

O-394-11

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NUMBER  
2549968  
BY JETSKISAFARIS LIMITED  
TO REGISTER THE FOLLOWING TRADE MARK IN  
CLASS 41:**

***JETSKISAFARIS***



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**Background**

1. On 11 June 2010, JETSKISAFARIS LIMITED ('the applicant') applied to register the trade mark shown above for the following services:

Class 41: Provision of tutored and supervised Jet Ski excursions and Royal Yachting Association personal watercraft training.

2. On 23 June 2010, the Intellectual Property Office ('IPO') issued an examination report in response to the application. In the report, an objection was raised under sections 3(1)(b) and (c) of the Trade Marks Act 1994 ('the Act'), on the basis that the mark consists exclusively of the words "JET SKI SAFARIS" (conjoined), being a sign which may serve in trade to designate the kind and intended purpose of the services e.g. provision of jet ski training and excursions (safaris).

3. I note that the specification of services claimed contained the term 'Royal Yachting Association'. This is something that should have been highlighted in the examination report because use of registered trade marks in specifications is not acceptable. The mark RYA, is a registered trade mark and a well known abbreviation for the Royal Yachting Association: this should have been flagged in the examination report. However, this is fairly academic in the wider context of the main issue of concern.

4. On 24 June 2010, a hearing was requested by Mr David Ceaton, the company secretary of JETSKISAFARIS LIMITED. On 29 September 2010, prior to the hearing, Mr David Ceaton submitted exhibits showing how the mark is used in trade. He also submitted director's reports, accounts for the year ended 2009, and accounts to 31 May 2010. At that hearing held on 5 October 2010, which was attended by both Mr David Ceaton and Mr Ross Ceaton, the company owner, the objection was maintained. After the hearing, further time was granted for Mr Ceaton to consider filing evidence of acquired distinctiveness.

5. On 30 November 2010 such evidence was submitted, but subsequently considered by the Registrar to be insufficient for proving acquired distinctiveness. On 10 January 2011, Mr Ceaton was advised in writing why the evidence was deficient, and was given a period of two months (until 10 March 2011) in which to respond. Mr Ceaton was also advised that if no reply was received by the due date, the application would be refused under the provisions of Section 37(4) of the Trade Marks Act 1994.

6. No further communication was received, and so on 18 May 2011 a formal notice of refusal was issued. On 6 June 2011, Mr Ceaton wrote to IPO stating that he wished to re-instate his application and appeal against my decision.

7. On 15 June, Mr Ceaton was advised that if he wished to pursue his application, he would have to file both a retrospective extension of time request and also a request for a statement of grounds by 18 July 2011. In response, on 27 June 2011 Mr Ceaton duly filed a retrospective extension of time and form TM5 seeking a statement of reasons for the Registrar's decision.

8. I am now asked under section 76 of the Trade marks Act 1994 and rule 69 of the Trade Marks Rules 2008, to state in writing the grounds of my decision and the materials used in arriving at it.

### **The applicant's case for registration**

9. Prior to setting out the law in relation to Section 3(1)(b) and (c) of the Act, I must emphasise that the following decision will set out my reasons for maintaining the objection by reviewing and assessing the mark applied for. Prior to the refusal of the application, the only arguments put forward in support of *prima facie* acceptance were those made orally at the *ex parte* hearing on 5 October 2011. These arguments centred on the fact that the term 'safari' had been chosen because it evoked adventure; that the words are conjoined; and that there is some stylisation within the mark. Mr Ceaton submitted that he first coined the term, and that third parties are now infringing his mark.

10. I have noted the fact that in his letter of 6 June 2011, Mr Ceaton made reference to the mark "Waverunner Safaris", which had been previously accepted by IPO, and note that much of his claim regarding alleged distinctiveness has been based upon the putative precedent set by this acceptance. Whilst I acknowledge Mr Ceaton's submissions, I have maintained the objection by assessing the *mark applied for*, rather than by comparing its relative merits against other accepted marks. It is now trite law that "state of the Register" evidence has limited value in relation to the examination of current trade mark applications:

"Both sides invited me to have regard to the state of the register. Some traders have registered marks consisting of or incorporating the word "Treat". I do not think this assists the factual enquiry one way or the other, save perhaps to confirm that this is the sort of word in which traders would like a monopoly. In particular the state of the register does not tell you what is actually happening out in the market and in any event one has no idea what the circumstances were which led the registrar to put the marks concerned on the register. It has long been held under the old Act that comparison with other marks on the register is in principle irrelevant when considering a particular mark tendered for registration, see e.g. *MADAME* Trade Mark and the same must be true under the 1994 Act. I disregard the state of the register evidence". (Jacob J in *British Sugar* [1996] RPC 281 at 305)

## Decision

11. Section 3(1) of the Act reads as follows:

“3.-(1) The following shall not be registered –

(a) ...

(b) trade marks which are devoid of any distinctive character,

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,

(d) ...

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

The above provisions mirror Article 3(1)(b) and (c) of First Council Directive 89/104 of 21 December 1988. The proviso to Section 3 is based on the equivalent provision of Article 3(3).

### Decision - Section 3(1)(c)

12. In *JanSport Apparel Corp v Office for Harmonisation in the Internal Market* (Case T-80/07) the General Court gave a helpful summary of the considerations to be taken into account in relation to Article 7(1)(c) of the regulation, the equivalent of section 3(1)(c) of the Act:

"18. Under Article 7(1)(c) of Regulation No 40/94, 'trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service' are not to be registered. ...

19. By prohibiting the registration of such signs, that article pursues an aim which is in the public interest, namely that descriptive signs or indications relating to the characteristics of goods or services in respect of which registration is sought may be freely used by all. That provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks (Case C-191/01 P *OHIM v Wrigley* [2003] ECR I-12447, paragraph 31).

