

BL O/0184/23

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK REGISTRATION NO. 918304969

IN THE NAME OF SHANGHAI ZHENGLANG TECHNOLOGY CO., LTD

REGARDING THE TRADE MARK:

BUBBLE POP ORIGIN

AND

AN APPLICATION FOR THE INVALIDATION THEREOF UNDER NO. 504418

BY

GAMEDUELL GMBH

Background and pleadings

1. On 9 September 2020, Shanghai Zhenglang Technology Co., Ltd (the “Proprietor”) applied to register the trade mark **Bubble Pop Origin** for goods and services in Classes 9 and 41. It was registered on 26 December 2020.

2. On 10 December 2021, GameDuell GmbH (the “Applicant”) applied to have the contested mark declared partially invalid under Section 47 of the Trade Marks Act 1994 (“the Act”), with the Applicant claiming that registration of the contested mark was contrary to Section 5(2)(b) of the Act. The invalidation is brought against the following goods and services only:

Class 9 *Computer game software downloadable from a global computer network; Computer games programmes downloaded via the internet; Computer games programmes downloaded via the internet [software]; Computer games programs downloaded via the internet [software]; Computer game programs; Computer game software; Computer game software for use on mobile and cellular phones; Electronic game programs; Electronic game software; Electronic game software for handheld electronic devices; Game software; Recorded computer game programs; Computer programs for pre-recorded games; Downloadable computer game programs; computer game software, recorded; computer game software, downloadable; computer video game software; electronic game software for mobile phones; Electronic game software for mobile phones; computer programs for video and computer games; joysticks for use with computers, other than for video games; video games software.*

Class 41 *Organization of competitions [education or entertainment]; providing online electronic publications, not downloadable; entertainment services; on-line game services; providing amusement arcade services; video editing services for events; audio and video recording services; providing online videos, not downloadable; audio, film, video and television recording services; Post-production editing services in the field of music, videos and film; Operation of video and audio equipment for*

the production of radio and television programs; production of sound and video recordings; videotape editing; providing age ratings for television, movie, music, video and video game content; digital video, audio and multimedia entertainment publishing services; providing audio or video studio services.

3. For the purposes of the invalidation, the Applicant relied upon its earlier United Kingdom Trade Mark (UKTM):

UKTM 801073863¹

Bubble Popp

Filing date: 15 February 2011

Registration date: 13 March 2012

4. The Applicant's mark is earlier in accordance with Section 47 of the Act, and completed its registration process more than five years before the date the contested mark was filed.²

5. For the purposes of the invalidation, the Applicant chose to rely upon only some of the goods and services for which the earlier mark is registered, namely:

Class 9 *Computer programs (downloadable software); computer programmes (programs), recorded; stored and downloadable computer programs, in particular computer and video games; stored and downloadable computer programs, especially for computer and video games; electronic publications, downloadable; computer and apparatus for video games adapted for use with an external display screen or monitor; data*

¹ The trade mark relied upon by the opponent is a UK 'comparable' trade mark. It is based on the opponent's earlier International Registration which has designated the EU ("IR(EU)"). On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with an existing IR

² Although the UK has left the EU and the transition period has now expired, EUTMs, and International Marks which have designated the EU for protection, are still relevant in these proceedings given the impact of the transitional provisions of the Trade Marks (Amendment etc.) (EU Exit) Regulations 2019. Tribunal Practice Notice 2/2020 refers.

processing apparatus; recorded data carriers for recording computer, in particular recorded ROM; compact discs, especially CD- and DVD-ROMs; recorded compact discs, sound and image, especially with computer and video games; recorded image, sound and data carriers; video recordings on digital media, in particular with computer and video games; hardware for computer games and online computer games, included in this class.

Class 28 *Apparatus for Games other than those adapted for use with an external display screen or monitor; games; games other than those adapted for use with an external display screen or monitor; board games.*

Class 41 *Game services provided on-line from a computer network; organization of competitions (education or entertainment), in particular on the Internet; providing on-line electronic publications, not downloadable; electronic desktop publishing; entertainment services offered via the Internet, in particular in relation with computer and video games; entertainment services offered via other wireless media or over cable connections; online entertainment in the range of video and computer games; entertainment, in particular holding of information and game shows via the Internet; organisation of gaming events and games, in particular on the Internet; offering of entertainment services to organize gaming tournaments, in particular on the Internet; organization of competitive computer and video games.*

6. The Applicant submitted that the contested mark 'Bubble Pop Origin' is visually, phonetically and conceptually highly similar to the earlier mark 'Bubble Popp'. The Applicant argued that both marks would be perceived as "bubble pop marks" by the relevant consumer, and that neither the additional silent letter 'p' in the earlier mark nor the additional word 'Origin' in the contested mark would detract from this perception. The Applicant argued that the consumer would either confuse the contested mark with the earlier mark or would instead mistakenly believe that 'Bubble Pop Origin' is an extension of the earlier 'Bubble Popp' brand.

7. The Applicant contended that the contested goods in class 9 and contested services in class 41 are identical to those of the earlier mark. The Applicant submitted that the goods and services would be sold to the same consumers via the same point of purchase through the same channels of trade. The Applicant argued that considering the principle of imperfect recollection, the consumer would likely assume the contested goods and services share the same designation of origin with those of the earlier mark.

8. On 3 May 2022, the Proprietor filed a counterstatement. The Proprietor argued that the contested mark would be perceived as a whole and therefore the dissection of it “in order to display that it contains parts of the Applicant’s prior mark is fabricated and unnatural”. The Proprietor referred to several earlier marks that contain either the word ‘Bubble’ or ‘Pop’ in the same classes as those of the contested mark, and stated that the Applicant had not taken cancellation action against them. The Proprietor argued that the contested mark is phonetically dissimilar to the earlier mark on the basis that the second ‘p’ in the earlier mark receives emphasis, and also because the word ‘Origin’ is not contained in the earlier mark. The Proprietor argued that there is limited visual similarity between the marks, as the different components of the contested mark “are holistically dissimilar to [those] of the Applicant’s mark.” As to the conceptual similarity, the Proprietor argued that the three words in the contested mark were [deliberately] chosen and incorporated into the mark as they are suggestive, and give hints to the public as to what the game is about. In contrast, the word ‘Popp’ in the earlier mark has no meaning. The Proprietor argued that a conceptual comparison is therefore not possible.

