Balloons and Virgin Balloons Benelux operate airships and hot air balloons in the UK and the Benelux;
- (g) Virgin Express - operated a low cost airline that flew to destinations throughout Europe between 1996 and 2007. It has since been rebranded as Brussel Airlines following a merger;
- (h) Virgin Charter - operated a search engine for end-to-end private air travel in the United States (no longer in operation);
- (i) Virgin Nigeria - operated an airline established in Nigeria that flew to a number of African destinations. It has been rebranded as Air Nigeria; and
- (j) Virgin Limousines - operated private limousine hire services in the United States. Following a merger, the services have been rebranded. However the website *www.virginlimo.com* remains active and Canadians are said to be able to obtain information and to make reservations via the website or by phone.

[Wisener affidavit, paras 62-83]

c. Media, Telecommunications and Entertainment – Canada and Elsewhere

[53] According to Ms. Wisener, the Virgin Group launched Virgin Net (subsequently Virgin Broadband) internet services, and Virgin Mobile telecommunication services, in the United Kingdom in 1996 and 1999 respectively. Similar mobile virtual networks were rolled out in other countries between 2000 and 2008, with a combined worldwide turnover of £1.8 billion in 2008 [Wisener affidavit, paras 87-98]. Virgin Mobile Canada was launched in 2005 and is now wholly owned by Bell Mobility [Wisener affidavit, para 91]. It had over 770,000 subscribers in 2008, with an estimated turnover of 268 million USD in 2009.

[54] Since its launch, Ms. Wisener states that Virgin Mobile Canada has sold a variety of goods including clothing, disks, ringtones and games to Canadians [Wisener affidavit, para 92]. Representative samples of purchase orders, invoices and packing slips for items said to bear the Virgin Marks (such as apparel, bags, notebooks, key chains, condoms, music and videos), sold by Virgin Mobile Canada to Canadians, are attached as Exhibit “O”. Printouts from *www.virginmobile.ca* showing sample use and advertisements of the Virgin Marks in association with mobile phone services and the sale of ringtones in Canada are attached as Exhibit “P”. No

information on the number of Canadians who would have accessed the website has been provided.

[55] In 1993, the Virgin Group launched the Virgin 1215 radio station in the United Kingdom. It has over 2 million listeners each week [Wisener affidavit, para 100]. Ms. Wisener states that Virgin Radio is broadcast via the internet and made accessible to Canadians via *www.virginradio.com* [Wisener affidavit, para 101]. However, no information on the number of Canadians who would have accessed the website or would have listened to the internet broadcast has been provided. Historical information and articles about Virgin Radio are attached as Exhibit “R” to Ms. Wisener’s affidavit.

[56] Numerous radio stations were rolled out by the Virgin Group around the world between 2001 and 2008 [Wisener affidavit, paras 102 to 113]. Notably, Ms. Wisener explains that Virgin Radio Canada was set up in partnership with Astral Media in 2008, with radio stations being launched in Toronto, Vancouver, Ottawa and Montreal between 2008 and 2010 [Wisener affidavit, para 110]. No information on Canadian listenership has been provided. However, copies of articles published by Toronto Sun, The Globe and Mail, Financial Post, CBC News, and others, in August 2008 about Toronto’s radio station Virgin Radio are attached as Exhibit “R” to Ms. Wisener’s affidavit.

[57] Virgin Megastores and Virgin Books & Music Stores were launched in 1979 and 2001, respectively [Wisener affidavit, paras 118 and 170]. The first Virgin Megastore was opened in Canada in 1996. Ms. Wisener states that the Vancouver Virgin Megastore offered a complete range of music and video equipment and instruments, as well as music, video, movies, computer software, computer games, and related merchandise including clothing and accessories, and printed publications. It also had a Virgin Café, which served food and beverages [Wisener affidavit, para 120]. The Vancouver location was open until September 2005. Photos of various items including disc cases, headgear and clothing bearing the Virgin Marks, said to be representative Virgin goods offered for sale in Canada at the Vancouver Virgin Megastore since 1999, as well as a photo of the sign Virgin Café, are attached as Exhibit “T” to Ms. Wisener’s affidavit. No Canadian sales figures have been provided.

[58] Ms. Wisener states that there are also 50 smaller Virgin stores located in airports and train stations across the world including Virgin Books & Music stores in the Ottawa, Montreal, Toronto, Winnipeg, Vancouver and Calgary international airports [Wisener affidavit, para 125]. In addition to music and books, Ms. Wisener states that the stores also sell consumer goods bearing the Virgin Marks. Photos of the Toronto, Vancouver and Montreal locations bearing Virgin signs are attached as Exhibit “U” to Ms. Wisener’s affidavit. No Canadian sales figures have been provided and it is unclear how long the stores have been in operation in Canada.

[59] Virgin Records was created by Sir Richard Branson in the United Kingdom in 1972. Ms. Wisener states that Canadians have purchased and continue to purchase CDs and DVDs under the Virgin label through third party distributors in Canada [Wisener affidavit, paras 114-117]. As mentioned previously, attached as Exhibit “S” are copies of discs and packaging bearing the Virgin Marks and copies of sales receipts from an HMV store located in Ottawa, Ontario. No information pertaining to the number of units sold or aggregate value of sales has been provided.

[60] In addition to brief mention of a television channel (Virgin 1) and digital music download services (Virgin Digital) offered to customers in the United Kingdom, Ms. Wisener also references several music festivals held around the world by the Virgin Group since 1996 [Wisener affidavit, para 127-136]. Notably, Virgin Festivals were held in numerous cities across Canada from 2006 to 2009. According to Ms. Wisener, attendance for the Canadian Virgin Festivals went from 30,000 in 2006 to over 155,000 in 2008. Information about the festivals in the United Kingdom, along with an advertisement of the Virgin Festival of 2008 in Toronto and Calgary, are attached as Exhibit “V” to Ms. Wisener’s affidavit.

d. Leisure and Lifestyle – In Canada and Elsewhere

[61] According to Ms. Wisener, the Virgin Group launched Virgin Games in 2004. Virgin Games is a website that offers players around the world (including Canadians) a selection of arcade, casino and instant win games [Wisener affidavit, paras 165-169].

[62] In 2010 Virgin Gaming was introduced through a partnership with another entity headquartered in Toronto [Wisener affidavit, paras 212-213].

[63] In 1996 the Virgin Clothing Company launched a range of Virgin branded clothing [Wisener affidavit, paras 198-201]. Although no longer available, except in Italy, products were once sold to Canadians at some point.

[64] According to Ms. Wisener, books published by Virgin Books bearing the Virgin Marks are distributed worldwide, including Canada, online and in retail stores such as Chapters/Indigo [Wisener affidavit, paras 170-176]. Copies of extracts from the Virgin catalogues and *www.virginbooks.com* are attached as Exhibit “X” to Ms. Wisener’s affidavit. No Canadian sales figures have been provided.

e. Activities outside of Canada

[65] In addition to the above mentioned fields of activity, the Virgin Group is also involved in a number of other businesses and other ventures, which are either inactive or which appear to be primarily active in jurisdictions outside of Canada. These businesses span a range of industries, including: finance and money (Virgin Money and Virgin Money Giving) [Wisener affidavit, paras 137 to 149]; health and well-being (Virgin Active, Virgin Life Care, Virgin Health Bank, Virgin Marathon and Virgin HealthMiles) [Wisener affidavit, paras 150 to 164, Exhibit “W”]; leisure and lifestyle (Virgin Comics, Virgin Brides, Virgin Cosmetics and Virgin Jewellery, Virgin Spa, Virgin Racing, Virgin Digital Help and Virgin Cinemas) [Wisener affidavit, paras 177, 178, 195-197, 198-211 and 214-217; Exhibits “EE”-“HH”]; Social and Environmental (Virgin Unite, Virgin Green Fund, Virgin Earth Challenge, Virgin Energy, and other initiatives relating to the environment and corporate responsibility and sustainable development) [Wisener affidavit, paras 218-245, Exhibits “II”-“NN”]. Ms. Wisener notes that in the past, the Opponent has also granted licenses to use the Virgin Marks to other entities in relation to a range of other goods and services including, the sale of cars, the production and distribution of computer games and the operation of cinemas [Wisener affidavit, para 246].

v. Sales Figures

[66] Worldwide sales figures for the years of 1995 to 2010 have been provided in paragraph 248 of the Wisener affidavit. The figures range from approximately £512 million in 1995 to almost £4 billion in 2010 and do not include sales for associated companies or licensees

[Wisener affidavit, paras 247-249]. There is no breakdown for Canada, nor is there any breakdown by industry or trade-mark.

vi. Advertising Expenditures

[67] Ms. Wisener has provided an estimate of worldwide advertising expenditures by the Virgin Group (excluding Licensees outside of the Virgin Group) for the years of 2001 to 2010. They range from £14,042 to £232,934 [Wisener affidavit, paras 250 to 251]. There is no information pertaining to what portion of these expenditures relates to Canada and the expenditures are not broken down by industry or trade-mark.

vii. Advertising and other Promotional Activities and Achievements

[68] In paragraph 252 of her affidavit, Ms. Wisener states that advertisements for goods and services provided by reference to the Virgin Marks have appeared in major newspapers, magazines and periodicals circulated in Canada. Attached as Exhibit “RR” are examples of articles which reference the Virgin Marks. The majority of the articles relate to Virgin Mobile and Virgin Media.