20. Furthermore, the signs covered by Article 7(1)(c) of Regulation No 40/94 are signs regarded as incapable of performing the essential function of a trade mark, namely that of identifying the commercial origin of the goods or services, thus enabling the

consumer who acquired the product or service to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (Case T-219/00 *Ellos v OHIM (ELLOS)* [2002] ECR II-753, paragraph 28, and Case T-348/02 *Quick v OHIM (Quick)* [2003] ECR II-5071, paragraph 28).

21. The signs and indications referred to in Article 7(1)(c) of Regulation No 40/94 are thus only those which may serve in normal usage from a consumer's point of view to designate, either directly or by reference to one of their essential characteristics, goods or services such as those in respect of which registration is sought (see the judgment of 9 July 2008 in Case T-323/05 *Coffee Store v OHIM (THE COFFEE STORE)*, not published in the ECR, paragraph 31 and the case-law cited). Accordingly, a sign's descriptiveness can only be assessed by reference to the goods or services concerned and to the way in which it is understood by the relevant public (Case T-322/03 *Telefon & Buch v OHIM– Herold Business Data (WEISSE SEITEN)* [2006] ECR II-835, paragraph 90).

22. It follows that, for a sign to be caught by the prohibition set out in that provision, there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (see Case T-19/04 *Metso Paper Automation v OHIM(PAPERLAB)* [2005] ECR II-2383, paragraph 25 and the case-law cited).

23. It must finally be pointed out that the criteria established by the case law for the purpose of determining whether a word mark composed of several word elements is descriptive or not are identical to those applied in the case of a word mark containing only a single element (Case T-28/06 *RheinfelsQuellen H. Hövelmann v OHIM (VOM URSPRUNG HER VOLLKOMMEN)* [2007] ECR II- 4413, paragraph 21)."

13. Furthermore, in Case C-363/99 *Koninklijke KPN Nederland NV and Benelux-Merkenbureau, C-363/99 (Postkantoor)*, the Court of Justice of the European Union stated:

"98. As a general rule, a mere combination of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, itself remains descriptive of those characteristics for the purposes of Article 3(1)(c) of the Directive. Merely bringing those elements together without introducing any unusual variations, in particular as to syntax or meaning, cannot result in anything other than a mark consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services concerned...

102. It is also irrelevant whether the characteristics of the goods or services which may be the subject of the description are commercially essential or merely ancillary. The wording of Article 3(1)(c) of the Directive does not draw any distinction by reference to the characteristics which may be designated by the signs or indications of which the mark consists. In fact, in the light of the public interest underlying the provision, any undertaking must be able freely to use such signs and indications to describe any characteristic whatsoever of its own goods, irrespective of how significant the characteristic may be commercially."

14. Section 3(1)(c) of the Act excludes signs which may serve, in trade, to designate the kind of services or other characteristics of the services. It follows that in order to decide this issue it must first be determined whether the mark designates a characteristic of the services in question. The services at issue are 'Provision of tutored and supervised jet ski excursions and Royal Yachting Association personal water craft training" in Class 41. At hearing, Mr Ceaton elaborated that the undertaking does not merely provide jet ski hire, but rather instructive and experience based trips. In relation to identifying the relevant consumer, it is reasonable to assume that the services claimed will be used by the general public, including consumers on holiday seeking adventure, and also consumers wishing to undertake water craft training. Whilst I consider that the services are likely to be directed to the general public, including in that description all non-specialists extending from the complete novice to more experienced jet ski riders, the specification also reflects services directed towards a more specialist consumer base. The reference to "Royal Yachting Association personal watercraft training" would include consumers who are seeking some sort of certification of their training as opposed to those merely seeking a holiday "adventure out on the water".

15. This is a wide spectrum of consumer. On balance, therefore, when assessing consumers' perception of the sign, in respect of all the terms claimed, I have assumed that the average consumer will apply a moderate level of attention.

### **The Mark**

16. Although it is paramount that any assessment of distinctiveness takes into account the mark's totality, it is also useful to first analyse the mark by reference to its constituent parts.

17. The mark applied for, it consists of the sign 'JETSKISAFARIS', presented in a stylised font. The words within the mark are defined in Chambers 21<sup>st</sup> Century Dictionary as meaning:

**Jet-ski**; *noun a powered craft, similar to a motorbike, adapted for skimming across water on a ski-like keel.*

**Safari**; *noun an expedition or tour to hunt or observe wild animals, especially in Africa on safari.*

18. In determining the mark's suitability for acceptance and registration under section 3(1)(c), the Registrar is obliged to consider the semantic content of the sign and consider, in the context of the services claimed, whether or not the relevant consumer is likely to perceive it as being a denotation of a particular characteristic. Both of the above dictionary definitions demonstrate that the sign 'jet ski safaris' not only possesses a consistent and recognisable meaning likely to be understood by the average English speaking consumer, but also that it is suitability apt to act as descriptor of the services covered by the application. Given these dictionary definitions, the Registrar finds it likely that the relevant consumer would recognise the sign as conveying a particular message, and that the message conveyed would be understood as having a functional (rather than "supplier-identifying") role to play in respect of the services it is used upon.

19. For the services covered by the application, the section 3(1)(c) objection is based on the premise that the term 'jetskisafaris', when used in respect of jet ski excursions and watercraft training, would be understood as reference to the *kind* of the services, i.e. an expedition or tour which takes place on a jet ski. Whilst I note that the definition of the word 'safari' is defined as meaning 'an expedition or tour to hunt or observe wild animals, especially in Africa on safari, and might seem unusual in relation to activities on water, I see no reason why the meaning of the word could not extend to an expedition or tour around the British coastline or similarly an expedition or tour of waterways or lakes in the UK. It seems to me that the term 'jet ski safaris' would serve to designate the kind of services claimed.

20, I am strengthened in this finding, given evidence of the use of the term. For example, it is helpful to consider how the applicant describes his own services. The following is taken from the applicant's web site at [www.jetskisafaris.co.uk](http://www.jetskisafaris.co.uk) (Annex 1) and explains what a 'jetski safari' is;

***So what is a Jetski Safari?***

*A Jetski Safari is an experience in which you will receive a safety briefing and instruction from a Qualified Personal Watercraft instructor before being taken to the water on your very own Jetski with no prior experience needed. Once on the water the Instructor will give you further guidance to get you comfortable with both driving the Jetski and your aqua surroundings. Once comfortable and feeling in control of the jetskis you will be led on a guided safari, during which you will experience the performance of our watercraft both within Poole Harbour and out on the open sea, along the stunning Jurassic Coastline.*

I think that the above reinforces the clear descriptive message conveyed by the term.

