O/0918/25

TRADE MARKS ACT 1994

IN THE MATTER OF INTERNATIONAL REGISTRATION NO. WO0000001685456 IN THE NAME OF AVA LABS, INC. FOR THE FOLLOWING TRADE MARK:

BLIZZARD

IN CLASSES 35 & 36

AND

IN THE MATTER OF THE OPPOSITION THERETO UNDER NO. 439830 BY BLIZZARD ENTERTAINMENT, INC.

BACKGROUND AND PLEADINGS

1. Ava Labs, Inc. (“the holder”) is the holder of the International Registration (“the IR”) shown on the cover page of this decision. The IR was registered on 8 March 2022 and, with effect from the same date, the holder designated the UK as a territory in which it seeks to protect the IR under the terms of the Protocol of the Madrid Agreement. The IR was accepted and published in the Trade Marks Journal for opposition purposes on 23 December 2022. The holder seeks protection in the UK for the following services:

Class 35:	Business services, namely, matching potential private investors with entrepreneurs needing funding; business intermediary services relating to the matching of potential private investors with entrepreneurs needing funding; business venture development and business venture formation consulting services for the crypto-asset and blockchain industries.
Class 35:	Venture capital financing and investing; venture capital fund management; venture capital advisory services; venture capital funding services to emerging and start-up companies in the field of crypto-assets and blockchain and related technologies; venture capital fund development and venture capital fund formation services for others; venture capital fund management; private equity fund investment services; hedge fund investment services; management of a capital investment fund; funds investment; investment of funds for others in the fields of blockchain, cryptocurrency and crypto-assets; financial services, namely, operation and management of collective investment vehicles and trading for others of crypto-assets and investments in blockchain and related companies.

2. The IR enjoys a priority date of 22 September 2021 which stems from an earlier US trade mark owned by the holder, being that under number 97040451. This date is the relevant date for these proceedings.

3. On 22 March 2023, the IR was opposed by Blizzard Entertainment, Inc. ("the opponent"). The opposition is based upon sections 5(2)(a), 5(2)(b) and 5(3) of the Trade Marks Act 1994 ("the Act") and is reliant upon the following marks:

BLIZZARD
UK registration no. 902721173
Filing date 4 June 2002; registration date 14 October 2003
Relying on all goods and services, namely:

Class 9: Computer software programs; compact discs; audio and video tapes; pre-recorded motion picture and television films; instructional and teaching apparatus; apparatus for recording, transmission or reproduction of sound or images; cassette and digital tapes in Class 9.

Class 16: Paper, cardboard and goods made from these materials, not included in other classes; printed matter; photographs; stationery; instructional and teaching material (except apparatus); comic books; strategy guides; trading cards; colouring books; adhesive stickers, rub-on transfers; notebooks and portfolios in class 16.

Class 28: Games and playthings; hand held computer software games; toys; toy action figures and action figure accessories in class 28; playing cards.

Class 41: Entertainment services, namely, providing on-line computer games, tips and strategies for computer games, and news

concerning computer games; arranging and conducting computer game competitions in class 41.

("the opponent's first mark"); and

UK registration no. 900352005

Filing date 12 August 1996; registration date 11 December 1998

Relying on all goods and services, namely:

Class 9: Computer programs; compact discs; audio and video tapes; pre-recorded motion picture and television films; instructional and teaching apparatus; apparatus for recording, transmission or reproduction of sound or images; cassette and digital tapes.

Class 16: Paper, cardboard and goods made from these materials, not included in other classes; printed matter; photographs; stationery; instructional and teaching material (except apparatus); playing cards; comic books; strategy guides; trading cards; colouring books; adhesive stickers; rub-on transfers; notebooks and portfolios.

Class 25: Clothing; pyjamas; hats and caps; sweatshirts; T-shirts; shirts; shoes; jackets; shorts; socks; swcaters;[1] slippers.

Class 28: Games and playthings; hand held computer software games; toys; toy action figures and action figure accessories.

[1] This is how the term appears on the trade marks register but it is presumed that this is meant to cover 'sweaters'.

Class 35: Advertising and marketing; business management and administration; market research.

Class 41: Education; provision of training; entertainment.

Class 42: Computer programming; computer software design; computer consultancy; graphic arts designing; software rental.