9. The Proprietor submitted that a certain number of contested goods and services are similar to those of the earlier mark, however, it also submitted that a certain number of the contested goods and services are entirely dissimilar. The Proprietor submitted that one of the mediums through which the contested goods in class 9 are accessed is via mobile phones, and so the targeted consumer of its goods is the average consumer, who would download the games onto their mobile phone or other compatible gadget. The Proprietor argued that the same medium is not covered by the earlier goods.

10. The Proprietor submitted that both marks have a relatively low inherent distinctiveness in relation to the respective goods. The Proprietor contested the

Applicant's claim that the earlier mark has been used in the UK, and requested proof of use.

11. No hearing was requested

12. Both parties are professionally represented. The Proprietor is represented by Akos Suele, LL.M., and the Applicant is represented by MW Trade Marks Limited.

PROOF OF USE

Relevant period

13. The relevant statutory provisions are as follows:

Section 47 states:

“47. (1) [...]

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(2ZA) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 5(6).

(2A) The registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met.

(2B) The use conditions are met if –

(a) the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with their consent in relation to the goods or services for which it is registered-

(i) within the period of 5 years ending with the date of application for the declaration, and

(ii) within the period of 5 years ending with the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application where, at that date, the five year period within which the earlier trade mark should have been put to genuine use as provided in

section 46(1)(a) has expired, or

(b) it has not been so used, but there are proper reasons for non-use.

(2C) For these purposes –

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(2D) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (2B) or (2C) to the United Kingdom shall be construed as a reference to the European Community.

(2DA) In relation to an international trade mark (EC), the reference in subsection (2A)(a) to the completion of the registration procedure is to be construed as a reference to the publication by the European Union Intellectual Property Office of the matters referred to in Article 190(2) of the European Union Trade Mark Regulation.

(2E) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

(2F) Subsection (2A) does not apply where the earlier trade mark is a trade mark within section 6(1)(c)

(2G) An application for a declaration of invalidity on the basis of an earlier trade mark must be refused if it would have been refused, for any of the reasons set out in subsection (2H), had the application for the declaration been made on the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application.

(2H) The reasons referred to in subsection (2G) are-

(a) that on the date in question the earlier trade mark was liable to be declared invalid by virtue of section 3(1)(b), (c) or (d), (and had not yet acquired a distinctive character as mentioned in the words after paragraph (d) in section 3(1));

(b) that the application for a declaration of invalidity is based on section 5(2) and the earlier trade mark had not yet become sufficiently distinctive to support a finding of likelihood of confusion within the meaning of section 5(2);

(c) that the application for a declaration of invalidity is based on section 5(3)(a) and the earlier trade mark had not yet acquired a reputation within the meaning of section 5(3).

(3) [...]

(4) [...]

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(5A) An application for a declaration of invalidity may be filed on the basis of one or more earlier trade marks or other earlier rights provided they all belong to the same proprietor.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.”

14. Further, Section 100 of the Act states that:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.

15. The Applicant’s earlier mark clearly accords with Section 47 of the Act. Considering the conditions stated above, it is incumbent on the Applicant to establish proof of use of its earlier mark UKTM 801073863 in the 5-year period ending on the date of application of the contested mark, i.e., between 10 September 2015 and 9 September 2020. Because the Applicant is relying upon a UK Comparable mark, i.e.,

International Registration (German) cloned into a UK registration, it is acceptable for the Applicant to rely upon evidence of use in the EU acquired before IP Completion Day, being 31 December 2020 (see TPN 2/2020).

Proof of use case law

16. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

17. The case law on genuine use was summarised by Arnold J (as he then was) in *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch):

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

- (1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

18. As the earlier mark is a comparable mark, the comments of the Court of Justice of the European Union (“CJEU”) in *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11 are also relevant. The court noted that:

“36. It should, however, be observed that [...] the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the

Community' is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use. [...]

50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as 'genuine use', it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark. [...] 55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A de minimis rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77).

19. The court held that:

“Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to 'genuine use in the Community' within the meaning of that provision.

A Community trade mark is put to 'genuine use' within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the

European Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity.”

20. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. reviewed the case law since *Leno* and concluded as follows:

“228. Since the decision of the Court of Justice in *Leno* there have been a number of decisions of OHIM Boards of Appeal, the General Court and national courts with respect to the question of the geographical extent of the use required for genuine use in the Community. It does not seem to me that a clear picture has yet emerged as to how the broad principles laid down in *Leno* are to be applied. It is sufficient for present purposes to refer by way of illustration to two cases which I am aware have attracted comment.

229. In Case T-278/13 *Now Wireless Ltd v Office for Harmonisation in the Internal Market* (Trade Marks and Designs) the General Court upheld at [47] the finding of the Board of Appeal that there had been genuine use of the contested mark in relation to the services in issues in London and the Thames Valley. On that basis, the General Court dismissed the applicant's challenge to the Board of Appeal's conclusion that there had been genuine use of the mark in the Community. At first blush, this appears to be a decision to the effect that use in rather less than the whole of one Member State is sufficient to constitute genuine use in the Community. On closer examination, however, it appears that the applicant's argument was not that use within London and the Thames Valley was not sufficient to constitute genuine use in the Community, but rather that the Board of Appeal was wrong to find that the mark had been used in those areas, and that it should have found that the mark had only been used in parts of London: see [42] and [54]-[58]. This stance may have been due to the fact that the applicant was based in Guildford, and thus a finding which still left open

the possibility of conversion of the Community trade mark to a national trade mark may not have sufficed for its purposes.

230. In *The Sofa Workshop Ltd v Sofaworks Ltd* [2015] EWHC 1773 (IPEC), [2015] ETMR 37 at [25] His Honour Judge Hacon interpreted *Leno* as establishing that "genuine use in the Community will in general require use in more than one Member State" but "an exception to that general requirement arises where the market for the relevant goods or services is restricted to the territory of a single Member State". On this basis, he went on to hold at [33]-[40] that extensive use of the trade mark in the UK, and one sale in Denmark, was not sufficient to amount to genuine use in the Community. As I understand it, this decision is presently under appeal and it would therefore be inappropriate for me to comment on the merits of the decision. All I will say is that, while I find the thrust of Judge Hacon's analysis of *Leno* persuasive, I would not myself express the applicable principles in terms of a general rule and an exception to that general rule. Rather, I would prefer to say that the assessment is a multifactorial one which includes the geographical extent of the use.