[69] Ms. Wisener estimates that an article about the Virgin Group is published in the United Kingdom every day. She notes that many United Kingdom newspapers are available on the internet and sold in Canada [Wisener affidavit, para 253]. Ms. Wisener does not indicate the source of this information, nor does she provide any further detail regarding how many Canadians actually read or subscribe to United Kingdom publications either in print or on-line.

[70] In paragraphs 255 to 269, Ms. Wisener provides details relating to some initiatives which are sponsored by the Virgin Licensees. Most of these activities appear to have taken place outside of Canada, with the exception of Lady Gaga’s Monster Ball Tour (2010) and Katy Perry’s Tour (2011), both of which were sponsored by Virgin Mobile Canada [Wisener affidavit, paras 266-268, Exhibit “TT”].

[71] In paragraphs 270-276 and Exhibits “UU” and “VV”, Ms. Wisener provides details regarding surveys which have been done over the years in relation to the Virgin brand. Ms. Wisener states that Virgin has been consistently ranked in the top 10 of the most successful,

innovative, admired and respected brands by independent survey companies [Wisener affidavit, para 270]. None of the surveys referenced therein appear to relate to Canada.

[72] In paragraph 277, Ms. Wisener references a number of awards which have been received by different companies in the Virgin Group. While most of the awards were presented in the United Kingdom, Australia and the United States, Virgin Mobile (Canada) is listed as having received at least one award in 2006.

[73] In paragraphs 278 to 293, Ms. Wisener provides details concerning the reputation and public recognition of the Virgin Group and Sir Richard Branson, as well as the Opponent's trademark enforcement activities. The bulk of this information relates specifically to the Virgin Group/ Richard Branson's reputation internationally and some of the information is based upon Ms. Wisener's own personal views and opinions.

[74] In summary, although it is lengthy, the Wisener affidavit is short on detail with respect to the Opponent's Canadian activities. Ms. Wisener's affidavit (in combination with portions of the Masouras affidavit) suggests that some of the Virgin Marks are more well-known or famous in Canada than others. Specifically, the evidence lends itself to a conclusion that the Opponent's licensees are more active or more well-known in Canada within the telecommunications, entertainment, travel and transportation spheres (for example, Virgin Mobile, Virgin Radio, Virgin Festival, Virgin Atlantic, Virgin airport stores, Virgin Galactic) and to a much lesser extent, in other spheres such as, for example, Wine (Virgin Wines/Virgin Vines – information on 2006 trade-shows only), Virgin records (limited information provided), Virgin Megastores (now closed), Virgin drinks (abandoned in 2002), books (Virgin books - limited information provided), games (Virgin Games – limited information provided), luxury resorts (Virgin Limited Edition), trains (Virgin Trains), etc. The Opponent also appears to be involved in numerous other business activities and ventures which are outside of Canada and which Ms. Wisener has not identified as being known, offered or accessible to Canadians (for example, Virgin Brides, Virgin Money, Virgin Life Care, Virgin Racing, Virgin Spa, Virgin Cinemas, etc.).

[75] While Ms. Wisener has provided sales and advertising figures, she has not provided any Canadian breakdown, nor has she provided a breakdown by trade-mark, industry, goods or services. In addition, the survey evidence which has been provided is all based upon

international, rather than Canadian data and the awards which have been mentioned also primarily relate to other jurisdictions.

Masouras Affidavit

[76] Ms. Masouras is a student-at-law employed by the agent for the Opponent [Masouras affidavit, para 1]. Ms. Masouras was instructed by a lawyer and trade-mark agent in her firm to locate articles and news about the Opponent in magazines, newspapers, periodicals, news media, etc. [Masouras affidavit, para 2].

[77] The Applicant submits that the Masouras affidavit is not admissible for any contentious facts given its provenance. The Applicant cites the *Cross-Canada Auto Body Shop Supply (Windsor) Ltd* decision in support of its submissions [*Cross-Canada Auto Body Shop Supply (Windsor) Ltd v Hyundai Auto Canada* (2006), 53 CPR (4th) 286 FCA]. In that decision, the Federal Court of Appeal has made it clear that it is not good practice for a law firm to cause its employees to act as investigators for the purpose of having them later give opinion evidence on the most crucial issues in the case.

[78] I do not find the evidence of Ms. Masouras to be of a contentious nature and I am therefore prepared to consider it. Ms. Masouras was simply asked to visit the Ottawa Public Library website and conduct a search for online articles pertaining to the Opponent using 85 different search terms. All of the search terms are listed by Ms. Masouras in her affidavit. I will not reproduce them all here, but I will note that they included such terms as Richard Branson, Virgin Enterprises, Virgin Group, Virgin Records, Virgin Atlantic and Virgin Mobile [Masouras affidavit, para 2].

[79] Ms. Masouras states that she printed out copies of all of the articles which she located with the 85 search terms [Masouras affidavit, paras 2 and 3]. The articles are listed in paragraph 4 of her affidavit and copies are attached as Exhibits “A1” to “A72” thereto.

[80] Exhibits “A1” to “A72” consist of 975 articles. The articles span across a wide range of dates going as far as 1989 and as far forward as 2012. The sources of the articles include over 200 publications. A few examples of sources of the articles are: *The Ottawa Citizen*; *Grocer*; *PR*

Week (UK); The Atlanta Journal; Edmonton Journal; Toronto Star, Newsweek; PR Newswire Europe; Forbes.com; International Business Times; PR Newswire; The Times, Marketing; National Post; StateWays; Revolution; The Windsor Star; Travel Weekly; Calgary Herald; The Globe and Mail; Business Traveller; The Vancouver Sun; AirFinance Journal; PR Newswire US; African Business; Asian Aviation; and Australian Banking and Finance.

[81] The Applicant submits that there is a hearsay issue with this evidence. While that is true and while the articles cannot be relied upon for the truth of their contents, I am prepared to accept that their existence can be relied upon as evidence of a presence in the media.

[82] That being said, there are further issues with this evidence. A large number of the sources of the 975 articles which are attached as Exhibits “A1” to “A72” to Ms. Masouras’ affidavit appear to be international, rather than Canadian. In addition, Ms. Masouras has not provided any Canadian circulation information for either the Canadian or the international publications. I can take judicial notice of national circulation in Canada of some of these publications, such as the *Globe & Mail* and the *National Post* and of regional circulation in Canada of various other newspapers [*Milliken & Co v Keystone Industries (1970) Ltd*, (1986), 12 CPR (3d) 166 (TMOB) at 168-169; *Carling O’Keefe Breweries of Canada Ltd v Anheuser-Bush, Inc* (1985) 4 CPR (3d) 216 at 224 (TMOB); and *Whole Foods Market IP, LP v Salba Corp. N.A.* (2012) CPR (4th) 361 (TMOB)]. However, this accounts for a relatively small number out of the 975 articles which are attached to Ms. Masouras’ affidavit. The Opponent has referred to a number of these articles on pages 12-15 of its written argument. A good number of them relate to Richard Branson and to the businesses which have been identified in the Wisener affidavit as having more of a presence in Canada or as being more accessible to Canadians (see para 74 above).

[83] In paragraph 5 of her affidavit, Ms. Masouras states that she was instructed to access the websites located at *www.ctvnews.ca*, *www.cbc.ca*, *www.cnn.com*, *www.theglobeandmail.com* and *www.lapresse.ca*, to search for articles or news pertaining to the Opponent by using the search features available on those sites and entering the keywords “Richard Branson Virgin”. Attached as Exhibits “B” to “F” of Ms. Masouras’ affidavit are the results of these searches. Many of the articles pertain to Richard Branson’s personal and professional exploits, but some also reference the Virgin Group’s various business lines, such as Virgin Galactic, Virgin Mobile, Virgin Music

Festival, Virgin Atlantic, etc. The results identify the title of the article or newsclip and include the date and a brief summary or abstract of the article or the subject matter and content of the video newsclip, as the case may be. In the cases where there was no reference to Richard Branson or Virgin in the summary of the article or newsclip, Ms. Masouras accessed the article or videoclip by clicking on the link thereto and confirmed that the article or videoclip did in fact refer to Richard Branson and/or Virgin.