21. In support of this, I refer to the four Internet pages attached as Annexes to this decision. The first four references (Annexes 2, 3,4 and 5), , all show use of the sign designating safaris available on a jet ski and which are available in the UK. The fifth and sixth references, (Annexes 6 and 7), show use of the term in relation to jet ski safaris which are available in Fuerteventura and Malta and which are targeted at consumers in the UK wishing to holiday abroad. I also consider that the word 'safari' is now used in a far more general sense as meaning a journey of some sort. To support my finding I refer to instances of use of the word in the context of a 'Greek island safari culinary tour', (Annex 8), a 'literary safari' (Annex 9), a 'musical safari' (Annex 10) and also a 'Scottish football safari' (Annex 11). These are a small sample of references, illustrating how the word 'safari' is used to describe a 'journey' and which support my view that the term is no longer exclusively used in its more traditional sense.

22. Regarding the stylisation within the sign, the criteria for accepting this mark seems equitable to those conditions set out in *Hormel Foods Corp v Antilles Landscape Investments NV* ('Spambuster' 2005 RPC 28) where Richard Arnold QC stated at paragraph 148 that:

"... despite the fact that a mark may consist of a particular visual representation of the prohibited sign out of the many possible visual representations, that mark still remains wholly descriptive".



At paragraph 150 of the decision, Mr Arnold went on to say that:

“... the test under section 3(1)(c) is whether the mark propounded for registration consists of one or more descriptive signs. If it does then registration is precluded in the public interest. If the mark is not a word per se then the question is whether or not the visual elements take the sign out of the realms of section 3(1)(c)”.

I appreciate that the mark filed has a particular visual presentation primarily consisting of black wavy stripes positioned across the latter part of the sign. This creates an impression of zebra-like print and is something which I do not consider to be arbitrary or unusual. In my mind, the zebra-type pattern is something that would be commonly associated with a safari. Whilst I accept that consumers would not expect to see zebras whilst on a jet ski, I find that this element of visual presentation has such little effect, that the mark in totality is unlikely to be seen as anything other than a wholly descriptive message.

23. To my mind, the zebra-like design emblazoned across the word safari does nothing more than reinforce the descriptiveness of the words. I refer to the comments of Mr Geoffrey Hobbs QC who, sitting as the Appointed Person in *Quick Wash Action* [BL O/205/04], stated the following:

"I do not think that the hearing officer was guilty of excision or dismemberment in his assessment of the present mark. Devices can be distinctive or nondistinctive, just like any other kind of sign. What matters are the perceptions and recollections that the sign in question is likely to trigger in the mind of the average consumer of the goods concerned and whether they would be origin specific or origin neutral.

I think that the verbal elements of the mark I am considering speak loud and clear. It seems to me that the message they convey is origin neutral. The artistic presentation neatly and skilfully builds upon and reinforces the origin neutral message in a way that makes it even more effective than the words alone might have been for that purpose. I think that the net result is a well executed, artistically pleasing, origin neutral device".

24. As with the *Quick Wash Action* mark, the term 'jet ski safari' appears to speak equally as clear and equally as loud when used in respect of services for that provide jet ski excursions and training. I also believe that the zebra-like stylisation within the sign utilises elements of "artistic presentation" as referred to by Mr Hobbs QC in his decision on that earlier mark. At this point, it is important to emphasise that artistic presentation does not necessarily equate to inherent distinctiveness – particularly where figurative elements only serve to reinforce a more literal message being simultaneously conveyed by textual elements contained within the same mark. In the case under consideration, it appears clear to me that the stylisation within the sign is not something that has been chosen arbitrarily - a factor which is relevant to the assessment of the mark's distinctive character, as confirmed by Mr Richard Arnold QC sitting as the Appointed Person in case *Sun Ripened Tobacco* BL O-2008-08.

25. Having found that the marks are to be excluded from registration by section 3(1)(c) of the Act, that effectively ends the matter. However, in case I am found to be wrong in this decision, I will go on to determine the matter under section 3(1)(b).

## Section 3(1)(b)

26. In relation to section 3(1)(b) it was held in *Postkantoor* that:

“86. In particular, a word mark which is descriptive of characteristics of goods or services for the purposes of Article 3(1)(c) of the Directive is, on that account, necessarily devoid of any distinctive character with regard to the same goods or services within the meaning of Article 3(1)(b) of the Directive. A mark may nonetheless be devoid of any distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive.”

27. I approach this ground of objection on the basis of the following principles derived from the ECJ cases referred to below:

- an objection under Section 3(1)(b) operates independently of objections under section 3(1)(c) – (*Linde AG (and others) v Deutsches Patent-und Markenamt*, Joined Cases C-53/01 to C-55/01, paragraphs 67 to 68);
- for a mark to possess a distinctive character it must identify the product (or service) in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish that product (or service) from the products (or services) of other undertakings (*Linde* paragraphs 40-41 and 47);
- a mark may be devoid of distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive (*Postkantoor* paragraph 86);
- a trade mark’s distinctiveness is not to be considered in the abstract but rather by reference to the goods or services in respect of which registration is sought and by reference to the relevant public’s perception of that mark (*Libertel Group BV v Benelux Merkenbureau*, Case C-104/01 paragraphs 72-77);
- the relevant public must be deemed to be composed of the average consumer who is reasonably well-informed and reasonably observant and circumspect (*Libertel* paragraph 46 referring to Case C-342/97 *Lloyd Schuhfabrik Meyer*).