21. In *Awareness Limited v Plymouth City Council, PLYMOUTH LIFE CENTRE*, BL O/236/13, Mr Daniel Alexander Q.C (as he then was), as the Appointed Person stated that:

"22. The burden lies on the registered proprietor to prove use [...]. However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having

regard to the interests of the proprietor, the opponent and, it should be said, the public”.

22. In *CATWALK Trade Mark*, BL O/404/13, Mr Geoffrey Hobbs Q.C. (as he then was) as the Appointed Person stated that:

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed

for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use”.

Evidence and submissions

23. On 4 July 2022 the Applicant provided submissions followed by a witness statement and exhibits that were filed on 29 July 2022. The Applicant’s submissions began by identifying what it considered to be the pertinent case law. In addition, it provided submissions arguing against the Proprietor’s denial that certain goods and services were similar. The Applicant’s submissions in relation to the purported similarity of the goods and services at issue shall not be summarised here, rather they shall be called upon if and when they provide any assistance to my own analysis.

24. The Applicant submitted that the average consumer would be the general public, “being anyone likely to consume gaming or entertainment-related products or services”. The Applicant identified that its game was in fact released as a downloadable app for mobile devices, contrary to the Proprietor’s submissions that its goods did not cover this medium. The Applicant contended that the degree of attention in relation to the goods and services at issue would be medium to low.

25. The Applicant submitted that both marks begin with the same word ‘Bubble’ and contended that consumers pay most attention to the beginning of a mark. The Applicant argued that the respective second words ‘Pop/Popp’ are highly visually similar, different only as to the addition of a letter ‘p’ in the earlier mark, whilst also being effectively phonetically identical. The Applicant submitted that both versions of the word refer to a light explosive sound. The Applicant argued that the inclusion of the word ‘Origin’ at the end of the contested mark would attract the least amount of consumer attention. The Applicant argued that consumers might mistake the contested mark as an extension of the Applicant’s brand.

26. The witness statement that accompanied the submissions is that of Kai Bolik and Boris Wasmuth, the managing directors of GameDuell GmbH. The witness statement explained that GameDuell was co-founded in 2003 and is one of the biggest cross-platform game communities, with 54 million registered players and offering 40 multiplayer games, including ‘Bubble Popp’. The witness statement submitted that the

earlier mark was first used in the UK in 2009 as a game accessible via a web browser, and that it was first released as a downloadable app in 2010. The witness statement submitted that the app was no longer available for download to new users after June 2018, however, it remains available to existing users. The witness statement claimed that because the game 'Bubble Pop' is a computer program the mark's registration in relation to computer programs and software-related goods in class 9 is supported. The witness statement also claimed that because GameDuell is a gaming community, in which customers can communicate, play and compete, the mark's registration for all of its services in classes 38 and 41 is also supported.

27. The witness statement provided figures for GameDuell's combined annual turnover for the UK and EU as of since 2017. The figures provided were: 2017 - €645,000; 2018 - €565,000; 2019 - 576,000; and 2020 - €616,000. Whilst figures were also provided for 2021 and 2022 these years are outside of the relevant period, and therefore shall not be considered. The witness statement also provided the figures of UK customers as 16,000 in 2019 and 17,700 in 2020. The witness statement explained that GameDuell emails promotions to newsletter-validated customers at least 12 times a year, within which the 'Bubble Pop' game appears as part of the special offers. The number of newsletter-validated customers in the UK was 1,200 in 2018, 1,100 in 2019, and 1,020 in 2020. Whilst other dates were provided, these were for years outside of the relevant period. The witness statement also explained that it maintained an active presence on social media, and provided figures for Facebook, Twitter, Instagram and Youtube. However, the figures provided were all dated as of 16 May 2022, which is outside of the relevant period. The witness statement referred to the maintenance of a company blog, where news about the company, events, open days, case studies, hints and tips is provided. However, the date of the extract in Exhibit F is also from outside of the relevant period.

28. The exhibits accompanying the witness statement consisted of the following:

- Exhibit A – a screenshot of the Bubble Popp game, available on the website www.gameduell.co.uk.
- Exhibit B – a series of four screenshots showing that Bubble Popp is available for re-download. No date is indicated on the exhibit.

- Exhibit C – an excerpt of App Store ‘Connect’s Sales Report’, “showing non-generating revenue activity in GBP currency region”.
- Exhibit D – a selection of metrics showing activity in relation to the App Store version of the Bubble Popp game, collated between 2017 and 2022. The “Sessions” metric refers to the number of times the game was used for at least two seconds, whilst the “Active Devices” metric refers to the number of devices that have engaged with an Apple service within the previous 90 days. The results for “Sessions” include: 6.03K Jan - Dec 2017; 3.83K Jan – Dec 2018; 3.69K Jan – Dec 2019; 203 Jan – Dec 2020. The results for “Active Devices” include: 19 Jan-Dec 2017; 4 Jan – Dec 2018; 2 Jan – Dec 2019; 1 Jan – Dec 2020. Whilst other dates were provided, these were for years outside of the relevant period.
- Exhibit E – according to the witness statement, the game was available as a Facebook game app between 2010 and 6 January 2021. The exhibit consists of a screen shot of the Bubble Popp Facebook app page, showing 558,903 people “follow” it. However, no date is indicated.

DECISION

Form of use

29. In the *Nirvana Trade Mark*, BL O/262/06, Mr Richard Arnold Q.C. (as he then was) acting as the Appointed Person summarised the test of use in a differing form from the trade mark as registered:

"33. The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter’s distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark

and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all."

30. In answer to the first question, the sign presented by the Applicant when demonstrating examples of purported use, and when citing the mark under which it provides its goods and services, is one of three marks: the word only **Bubble Popp**; and the following two figurative marks;



31. The distinctive character of the registered mark lies in its combination of the two words 'Bubble Popp' in plain text. Representations of the mark in this form are included in the evidence, most notably when referring to the name of the game. It is usually accompanied by either of the two stylised versions, but this does not detract from the obvious presence of the mark in the form as registered, and therefore such representations constitute acceptable examples of use. Even in those instances where the mark is used in conjunction with the figurative marks it is still acceptable for the purposes of indicating proof of use, as use of a trade mark can be indicated if the sign has been used either independently or in conjunction with another mark (*Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, paragraph 32 and 35). For the sake of clarity, even where the examples of use do not contain the word only version Bubble Popp, and exclusively display either of the figurative versions (i.e., Exhibit A), I still consider this to be an acceptable example of use. The reason being is that in my opinion the figurative marks are purely decorative, and do not alter the distinctive character of the mark as registered (see *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, paragraph 15).