[84] As part of Exhibit “B” (results from *www.ctvnews.ca* website), Exhibit “D” (results from *www.theglobeandmail.com* website) and Exhibit “E” (results from *www.cnn.com* website), Ms. Masouras also included information from the “About Us” type pages from each website in an attempt to establish that they have wide viewership/readership within Canada [Masouras affidavit, paras 6, 8 and 9]. With respect to Exhibit “C” (results from *cbc.ca* website), Ms. Masouras simply states that she understands that CBC/Radio Canada is Canada’s national public broadcaster [Masouras affidavit, para 7]. With respect to Exhibit “F” (results from *www.lapresse.ca* website), Ms. Masouras simply states that she understands from the lawyer and trade-mark agent who instructed her to conduct her searches that *La Presse* newspaper is one of the leading newspapers in the province of Québec [Masouras affidavit, para 10].

[85] For the same reasons mentioned previously in relation to the articles located by Ms. Masouras during her search in the public library, I am not prepared to rely upon Exhibits “B”-“F” as being evidence of truth of contents. However, I do accept them as being evidence of a general media presence in Canada.

[86] Attached as Exhibit “G” to Ms. Masouras’ affidavit is a copy of a Wikipedia article entitled “The Rebel Billionaire: Branson’s Quest for the Best”. Again, I cannot consider this article as being evidence of truth of its contents, but its existence does establish some internet presence.

[87] In summary, I find that Ms. Masouras’ affidavit also establishes a media presence in Canada, particularly in relation to Richard Branson himself and the businesses which were identified in the Wisener affidavit as being more active in Canada or as being more accessible or known to Canadians. Had Ms. Masouras provided some confirmation of Canadian circulation for a larger number of the publications referenced in Exhibit “A” and more detail pertaining to the

readership/viewership for the articles and clips attached as Exhibits “B” to “F”, it might have assisted the Opponent in establishing a more substantial media presence or a media presence which extends across more of the Opponent’s businesses.

Applicant’s Evidence

Kimel Affidavit and Transcript of Cross-examination

[88] Mr. Kimel is the President of the Applicant and he has held this position since 1991. The Applicant specializes in bottle-less water cooler filtration systems and has done so since 1991 [Kimel affidavit, paras 1 & 2]. The Applicant operates in the commercial and industrial areas [Kimel affidavit, para 3].

[89] According to Mr. Kimel, he chose the trade-mark VIRGIN WATER because he thought it suggested water that was clean and pure. He states that at the time that he thought of the name, he did not associate it in any way with the Virgin Group or its trade-marks [Kimel affidavit, para 5]. In paragraph 6 of his affidavit, Mr. Kimel states that he did know of the Virgin corporations at the time and in particular that it was involved in music and an airline, but that he did not associate it with his office water coolers, filtration systems or services relating thereto.

[90] In paragraphs 14 to 18 of his affidavit, Mr. Kimel states that he was advised by counsel that three of the Opponent’s Virgin Marks were cited against the application for the Mark during prosecution, as they were registered for use in association with “soft drinks” and “fruit juices”, among other things. Mr. Kimel states that since he was unaware of any use of these trade-marks in Canada he instructed counsel to commence section 45 proceedings to have the registrations cancelled. Mr. Kimel states that two of the three registrations which related to the soft drink business were expunged in their entirety and the third was maintained for only non-drink related goods. In paragraph 17 of his affidavit, Mr. Kimel states that attached as Exhibits “B” and “C” to his affidavit are copies of the decisions which were issued on behalf of the Registrar of Trade-marks in relation to these section 45 proceedings. It appears as though there were actually four trade-marks, registration Nos. TMA553,902, TMA553,903 and TMA573,241, which were expunged in their entirety and registration No. TMA509,209, which was maintained for non-drink related goods only.

[91] The Opponent submits that Mr. Kimel's affidavit is materially incorrect in a number of places. For example, the Opponent notes that although Mr. Kimel states in paragraphs 2 and 3 of his affidavit that the Applicant operates in the commercial and industrial areas, during cross-examination, Mr. Kimel admitted that the Applicant does in fact rent or sell water systems to individual consumers [Kimel transcript, Q's 15-17 and 45]. In addition, Mr. Kimel stated in his affidavit that he only found out about VEL and its Virgin Marks covering soft drinks during prosecution of the application for the Mark. However, during cross-examination, it was established that the section 45 proceedings against one of the Virgin Marks covering soft drinks was actually initiated before the filing of the application for the Mark [Kimel transcript, Q's 340-345]. While it is true that there are some inconsistencies in the Kimel affidavit, I do not find that anything turns on any of them.

Reply Evidence

Tibbo Witt Affidavit

[92] The Tibbo Witt Affidavit consists of a certified copy of the application for the Mark (Exhibit "A") and a certified copy of the Section 45 Notice dated July 19, 2006 which issued against registration No. TMA509,209 (Exhibit "B"). This evidence appears to have been put in solely to establish the previously mentioned inconsistency in the Kimel affidavit.

Analysis of Grounds of Opposition

Non-compliance - Section 30(e)

[93] The Opponent has pleaded that the Application does not comply with the requirements of section 30(e) of the Act, in that the Applicant does not intend to use the Mark in Canada for the goods and services set out in the application.

[94] The application contains a statement that the Applicant, by itself, or through a licensee intends to use the Mark in Canada and it therefore formally complies with section 30(e) of the Act. The Opponent has not filed any evidence to suggest a lack of intention to use the Mark on the part of the Applicant and its written argument is devoid of any submissions on this point.

[95] At the hearing, the Opponent attempted to rely on the Kimel affidavit in support of this ground of opposition. In particular, the Opponent noted that although Mr. Kimel provides information regarding how the Applicant proposes to use the Mark in association with some of the goods and services (including “coffee services), he did not mention anything about “coffee” *per se* [Kimel affidavit, para 9]. The fact that Mr. Kimel did not provide any information regarding how the Applicant intends to use the Mark for those particular goods, does not, in my view, amount to evidence that the Applicant falsely made the statement required under section 30(e) of the Act in its application.

[96] Accordingly, this ground of opposition is dismissed as a result of the Opponent’s failure to meet its initial burden.

Non-compliance – Section 30(i)

[97] The Opponent has pleaded that the application for the Mark does not comply with section 30(i) of the Act in that the Applicant could not have been satisfied that it was entitled to use the Mark in view of the Opponent’s prior extensive use of a family of trade-marks comprising the name VIRGIN, of which the Opponent should have been aware.

[98] Section 30(i) of the Act merely requires that an applicant declare in its application that it is satisfied that it is entitled to registration of its trade-mark. Where an applicant has provided the requisite statement, a section 30(i) ground should only succeed in exceptional cases, such as where there is evidence of bad faith on the part of the applicant [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. Mere knowledge of the existence of an opponent’s trade-marks does not in and of itself support an allegation that the applicant could not have been satisfied of its entitlement to use a mark [*Woot, Inc v WootRestaurants Inc Les Restaurants Woot Inc* 2012 TMOB 197 (CanLII)]. The Applicant has provided the necessary statement and the Opponent has not demonstrated that this is an exceptional case. Accordingly, this ground of opposition is also dismissed as a result of the Opponent’s failure to meet its initial burden.

Non-registrability – Section 12(1)(d)

[99] The Opponent has pleaded that the Mark is not registrable as it is confusing with its registered trade-marks which consist of or incorporate the term VIRGIN. Schedule “B” to the statement of opposition contains the particulars for the Virgin Marks which the Opponent relies upon in support of its section 12(1)(d) ground of opposition. Those trade-marks are identified in Schedule “A” attached hereto.

[100] An opponent's initial onus is met with respect to a section 12(1)(d) ground of opposition if the registrations relied upon are in good standing as of the date of the opposition decision. The Registrar has discretion to check the register in order to confirm the existence of the registrations relied upon by an opponent [see *Quaker Oats Co. of Canada/Cie Quaker Oats du Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. I have exercised that discretion and confirm that all of the registrations for the Opponent's Virgin Marks remain extant. The Opponent has therefore met its initial evidentiary burden. I must therefore go on to consider whether the Applicant has met the legal onus upon it to show, on a balance of probabilities, that there is no likelihood of confusion between the Mark and one or more of the Opponent's trade-marks.

[101] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the goods or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class.

[102] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight. [*Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC)].

Section 6(5)(a) — the inherent distinctiveness of the trade-marks and the extent to which they have become known

[103] Although both of the parties' trade-marks are comprised in whole or in part of the word VIRGIN, which is an ordinary dictionary term, both possess some degree of inherent distinctiveness. However, I find that the Mark possesses less inherent distinctiveness than the Opponent's trade-marks, as the word VIRGIN is somewhat suggestive in the context of some of the Applicant's goods. As indicated above, Mr. Kimel stated in his affidavit that he specifically chose the Mark because he thought it suggested water that was "clean and pure" [Kimel Affidavit, para 5].