("the opponent's second mark").

4. The opponent's marks are both comparable marks based on earlier EUTMs. 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 existing EUTMs. These comparable marks enjoy the same filing and registration dates as their European counterparts.

5. Under the section 5(2)(a) ground, the opponent relies on its first mark only and, in doing so, claims that the marks at issue are identical and that the goods and services at issue are similar. As for the section 5(2)(b) ground, the opponent relies on its second mark and maintains that the marks are similar and that the goods and services at issue are similar. Under both of these grounds, the opponent claims that these factors result in a likelihood that the marks would be confused.

6. In respect of the section 5(3) ground, the opponent relies on both of its marks and claims that it enjoys a reputation in all of the goods and services relied upon. As such, the opponent claims that the consumer will invariably associate the IR with the opponent. The opponent's position is that use of the IR, without due cause, would take unfair advantage of, or be detrimental to the distinctive character or the repute of the opponent's marks.

7. The holder filed a counterstatement wherein it denied the claims against it and requested that the opponent provide proof of use for the marks relied upon.

8. The holder is represented by Bristows LLP and the opponent is represented by FRKelly. Both parties filed evidence in chief with the opponent also electing to file evidence in reply. No hearing was requested and both parties filed written submissions in lieu of the same. This decision is taken after careful consideration of the papers.

9. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

EVIDENCE

10. The opponent's evidence in chief came in the form of the witness statement of Benjamin S. Lin dated 26 March 2024. Mr Lin is a Director of Intellectual Property and Legal for Activision Publishing, Inc (being a wholly owned subsidiary of the opponent). In this capacity, Mr Lin acts as in-house intellectual property Counsel for the opponent. The evidence was adduced in order to demonstrate use of the opponent's marks and in order to prove that they enjoy a reputation. The statement is accompanied by nine exhibits, being BSL1 to BSL9. I note that BSL3 is subject to a confidentiality order.

11. The holder's evidence came in the form of the witness statement of Lee A. Schneider dated 17 July 2024. Lee A. Schneider is the General Counsel of the holder, a position they have held since 17 May 2021. The holder's evidence is accompanied by seven exhibits, being LS1 to LS7, and was adduced in order to

demonstrate the holder's services and the differences in the goods and services offered by the parties.

12. The opponent's evidence in reply came in the form of the witness statement of Mr David Flynn dated 23 September 2024. Mr Flynn is a Senior Associate at the opponent's representative firm. His statement is accompanied by one exhibit and was adduced in response to the holder's evidence, namely Exhibit LS7 and the comments surrounding the same. This evidence is accompanied by one exhibit, being DF-1.

13. I do not intend to summarise the parties' evidence in full here (or their submissions, for that matter). However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

DECISION

Proof of use

14. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

> "(6)(1) In this Act an "earlier trade mark" means –
>
> (a) a registered trade mark or international trade mark (UK) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,
>
> (aa) a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a valid claim to seniority of an earlier registered trade mark or protected

international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;

(ab) a comparable trade mark (IR) or a trade mark registered pursuant to an application made under paragraph 28, 29 or 33 of Schedule 2B which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired.

[…]

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered."

15. Section 6A is also relevant. It reads:

"(1) This section applies where:

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

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

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) 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.

(5)-(5A) [Repealed]

(6) 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."

16. Section 100 of the Act is also relevant. It reads:

"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."

17. Given their earlier filing dates, the opponent's marks both qualify as earlier trade marks under the above provisions. As set out above, the holder requested that the opponent provide proof of use in respect of all of the goods and services relied upon. As a result, the opponent's marks are subject to the use provisions on the basis that they completed their registration processes more than five years prior to the priority date of the IR.

18. As the opponent's marks are comparable marks, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

"7.— (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the relevant period referred to in section 6A(3)(a) (the "five-year period") has expired before IP completion day—

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day —

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A to the United Kingdom include the European Union".

19. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, 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], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], 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], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer*

Baumwollbörse [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles 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]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(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]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(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]. 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].

(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]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(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]; *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]."