Genuine use

32. The relevant statutory provision Section 47(2B)(a)(ii) identifies that the relevant period for proving genuine use is the period of 5 years ending with the date of application for registration of the contested mark, or the date of priority claimed for that

application. The relevant period for proving genuine use of the earlier mark UTKM 801073863 has been established as being between 10 September 2015 and 9 September 2020. A number of the Applicant's exhibits include details that pertain to dates outside of the relevant period, and therefore shall not be considered for the purposes of establishing genuine use.

33. The assessment of genuine use is multifactorial. In the first instance, the earlier mark must be shown to have been used by either the registered proprietor (i.e., the Applicant) or an authorised third party. It seems to me that all of the examples provided reflect 'actual use'³ of the mark by the appropriate parties, that is 'consistent with the essential function of a trade mark',⁴ i.e., the evidence demonstrates real use which has the intent to identify the origin of the goods and services.

34. I note that the witness statement indicated the game 'Bubble Popp' was no longer available as a downloadable app for new users after 2018. I also note that the number of times the game was used for at least two seconds ("Sessions") steadily decreased from 6.03K in 2017 to 203 in 2020, whilst the "number of devices that have engaged with an Apple service within the previous 90 days" ("Active Devices") has also decreased from 19 in 2017 to 1 in 2020. It should be noted that even at its "height" the number 19 is not a particularly significant figure. What exactly is meant when referring to "a device engaged with an Apple service" has not been further particularised by the Applicant, but I assume it to refer to a user accessing the game. Both sets of statistics evidenced in Exhibit D could be perceived as pointing towards a troubling trend, whereby use is notably and consistently falling. However, the evidence must be assessed in relation to the relevant period as a whole, in which case I do not believe it can be denied that use has been indicated to exist.

35. The witness statement also referred to combined UK and EU sales figures. As the earlier mark relied upon is comparable, the sales figures pertaining to the EU can be taken into consideration (see TPN 2/2020). In comparison to the reducing figures provided for the "Sessions" and "Active Devices", the figures of sales are relatively more consistent, as are the number of UK consumers (assumed to be for the game 'Bubble Popp', although again not particularised) which was 16,000 in 2019 and

³ *Ansul* paragraph 35.

⁴ *Ibid* paragraph 36.

17,700 in 2020. I also consider the “active newsletter-validated customers” to indicate an awareness of the earlier mark, with the related number being 1,200 in 2018, 1,100 in 2019 and 1,020 in 2020.

36. It is clear and established that the burden of proving use lies with the registered proprietor,⁵ and that the evidence must represent the Applicant’s best case.⁶ The evidence before me is not particularly voluminous, nor does it provide clear details in relation to aspects that would ordinarily assist in establishing proof of use, such as geographical spread, market share or advertising/marketing expenditure. However, the assessment of genuine use is global, and requires evaluating the picture created by the overall impression of the evidence, even if certain exhibits when taken into account individually would be insufficient to constitute proof of use.⁷ It is also important to recognise that evidence can satisfy the decision taker in the positive with regard to whatever it is that falls to be determined based on the balance of probabilities.⁸ With such principles in mind, I consider that on the balance of probabilities it is evident that the mark as registered has been put to genuine use in the relevant territory during the relevant period.

Framing a fair specification

37. In order to identify a ‘fair specification’, Mr Geoffrey Hobbs Q.C (as he then was) as the Appointed Person provided a summary of the law to be taken into account in *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of

⁵ *PLYMOUTH LIFE CENTRE* paragraph 22.

⁶ BL O/424/14 *Guccio Gucci SPA v Gerry Weber International AG* – Although these proceedings related to revocation proceedings, the principle is nevertheless the same for proof of use in opposition actions, whereby it is essentially incumbent on the relevant party to provide the Registrar with its best case at the earliest opportunity.

⁷ *New Yorker SHK Jeans GmbH & Co KG v OHIM, T-415/09*, paragraph 53.

⁸ *CATWALK* Trade Mark, BL O/404/13

the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

38. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows (at [47]):

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) (“Thomas Pink”) at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd (Extreme Trade Mark)* [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 (“Asos”) at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand,

protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46.”

39. Based on an assessment of the evidence submitted before me, I consider it a fair reflection to say that the earlier mark has been used in relation to a narrower scope of goods and services than that for which it is registered. The goods and services for which the earlier mark is registered are quite broad, and include general categories that would include a vast range of offerings which the Applicant has demonstrated no business interest in, e.g., Class 9 *hardware for computer games*; Class 28 *board games*; Class 35 *providing internet chatrooms* and Class 41 *entertainment services offered via other wireless media or over cable connections*.

40. Instead of listing the goods and services upon which the earlier mark has not been used, it is a more economic use of time to positively identify the goods and services upon which the earlier mark clearly *has* been used in the evidence. In doing so, I must keep in mind that I should not reflect the specification in the narrowest possible terms, but nor should I allow the Applicant to monopolise a general category based on use of a smattering of offerings contained therein.

41. I am aware that the parties in these proceedings have been Opponent and Applicant in the decision BL O/922/22, published on 25 October 2022. In that decision the issue of a fair specification was also considered. Having examined the fair specification in BL O/922/22, I consider it to reflect my own conclusion of a fair specification for the earlier mark in these proceedings. Considering that the Applicant’s trade appears to be primarily that of a game, provided either on an app or downloadable, I find a fair specification to be:

Class 9: *Computer game programs (downloadable software); stored and downloadable computer programs, namely computer and video games.*

Class 41: *Computer and video game services provided on-line from a computer network; computer and video games services offered via the Internet; computer and video games services offered via other wireless media or over cable connections; online video and computer games; computer and video games entertainment services offered via the Internet; computer and video games entertainment services offered via other wireless media or over cable connections; online computer and video games entertainment.*

Section 5(2)(b)

42. Section 5(2)(b) of the Act is as follows:

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

(a) ...