[104] With respect to the extent to which the parties' trade-marks have become known, I note that the application for the Mark is based upon proposed use and Mr. Kimel confirmed in his affidavit that as of the date it was sworn, use of the Mark had not yet commenced.

[105] Overall the evidence put forward in the Wisener and Masouras affidavits is sufficient to enable me to conclude that at least some of the Opponent's Virgin Marks have become quite well known or famous in Canada through a presence in the media and/or use in Canada. I will address this, as well as the Opponent's assertions of its fame and reputation for diversification in more detail below, as a separate surrounding circumstance.

[106] Suffice it to say, the section 6(5)(a) factor, which is a combination of the inherent distinctiveness of the trade-marks and the extent to which they have become known clearly favors the Opponent.

Section 6(5)(b) – the length of time in use

[107] The application for the Mark is based upon proposed use and the Applicant has not adduced any evidence of use. The Opponent has evidenced use of at least some of its Virgin Marks in Canada. However, it is not clear in all cases that the use which occurred was in accordance with section 50 of the Act and consequently, it is unclear whether it would have enured to the benefit of the Opponent.

Sections 6(5)(c) and (d) – the nature of the goods, services or business and trade

[108] When considering sections 6(5)(c) and (d) of the Act, it is the statement of services in the application for the Mark and the statement of goods and services in the Opponent’s registrations that govern the assessment of the likelihood of confusion under section 12(1)(d) of the Act [see *Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA) and *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)]. Those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording and evidence of the actual trades of the parties is sometimes useful [*McDonald's Corp v Coffee Hut Stores Ltd* (1996), 1996 CanLII 3963 (FCA), 68 CPR (3d) 168 (FCA); *Procter & Gamble Inc v Hunter Packaging Ltd*, (1999), 2 CPR (4th) 266 (TMOB); and *American Optical Corp v Alcon Pharmaceuticals Ltd*, (2000), 5 CPR (4th) 110 (TMOB)].

[109] The statement of goods in the application for the Mark covers “water coolers, water filtration systems and coffee” and the statement of services covers “services of renting, leasing and selling water filtration systems and water coolers”.

[110] The statements of goods and services in the Opponent’s registrations are reproduced in Schedule “A” attached hereto. There is no clear overlap in the parties’ respective goods and services.

[111] In its written argument (at page 2), the Opponent highlighted its registrations for “wine, potable and distilled spirits” (nos. TMA524,506 and TMA524,590), presumably because it was of the view that these goods were the closest in nature to the goods and services of the Applicant. However, aside from the fact that “wine” and “distilled spirits” are beverages and the Applicant’s “coffee” is also a beverage and its “water coolers”, “water filtration systems” and related services relate to water (also a beverage), there is no relationship whatsoever between the parties’ goods and services. In my view, the wine and spirit industries are entirely different from the water filtration business or from the coffee business, both of which are non-alcoholic in nature.

[112] The Opponent has also pointed out that it used the Virgin Marks in association with “soft drinks” in Canada up until 2001 and that it continues to do so in other countries to this date

[Wisener affidavit, paras 30 and 179 to 187]. While that may well be the case, such goods are no longer covered in any of the Opponent's Canadian registrations and its use of its Virgin Marks in other countries is irrelevant if there is no evidence that that they have become known in Canada in association with those goods.

[113] The Opponent has also directed my attention to the fact that one of its registrations (No. TMA509,209) also covers "restaurant, café and cafeteria services", presumably because beverages are typically served in such settings. In my view, the operation of a restaurant, café or cafeteria is entirely different from the operation of a business that rents, leases and sells water filtration systems and water coolers. However, I do find there to be a distant association between the Applicant's "coffee" and the Opponent's "restaurant, café and cafeteria services", to the extent that these types of settings might offer such an item on their premises.

[114] The Opponent also points out that in 2012, it expanded its business into the water purification business, under the name Virgin Pure, in the United Kingdom and Ireland [Wisener affidavit, paras 31-33]. However, there is no mention of any intention on the part of the Opponent to similarly expand its operations in Canada, nor is there any evidence to suggest that Canadians would even be aware of the Opponent's expansion into the water purification business overseas.

[115] To conclude, with the exception of perhaps a distant relationship between the Applicant's "coffee" and the Opponent's "restaurant, café and cafeteria services" (for which I note as an aside, there is little or no mention of in the evidence), there appear to be significant differences between the parties' goods/services/businesses in Canada and presumably also their respective channels of trade.

Section 6(5)(e)- the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them

[116] The Mark consists of the words VIRGIN and WATER, whereas the Opponent's trade-marks consist of the word VIRGIN (in word or design form) on its own or in combination with other words or design elements. While the parties' trade-marks are not identical, the Applicant has incorporated the whole of many of the Opponent's trade-marks (i.e. the VIRGIN word

marks) into the Mark. In addition, the Mark has a structure which is similar to some of the Opponent's other trade-marks (i.e. the word VIRGIN, followed by a descriptor). At least some of the parties' trade-marks therefore resemble one another to a significant extent.

Surrounding Circumstances

Opponent's fame and diversification

[117] The Opponent submits that its presence in the beverage industry in Canada at one point and elsewhere currently, together with its expansion into the home water purification business (in the United Kingdom and Ireland to date) shows without any doubt that it is within the Opponent's natural zone of expansion to cover the kind of goods and services in association with which the Applicant proposes to use its Mark. The Opponent submits that even if it is not offering goods and services of the same nature as those of the Applicant, the wide diversity of goods and services with which the Virgin Marks have been used, promoted and have become well-known or famous in Canada and around the world over the years justifies the refusal of the Applicant's application for the Mark.

[118] In its written argument and at the hearing, the Applicant criticized the Opponent's evidence, pointing out that it has provided nearly six feet of paper and that very little of it relates to use of the Opponent's Virgin Marks in Canada. While I have not gone to the trouble of physically measuring the Opponent's evidence in the same way that the Applicant has, I agree that the bulk of the evidence relates to the Opponent's international activities. That being said, to the extent that Canadians are aware of the Opponent's international activities as a result of media coverage or perhaps travel, such evidence is relevant (for example, the evidence suggests that Virgin Galactic has enjoyed a fair amount of media coverage in Canada).

[119] The Applicant also submits that while there is media presence for the Opponent's Virgin Marks, it is not universal and there is no evidence whatsoever that the average Canadian consumer would be aware of the Virgin brand for anything outside of radio and mobile telephones in Canada. I do not entirely agree with the Applicant's assessment of the evidence.

[120] The Opponent's evidence is, without question, short on Canadian content. However, in my view, it does establish that the Opponent has been sufficiently active or enjoyed enough of a presence in the media in Canada within the telecommunications, entertainment, travel and transportation spheres (Virgin Mobile, Virgin Radio, Virgin Festival, Virgin Atlantic, Virgin airport stores, Virgin Galactic), such that the Virgin Marks which are associated with the goods and services of those businesses have become either famous or known to a significant extent in Canada. The evidence suggests that some of the other Virgin Marks are much less well known in Canada and that some are perhaps not known to Canadians at all. The evidence is also inconclusive in respect of some of the Virgin Marks.

[121] While Ms. Wisener has provided sales and advertising figures, she has not provided any Canadian breakdown, nor has she indicated what portion of those figures is attributable to which business, product or service. In the absence of this information and in light of the lack of detail pertaining to Canadian circulation, readership and viewership in Ms. Masouras' affidavit, it is difficult to draw any meaningful conclusions with respect to how well-known many of the Virgin Marks are in Canada.

[122] The goods and services associated with the Virgin Marks relating to the spheres of activity which are identified in paragraph 120 are diverse in nature. However, they are somewhat limited in number and while the evidence suggests that Canadians might have some awareness of the Opponent's diversification in other jurisdictions, in my view, it falls short of establishing that Canadian consumers would perceive the Opponent to be similarly diversified in Canada.

[123] There is also the issue with respect to who is using the Virgin Marks in Canada and whether those entities are properly licensed such that any use would enure to the benefit of the Opponent. This is particularly concerning for businesses such as Virgin Mobile Canada, which Ms. Wisener states is now wholly owned by Bell Mobility (an entity not identified as being within the Virgin Group), which uses the Virgin Marks under license from VEL. It is not readily apparent how it would be possible for VEL to maintain direct or indirect control over the character or quality of the goods and services which are being offered in association with the Virgin Marks by external or unrelated entities such as Bell Mobility and Ms. Wisener has not even provided a sworn statement attesting to the fact that VEL has such control.