20. While section 6A of the Act (cited above) is silent on the issue of IRs, the Trade Marks (International Registration) Order 2008 sets out that this section of the Act extends to apply to IRs. As such, the relevant period for the present assessment is the five-year period prior to the priority date of the IR, being 22 September 2021. The relevant period is, therefore, 23 September 2016 to 22 September 2021 ("the relevant period").

21. Proven use of a mark which fails to establish that "the commercial exploitation of the mark is real"[2] because the use would not be "viewed as warranted in the economic sector concerned to maintain or create a share in the mark for the goods or services protected by the mark" is, therefore, not genuine use.

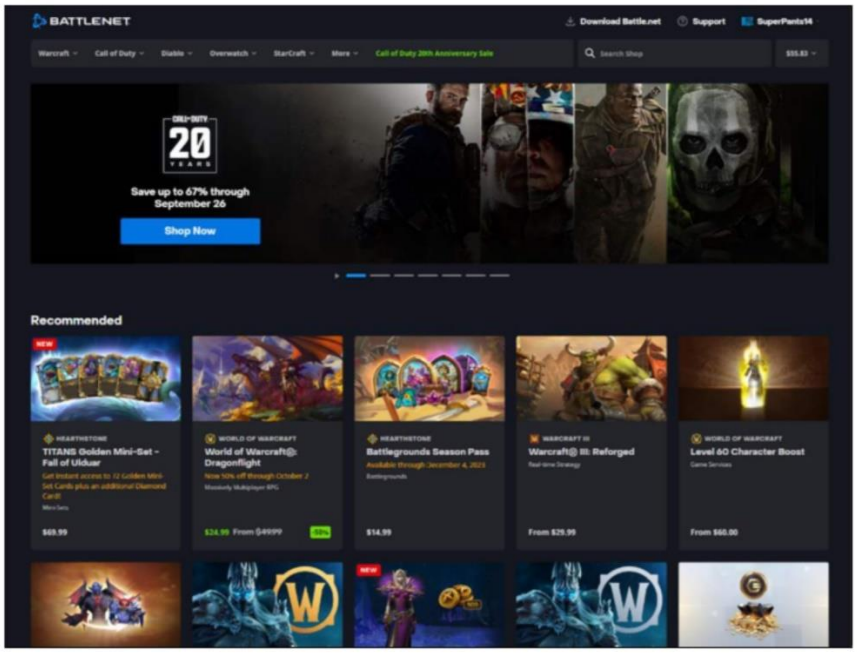
Evidence of use

22. The opponent's evidence sets out that it is an American video game developer and publisher that has create video games such as World or Warcraft, Diablo, StarCraft and Overwatch, amongst others. A number of printouts taken from internet resources such as Wikipedia, Investopedia and Statista are provided.[3] While I do not intend to discuss these in full, I note that they refer to Blizzard being a large video game business operation with reference to revenue of $387 million in the fourth quarter of 2021. While the fourth quarter of 2021 falls after the relevant date, this article refers to the fact that this revenue was 27% lower than the revenue for the same quarter a year prior. This indicates that the opponent's global turnover during the relevant period was exceedingly large.

23. The evidence goes on to state that the opponent's games operate through an online gaming service called Battle.net and are played by millions of users around the world, including the UK. It is confirmed that all of the games accessed through

[2] *Jumpman* BL O/222/16
[3] BSL1

this service are done so under the overarching brands of ‘BLIZZARD’ and ‘BLIZZARD ENTERTAINMENT’. Historic screenshots are provided of the BLIZZARD store, as well as those taken from Battle.net.[4] In addition, screenshots are provided from the opponent’s online store that sells merchandise from BLIZZARD’s games. While this evidence is noted, some of it is from prior to the relevant period and where ‘Battle.net’ pages are shown during the relevant period, there is no obvious use of the trade marks relied upon. As an illustrative example, I refer to the following screenshot that is taken from Battle.net in 2021:[5]



24. While I appreciate that ‘Battle.net’ is operated by the opponent, it is not clear how such use is use of the marks at issue.

25. Prior to 2019, the merchandise goods were sold directly by the opponent itself. UK sales data has been provided for this activity by way of a report which covers 16 January 2016 to 7 October 2019.[6] I note that the report covers demonstrates the

[4] BSL2
[5] See page 15 of BSL2.
[6] Confidential Exhibit BSL3

sale of $[redacted] worth of goods stemming from [redacted] transactions. There is no breakdown of when this turnover accrued and, in the present case, this is an issue as the relevant period did not begin until 23 September 2016, meaning that the first eight months that the report covers are of no assistance. Without anything to guide me, it is not possible to determine precisely what amount of this turnover is relevant.