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

Section 5A

43. Section 5A of the Act is as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

44. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia*

Sales Germany & Austria GmbH, Case C-120/04, Shaker di L. Laudato & C. Sas v OHIM, Case C-334/05P and Bimbo SA v OHIM, Case C-591/12P:

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

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

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

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

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

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

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

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

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

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

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

Comparison of goods and services

45. Both parties provided submissions in relation to the respective goods and services at issue. Whilst the parties' comments are noted, the degree of similarity or identity of the goods and services, as the case may be, is something which fundamentally contributes to whether there is a likelihood of confusion. I must therefore conduct my own full analysis of the goods and services at issue. I shall refer to the submissions of each party if and when I consider them to provide assistance and clarity.

Earlier mark fair specification	Contested registration
<i>Class 9: Computer game programs (downloadable software); stored and downloadable computer programs, namely computer and video games.</i>	<i>Class 9: Computer game software downloadable from a global computer network; Computer games programmes downloaded via the internet; Computer games programmes downloaded via the internet [software]; Computer games programs downloaded via the internet [software]; Computer game programs; Computer game software; Computer game software for use on mobile and cellular phones; Electronic game programs; Electronic game software; Electronic game software for handheld electronic devices; Game software; Recorded computer game programs;</i>

	<p><i>Computer programs for pre-recorded games; Downloadable computer game programs; computer game software, recorded; computer game software, downloadable; computer video game software; electronic game software for mobile phones; Electronic game software for mobile phones; computer programs for video and computer games; joysticks for use with computers, other than for video games; video games software.</i></p>
<p><i>Class 41: Computer and video game services provided on-line from a computer network; computer and video games services offered via the Internet; computer and video games services offered via other wireless media or over cable connections; online video and computer games; computer and video games entertainment services offered via the Internet; computer and video games entertainment services offered via other wireless media or over cable connections; online computer and video games entertainment.</i></p>	<p><i>Class 41: Organization of competitions [education or entertainment]; providing online electronic publications, not downloadable; entertainment services; on-line game services; providing amusement arcade services; video editing services for events; audio and video recording services; providing online videos, not downloadable; audio, film, video and television recording services; Post-production editing services in the field of music, videos and film; Operation of video and audio equipment for the production of radio and television programs; production of sound and video recordings; videotape editing; providing age ratings for television, movie, music, video and video game content; digital video, audio and multimedia entertainment publishing</i></p>

	<i>services; providing audio or video studio services.</i>
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46. In the judgment of the CJEU in *Canon*, C-39/97, the court stated at paragraph 23 of its judgment that:

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

47. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

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

48. It has also been established by the General Court (GC) in *Gérard Meric v Office for Harmonisation in the Internal Market*, T- 133/05, that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut fur Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

49. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the GC stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

50. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.”

Whilst on the other hand:

“.....it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

Class 9

51. The earlier mark has essentially been found to have been used in relation to computer programs/software, more specifically in the form of video games. The majority of contested goods are all formats of computer games, either being software or programmes, which are either recorded or downloadable. The following contested goods are included in the more general category of several of the earlier mark's goods in Class 9, especially and in particular *Computer programs (downloadable software)*; and *computer programmes (programs) recorded*; and are therefore considered to be identical in accordance with the *Meric* principle:

Computer game software downloadable from a global computer network; Computer games programmes downloaded via the internet; Computer games programmes downloaded via the internet [software]; Computer games programs downloaded via the internet [software]; Computer game programs; Computer game software; Computer game software for use on mobile and cellular phones; Electronic game programs; Electronic game software; Electronic game software for handheld electronic devices; Game software; Recorded computer game programs; Computer programs for pre-recorded games; Downloadable computer game programs; computer game software, recorded; computer game software, downloadable; computer video game software; electronic game software for mobile phones; Electronic game software for mobile phones; computer programs for video and computer games; video games software.

52. The contested *joysticks for use with computers, other than for video games* are of a different physical nature to programs/software. Nevertheless, joysticks and computer games are traditionally used frequently in combination with one another, and have the same end user and trade channels, and are also often complementary. I noted that the limitation indicates that the joysticks are not for use for video games. It must be remembered that the consumer and interested third parties are not privy to the wording or effect of limitations. Also, no indication as to what the joysticks actually do relate to has been given by the Proprietor, and it is therefore left to me to assume that they are likely still sold in the same type of store, are likely sold through the same trade channels, are likely bought by the same kind of user, and may even be produced by the same manufacturer. As such, the contested *joysticks for use with computers, other than for video games* are similar to at least a low degree.

Class 41

53. In its counterstatement, the Proprietor identified the contested goods and services which it considered to be similar to the goods and services of the earlier mark. The list of similar services included *Organization of competitions [education or entertainment]*. I see no reason to disagree with the Proprietor's concession as to the similarity. In addition, regardless of the Applicant's position, I would in any case have found the contested *Organization of competitions [education or entertainment]* to be similar to the fair specification of the earlier mark. The fair specification is restricted to goods and services that relate to computer and video games, which could form part of the entertainment which the contested mark organises competitions in. There would therefore be potential for the same end user and trade channel. As such, the contested *Organization of competitions [education or entertainment]* are similar to a low degree.

54. The contested *providing online electronic publications, not downloadable*, has a different end user, use and trade channel to the type of services that involve the provision of computer games. Further, such services are not complementary. However, the content of the contested publications has not been specified, and could relate to computer games, for which the earlier mark is registered in Class 9. There is therefore a degree of overlap between end users, especially if the publications are computer game review or assistance based. In addition, the contested *providing online*

electronic publications, not downloadable is on the list of contested services which the Proprietor conceded to be similar.

55. The contested *entertainment services* and *on-line game services* are both a general category that would include the *computer and video games entertainment services offered via the Internet* of the earlier mark, and are therefore identical in accordance with the *Meric* principle.

56. The contested *providing amusement arcade services* are highly similar if not identical to the *computer and video games services offered via other wireless media or over cable connections*, insofar as they both offer the chance to “play” games (arcade services provide machines that enable the user to play a video game).

57. The contested *video editing services for events; audio and video recording services; audio, film, video and television recording services; Post-production editing services in the field of music, videos and film; Operation of video and audio equipment for the production of radio and television programs; production of sound and video recordings; videotape editing; digital video, audio and multimedia entertainment publishing services; providing audio or video studio services* clearly facilitate the editing, recording, production and publishing of film, audio and video, often for radio and television. There does not seem to be any close relationship to either the goods or services of the earlier mark, which focus on the provision of computer games. These contested services are therefore considered to be dissimilar.