[124] Without a clear indication that proper licensing is in place it is difficult to know whether Canadian consumers would recognize all of the goods and services being provided by the various licensees as being associated with the Opponent or only some of them. In paragraph 81 of *Mattel*, the Supreme Court commented on the fact that profligate use by the owner of a trade-mark alone can destroy the distinctiveness of a mark, and licenses granted too widely and unwisely may aggravate its problem. While I am not suggesting that this may have occurred in the present case, it does further serve to highlight the importance of proper licensing.

[125] The Supreme Court indicated in *Masterpiece* that the use of survey evidence in confusion cases should be applied with caution. However, given the aforementioned shortcomings in the evidence in this case, the Opponent may well have benefited from such evidence. While not conclusive of the existence of a likelihood of confusion and not necessary in many cases, the benefit of a Canadian specific consumer survey in this case could well have shed some light on the Canadian public's perception of the Opponent and its perception of the extent or reach of its business operations in Canada.

The Opponent's Family of Virgin Marks

[126] The Opponent made a passing reference to the fact that it has a "family" of registered trade-marks in its written argument and at the hearing. At the hearing, the Applicant took issue with the Opponent's characterization of its registered trade-marks as constituting what is commonly referred to as a "family" because most of the registrations cover marks consisting of the word VIRGIN in text or in design form and simply cover different goods and services. The Applicant seemed to be of the view that a "family" is generally understood to refer to a number of trade-marks comprising one common element in addition to other elements, rather than a number of trade-marks comprising the same element and covering different goods or services. This issue aside, it is well established that in order to rely upon a family of trade-marks, an opponent must evidence use of those trade-marks in the marketplace [see *Mcdonald's Corp v Yogi Yogurt* (1982), 66 CPR (3d) 101 (FCTD)]. While the Opponent has filed evidence pertaining to reputation, it has failed to file actual evidence of use within the meaning of section 4 of the Act for the vast majority of its Virgin Marks.

Conclusion Regarding Likelihood of Confusion between the Parties' Trade-marks

[127] Having considered all of the surrounding circumstances, I have concluded that there is not a reasonable probability of confusion between the trade-marks at issue. In coming to this conclusion, I acknowledge that the parties' marks are very similar and that in most instances the degree of resemblance between the trade-marks is the most crucial factor in determining the issue of confusion [see *Beverley Bedding & Upholstery Co v Regal Bedding & Upholstery Ltd* (1980), 47 CPR (2d) 145 (FCTD) at 149, affirmed 60 CPR (2d) 70 and *Masterpiece supra*]. I also acknowledge the fame of Richard Branson and the fact that some of the Opponent's Virgin Marks have become well-known or famous in Canada through promotion and use or by virtue of a presence in the media. I also acknowledge that there is no evidence to establish that the Mark has been used or acquired any reputation in Canada. However, I am unable to conclude that the Opponent is sufficiently diversified in Canada or that the average consumer in Canada would be sufficiently knowledgeable about the diversification of the Opponent in other jurisdictions such that upon seeing the Mark in the context of the Applicant's goods and services, he or she would be likely to conclude that those goods and services originate with or are somehow associated with the Opponent.

[128] The Opponent has correctly pointed out that it is possible for confusion to be likely even when parties' goods and services are not of the same general class [section 6(2)]. However, as stated in *Mattel* at paragraph 71, "given the role and function of trade-marks, [a difference in goods and services] will generally be an important consideration." In my view, the disparity between the parties' goods and services, coupled with the slight differences between the trade-marks suffices to meet the Applicant's legal burden. Prospective consumers will likely *not* infer that the goods and services associated with the Mark originate from the same source or are somehow associated with the same source of those which are associated with the Virgin Marks.

[129] For the foregoing reasons, the section 12(1)(d) ground of opposition is unsuccessful.

Non-entitlement – Sections 16(3)(a)-(c)

[130] The Opponent has pleaded that the Applicant is not the person entitled to registration of the Mark in view of the provisions of sections 16(3)(a)-16(3)(c) of the Act because at the date of

filing of the Applicant's application, the Mark was confusing with: i) one or more of the Opponent's Virgin Marks referred to in Schedule "A" to the statement of opposition, which have been previously used or made known in Canada by the Opponent, ii) one or more of the Opponent's Virgin Marks referred to in Schedule "A" to the statement of opposition, for which applications for registration had been previously filed in Canada by the Opponent, and iii) various trade-names comprising the term VIRGIN, which had been previously used in Canada by the Opponent.

[131] An opponent meets its evidentiary burden with respect to sections 16(3)(a) and 16(3)(c) grounds of opposition if it shows that as of the date of filing of the applicant's application, its trade-mark(s) and trade-name(s) had been previously used in Canada and had not been abandoned as of the date of advertisement of the applicant's application [section 16(5) of the Act]. An opponent meets its evidentiary burden with respect to a section 16(3)(b) ground of opposition if it can establish that one or more of its applications was filed prior to the filing date of the Applicant's application for the Mark and was not abandoned at the date of advertisement of the application for the Mark [section 16(4) of the Act].

[132] While Schedule "A" to the statement of opposition includes some additional trade-marks which were not set out in Schedule "B" to the statement of opposition which related to the Opponent's section 12(1)(d) ground, the additional trade-marks which have been identified do not relate to goods or services which are any more similar to those of the Applicant than those which it has relied upon in support of its section 12(1)(b) ground.

[133] To the extent that the Opponent has met its initial burden with respect to any of its section 16 grounds of opposition, each of these grounds fail for reasons similar to those set out under the discussion of the section 12(1)(d) ground of opposition. In fact, the Opponent's case is weaker for some of its marks under section 16 than it is under section 12(1)(d) since some of the Opponent's evidence does not predate the filing date of the application for the Mark.

[134] Accordingly, for the same reasons which were set out above in my analysis under the section 12(1)(d) ground of opposition, these grounds of opposition are unsuccessful.

Non-distinctiveness – Section 2

[135] The Opponent has pleaded that the Mark is not distinctive in that it does not distinguish, nor is it adapted to distinguish, the goods and services of the Applicant from the goods and services of the Opponent.

[136] While there is a legal onus on the Applicant to show that the Mark is adapted to distinguish or actually distinguishes its Goods from those of others throughout Canada [see *Muffin Houses Incorporated v The Muffin House Bakery Ltd* (1985), 4 CPR (3d) 272 (TMOB)], there is an initial evidential burden on the Opponent to establish the facts relied upon in support of the ground of non-distinctiveness. In the present case, the Opponent is under an obligation to show that, as of the date of filing of the statement of opposition, one or more of its trade-marks or trade-names had become known sufficiently to negate the distinctiveness of the Mark [see *Bojangles' International, LLC v Bojangles Café Ltd* (2004), 40 CPR (4th) 553, affirmed (2006), 48 CPR (4th) 427 (FC)].

[137] To the extent that the Opponent has met its initial burden, this ground fails for the same reasons that the section 12(1)(d) ground failed. In fact the Opponent's case is weaker under this ground than it is under the section 12(1)(d) ground since some of the Opponent's evidence does not predate the filing date of the statement of opposition.


[138] Accordingly, this ground of opposition is also unsuccessful.

Disposition

[139] In view of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(8) of the Act.

Lisa Reynolds
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

Schedule A

Trade-Mark	Application No. & Registration No.
1. VIRGIN	388,068 TMA222,303
<p>GOODS:</p> <p>(1) Pre-recorded sound recordings in the form of discs.</p> <p>(2) T-shirts, board games, buttons, badges, concert, tour programs, artists' photographs, dolls, artists' pamphlets, artists' biographical materials, computer software, computer games, video games, video discs, compact discs, posters, sweat shirts, video cassettes.</p> <p>(3) Prerecorded tapes and cassettes.</p> <p>(4) Apparatus and instruments, all for recording and reproducing sound and images namely sound and image recording machines; radio and television apparatus and instruments both for reception and transmission; aerials; magnetic tapes for or bearing sound or video recordings, and cassettes and cartridges; all for use therewith; video accessories; sound recordings; video recordings; racks and cases adapted to hold recordings or to hold tapes; cinematographic and photographic films, all prepared for exhibition; photographic slide transparencies; calculators; software and firmware for electronic games and for electronic amusement apparatus; firmware for computers; data bearing magnetic tapes, cassette tapes, cartridges, floppy discs and CD-ROM discs; electronic games and electronic games machines; hand-held electronic games machines; interactive software for computers, electronic games for electronic games machines; interactive software and games delivered by cable, satellite or via the telecommunications network.</p> <p>SERVICES:</p> <p>(1) Music publishing, broadcasting, operation of record stores, film distribution and production, television broadcasting, operation of bars and night clubs.</p>	
2. VIRGIN	421,594 TMA231,861
<p>GOODS:</p> <p>(1) Pre-recorded tapes and cassettes.</p>	
3. VIRGIN DESIGN 	599,724 TMA383,374
<p>GOODS:</p> <p>(1) Apparatus and instruments, all for recording and reproducing sound and video, namely video recorders, tape recorders, record players, hi-fi's and stereo recorder players, record decks, cassette decks, compact disc players; radio and television apparatus and instruments, namely radios, televisions and head phones; and parts and fittings for all the aforesaid goods; magnetic tapes for or bearing sound or video recordings and cassettes and cartridges all for use therewith; video discs; video accessories, namely video storage holders, magnetic tape head cleaners, and video tapes; compact discs; sound records in the form of discs, tapes or wires; racks adapted to hold records or to hold tapes; cinematographic and photographic films, all prepared for exhibition; photographic slide transparencies; calculators; video games and electronic games and amusement apparatus for use with television receivers, coin operated amusement machines, automatic amusement machines, and pin ball machines; and parts and fittings therefor; computers, computer software, computer games and parts and fittings therefor; printed music, holographs, photographs, posters, books, magazines and brochures; cardboard and paper articles, namely paper towels, table napkins, table mats, table cloths, coasters, decanter mats, dish mats, filter papers, pocket</p>	