26. In addition to the above, there is no breakdown of what goods this evidence is said to cover. That being said, the evidence does include a number of printouts of the opponent's online store that shows the offering of different types of goods. Some of these printouts are from outside the relevant period but, from those within it, I note the offering of goods such as jackets, hoodies, t-shirts and caps.[7] In addition, further printouts have been provided showing merchandise goods for sale between 29 January 2017 and 19 April 2021[8] which show board games, caps, key rings, pins, t-shirts, BBQ aprons, plush toys, toys (including Funko Pop figurines), drawstring bags, lanyards, hoodies, shorts, beanies, tote bags and artwork. While I appreciate that the opponent has sought to offer these goods to consumers, the issue remains in that there is no breakdown as to how these goods make up the turnover provided and, if so, what proportion can be attributed to the different products.

27. After 2019, the evidence sets out that the opponent sold merchandise goods via third-party merchandise companies such as 'LEGENDS HOSPITALITY' and 'FANATICS'. While these third-parties operate the sales, the opponent confirms that it is involved in the process throughout the entire operation including designing, marketing and promoting the stores. Further, all actions by these third-parties are with the express approval of the opponent. In respect of this evidence, I wish to point out at this stage that the opponent being involved in the marketing and promotion of its own online stores is not the same as offering such service to third

[7] See page 12 of BSL12
[8] BSL6

parties. Therefore, I do not consider that the opponent, by seeking to market and promote its own goods, is actually using its marks for the provision of such services to the point that it can be said to be attempting to create or preserve market share in relation to the same.

28. In respect of sales via these third-parties, the opponent has provided approximate turnover figures in respect of sales from 2019 to 2022. This evidence is confirmed as covering the goods I have discussed in paragraph 26 above, as well as desk mats, wallets, phone cases, drinkware, keychains, books and posters. I also note that these sales cover goods that are branded as 'BLIZZARD' or 'BLIZZARD ENTERTAINMENT'. This turnover is as follows:[9]

Year	**Fanatics (£)**
2019:	45,000
2020:	70,000
2021:	229,000
Total:	**344,000**

29. In addition to the above, the opponent has provided UK-turnover for specific franchise categories such as Blizzard Other, Diablo 3, Hearthstone and Overwatch, amongst others. This is broken down in the following way:

Franchise	**2019 (£)**	**2020 (£)**	**2021 (£)**
FR BLIZZARD OTHER	312	500	12,000
FR DIABLO 3	545	6,000	18,000
FR HEARTHSTONE	390	900	4,000
FR HEREOES OF THE STORM	60	200	800

[9] For the avoidance of doubt, the 2022 figures have been removed as they fall outside the relevant period. It is noted that all of the turnover for LEGENDS HOSPITALITY fell in 2022.

FR OVERWATCH	12000	2,5000	106,000
FR OVERWATCH LEAGUE	23000	20,000	1,500
FR STARCRAFT 2	230	550	5,000
FR WORLD OF WARCRAFT	8500	16,000	82,000
Grand Total	**45,000**	**70,000**	**229,000**

30. In considering the turnover provided, I note that the total figures (being £344,000) across both tables provided are identical. No explanation has been provided for this and it is not clear whether the opponent is intending to rely on the above tables as separate examples of use or whether the latter table is simply a breakdown of the first table. In light of the identity of the total figures and the lack of any explanation, I will treat the above tables as if they cover the same turnover, being £344,000 between 2019 and 2021.

31. I note that global sales data is provided for 1 January 2016 to 7 October 2019, being the period during which the opponent operated the BLIZZARD store itself.[10] The totals are only broken down to specific products, each of which has, for some reason, been redacted. That being said, I am able to determine the type of good sold. For example, the top selling product is a statue that accrued a revenue of $18,207,634.76 between 1 January 2016 and 7 October 2019. I have a number of issues with this evidence. The first of which is that the sales are global so it is not possible to extrapolate how much this relates to the UK or the EU. The second issue is that the figures are not broken down so cover the entirety of this period, some of which is prior to the relevant period. In respect of the other goods shown, I note that the majority of them are statues but they include other goods such as goody bags, hoodies, replica blades/swords, Funko Pop toys, LEGO building kits, a gaming keyboard, a plush toy and a gaming headset.