28. The specific services claimed in Class 41 are in relation to the ‘Provision of tutored and supervised jet ski excursions and Royal Yachting Association Personal Watercraft training’ and the mark when used in relation to these services gives a direct message to the average consumer that excursions and training relate to jet ski expeditions. I do not feel that the mark possesses the inherent capability to distinguish one trader’s services from another as required under section 3(1)(b) of the Act. The sign is unlikely to be perceived as originating from a single undertaking because of its direct association with the services being offered.

29. This is essentially the same objection as that under set out under section 3(1)(c). Given the presence of the decorative element in the sign – that is, the zebra-like strips I have referred to previously – I gave some consideration to whether an objection under section 3(1)(b) was more appropriate, particularly following the finding of the Appointed Person in

*Coca Cola v Pepsi* BL O-246-09 (*ZERO*). However, it seems to me that the distinction between these two provisions in that decision was based on finding the sign there was a device mark not exclusively composed of 'descriptive' elements (see paragraph 35 in *ZERO*). Here the mark in suit is much more of a variation to a very standard font by the addition of matter that, as I have already discussed, is not arbitrary and, in the totality of the mark as a whole, amounts to no more than a description.

## EVIDENCE OF USE

30. The evidence of use submitted on 30 November 2010 consists of one Witness Statement from Ross Ceaton, Managing Director of Jet Ski Safaris, together with supporting exhibits. Mr Ceaton declared that the mark was first used in the United Kingdom in March 2008 in relation to "Provision of tutored jet ski excursions and Royal Yachting Association approved personal watercraft training". Turnover and advertising figures for the period 2008 to 31 October 2010 are set out below:

<b>TURNOVER</b>	<b>ADVERTISING</b>
Calendar year 2008 - £19,885	Calendar year 2008 -£1,803
Calendar year 2009- £64,827	Calendar year 2009-£2,792
5 months to 31 May 2010- £24,910	5 months to 31 May 2010- £1,763
10 months to 31 October 2010- £91,853	10 months to 31 October 2010-£4,667

Because of the seasonal nature of the business, the turnover and advertising for the 10 months ended 31 October 2010, which includes the 5 month period post the date of application, has been provided, to give a more comparative figure.

31. The exhibits submitted with the witness statement are summarised below;

- Exhibit 1 consists of a single advertisement in the Poole Tourist Guide which is undated. There is no information regarding the number of tourist guides published or distributed. In view of the title of the guide and in the absence of further knowledge, I think it is fair and reasonable to assume that these guides are largely distributed in Dorset, particularly in Poole.
- Exhibit 2 is an extract from the Bay View Magazine. I believe this is a community network magazine targeted at residents in the local Dorset community. There is a single advert and again, in the absence of further information such as the distribution figures of this publication, I am unable to establish what exposure this advertisement would have received. Furthermore, given the nature of the publication and its target audience, it would appear that any exposure the publication may have received would have again been limited to Dorset. The publication is undated and in my view is of very limited support to the application.
- Exhibit 3 consists of a flyer included in an 'Into The Blue' leaflet. From my own research, 'Into The Blue' appears to be a website specialising in experience days and gifts. Regarding this flyer, the witness statement does not provide any details of where the flyer would have been distributed, nor indicates how many copies of the flyers were

distributed. The flyer and leaflet is undated and again, in my view, is of little assistance in demonstrating acquired distinctiveness.

- Exhibits 4 and 5 are articles from Jet Skier & PW Magazine and Coast magazine. These are dated September 2009 and November 2009 respectively. The witness statement does not provide any indication of the circulation figures of the magazines and I also note that the exhibits have been taken from web sites. If these are online versions of the magazines, I have not been provided with details regarding the subscription figures of these magazines. Consequently I consider that these exhibits do not assist greatly demonstrating the exposure the sign may have received.
- Exhibit 6 consists of the applicant's advertising leaflets, but again in the absence of any indication of where these leaflets have been distributed, it is not possible to gauge what exposure they have received. Again the leaflets are undated and are of limited assistance in demonstrating that the applicant has educated consumers that the sign is a trade mark.
- Exhibits 7, 8 and 9 provide statistics relating to the number of hits to the applicant's website at [www.jetskisafaris.co.uk](http://www.jetskisafaris.co.uk). The statistics also provide data relating to the geographical areas where the hits have originated. The total number of hits amount to 37,086 for the period 25 May 2008-19 October 2010. The geographical spread of hits covers major towns and cities which are listed in the exhibit. A higher percentage of hits understandably originate in the south east, with the majority emanating from the southern part of the UK. There are noticeably very few hits in Wales and very few hits in northern England or Scotland. In relation to this exhibit, it is not possible to ascertain how many hits occurred prior to the date of application.

32. The question to be determined is whether, through the use made of it, the sign applied for has acquired a distinctive character in respect of the goods for which registration is sought. In doing so, this question must be asked through the eyes of the average consumer who is reasonably well informed and reasonably observant and circumspect (*Libertel* paragraph 46 referring to Case C-342/97 *Lloyd Schuhfabrik Meyer*). In this case, at paragraph 11, we have identified the average consumer as being the general public.

33. The key authority for acquired distinctiveness is *Windsurfing Chiemsee Produktions Und Vertriebs GMBH v. Boots-Und Segelzubehor Wlater Huber* (C109/97) [1999] E.T.M.R. 585 at 46 and the relevant test, which is set out in the second emboldened answer following paragraph 55, is:

"2. The first sentence of Article 3(3) of the First Directive 89/104/EEC is to be interpreted as meaning that:

- a trade mark acquires distinctive character following the use which has been made of it where the mark has come to identify the product in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish that product from goods of other undertakings;

- it precludes differentiation as regards distinctiveness by reference to the perceived importance of keeping the geographical name available for use by other undertakings:

- in determining whether a trade mark has acquired distinctive character following the use which has been made of it, the competent authority must make an overall assessment of the evidence that the mark has come to identify the product concerned as originating from a particular undertaking and thus to distinguish that product from goods of other undertakings;

-If the competent authority finds that a significant proportion of the relevant class of persons identify goods as originating from a particular undertaking because of the trade mark, it must hold the requirement for registering the mark to be satisfied;

- where the competent authority has particular difficulty in assessing the distinctive character of the mark in respect of which registration is applied for, Community law does not preclude it from having recourse, under the conditions laid down by its national law, to an opinion poll as guidance for its judgment.”