handkerchiefs, hygienic paper, babies diapers; cases and bags for packaging; greeting cards, postcards; writing instruments, namely pens, pencils, ball point pens, fountain pens, felt tips and crayons; stationery, namely writing paper, note paper, envelopes, note pads, paper dinnerware, playing cards; diaries, address books, pocket books, notebooks, personal organizers; clothing, namely suits, stockings, lingerie, underwear, hosiery, shirts, T-shirts, sweat shirts, blouses, slacks, trousers, skirts, dresses, jackets overalls, coveralls, waistcoats, panty-hose, jumpers, sweaters, pullovers, gloves, scarves, suits, coats, jumpsuits, slipovers, cardigans, hats, mittens, shorts, track suits, jogging suits, wet suits, raincoats, waterproof pants and jackets, leg warmers, ties, ascots, jeans, leather trousers and jackets, aprons, belts, caps, swim wear; footwear, namely boots, shoes, slippers, sandals, moccasins, flipflops, rubbers.


(2) Software and firmware for electronic games and for electronic amusement apparatus; firmware for computers; data-bearing magnetic tapes, cassette tapes, cartridges, floppy discs and CD-ROM discs; electronic games and electronic games machines; hand-held electronic games machines; interactive computer software for the education and entertainment of children and adults, electronic games for electronic games machines; interactive software and games delivered by cable, satellite or via the telecommunications network for the education and entertainment of children and adults.

SERVICES:

(1) Operation of shops, stores and retail outlets.

4. VIRGIN	606,775 TMA404,724
<p>SERVICES:</p> <p>(1) Dissemination of advertising matter and printed material; entertainment and entertainer services, namely, the production and performance of stage, screen and television entertainment; musical entertainment services; the services of organizing and conducting contests; video, film and recording services.</p>	

<p>5. VIRGIN & DESIGN</p> 	606,776 TMA405,050
<p>SERVICES:</p> <p>(1) Dissemination of advertising matter and printed material; entertainment and entertainer services namely the production and performance of stage, screen and television entertainment, musical entertainment services, the services of organizing and conducting contests, video film, and recording services.</p>	

<p>6. VIRGIN DESIGN</p> 	758,841 TMA524,506
<p>GOODS:</p> <p>(1) Wines; potable and distilled spirits namely, vodka, gin, whisky, brandy, rum, tequila, slivovitz, aquavit, saki, arak, ouzo; and liqueurs.</p>	

7. VIRGIN	758,842 TMA524,590
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GOODS:

(1) Wines; potable and distilled spirits namely, vodka, gin, whisky, brandy, rum, tequila, slivovitz, aquavit, saki, arak, ouzo; and liqueurs.

8. VIRGIN

837,863
TMA509,209

GOODS:

(1) Articles of under clothing, namely, pants; shirts; jackets; scarves; hats; articles of sports clothing, namely, track suits; caps; compact disks featuring music and sound recordings; computer software, namely, computer game software and computer software for educational computer games, for amusement arcade games, for calculators, and for global computer network access and for music products; stationery, namely, writing and note paper, postcards, pens; cups, mugs; leather goods, namely, handbags.

SERVICES:

(1) Transportation of goods and passengers by air; arranging the transport of passengers and goods by road, rail and air; tourist office services; travel agency services; transportation, accommodation and entertainment reservation services.

(2) Hotel reservation, restaurant, cafe and cafeteria services.

9. VIRGIN

1,135,419
TMA674,540

SERVICES:

(1) Provision of entertainment, namely live performances by a musical band, organising and conducting stage shows, contests, dances and parties; concert and nightclub entertainment services; entertainer services in connection with music shows, dance shows, arts shows, cultural activities namely, organization and arrangements for concerts.

(2) Entertainment services in the form of television programming, motion picture production, commercial musical services, namely the promotion of artists and their works to radio, television, film and press and the promotion of publishing rights of lyrical and written artistic works, provision of entertainment namely live performances by a musical band, theatrical productions and audio programming by means of radio and television; entertainment in the nature of ongoing television programmes and news shows; concert and nightclub entertainment services; organising and conducting stage shows, theatre productions, contests, dances and parties; casino services; entertainer services in connection with music shows, dance shows, arts shows; recording studio services for sound, films, videos and television; provision of recreational facilities including organisation of sporting events and competitions; music publishing services and book publishing.

10. VIRGIN Design



1,135,420
TMA674,541


SERVICES:

(1) Provision of entertainment, namely live performances by a musical band, organising and conducting stage shows, contests, dances and parties; concert and nightclub entertainment services; entertainer services in connection with music shows, dance shows, arts shows; cultural activities namely, organization and arrangements for concerts.

(2) Entertainment services in the form of television programming, motion picture production, commercial musical services, namely the promotion of artists and their works to radio, television, film and press and the promotion of

publishing rights of lyrical and written artistic works, provision of entertainment namely live performances by a musical band, theatrical productions and audio programming by means of radio and television; entertainment in the nature of ongoing television programmes and news shows; concert and nightclub entertainment services; organising and conducting stage shows, theatre productions, contests, dances and parties; casino services; entertainer services in connection with music shows, dance shows, arts shows; recording studio services for sound, films, videos and television; provision of recreational facilities including organisation of sporting events and competitions; music publishing services and book publishing.


11. VIRGIN	1,195,396 TMA690,466
<p>GOODS:</p> <p>(1) Mobile telephones, telephones, modems, batteries; battery chargers; cigarette lighter adapters; dashboard mounts; hands-free headsets; carrying cases; belt clips.</p> <p>(2) Mobile telephones and accessories therefor, namely, batteries; battery chargers; cigarette lighter adapters; hands-free headsets; carrying cases and belt clips.</p> <p>SERVICES:</p> <p>(1) Telecommunications services, namely, transmission of images, audio, video via the telephone and the Internet; telecommunications services, namely, the transmission of voice, data and information namely, (1) the recording, storage and delivery of voice, text and electronic messages via wired and/or wireless telephone and Internet networks, (2) access, download and transmission of news, jokes, horoscopes, service updates via voice, text and electronic messages via wired and/or wireless telephone and Internet networks, (3) access, play and download of games via wired and/or wireless telephone and Internet networks; personal communications services; pager services; transmission or broadcast of news and information for others via telephone, including the Internet</p> <p>(2) Providing directory information via telephone.</p> <p>(3) Telecommunications services, namely, the transmission of images, audio, video via the telephone; telecommunication services, namely, the transmission of voice, data and information namely (1) the recording, storage and delivery of voice, text and electronic messages via wireless telephone (2) access, download and transmission of news, jokes, horoscopes, service updates via voice, text and electronic messages via wireless telephone; access, download and transmission of service updates via Internet networks (3) access, play and download of games via wireless telephone and Internet networks; personal communications services; pager services; transmission or broadcast of news and information for others via telephone.</p>	

<p>12. VIRGIN DESIGN</p> 	1,195,398 TMA690,462
<p>GOODS:</p> <p>(1) Mobile telephones; telephones; modems; batteries; battery chargers; cigarette lighter adapters; dashboard mounts (hand-free); hands-free headsets; carrying cases; belt clips.</p> <p>(2) Mobile telephones and accessories therefor, namely, batteries; battery chargers; cigarette lighter adapters; hands-free headsets; carrying cases and belt clips.</p> <p>SERVICES:</p> <p>(1) Telecommunications services, namely, the transmission of images, audio, video via the telephone and the Internet; telecommunication services, namely, the transmission of voice, data and information namely (1) the recording, storage and delivery of voice, text and electronic messages via wired and/or wireless telephone and Internet networks (2) access, download and transmission of news, jokes, horoscopes, service updates via voice,</p>	

text and electronic messages via wired and/or wireless telephone and Internet networks, (3) access, play and download of games via wired and/or wireless telephone and Internet networks; personal communications services; pager services; transmission or broadcast of news and information for others via telephone, including the Internet

(2) Telecommunications services, namely, the transmission of images, audio, video via the telephone; telecommunication services, namely, the transmission of voice, data and information namely (1) the recording, storage and delivery of voice, text and electronic messages via wireless telephone (2) access, download and transmission of news, jokes, horoscopes, service updates via voice, text and electronic messages via wireless telephone access, download and transmission of service updates via Internet networks (3) access, play and download of games via wireless telephone and Internet networks; personal communications services; pager services; transmission or broadcast of news and information for others via telephone; Providing directory information via telephone.