[10] BSL7

32. In terms of marketing efforts, the opponent has provided an example of what it refers to as an 'email blast' that it sends to subscribers of 'Battle.net' and to consumers who have an account with the above mentioned third-party retailers.[11] The email provided shows a range of different backpacks but the footer of the email refers to 2022, indicating that the email was sent outside of the relevant period. On this point, I appreciate that the opponent may have sent out similar email blasts during the relevant period. However, these are not provided so I am unable to determine what goods it was seeking to promote via these emails.

33. The evidence moves on to discuss its oversight of the Blizzard Gear store operations and how it is involved with the same. In short, the opponent is keen to stress that it is heavily involved in any and all aspects of the operation of these websites and the goods that are sold. In support of this, a copy of the license with LEGENDS HOSPITALITY is provided.[12] It is unclear to me whether this evidence was provided in order to attempt to demonstrate that the opponent is involved in the provision of a sort of business management service, being a service its second mark is registered for in class 35. If this was the opponent's intention, I fail to see how this evidence demonstrates the use of such a service. As was the case at paragraph 27 above, there is no evidence that the opponent has actually provided such services to the point that it can be said to be demonstrative of an attempt to create or preserve a market share in its marks for such services.

34. Press coverage is provided, mainly from Forbes and New York Times.[13] I note that this evidence contains information as to the readership of these publications in the UK. On this point, I note that an article from 11 April 2019 is provided which sets out that the New York Times has 10 million subscribers in the UK and that the UK is, after the USA, the New York Times' biggest market. In addition, there is an article provided from 24 July 2023 which sets out that Forbes is discussed as one

[11] BSL4
[12] BSL5
[13] BSL8

of the UK's most popular websites for business news. While the article is from after the relevant date, it is my understanding that Forbes is a popular publication with a substantial reach in the UK.

35. I do not intend to discuss each and every item of press coverage but note that it includes articles discussing the acquisition of Activision Blizzard by Microsoft in 2019. Additionally, the articles cover discussions with a founding artist of the opponent, discussions surrounding new games and new product releases such as LEGO in December 2018. I also note that there is an article dated 23 November 2017 from the Financial Times wherein a collaboration with Google is discussed regarding the use of AI to research and learn from millions of replays of previous StarCraft battles.

Assessment of the evidence

36. Before discussing the evidence filed, I consider it necessary to refer to the case of *Awareness Limited v Plymouth City Council,* Case BL O/236/13, wherein Mr Daniel Alexander Q.C. 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."

and further at paragraph 28:

"28. ..... I can understand the rationale for the evidence being as it was but suggest that, for the future, if a broad class, such as "tuition services", is sought to be defended on the basis of narrow use within the category (such as for classes of a particular kind) the evidence should not state that the mark has been used in relation to "tuition services" even by compendious reference to the trade mark specification. The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a broader category is nonetheless appropriate for the specification. Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted."

37. Further, I also refer to the case of *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd,* Case BL O/404/13*,* Mr Geoffrey Hobbs Q.C. 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."

38. Plainly, the opponent operates a large global business with a focus on video games. That being said, the evidence is not particularly focused on proving use for the same in the relevant territory. For example, there is no evidence as to video games sales or downloads in the UK or the EU prior to IP Completion Day (being 31 December 2020). Instead, all I have to go on in respect of video game use is that the global turnover for the opponent in the fourth quarter in 2021 was $387 million which was down 27% from the earning in the fourth quarter of 2020. While indicative of a very high turnover, it covers global use and without anything sufficiently solid to guide me, I am unable to determine how this relates to the

relevant territory. In respect of this point, I consider it reasonable to suggest that the opponent had access to download/sales figures for its games in the UK or the EU and that it should have filed the same, even if that meant the filing of approximate figures (in the event that confidentiality may have been an issue for the opponent). So while I appreciate that the opponent's main focus appears to be on video games, there is nothing to inform me how such a high turnover can be apportioned to the relevant territory. Without evidence on this point, I consider that any inference on this point would be unreasonable.