58. The contested *providing age ratings for television, movie, music, video content* has a different intended purpose, end user and trade channel to both the goods and services of the earlier mark. In addition, the service is neither complementary nor is it in competition. However, the contested *providing age ratings for video games* could fall within the general category of the earlier mark’s *computer and video games entertainment services offered via the Internet*, for example, insofar as games are often subject to age restrictions and therefore the provision of the games would first have to comply with age ratings. The contested *providing age ratings for video games* are therefore similar to a low degree.

Comparison of the marks

59. In *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated that:

“49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity.

60. In relation to any contested goods and services which have been found to be dissimilar, there can be no likelihood of confusion. It is therefore not necessary to conduct a comparison of the marks in relation to the following particular services:

Class 41 *Video editing services for events; audio and video recording services; audio, film, video and television recording services; Post-production editing services in the field of music, videos and film; Operation of video and audio equipment for the production of radio and television programs; production of sound and video recordings; videotape editing; digital video, audio and multimedia entertainment publishing services; providing audio or video studio services*

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

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight

in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

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

63. The respective trade marks are shown below:

Earlier mark	Contested registration
Bubble Popp	Bubble Pop Origin

64. The earlier mark is presented in a standard typeface. It consists of the combination of terms ‘Bubble Popp’. The word ‘Bubble’ is an English-language word that has the meaning of a ball of air or gas or liquid. The term ‘Popp’ as written does not exist as a word in any dictionary, but I consider it would most likely be perceived as a misspelling of the English-language word ‘Pop’, especially given the context of the preceding word ‘Bubble’ (which are prone to ‘pop’). Although the term ‘Pop’ can refer to a type of music or a fizzy drink, I consider it most likely to be perceived as a short, sharp explosion, again due to the context of it existing in combination with the term ‘Bubble’. I consider the terms to hang together, and as such I do not consider either term to be more eye-catching, dominant or distinctive. As the words hang together, the overall impression is that of a ball of air exploding. This concept is where any distinctiveness lies.

65. The contested registration is presented in a standard typeface. It consists of the combination of English-language terms ‘Bubble Pop Origin’. The meanings of ‘Bubble’ and ‘Pop’ have been provided above, and are identical in the contested mark. The word ‘Origin’ refers to the beginning, source or cause of something. The term is often used in a laudatory context, to suggest original, or truest version. Although I consider the terms to hang together, I find the word ‘Origin’ to be the least dominant and distinctive of the three words, due to its use in a laudatory or explanatory context. As

the words hang together, the overall impression is that of the source/“original” version of a ball of air exploding. This concept is where any distinctiveness lies.

Visual similarity

66. The marks are visually similar insofar as they contain the identical respective first-nine letters. The marks differ visually due to the inclusion of a second letter ‘p’ at the end of the second word (10th letter overall) in the earlier mark. The marks also differ visually due to the inclusion of the word ‘Origin’ in the contested mark, which has no counterpart in the earlier mark. Overall, the marks are considered to be visually similar to between a medium and high degree.

Aural similarity

67. The marks are aurally similar insofar as they contain the identical respective first-three syllables ‘Buh-Bul-Pop’. I disagree with the Proprietor’s submission that the second letter ‘p’ in the earlier mark receives emphasis, and in my opinion it is silent. The marks differ aurally due to the inclusion of the three-syllable word ‘Or-lj-ln’ in the contested mark, which has no counterpart in the earlier mark. Overall, the marks are aurally similar to between a medium and high degree.

Conceptual similarity

68. The marks share the concept of a bubble that explodes. Although the earlier mark contains the term ‘Popp’, spelt with an additional letter ‘p’, I am of the opinion that it will be perceived as nothing more than a misspelling of ‘Pop’. As a result, not only does each mark share the concept of a small explosion, but they share the overall impression of a bubble that is exploding. The marks differ conceptually due to the presence of the word ‘Origin’ in the contested mark, which has no counterpart in the earlier mark. The additional word affects the concept of a bubble that is exploding to the degree that it implies the source or original version of said explosion. Overall, the marks are conceptually similar to a high degree.

Average consumer and the purchasing act

69. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.⁹ In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

70. The goods and services at issue relate largely to the world of computer games/video games. Such goods and services are considered to be everyday offerings, insofar as they are bought, downloaded and used frequently/on a daily basis. Games can vary in price, but in general they fall within an affordable price range of inexpensive items. Based on the nature of goods and services at issue, they are invariably made available for purchase in a retail store, app store, brochure, magazine, or online. As such, the purchase process would predominantly depend on a visual inspection. I do not discount the possibility that the goods and services may also be bought over the telephone from a telemarketer or following consultation with a shop assistant, for example, in which case both interactions will rely heavily on an oral exchange, and there would subsequently be an aural element to the purchasing process. However, I consider this to be a secondary purchasing process to the visually dominant process.

71. In relation to the services which relate to recording, editing, production and publishing, rather than games, the offerings are more specific and in comparison

⁹ *Lloyd Schuhfabrik Meyer*, Case C-342/97

would likely enjoy a higher degree of attention. That having been said, I do not consider such services to be so specialist that they exclusively attract a specialist or business consumer, as even the “average consumer” can produce their own sound and video recordings, for example. Whilst the level of attention may fluctuate depending on the specific requirements of the user, overall the level of attention would be medium. The purchase process of the services would most likely be made following an observation of the offerings either online or in a magazine or specific retail establishment, in which case the visual aspect will be the most dominant. That having been said, services enjoy word-of-mouth recommendations or contact from a telemarketer or following consultation with a shop assistant, for example, in which case the aural element would also be a (lesser) factor.

Distinctive character of the earlier trade mark

72. The Applicant has provided proof of use, which has been examined and assessed to the point that genuine use has been proven only in relation to a reduced number of the goods and services for which the earlier mark is registered. Whilst the evidence provided has shown genuine use of the mark in relation to those goods and services, the evidence has not been filed in a way to indicate or suggest that the mark possesses any enhanced degree of distinctive character. My assessment of the degree of distinctive character of the earlier mark is therefore to be made only on the basis of its inherent features.