34. Taking into account all the information in the witness statements and exhibits, I do not consider that, at the time of application, the evidence shows that the mark has become distinctive because of the use made of it. In order to find that a mark has become distinctive through use, case law guides us (see paragraph 27 above) that:

“If the competent authority finds that a significant proportion of the relevant class of persons identify goods as originating from a particular undertaking because of the trade mark, it must hold the requirement for registering the mark to be satisfied”..

I consider the applicant has failed to do this.

35. Regarding the exposure the mark has received, there is little evidence to suggest that the mark has received widespread exposure throughout the UK. In this respect I must take into account the ECJ decision in *Bovemj Verzekeringen NV v Benelux Merkenbureau* (Case C-108/05) where it was held that a trade mark may be registered on the basis of acquired distinctiveness “only if it is proven that the trade mark has acquired distinctive character through use throughout the territory of a member state.”. It is clear from the evidence that the mark had not gained a distinctive character from the use made of it throughout the UK, or to a significant proportion of the average consumer. Exhibits 1, 2 and 3 amount to three instances of use of the sign, and two of them are undated. There is no information regarding the number of tourist guides, magazines or flyers distributed or where these have been distributed. Consequently these are of little assistance in demonstrating acquired distinctiveness. Also, regarding Exhibit 1 and 2, these would appear to be largely targeted at consumers in Dorset and have would receive limited exposure in other areas in the UK. In view of these very limited number and instances of advertisements I can conclude that there has not been any national advertising of the sign.

36. The same can be said in respect of Exhibits 4 and 5. These are journalistic articles from *Jet Skier & PW Magazine* and *Coast magazine* and again the witness statement does not provide any indication of the circulation figures of both magazines. Regarding Exhibit 6,

whilst this confirms that the applicant produces advertising literature, the witness statement fails to confirm where this literature is displayed or disseminated.

37. The services generally appear to be available through the applicant's web site. Regarding this medium, the applicant has provided an analysis of statistical data showing the number of hits to the website and the geographical spread of where these hits have come from. In my view, the territorial hits confirm that there have been very few enquiries from potential consumers in the north of England and similarly very few hits from Wales. The statistics confirm that the majority of hits emanate from the south of England and more specifically are far more prolific in the south east of England. Regarding the number of hits over the period which equates to two years, five months, I do not consider that the figure of 37,086 is particularly high.

38. Regarding the period of use, the applicant has been using the sign since March 2008 which is approximately two years and three months prior to the date of application. As some of the exhibits are undated, they are not helpful in determining whether they relate to use prior to the date of filing. In respect of the turnover and advertising figures I do not consider that these are particularly high.

39. The witness statement does not provide any indication of the applicant's market share. In order to help gauge the extent to which consumers have been educated that the sign is a trade mark it is necessary to have some idea of the market share held by the applicant under the mark applied for. Taking into account the advice given in relevant case law such as *Windsurfing* and *Bovemj*, and all the documents and exhibits filed, I consider the evidence has failed to show that, at the date of application, the average consumer had been educated into seeing the sign as indicating the trade origin of the services. The mark is therefore excluded from acceptance under section 3(1)(b) and (c).

## **Conclusion**

40. In this decision, I have considered all documents filed by the applicant/agent and all arguments submitted to me in relation to this application. Having done so, and for the reasons given above, the application is refused because it fails to qualify under sections 3(1)(b) and (c) of the Act.

**Dated this 15th day of November 2011**

**Bridget Whatmough**  
**For the Registrar**  
**The Comptroller-General**

## APPENDIX

# Annex 1

Website found [www.jetskisafaris.co.uk](http://www.jetskisafaris.co.uk)

The screenshot shows a web browser window displaying the website for Jetski Safaris. The browser's address bar shows the URL [http://www.jetskisafaris.co.uk/on\\_safari.html](http://www.jetskisafaris.co.uk/on_safari.html). The website has a dark theme with a navigation menu at the top including: Home, On Safari, Group Packages, RYA Courses, The Jetski Club, Film Services, News & Media, Prices, Bookings, and Contact Us. A sidebar on the left lists: On Safari, The Experience, The Location, and The Equipment. The main content area features a large image of two people on a yellow and black jet ski. Below the image is the heading "Jet Ski Safari – The ultimate Watersports Activity" and a paragraph: "Jetski Safaris aims to bring the exhilaration of jetskiing to a wider audience through its safari experiences. Please take a look below at our frequently asked questions to find out more. If you have any further questions please don't hesitate to contact us." To the right of this text is a "Get in touch" box with contact information: office number: 01202 706 784, mobile number: 07803 620 650, and a link to an "Enquiry form". Below the main text, a question "Q. So what exactly is a Jetski Safari?" is followed by an answer "A. A Jetski Safari is an experience in which you will receive a safety briefing and instruction from a Qualified Personal Watercraft Instructor before taking to the water on your very own Jetski with no prior experience needed..." The browser's taskbar at the bottom shows several open applications including Microsoft Word, Internet Explorer, and the website itself.



## Annex 2

### Website found at www.visittenby.co.uk



## Annex 3

### Website found at [www.cornwallwaverunnersafaris.co.uk](http://www.cornwallwaverunnersafaris.co.uk)



# Annex 4

## Website found at www.solentboatcharters.co.uk

**SOLENT CHARTERS**  
COWES  
HAMBLE  
LYMINGTON  
PORTSMOUTH  
SOUTHAMPTON  
Telephone: 0800 612 6010

**Solent Charters**  
Speed Boat Rib Hire  
Motor Yacht Charter  
Solent Special Events  
Make A Charter Booking  
Charter Rates & Details  
A Typical Charter Day  
Hen Party Boat Ideas  
Explore Our Website  
Customer Reviews  
Onboard Catering  
Charter News  
Jet Ski Hire  
Availability  
Contact Us  
Photos

**Solent Jet Ski Safari Adventure Days**

We offer this Solent Jet Ski Safari event for groups of up to 6 guests. An RYA jet ski instructor on his own safety rib boat takes the group out on either 2 jet ski bikes for £299 or 3 jet ski bikes for just £399 in total.