39. The above being said, the opponent's evidence does offer slightly more focus when it comes to the merchandising goods, though not much. This is on the basis that it has provided UK-specific turnover for a range of merchandise. I remind myself that the total turnover provided stands at approximately $[redacted] in respect of the opponent's own use and £344,000 in respect of the third-party use. On the face of it, this appears to be a respectable level of turnover. That being said, I have some difficulties with the evidence as the opponent has not provided any breakdown as to how this turnover relates to the different goods covered by the evidence.[14] I say this because the opponent has made reference to a wide range of merchandise goods (including jackets, hoodies, t-shirts, shorts, beanies, caps, BBQ aprons, statues, goody bags, replica swords, board games, key rings, pins, plush toys, toys, drawstring bags, lanyards, tote bags and artwork). Without any breakdown, it is not possible for me to accurately apportion sufficient levels of use to the different categories of goods sold. For example, I am unable to determine how much of the turnover can be attributed to board games or how much can be attributes to the various clothing goods covered.

40. In light of the cases of *Plymouth Life* and *Dosenbach* (both cited above) as well as section 100 of the Act (which is reproduced above), I am of the view that it is reasonable to expect the opponent to have provided a sufficient breakdown relating

[14] I appreciate that breakdowns have been provided for some specific goods sold (BSL7), however, this relates to global use so is of no real assistance to me in determining UK (or EU) use.

to the goods it sells, especially when considering the varying nature of the opponent's merchandising goods. Without such, I consider that I am entitled to be sceptical of the evidence before me. Taking this into account together with the fact that it has not been possible for me to accurately determine how the use shown in evidence can be attributed to the relevant goods, I am of the view that I have no alternative but to conclude that the evidence filed is just too insufficiently solid to allow for a finding that the opponent has genuinely used its marks on the various goods and services relied upon. In short, I am of the view that reaching a finding of genuine use would be the result of me taking a broad-brush approach by simply apportioning a sufficient level of use to the varying category of goods contained in the opponent's evidence. This, in my view, is an unreasonable inference in favour of the opponent which, in the circumstances, is inappropriate.

41. As a result of everything I have set out above and despite the size of the opponent's global operation, I find that the evidence filed is insufficient to prove that it has genuinely used its marks during the relevant period in the relevant territory for the goods and services relied upon. The consequence of this is that the opponent is unable to rely on its marks for the purpose of its section 5(2)(a), 5(2)(b) and 5(3) grounds. Therefore, all of these grounds fail in their entirety.

42. The above being said, I consider it necessary to discuss the fact that even if genuine use had been proven for the goods covered in the evidence, the section 5(2) and 5(3) grounds would still fail. I say this because in the event that genuine use was to have been found, it would cover the below goods only, all of which are, in my view, dissimilar to the holder's services. My reasons will follow.

Class 9: Computer programs, namely video games.

Class 16: Printed matter, namely posters and artwork.

Class 25: Clothing; hats and caps.

Class 28: Toys, namely plush toys and statues.

Section 5(2): legislation and case law

43. Section 5(2) of the Act reads as follows:

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

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

(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 or association with the earlier trade mark."

44. Section 5A of the Act states as follows:

"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."

45. 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 Office for Harmonization in the Internal Market*

(Trade Marks and Designs) ("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

46. The holder's services are listed at paragraph one above. As for the opponent, the goods for which I have permitted it to proceed on are set out at paragraph 42 above.

47. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

> "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".

48. 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.