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

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

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

In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask ‘in what does the distinctive character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

74. The distinctiveness of the earlier mark lies in the combination of words that hang together ‘Bubble Popp’. The concept of the mark is that of bubbles which explode/are exploded. Considering the mark is registered for goods and services that relate exclusively to games, the combination is perceived to refer to the nature of the game concerned, i.e., the purpose of the games is to pop bubbles. This has been indicated by the evidence filed for the purposes of proving genuine use. As such, the combination ‘Bubble Popp’ is not particularly fanciful or allusive, but rather indicative. In my opinion, the second ‘p’ in the term ‘Popp’ adds only the minimum degree of additional distinctiveness to the level enjoyed by the words themselves.

75. In *Formula One Licensing BV v OHIM*, Case C-196/11P, the CJEU found that:

“41...it is not possible to find, with regard to a sign identical to a trade mark protected in a Member State, an absolute ground for refusal, such as the lack of distinctive character, provided by Article 7(1)(b) of Regulation No 40/94 and Article 3(1)(b) of Directives 89/104 and 2008/95. In this respect, it should be noted that the characterisation of a sign as descriptive or generic is equivalent to denying its distinctive character.

42. It is true that, as is clear from paragraph 48 of the judgment under appeal, where an opposition, based on the existence of an earlier national trade mark, is filed against the registration of a Community trade mark, OHIM and, consequently, the General Court, must verify the way in which the relevant public perceives the sign which is identical to the national trade mark in the mark applied for and evaluate, if necessary, the degree of distinctiveness of that sign.

43. However, as the appellant rightly points out, their verification has limits.

44. Their verification may not culminate in a finding of the lack of distinctive character of a sign identical to a registered and protected national trade mark, since such a finding would not be compatible with the coexistence of Community trade marks and national trade marks or with Article 8(1)(b) of Regulation No 40/94, read in conjunction with Article 8(2)(a)(ii).”

76. It therefore must be held that the earlier mark possesses at least a minimum degree of distinctive character. In my opinion, the level of distinctive character is elevated slightly by the misspelling of the word ‘Popp’, but nevertheless the earlier mark remains inherently distinctive to a low degree.

Likelihood of confusion

77. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related.

78. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind (see *Sabel*, C-251/95, para 22). The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa (see *Canon*, C-39/97, para 17). It is necessary for me to keep in mind the distinctive character of the Opponent’s trade mark, the average consumer for the

services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

79. In *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03, the GC stated that:

“49. However, it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market (*BUDMEN*, paragraph 57). The extent of the similarity or difference between the signs may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumer choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs.”

80. In *Quelle AG v OHIM*, T-88/05, the GC found that visual similarity (and difference) is most important in the case of goods that are self-selected or where the consumer sees the mark when purchasing the goods. The Court stated that:

“68... If the goods covered by the marks in question are usually sold in self-service stores where consumers choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any phonetic similarity between the signs (*NLSPORT, NLJEANS, NLACTIVE and NLCollection*, paragraph 53 supra, paragraph 49).

69. Likewise, the degree of phonetic similarity between two marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually perceives visually the mark designating those goods (*BASS*, paragraph 56 supra, paragraph 55, and Case T-301/03 *Canali Ireland v OHIM – Canal Jean (CANAL JEAN CO. NEW YORK)* [2005] ECR II-2479, paragraph 55)... The same is true of catalogue selling, which involves as much as does shop selling a visual assessment of the item purchased by the consumer, whether clothing or shoes, and does not generally allow him to obtain the help of a sales assistant. Where a sales discussion by telephone is possible, it takes place usually only after the consumer has consulted the catalogue and seen the goods. The fact that those products may, in some circumstances, be the subject of discussion between consumers is therefore irrelevant, since, at the time of purchase, the goods in question and, therefore, the marks which are affixed to them are visually perceived by consumers.”

81. Having conducted a full analysis and thorough comparison of the marks and their respective goods and services at issue I have determined that it is the visual considerations which are of a greater importance in the assessment of a likelihood of confusion, due to the purchasing process of the respective goods and services being visually dominated. With this in mind, it is important to reaffirm that I have found the marks to be visually similar to between a medium and high degree. It is also important to reaffirm that I did not rule out a part of the relevant public paying attention to the aural aspect of the marks during the purchasing process, in which case I consider the finding of aural similarity as being between a medium and high degree to be of significance.

82. In *El Corte Inglés, SA v OHIM*, T-183/02 and T-184/02, the GC noted that the beginnings of word tend to have more visual and aural impact than the ends. The court stated:

“81. It is clear that visually the similarities between the word marks MUNDICOLOR and the mark applied for, MUNDICOR, are very pronounced. As was pointed out by the Board of Appeal, the only visual difference between the signs is in the additional letters ‘lo’ which characterise the earlier marks and

which are, however, preceded in those marks by six letters placed in the same position as in the mark MUNDICOR and followed by the letter 'r', which is also the final letter of the mark applied for. Given that, as the Opposition Division and the Board of Appeal rightly held, the consumer normally attaches more importance to the first part of words, the presence of the same root 'mundico' in the opposing signs gives rise to a strong visual similarity, which is, moreover, reinforced by the presence of the letter 'r' at the end of the two signs. Given those similarities, the applicant's argument based on the difference in length of the opposing signs is insufficient to dispel the existence of a strong visual similarity.

82. As regards aural characteristics, it should be noted first that all eight letters of the mark MUNDICOR are included in the MUNDICOLOR marks.

83. Second, the first two syllables of the opposing signs forming the prefix 'mundi' are the same. In that respect, it should again be emphasised that the attention of the consumer is usually directed to the beginning of the word. Those features make the sound very similar.

83. The marks at issue share the respective first nine letters identically. These letters create two words that are present in each of the two marks: 'Bubble' and 'Pop'. Whilst the earlier mark contains an additional letter 'p', this does not overcome the extremely high degree of visual similarity between the respective first two word elements. In addition, the second letter 'p' is aurally invisible. I indicated previously that I disagree with the Proprietor's submission that the second letter 'p' receives emphasis. In the English language, 'pp' appears not infrequently, e.g., dripping, applicant, choppy, and it does not seem to me that the combination is pronounced in these words any differently than if it were a single letter. I consider the same would apply with 'Popp'.