These events run from 10am - 1pm or 2pm - 5pm and include safety instruction within our marina training area before moving out into open water for a few extra minutes of high speed tuition.

Your instructor will now explain the safari course and send you on your way whilst bringing up the rear himself. You will actually be on the water for about 2 hours & 45 minutes which is nearly double the time of other jet ski safaris.

During the safari you will gain a working knowledge of the jet skis that might just encourage you to take your RYA PWC jet ski qualification.

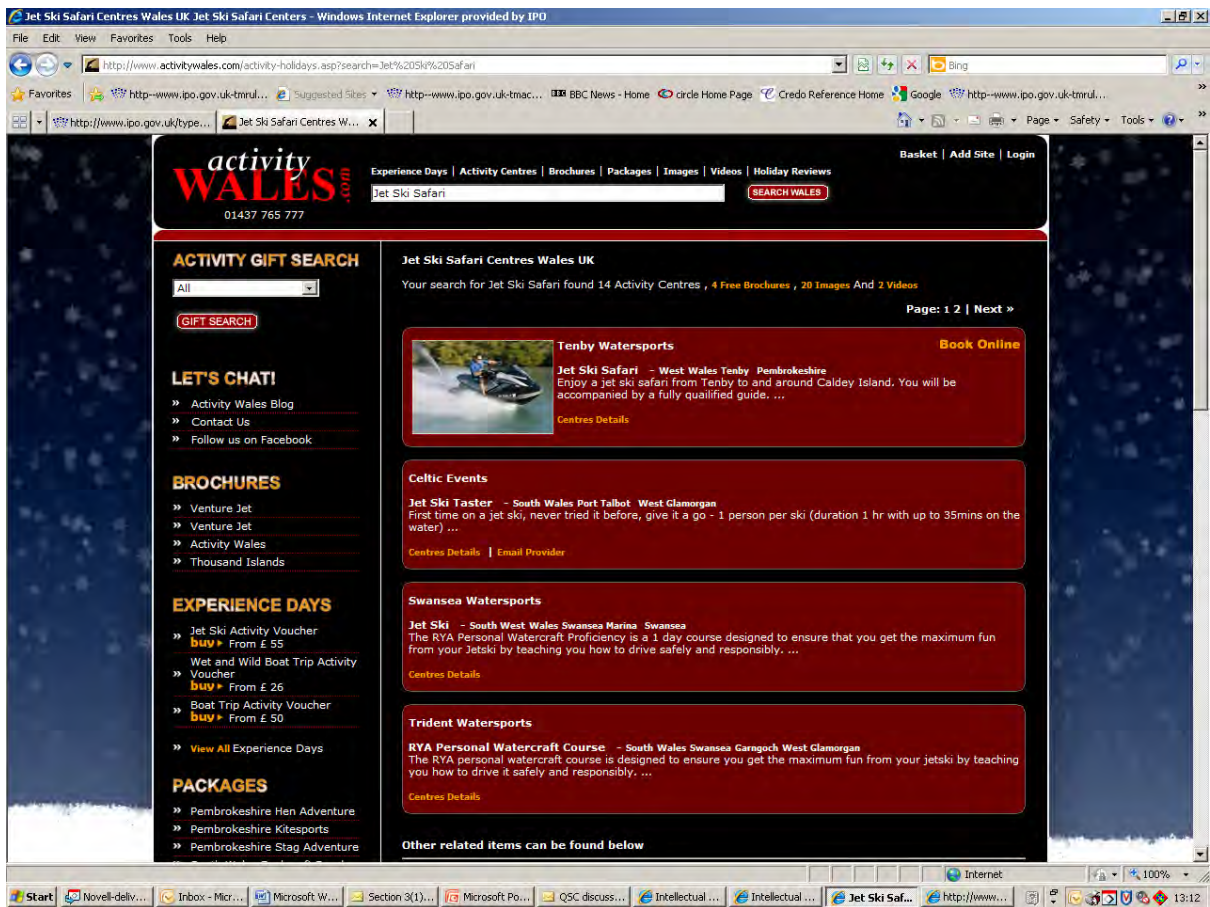
Charter Image Library  
Evening Charters

Rib Speed Boats | Motor Yachts | Jet Ski Safari | Availability

Start | Novell-deliver... | Inbox - Micros... | Microsoft Word | Section 3(1)(c... | Microsoft Pow... | QSC discussio... | Intellectual Pr... | Intellectual Pr... | Solent Jet 5... | 13:08

# Annex 5

## Website found at www.activitywales.com



# Annex 6

## Website found at www.isango.com

The screenshot shows a Windows Internet Explorer browser window displaying the isango.com website. The browser's address bar shows the URL: [http://www.isango.com/spain-tours/fuerteventura-tours/jet-ski-water-safari\\_3600](http://www.isango.com/spain-tours/fuerteventura-tours/jet-ski-water-safari_3600). The website header features the isango! logo and navigation links for 'Tours, Activities and Experiences', 'City Breaks and Short Breaks', 'Destination Ideas and Inspiration', and 'Help Travel blog'. A phone number '0203 355 1240' and a 'UK' flag are also visible.

The main content area is titled 'Jet Ski Water Safari'. It includes a search bar with the text 'Where are you going?' and 'What would you like to do? (optional)'. Below the search bar, there is a 'SEARCH' button. The product details section shows a price of 'Price per person ..... from £57.61' with a 'View price guide' link. A 'Select Date and Travellers' section allows users to choose a date (24 Oct 2011) and the number of adults (1) and children (0). A 'CHECK AVAILABILITY' button is present.