13. VIRGIN	1,246,354 TMA744,547
<p>SERVICES:</p> <p>(1) Advertising services of real property in printed publications and over a global communication network on behalf of others; management of incentive and loyalty programmes and other promotional schemes including those that reward healthy lifestyle choices with bonuses and benefits; information and advisory services relating to all the aforesaid services</p> <p>(2) Health insurance services including bonus and reward payments made as part of the insurance service; private health insurance; medical insurance; provision of finance for health care; savings schemes relating to health and health care; savings schemes relating to health insurance; issuing of tokens of value in relation to incentive schemes; incentivised health and fitness programmes for signing up and for reaching/exceeding programme goals; real estate services; agency services for the leasing of real estate property; agency services for the selling on commission of real property; financial services relating to real estate property and buildings namely financial management in the fields of real estate property and buildings, financial investment in the fields of real estate property and buildings, mortgages/mortgage services; estate management services relating to transactions in real property; financing of property development; management of property; property portfolio management; information and advisory services relating to all the aforesaid services</p> <p>(3) Building construction; advisory services relating to development of property; advisory services relating to the renovation of property; commercial retail property development services; property development</p> <p>(4) Health assessments and health care risk assessments; advisory services relating to health; consultancy relating to health care; lifestyle counselling and consultancy; organisation, operation and supervision of incentivised health and fitness programmes for signing up and for reaching/exceeding programme goals</p>	


<p>14. VIRGIN & Design</p> 	1,246,358 TMA744,545
<p>SERVICES:</p> <p>(1) Advertising services of real property in printed publications and over a global communication network on behalf of others; management of incentive and loyalty programmes and other promotional schemes including those that reward healthy lifestyle choices with bonuses and benefits; information and advisory services relating to all the aforesaid services</p> <p>(2) Health insurance services including bonus and reward payments made as part of the insurance service; private health insurance; medical insurance; provision of finance for health care; savings schemes relating to health and health care; savings schemes relating to health insurance; issuing of tokens of value in relation to incentive</p>	

schemes; incentivised health and fitness programmes for signing up and for reaching/exceeding programme goals; real estate services; agency services for the leasing of real estate property; agency services for the selling on commission of real property; financial services relating to real estate property and buildings namely financial management in the fields of real estate property and buildings, financial investment in the fields of real estate property and buildings, mortgages/mortgage services; estate management services relating to transactions in real property; financing of property development; management of property; property portfolio management; information and advisory services relating to all the aforesaid services


(3) Building construction; advisory services relating to development of property; advisory services relating to the renovation of property; commercial retail property development services; property development


(4) Health assessments and health care risk assessments; advisory services relating to health; consultancy relating to health care; lifestyle counselling and consultancy; organisation, operation and supervision of incentivised health and fitness programmes for signing up and for reaching/exceeding programme goals


15. VIRGIN	1,401,660 TMA801,313
<p>SERVICES:</p> <p>(1) Financial services, namely personal equity plans, tax advantaged personal savings, information relating to financial services, financial consultancy, credit and debit card services, financial management, mutual funds services, real estate, financial information and analysis, deposit taking, the provision of loans whether secured or unsecured, guarantees, performance bonds, issuing of letters of credit, clearance facilities, provision of smart cards, provision of stored value cards, foreign currency exchange services, the provision of domestic and international cash transmission and other payment or clearance facilities, savings, chequing, borrowing and deposit accounts for all currencies, the provision of custody services and the provision of advice in respect of any of the foregoing; life insurance, general insurance, health insurance, pensions, annuities, unit trusts, investment trusts, investment funds, open- or close-ended investment company services, namely creation, management and sale of collective investment schemes, investment services, namely, commodity and stock investment advice, investment management, investing funds for others and investment of real estate, inflation-indexed revenue investments in the field of bonds, stocks and real estate; fund investments; fund transfers; insurance consultancy; insurance underwriting; capital investment; issue of tokens of value; life insurance underwriting; mortgage services, namely origination, acquisition, servicing, securitization and brokerage of mortgage loans.</p>	

<p>16. VIRGIN Design</p> 	1,460,896 TMA801,688
<p>SERVICES:</p> <p>(1) Financial services, namely personal equity plans, tax advantaged personal savings, information relating to financial services, financial consultancy, credit and debit card services, financial management, mutual funds services, real estate, financial information and analysis, deposit taking, the provision of loans whether secured or unsecured, guarantees, performance bonds, issuing of letters of credit, clearance facilities, provision of smart cards, provision of cards with stored monetary value, foreign currency exchange services, the provision of domestic and international cash transmission and other payment or clearance facilities, savings, chequing, borrowing and deposit accounts for all currencies, the provision of custody services and the provision of advice in respect of any of the foregoing; life insurance, general insurance, health insurance, pensions, annuities, unit trusts, investment trusts, investment funds, open- or close-ended investment company services, namely creation, management and sale of collective investment schemes, investment services, namely, commodity and stock investment advice, investment management, investing funds for others and investment of real estate, inflation-indexed revenue investments in the field of bonds, stocks and real estate; fund investments; fund transfers; insurance consultancy; insurance underwriting; capital investment; issue of tokens of value; life insurance</p>	

underwriting; mortgage services, namely origination, acquisition, servicing, securitization and brokerage of mortgage loans


17. VIRGIN & DESIGN (BLACK AND WHITE) 	539,230 TMA323,461
<p>GOODS: (1) T-shirts, board games, buttons, badges, concert tour programs, artists' photographs, dolls, artists' pamphlets, artists' biographical materials, computer software, computer games, video games, video discs, compact discs, posters, sweat shirts, video cassettes, pre-recorded tapes and cassettes, pre-recorded sound recordings in the form of discs.</p> <p>SERVICES: (1) Music publishing, broadcasting, operation of record stores, film distribution and production, television broadcasting, operation of bars and night clubs.</p>	

18. VIRGIN & DESIGN (RED ON WHITE) 	539,229 TMA323,747
<p>GOODS: (1) T-shirts, board games, buttons, badges, concert tour programs, artists' photographs, dolls, artists' pamphlets, artists' biographical materials, computer software, computer games, video games, video discs, compact discs, posters, sweat shirts, video cassettes, pre-recorded tapes and cassettes, pre-recorded sound recordings in the form of discs.</p> <p>SERVICES: (1) Music publishing, broadcasting, operation of record stores, film distribution and production, television broadcasting, operation of bars and night clubs.</p>	

19. VIRGIN ACTIVE AND DESIGN 	1,135,418 TMA608,703
<p>GOODS: (1) Clothing, namely athletic clothing, casual clothing; headgear, namely hats, caps, toques, bandannas, tams. (2) Gymnastic and sporting articles, namely skipping ropes, fitness machines, namely rowing machines, treadmills, cross-training machines, exercise bikes and fixed weight machines, weights and swiss balls.</p> <p>SERVICES: (1) Organising and conducting contests, dances and parties; provision of recreational facilities; sporting and cultural activities, namely organisation and arrangement for film shows, theatre performances, concerts and sports events; operation of leisure/fitness centres and health club services; organisation of sporting events and</p>	

competitions.