84. It is clear that the contested mark contains an additional word element that has no counterpart in the earlier mark. Although I consider the term 'Origin' to fulfil little more than a laudatory function, I nevertheless do not consider it to be aurally invisible and am of the opinion that it would indeed be pronounced. This leads to an aural difference between the marks. That having been said, although I believe the word will be

pronounced, I also believe it will be perceived to be secondary and, in certain instances, a negligible element. With this in mind, I refer to the *Trubion* judgment T-412/08, which found the following:

35 Assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (see *OHIM v Shaker*, paragraph 41 and the case-law cited).

36 It is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element (*OHIM v Shaker*, paragraph 42, and judgment of 20 September 2007 in Case C 193/06 *P Nestlé v OHIM*, not published in the ECR, paragraph 42). That could be the case, in particular, where that component is capable alone of dominating the image of that mark which members of the relevant public keep in their minds, so that all the other components are negligible in the overall impression created by that mark. In addition, the fact that an element is not negligible does not mean that it is dominant, and by the same token the fact that an element is not dominant in no way means that it is negligible (*Nestlé v OHIM*, paragraphs 43 and 44).

85. I have previously considered the dominant and distinctive elements of the marks at issue and am of the opinion that within the makeup of the sign as a whole the element 'Origin' in the contested mark is the least dominant and distinctive. In instances where 'Origin' is indeed perceived in such a way, the components of the earlier mark that would be kept in the mind of the relevant public are the words 'Bubble Pop', which are (almost) identically contained within the earlier mark.

86. I have identified that I consider the earlier mark to be inherently distinctive to a low degree. However, that does not eradicate the potential for finding a likelihood of confusion. Indeed, a likelihood of confusion can be found if a similar or identical (and

equally weakly distinctive component) is replicated in a later mark. In this regard I refer to *L'Oréal SA v OHIM*, Case C-235/05 P, whereby the CJEU found that:

“45. The applicant’s approach would have the effect of disregarding the notion of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that where the earlier mark is only of weak distinctive character a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the marks in question. If that were the case, it would be possible to register a complex mark, one of the elements of which was identical with or similar to those of an earlier mark with a weak distinctive character, even where the other elements of that complex mark were still less distinctive than the common element and notwithstanding a likelihood that consumers would believe that the slight difference between the signs reflected a variation in the nature of the products or stemmed from marketing considerations and not that that difference denoted goods from different traders.”

87. In my opinion, the relevant consumer of the goods and services at issue would be forgiven for misremembering whether an earlier mark used in relation to identical or similar goods and services contained the weakly distinctive element ‘Origin’ or not. This is especially so in the cases where the consumer considers the term to be negligible. I consider it probable that the consumer would mistake the later mark for the earlier mark, especially when factoring in the notion of imperfect recollection and the reality that a consumer rarely has the chance to make direct comparisons between marks. I therefore find a likelihood of direct confusion.

88. As an alternative and additional finding, I consider the marks at issue to at least lead to a likelihood of indirect confusion. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., (as he then was) as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it

is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark."

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ("26 RED TESCO" would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as "LITE", "EXPRESS", "WORLDWIDE", "MINI" etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ("FAT FACE" to "BRAT FACE" for example)."

89. The contested mark contains the additional element 'Origin', which in my opinion is on par with the type of non-distinctive additions one would expect in a sub-brand or brand extension. Moreover, the addition of the word 'Origin' would appear entirely logical and consistent with a brand extension, whereby the consumer would likely perceive the game 'Bubble Popp' to have a newer version/adventure, in the name of 'Bubble Pop Origin'.

90. The consumer of the goods and services at issue does not pay a particularly high degree of attention when making a purchase, and in my opinion such a consumer may not realise that the additional term 'Origin' in the contested mark is/was not contained within the earlier mark the last time they saw it. Even in those instances where the consumer displays a slightly elevated degree of attention and does perceive this element as a new addition (most likely observed by the consumer of the more specific, yet still not specialist services), I believe that they would simply dismiss it either as a negligible element, or a non-distinctive element that is consistent with a logical brand extension. It is my opinion that each level of attention would miss the lack of a second letter 'p' in the contested mark, as it is aurally invisible and visually minimalist. If a consumer does not directly confuse the marks at issue by way of simple mistake, they would put the overwhelming similarity between the marks, and identity/similarity of the goods and services at issue, down to the responsible undertakings being one and the same. I therefore find there to be a likelihood of indirect confusion.

Conclusion

91. The invalidation is partially successful under Section 5(2)(b) for those goods and services which have been found to be identical or similar. Subject to an appeal, the registration is deemed never to have been made in respect of the following:

Class 9: *Computer game software downloadable from a global computer network; Computer games programmes downloaded via the internet; Computer games programmes downloaded via the internet [software]; Computer games programs downloaded via the internet [software]; Computer game programs; Computer game software; Computer game software for use on mobile and cellular phones; Electronic game programs; Electronic game software; Electronic game software for handheld electronic devices; Game software; Recorded computer game programs; Computer programs for pre-recorded games; Downloadable computer game programs; computer game software, recorded; computer game software, downloadable; computer video game software; electronic game software for mobile phones; Electronic game software for mobile phones; computer programs for video and computer games; joysticks for use with computers, other than for video games; video games software.*

Class 41: *Organization of competitions [education or entertainment]; providing online electronic publications, not downloadable; entertainment services; on-line game services; providing amusement arcade services; providing online videos, not downloadable; providing age ratings for video game content.*

92. The contested mark will remain on the register for those services which were found to be dissimilar, namely:

Class 41: *Video editing services for events; audio and video recording services; audio, film, video and television recording services; Post-production editing services in the field of music, videos and film; Operation of video and audio equipment for the production of radio and television programs; production of sound and video recordings; videotape editing; providing age ratings for television, movie, music, and video content; digital video, audio and multimedia entertainment publishing services; providing audio or video studio services.*

Costs

93. Whilst both parties have achieved a measure of success, proportionately I consider the Applicant to have been more successful, and therefore entitled to a contribution towards its costs. I bear in mind that the relevant scale is contained in Tribunal Practice Notice 2/2016. In the circumstances I award the Applicant the sum of £700 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Preparing a statement and considering the

counterstatement of the other side	£200
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Preparing evidence	£500
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94. I therefore order Shanghai Zhenglang Technology Co., Ltd to pay GameDuell GmbH the sum of £700. The above sum should be paid within twenty-one days of the

expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 22nd day of February 2023

Dafydd Collins

For the Registrar