Key facts listed include: 'Where: Fuerteventura, Spain', 'Duration: 90 minutes', and a 'LOWEST PRICES GUARANTEED' badge. The product is rated 'Fabulous, 5.0' with a 'Read traveller reviews' link. A list of benefits at the bottom includes: 'Easy to book - easy to cancel - easy to change', 'Book early and receive discounts', and 'Price same or lower than local rates'.

## Annex 7

Website found at <http://holidays.easyjet.com/all-inclusive/malta-all-inclusive-holidays.htm>

The screenshot shows a web browser window displaying the EasyJet website for all-inclusive holidays to Malta. The browser's address bar shows the URL: <http://holidays.easyjet.com/all-inclusive/malta-all-inclusive-holidays.htm>. The page features a navigation menu with options like 'Cheap Holidays' and 'easyJet Holidays'. A search bar is visible with the text 'Find: saf'. The main content area is titled 'Overview' and includes a large image of a hotel building at night. Below the image, there is a section titled 'Overview' with the following text:

Get a great all inclusive deal with easyJet Holidays

Malta, part of an archipelago of three islands, lies bang in the middle of the Mediterranean, meaning the weather is divine, the sea warm and the holiday spirit vibrant. Select an all inclusive deal to Malta this summer and you could be exploring this colourful isle: its red sandy beaches, blue lagoons, medieval pageantry and carnival atmosphere. Most important of all, you can relax, by travelling all inclusive with easyJet Holidays, your wallet gets a break too!

**All Inclusive Malta: perfect for families**

Malta is a dream destination for a family holiday. The island possess a myriad of beaches, many with excellent facilities, especially popular are Mellieha and Golden Bay. If your children have vivid imaginations, take them to White Tower Bay, where they can play knights and conquerors on this pretty beach enclosed by a fortified wall and tower. If you enjoy the tranquillity of deserted sands, then simply diverge a little from well-trodden paths and you will not be disappointed. Alternatively, head over to the islands of Gozo or Comino where there are many peaceful coves perfect for snorkelling. Don't forget to visit Gozo's Ramla il-Hamra with its distinctive red sand.

Away from the beach, if you can drag the family from the hotel pool, then there is plenty of entertainment. Visit Popeye's Village, perfect for big and little kids: check out the 1980s film set, join the animation crew and leap on the water trampolines! It's hard to turn down a trip to the Playmobil Fun Park, the only place in the world where you can watch your favourite toys being made! For more watery diversions, ride the water chutes at Slide and Splash and explore the aquatic life at Mediterraneo Marine Park, where you can even swim with dolphins.

For sports enthusiasts Malta is an excellent destination, especially for those who share the Maltese love of the sea. For diving, the north of the island has the best sites; the caves at Cirkewwa are perfect for fish spotting. Proficient divers can undertake a night excursion from Wied iz-Zurreiq. Elsewhere, St Paul's Bay is good for windsurfing, take a jet ski safari and join the wake boarding trend. A wonderful way to capture the essence of the archipelago is aboard a traditional sailing ship: take in the beautiful scenery, enjoy a smorgasbord lunch and swim in crystal clear waters. (By far my favourite trip of the holiday!)

Inject a little culture into your visit by following in the footsteps of the Knight's of Malta; see buildings embellished by old masters, including Caravaggio and Mattia Preti. Visit the opera at Valletta's Manoel Theatre, the second oldest in Europe, or purchase handcrafts from the locals on the island of Gozo. Explore

On the right side of the page, there is a search filter section with the following options:

- Check-in date: Nov '11, 12 (Sat), 23
- Duration: 7
- Rating: Any Rating
- Board: All
- Rooms: 1
- Guests: Adults: 2, Kids (2-18): 0, Infants (0-1): 0

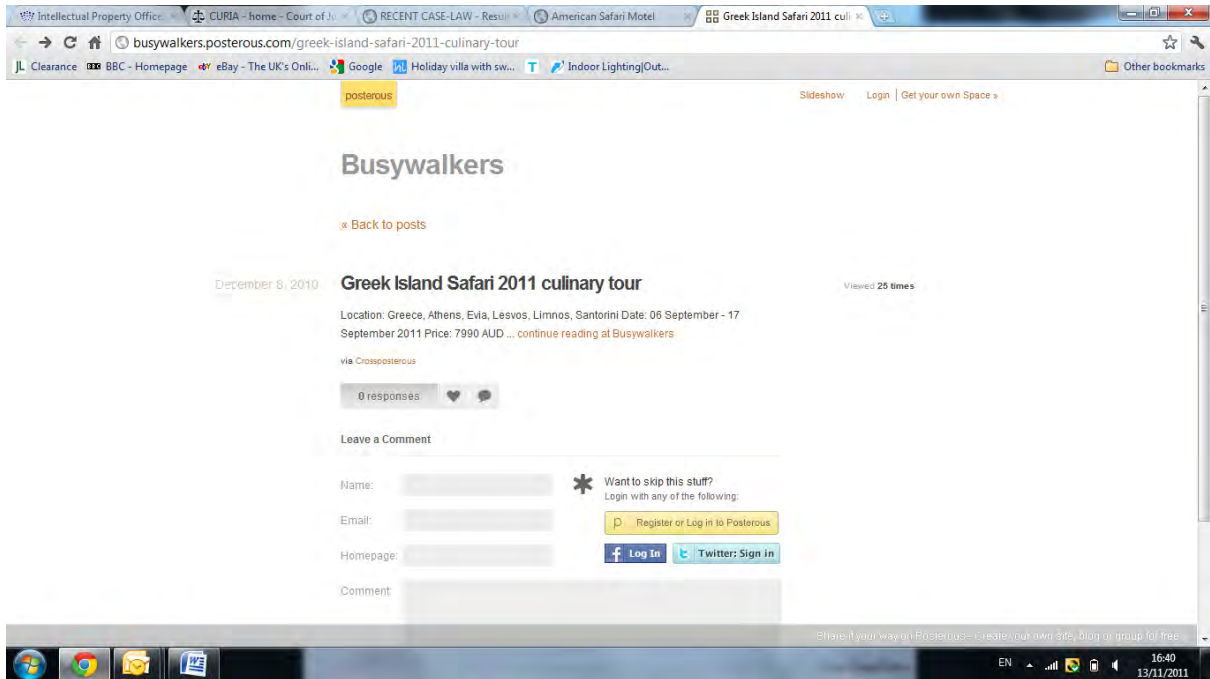
Below the search filters, there is a section titled 'Other All Inclusive Destinations' with a list of links to other holiday packages:

- [All Inclusive Holidays to Spain](#)
- [All Inclusive Holidays to Egypt](#)
- [All Inclusive Holidays to Sharm el Sheik](#)
- [All Inclusive Holidays to Turkey](#)
- [All Inclusive Holidays to Greece](#)
- [All Inclusive Holidays to Crete](#)
- [All Inclusive Holidays to Portugal](#)
- [All Inclusive Holidays to Algarve](#)
- [All Inclusive Holidays to Tenerife](#)
- [All Inclusive Holidays to Lanzarote](#)
- [All Inclusive Holidays to Costa del Sol](#)
- [All Inclusive Holidays to Madeira](#)
- [All Inclusive Holidays to Kos](#)

The browser's taskbar at the bottom shows several open applications, including 'Novell-delivered App...', 'Intellectual Property...', 'Inbox - Microsoft Ou...', 'ibis', 'Microsoft Word', and 'Malta All Inclusive...'. The system clock shows the time as 11:46.

## Annex 8

Website found at <http://busywalkers.posterous.com/greek-island-safari-2011-culinary-tour>



## Annex 9

Website found at <http://www.pen.org/viewmedia.php/prmMID/5703/prmID/2126>

The screenshot shows a web browser window displaying the PEN American Center website. The browser's address bar shows the URL [www.pen.org/viewmedia.php/prmMID/5703/prmID/2126](http://www.pen.org/viewmedia.php/prmMID/5703/prmID/2126). The website's navigation menu includes links for WHO WE ARE, WHAT WE DO, HOW TO HELP, WORLD VOICES, ADVOCACY, and PRESS. A search bar is located in the top right corner. The main content area features a large banner for the 'PEN WORLD VOICES FESTIVAL of International Literature' in New York City, running from April 25 to May 1, 2011. Below the banner, there is a sidebar with a 'PEN WORLD VOICES' section containing links to 'Letter from the Director', '2011 Multimedia', 'Participants', 'Writing by Festival Participants', 'World Voices Blogs', 'Schedule of Events', 'Film Series', 'Stand-up Book Critics', and 'Also During the Festival'. The main article, titled 'A Literary Safari: A Unique Experience', is dated April 28, 2011, and is located at Westbeth Home of the Arts in New York City. The article lists participants including Nathacha Appanah, Rahul Bhattacharva, Abdeikader Benali, Amélie Nothomb, Ksenia Shcherbina, Teresa Solana, John Burnside, Mircea Cărtărescu, Manuel de Lope, Deborah Eisenberg, Marcelo Figueras, Jonas Hassan Khemiri, Hervé Le Tellier, Daniel Orozco, Gunnhild Oyeheaug, and Lynne Tillman. The article is co-sponsored by Westbeth Center for the Arts and includes a link to a photo gallery on Flickr. The browser's taskbar at the bottom shows the date and time as 16:41 on 13/11/2011.



# Annex 10

Website found at <http://arresteddevelopmentmusic.com/musical-safari/>

Intellectual Property Cl... CURIA - home - Court... RECENT CASE-LAW - P... Greek Island Safari 2011... PEN PEN American Center... Attractions of a politic... Arrested Development - x

arresteddevelopmentmusic.com/musical-safari/

Clearance BBC - Homepage eBay - The UK's Onli... Google Holiday villa with sw... Indoor Lighting|Out... Other bookmarks

HOME NEWS SHOWS VIDS PICS LYRICS BIO LINKS

## STORE

### Musical Safari

You are here: Home » Musical Safari



**SPEECH** - globally known as an innovator of mixing tribal, jazz, funk & soul music together with hip-hop; transcending genres and raising the bar! His DJ show **Musical Safari** is now aired on multiple stations throughout the U.S., soon in Japan and Europe. **Speech** wants to broaden the scope of the music being played!

[Click on the picture to hear his iTunes podcast!](#)

He is known as a trendsetting producer and pioneer. His group, Arrested Development was voted one of **VH-1's best Hip Hop artists of all time**. Check Speech as a DJ rocking crowds throughout **Europe, Australia, Africa, America & Asia**, various corporate events & mega brands with his unique style of spinning and impromptu live performances.

[Podomatic site](#) / [Soundcloud site](#) /

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### Store



### Shout Box: Let Your Voice Be Heard!

ShoutBox

ESHE: HEY FAM! Thanks so much for your support! Have a GREAT DAY! 😊  
11/11/11 11:32 am #

Jane: Just watched your appearance on "Crime After Crime." So glad you're still out there sharing your positive outlook and personalities. Keep on keeping o  
11/5/11 7:11 pm #

EN 16:44 13/11/2011

# Annex 11

Website found at <http://www.amazon.co.uk/Hunting-Grounds-Scottish-Football-Safari/dp/1841587354>

amazon.co.uk Hello Bridget Whatmough. We have recommendations for you. (Not Bridget?)  
Bridget's Amazon.co.uk Today's Deals Gift Cards Gifts & Wish Lists

Shop All Departments Search Books Basket Wish List

Hunting Grounds: A Scottish Football Safari and over 750,000 other books are available for Amazon Kindle. Learn more

**Hunting Grounds: A Scottish Football Safari** [Paperback]  
Gary Sutherland (Author)  
★★★★☆ (4 customer reviews) Like (1)

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Price: **£7.19** & this item **Delivered FREE in the UK** with Super Saver Delivery. See details and conditions  
You Save: £0.80 (10%)  
Usually dispatched within 9 to 12 days.  
Dispatched from and sold by Amazon.co.uk. Gift-wrap available.  
7 used from £0.94

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Paperback	£7.19	£7.19	£0.94

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Don't have a Kindle? Get your Kindle here

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