49. In its submissions, the opponent focuses its comparison of the goods and services on its own class 35 services. This is on the basis that "the Opponent has shown genuine use of its Class 9, 16, 25, 28, 35, 41 and 42 goods and services". While this is noted, the present decision only proceeds on the basis that use has been shown for goods in class 9, 16, 25 and 28. Therefore, the submissions in respect of the opponent's class 35 services are not applicable here. This leaves the holder's class 35 and 36 services to be compared with the goods I have listed at paragraph 42 above. In considering these, I am of the view that, plainly, the holder's services all differ in nature, method of use, purpose and trade channels when compared with the goods that remain in the opponent's specifications. Further, the

goods and services are in no way complementary and neither are they in competition with one another. Of course, I accept that users of the various goods in the opponent's specifications may also use the holder's services. However, this alone is not sufficient to warrant a finding that these goods and services are similar to any degree. Lastly, applying the comments of Mr Iain Purvis K.C., sitting as deputy High Court judge, at paragraph 24 of the case of *Unicorn Studio Inc v Veronese* [2024] EWHC 1098 (Ch), I am of the view that upon taking a step back and considering the actual terms before me, a finding of similarity between the above services and the opponent's goods is non-sensical. As a result, I find that the opponent's goods are dissimilar to the holder's services.

50. In order for there to be a likelihood of confusion under section 5(2)(a) or 5(2)(b) of the Act, a level of similarity between the goods and services is required.[15] This applies regardless of any identity or similarity between the marks. Therefore, in light of my above findings, I conclude that even if I was wrong to find no genuine use and that the opposition should proceed on the basis that there has been some genuine use, the section 5(2)(a) and 5(2)(b) grounds of opposition fail in any event.

Section 5(3)

51. Section 5(3) of the Act states:

> "5(3) A trade mark which –
>
> is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be

[15] See paragraph 49 of *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA

detrimental to, the distinctive character or repute of the earlier trade mark."

52. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors,* Case 252/07, *Intel,* Case C-408/01, *Adidas-Salomon,* Case C-487/07, *L'Oreal v Bellure,* Case C-323/09, *Marks and Spencer v Interflora,* Case C383/12P, *Environmental Manufacturing LLP v OHIM.* The law appears to be as follows:

(a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; General Motors, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; General Motors, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; Adidas Salomon, paragraph 29 and Intel, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; Intel, paragraph 42

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; Intel, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; Intel, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; Intel, paragraphs 76 and 77 and Environmental Manufacturing, paragraph 34.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; Intel, paragraph 74.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; L'Oreal v Bellure NV, paragraph 40.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the holder of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure).

53. Under the present ground, the opponent relies on the same marks and goods and services as it did under the section 5(2)(a) and 5(2)(b) grounds. Proof of use applies equally to section 5(3) grounds as it does to 5(2)(a) and 5(2)(b) meaning that my primary finding above means that this ground automatically fails as the opponent has failed to demonstrate that it has genuinely used its mark. That being said, I have proceeded to this point of my decision on the basis that genuine use was demonstrated for some goods and will consider those here. In this scenario, the opposition proceeds in respect of the following goods:

Class 9: Computer programs, namely video games.

Class 16: Printed matter, namely posters and artwork.

Class 25: Clothing; hats and caps.

Class 28: Toys, namely plush toys and statues.

54. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that the marks are similar. Secondly, the opponent must show that its marks have achieved a level of knowledge/reputation amongst a significant part of the public throughout the relevant territory. Thirdly, it must be established that the level of reputation and the similarities between the parties' marks will cause the public to make a link between them. Finally, assuming the first three conditions have been met, section 5(3) requires that one or more of the types of damage will occur. It is unnecessary for the purposes of section 5(3) that the goods or services be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

Reputation

55. I have assessed the opponent's evidence of use at paragraphs 22 to 35 above. I do not intend to repeat this evidence in full here but remind myself that the only sufficiently solid evidence I have to demonstrate a level of use is the opponent's UK-turnover that accrued from its sale of various merchandise goods. This turnover stands at approximately $[redacted] in respect of the opponent's own use and £344,000 in respect of third party use. While this is noted, I cannot ignore the various issues that I have discussed at paragraphs 38 to 41 above. On this point, I refer, particularly, to the complete lack of breakdown in how this turnover relates to the goods relied upon. Even though I have proceeded to this point of my decision on the basis that genuine use was shown, this does not mean that I must automatically accept that there exists a reputation. In saying this, I remind myself that the test for proving reputation is significantly more onerous than that for proof of use.[16] In the present case, I am of the view that the evidence filed, even if it were suitable to prove genuine use, does not cross the threshold for proving that a significant part of the relevant public is aware of the opponent's marks. I say this because, even at its best case, turnover of $[redacted] plus £344,000 is not representative of a strong level of use and neither is it reflective of a longstanding period of use (on the basis that it only covers use from 2016 to the relevant date, being approximately five years in total).

