

O/0958/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003858399

BY CREATIVE MOBILE OU

TO REGISTER:

CM GAMES

AS A TRADE MARK IN CLASSES 9 & 41

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 441167 BY

CHEETAH MOBILE SINGAPORE PTE. LTD.

BACKGROUND AND PLEADINGS

1. On 12 December 2022, Creative Mobile OU (“the applicant”) applied to register the trade mark on the cover page of this decision in the UK (“the applicant’s mark”). The applicant’s mark was published for opposition purposes on 3 March 2023 and registration is sought for the following goods and services:

Class 9: Game software; downloadable game software; downloadable game related software applications; video game programs; electronic game programs; virtual reality game software; downloadable electronic game programs; interactive computer game programs; electronic game software for wireless devices; computer application software for mobile phones; computer game software for use on mobile devices; interactive game software.

Class 41: Entertainment services, namely, providing on-line computer games; providing interactive multi-player computer games via the internet and electronic communication networks; online game services through mobile devices; interactive computer game services; provision of entertainment information via the internet; providing information on-line relating to computer games and computer enhancements for games; organization of electronic game competitions; organization of electronic sports competitions; computer and video game amusement services; video game services; video game entertainment services; video entertainment services; provision of non-downloadable videos.

2. The applicant’s mark is derived from two earlier trade marks registered in the United States of America under numbers 97635235 and 97635242, both of which have the same filing date of 17 October 2022. As such, the applicant’s mark has a priority date of 17 October 2022.
3. On 5 June 2023, the applicant’s mark was opposed by CHEETAH MOBILE SINGAPORE PTE. LTD. (“the opponent”). The opposition is brought under section

5(2)(b) of the Trade Marks Act 1994 (“the Act”) and is reliant upon the following trade mark:



UK registration no. 3443589

Filing date 12 November 2019; registration date 9 August 2020

Relying on all goods and services, being those set out in the Annex of this decision. (“the opponent’s mark”).

4. The opponent argues that in view of the high degree of similarity between the marks at issue and the identical or at least similar goods and services, there exists a likelihood of confusion on the part of the public, which includes a likelihood of association.
5. The applicant filed a counterstatement wherein it denied the claims against it.
6. The opponent is represented by Boulton Wade Tennant LLP and the applicant is represented by Trademarkit LLP. Only the opponent filed evidence. No hearing was requested and neither party filed written submissions in lieu. This decision is taken following a careful consideration of the papers.
7. 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

8. The opponent’s evidence came in the form of the witness statement of Laura Kusserow dated 13 November 2023. Ms Kusserow is a Trade Mark Assistant at

the opponent's representative firm and is, therefore, duly authorised to file evidence on its behalf. Ms Kusserow's statement is accompanied by two exhibits, being those labelled L XK01 and L XK02.

9. I note that L XK01 and L XK02 are documents from proceedings between the parties before the Trade Mark Trial and Appeal Board of the United States Patent and Trade Mark Office. The documents are labelled as 'Interrogatories' and 'Supplemental Interrogatories'. In these US proceedings, Ms Kusserow explains that the applicant in these proceedings is acting as 'the opposer' and that the opponent is acting as 'the applicant'. The marks subject to the US proceedings are confirmed as being the same as those at issue here,¹ so too are the goods and services.

10. Ms Kusserow sets out that the applicant is, in the US proceedings, arguing that the marks at issue are similar and that the goods and services are overlapping, identical in part, similar or related. Further, the applicant argues, in the US proceedings, that the parties share the same target consumers and channels of trade.

11. The evidence is noted but I am of the view that it is of no assistance here. In short, the applicant's adopted position in another jurisdiction is of no relevance to proceedings in the UK. I appreciate that the opposing arguments may appear contradictory but the comments of the applicant in the US proceedings are not capable of being deemed as submissions or concessions in proceedings in a separate jurisdiction. Instead, I must proceed on the basis of the pleadings I have before me which, as above, include a series of denials from the applicant in respect of the claims against it. I must, therefore, proceed to consider my decision based on ordinary multifactorial assessments that govern proceedings before the Tribunal. The principles and approaches to each assessment will be set out where necessary below. For the avoidance of doubt, I will say no more about the US proceedings and the evidence filed by the opponent.