20. VIRGIN ATLANTIC	1,087,535 TMA600,131
<p>SERVICES:</p> <p>(1) Transportation of and arranging transportation of goods and of passengers by air; freight transport by air .</p> <p>(2) Transportation of goods and passengers by road, rail, air and sea; arranging the transport of passengers and goods by road, rail, sea and air; tourist office; travel agency; arranging and conducting travel tours; transportation and hotel reservation services.</p> <p>(3) Package holiday services, health club services, hotel, hotel reservation, restaurants, public house, cafe and cafeteria services.</p>	

21. virgin atlantic & design	1,087,536 TMA602,222
	
<p>SERVICES:</p> <p>(1) Transportation of and arranging transportation of goods and of passengers by road and air; freight services by air; chauffeur services; operation of aircraft; hotel reservation; duty free shops; manicure and pedicure; massage.</p>	

22. VIRGIN HOLIDAYS	837,846 TMA504,414
<p>SERVICES:</p> <p>(1) Arranging the transport of passengers and goods by road, rail, sea and air; tourist office services; travel agency services; arranging and organizing of tours; and transportation, accommodation and entertainment reservation services.</p>	

23. VIRGIN MEGASTORE	837,845 TMA509,210
<p>GOODS:</p> <p>(1) Sound and video recording and reproducing apparatus and instruments, namely, radio and television apparatus, video recorders, magnetic tapes for or bearing sound or video recordings and cassettes and cartridges for use therewith, video discs, sound recordings in the form of discs, tapes or of wires, optical discs, apparatus for reading optical discs, cinematographic and photographic films, and photographic slide transparencies; parts and fittings for all the aforesaid goods; sound and video recordings, all in the form of discs, tapes, and cassettes and cartridges, all for use with the aforesaid tapes; racks adapted for records and for tapes; cinematographic films prepared for exhibition; photographic slide transparencies.</p> <p>(2) Music, holographs, photographs, posters, books, magazines; cardboard, cardboard articles, namely, boxes of cardboard, and signs of cardboard; paper and paper articles, namely, stationery, writing and note paper, envelopes, greeting cards, postcards, blank books, note books, ledgers, cards, index cards, document files, drawing pads, stationery folders.</p> <p>(3) Suits, stockings; articles of under clothing, namely, vests, underpants, pants, camisoles and knickers; shirts, blouses, slacks, trousers, skirts, dresses, jackets, overalls, waistcoats, pantie-hose; knitted articles of clothing and articles of clothing made from knitted materials, namely, sweaters, cardigans and leggings; scarves, hats, dressing gowns, bath robes; articles of sports clothing, namely, shorts, track suits, salopettes and leotards; sleeping garments, namely, pajamas, nightgowns, and night shirts; aprons, socks, belts, caps, gloves, tights, jeans; neckwear, namely, ties; swimwear; footwear, namely, shoes, boots, sneakers, and slippers.</p>	

SERVICES:

(1) Retail department store services.

24. VIRGIN MOBILE

1,195,397

TMA675,261

GOODS:

(1) Mobile telephones, telephones and modems, and accessories therefor, namely, batteries; battery chargers; cigarette lighter adapters; hands-free headsets; carrying cases and belt clips.

(2) Mobile telephones and accessories therefor, namely, batteries; battery chargers; cigarette lighter adapters; hands-free headsets; carrying cases and belt clips.

SERVICES:

(1) Telecommunications services, namely, transmission of images, audio, video via the telephone and the Internet; telecommunications services, namely, the transmission of voice, data and information namely, (1) the recording, storage and delivery of voice, text and electronic messages via wired and/or wireless telephone and Internet networks, (2) access, download and transmission of news, jokes, horoscopes, service updates via voice, text and electronic messages via wired and/or wireless telephone and Internet networks, (3) access, play and download of games via wired and/or wireless telephone and Internet networks; personal communications services; pager services; transmission or broadcast of news and information for others via telephone, including the Internet
(2) Providing directory information via telephone.

(3) Telecommunications services, namely, the transmission of images, audio, video via the telephone; telecommunications services, namely, the transmission of voice, data and information namely, (1) the recording, storage and delivery of voice, text and electronic messages via wireless telephone, (2) access, download and transmission of news, jokes, horoscopes, service updates via voice, text and electronic messages via wireless telephone; access, download and transmission of services updates via Internet networks, (3) access, play and download of games via wireless telephone and Internet networks; personal communications services; pager services; transmission or broadcast of news and information for others via telephone.

25. VIRGIN MOBILE & Design

1,195,399

TMA675,250



GOODS:

(1) Mobile telephones; telephones and modems, and accessories therefor, namely, batteries; battery chargers; cigarette lighter adapters; hands-free headsets; carrying cases and belt clips.

(2) Mobile telephones and accessories therefor, namely, batteries; battery chargers; cigarette lighter adapters; hands-free headsets; carrying cases and belt clips.

SERVICES:


(1) Telecommunications services, namely, the transmission of images, audio, video via the telephone and the Internet; telecommunications services, namely, the transmission of voice, data and information namely, (1) the recording, storage and delivery of voice, text and electronic messages via wired and/or wireless telephone and Internet networks, (2) access, download and transmission of news, jokes, horoscopes, service updates via voice, text and electronic messages via wired and/or wireless telephone and Internet networks, (3) access, play and download of games via wired and/or wireless telephone and Internet networks; personal communications services; pager services; transmission or broadcast of news and information for others via telephone, including the Internet
(2) Providing directory information via telephone.

(3) Telecommunications services, namely, the transmission of images, audio, video via the telephone;

telecommunications services, namely, the transmission of voice, data and information namely, (1) the recording, storage and delivery of voice, text and electronic messages via wireless telephone, (2) access, download and transmission of news, jokes, horoscopes, service updates via voice, text and electronic messages via wireless telephone; access, download and transmission of service updates via Internet networks, (3) access, play and download of games via wireless telephone and Internet networks; personal communications services; pager services; transmission or broadcast of news and information for others via telephone.


26. VIRGIN MOBILE CANADA	1,245,494 TMA723,120
<p>GOODS: (1) Mobile telephones, telephones and modems, and accessories therefor, namely, batteries; battery chargers; cigarette lighter adapters; hands-free headsets; carrying cases and belt clips.</p> <p>SERVICES: (1) Telecommunications services, namely, the transmission of images, audio, video via the telephone and the Internet; telecommunication services, namely, the transmission of voice, data and information namely, (1) the recording, storage and delivery of voice, text and electronic messages via wired and/or wireless telephone and Internet networks, (2) access, download and transmission of news, jokes, horoscopes, service updates via voice, text and electronic messages via wired and/or wireless telephone and Internet networks, (3) access, play and download of games via wired and/or wireless telephone and Internet networks; personal communications services; pager services; transmission or broadcast of news and information for others via telephone, including the Internet; providing directory information via telephone.</p>	

27. VIRGIN MOBILE LIVE	1,358,547 TMA766,526
<p>GOODS: (1) Ringtones, audio, video and graphic content, namely video games, images and music, downloadable to wireless and handheld devices via the internet and via wired and wireless networks.</p> <p>SERVICES: (1) Telecommunications services, namely electronic transmission of streamed and downloadable audio, video and graphic files via the internet and via wired and wireless networks; provision of wireless digital messaging services and voice messaging services; provision of web messaging and electronic mail services; provision of access to on-line chat rooms and electronic bulletin boards for transmission of messages among computer users; entertainment services, namely providing musical performances, videos, film clips, photographs and music via the internet and via wired and wireless networks; provision of access to on-line blogs featuring content provided by mobile device and computer users.</p>	


<p>28. VIRGIN MOBILE LIVE & Design</p> 	1,359,438 TMA734,145
<p>GOODS: (1) Ringtones, audio, video and graphic content, namely video games, images and music, downloadable to wireless and handheld devices via the internet and via wired and wireless networks.</p> <p>SERVICES:</p>	

(1) Telecommunications services, namely electronic transmission of streamed and downloadable audio, video and graphic files via the internet and via wired and wireless networks; provision of wireless digital messaging services and voice messaging services; provision of web messaging and electronic mail services; provision of access to on-line chat rooms and electronic bulletin boards for transmission of messages among computer users; entertainment services, namely providing musical performances, videos, film clips, photographs and music via the internet and via wired and wireless networks; provision of access to online blogs featuring content provided by mobile device and computer users.

29. VIRGIN RADIO	1,408,381 TMA768,559
SERVICES: (1) Radio broadcasting services.	

30. VIRGIN RADIO & DESIGN 	1,408,382 TMA768,094
SERVICES: (1) Radio broadcasting services.	

31. VIRGIN VIE	1,054,615 TMA668,075
GOODS: (1) Nail care preparations, namely, nail colour; soaps for personal use; non-medicated lip balm, moisturising creams, skin moisturizers and colognes.	

32. VIRGIN VIE Design 	1,170,729 TMA638,944
GOODS: (1) Soaps, shampoos, perfumes, eau-de-cologne, toilet waters, essential oils, shaving preparations, after-shave lotions, shaving foams, non-medicated toilet preparations, non-medicated bath salts and bath oils; anti-perspirants, deodorants for use on the person, depilatories, dentifrices, mouth washes; cosmetics, namely, foundation, concealer, moisturiser, powder, blusher, eyeshadow, eyeliner, mascara, lip liner, lip pencil, lipstick, lip gloss; suntanning and suncreening preparations; preparations for the hair, hair lotions, hair sprays; dyes for the hair; non-medicated preparations for the care of the skin, hands, scalp and the body; skin cleansing preparations; creams and lotions for the skin; talcum powders; nail varnishes and nail varnish removers, nail preparations, namely nail color cleanser, cuticle softener, nail strengthener, nail varnish undercoat, nail varnish protector, nail varnish drying fluid, artificial nails and adhesives therefor, preparations for repairing artificial nails; artificial eyelashes and adhesives therefor; but not including virgin oils.	