56. Even if I am wrong in the above and that the opponent's marks did enjoy a reputation, it would, on the basis of the evidence before, be relatively weak in strength and would not be sufficient to give rise to the existence of a link between the marks. My reasons follow.

[16] A finding of genuine use only requires a sufficient level of use (as per the case of *easyGroup*, cited above, this need not be quantitively significant) whereas a finding of a reputation requires that the marks relied upon are known by a significant part of the relevant public in the relevant territory.

Link

57. As noted above, my assessment of whether the public will make the required mental 'link' between the marks must take account of all relevant factors. The factors identified in *Intel* are:

The degree of similarity between the conflicting marks.

58. The IR is, plainly, identical to the opponent's first mark. As for a comparison with the opponent's second mark, I note that the marks share the word 'BLIZZARD' but differ in the use of stylisation, typeface and the word 'ENTERTAINMENT' in the opponent's second mark. Despite these additional points, the word' BLIZZARD' remains the dominant element of the opponent's second mark and its shared use in the IR is, in my view, sufficient to give rise to a finding that the marks are highly similar.

The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public.

59. For the same reasons discussed at paragraph 49 above, the goods and services at issue are dissimilar. While I appreciate that some users of the opponent's goods will use the services of the holder, this overlap is somewhat fleeting on the basis that the user bases for the parties' goods and services are so broad.

The strength of the earlier mark's reputation.

60. The opponent's marks enjoy a reputation that is only relatively weak in strength.

The degree of the earlier mark's distinctive character, whether inherent or acquired through use.

61. While 'BLIZZARD' (which dominates both of the opponent's marks) is not descriptive or allusive to the goods relied upon, it is an ordinary dictionary word and, therefore, enjoys only a medium degree of distinctiveness. As this forms the sole element of the opponent's first mark, I conclude that this mark enjoys a medium degree of distinctiveness. In respect of the opponent's second mark, I do not consider that the stylisation of the mark nor the word 'ENTERTAINMENT' will do anything to raise the distinctiveness of the mark beyond that created by the word 'BLIZZARD'.

62. In terms of an enhanced degree of distinctiveness, I remind myself that I have proceeded on the basis that there does exist some reputation in the opponent's marks, albeit a relatively weak one. In such circumstances, I am of the view that while the evidence may be said to point to some enhancing of the distinctive character of the marks, it would only be to a very slight degree. While this may be the case, I do not consider that this slight enhancement is sufficient to take the level of distinctiveness of the marks beyond the inherent level, which is medium.

Whether there is a likelihood of confusion

63. While confusion under section 5(3) grounds can be found for dissimilar goods and services, this is only likely to occur where the reputation of the earlier marks is so strong that confusion is inevitable. This is not the case here. The reputation is relatively weak and the clear distinction between the goods and services at issue is such that consumers will not be confused as to the origin of the holder's services.

Conclusion on link

64. Taking all of the above factors into account, I find that there exists no link between the marks at issue. In short, the reputation and distinctiveness of the opponent's mark has not been demonstrated to be at a level that can overcome the distance between the goods and services at issue. I say this whilst bearing in mind that some of the users of the opponent's goods will also seek the holder's services. However, even where that occurs, I do not consider that the members of the relevant public, even being aware of the opponent's mark, would be caused to wonder if the opponent had expanded its offerings so as to provide a range of financial or business management services. Again, the goods and services are just too disparate for such a connection to be made.

65. As a result of what I have said above, the section 5(3) ground fails.

CONCLUSION

66. The opposition fails in its entirety and the IR will, subject to any successful appeal of my decision, be granted protection in the UK for all of the services applied for.

COSTS

67. The holder has been successful and it is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the holder the sum of £1,500 as a contribution towards its costs. The sum is calculated as follows:

Considering a notice of opposition and preparing a counterstatement:	£300

Considering the opponent's evidence and filing its own evidence:	£800
Filing written submissions in lieu:	£400
Total:	**£1,500**

68. I hereby order Blizzard Entertainment, Inc to pay Ava Labs, Inc the sum of £1,500. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 30th day of September 2025

A COOPER
For the Registrar