¹ Though I do note that an additional mark is present in the US proceedings that is not at issue here.

DECISION

Section 5(2)(b): legislation and case law

12. Section 5(2)(b) of the Act reads 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 or association with the earlier trade mark.”

13. 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.”

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.

15. The opponent's mark qualifies as an earlier trade mark under the above provisions. As the opponent's mark had not completed its registration process more than five years before the priority date of the applicant's mark, it is not subject to proof of use pursuant to section 6A of the Act. Consequently, the opponent may rely on the goods and services for which its mark is registered.
16. 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 the goods and services

17. The applicant's goods and services are set out at paragraph 1 above whereas the opponent's goods and services are set out in the Annex of this decision.

18. 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 Court of Justice of the European Union ("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”.

19. 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.

20. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court stated 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 für 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.”

Class 9

Game software; downloadable game software; downloadable game related software applications; video game programs; electronic game programs; virtual reality game software; downloadable electronic game programs; interactive computer game programs; electronic game software for wireless devices; computer application software for mobile phones; computer game software for use on mobile devices; interactive game software.

21. All of the above terms cover different types of software for computer games. I note that the opponent’s specification includes the term “computer game software”. This is sufficiently broad enough to cover a wide range of computer game software. In my view, the reference to ‘computer game’ will not be read as being games exclusively reserved for use on computers. Instead, I consider that the term ‘computer games’ is commonly used when referring to games played on any electronic device or system, regardless of whether they are technically *computers* or not. As a result, I consider that the opponent’s term covers games that are played on video games consoles, virtual reality devices, mobile phones or any other electronic device. As a result, the above terms of the applicant all fall within the opponent’s term and, therefore, I find they are identical under the principle outlined in *Meric*.

Class 41

Entertainment services, namely, providing on-line computer games; providing interactive multi-player computer games via the internet and electronic communication networks; online game services through mobile devices; interactive computer game services; computer and video game amusement services; video game services; video game entertainment services.

22. While the above terms all differ in nature and method of use with the opponent's term of "computer game software", I am of the view that there is a level of similarity between them. I say this because the users of the above terms will be the same as the users of the opponent's goods, namely members of the general public who play computer games. Additionally, while the goods and services are not accessed in the same way, their purposes will be to provide entertainment to the user via video games. I also consider that a provider of computer game software in class 9 is also likely to provide on-line computer games and other forms of computer game services. As such, there is an overlap in trade channels. Lastly, I consider that there is a degree of complementarity between the goods and services. I say this because a user accessing the services of the applicant is likely to do so via computer game software. As far as I understand it, it is common in the trade for online computer game services to be in-game features that are accessed via the game software itself. Therefore, the goods are clearly important to the services. Additionally, I consider that the need to access the computer software in order to access the services is such that consumers will believe the goods and services to be the responsibility of the same undertaking.² Taking all of this into account, I am of the view that these goods and services are similar to a medium degree.

Provision of entertainment information via the internet; providing information on-line relating to computer games and computer enhancements for games.

23. While the opponent's specification does not include any services in class 41, I consider that the above terms are capable of being similar to the opponent's term of "computer game software". The goods and services are plainly different in their natures and method of use. Further, their purposes are not the same as the services aim to provide information whereas the opponent's goods do not. As for the points of similarity, I am of the view that the user of computer games is also likely to seek the provision of entertainment information. Therefore, these goods and services overlap in user. Further, it is my understanding that it is common for producers of video game software to also provide information relating to those

² *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

games via online sources such as FAQs or walkthroughs provided on websites. As a result, there is an overlap in trade channels between these goods and services.

24. Both of the above terms of the applicant either expressly cover information regarding computer enhancements or are broad enough to cover the same. It is my view that this sort of information is important to the computer games themselves. I say this because, as is commonly the case in the video game market, computer games are constantly being updated and patched to fix bugs and errors or to introduce new items into the game such as weapons, skins or the provision of additional maps. I consider these types of releases are the types of 'enhancements' covered by the above terms. When new patches or downloadable content important to the game is released, the producer will commonly provide information as to the patch/content online. As such, I consider that the provision of this information is important to the game itself. In this scenario, the relationship between the game itself and the provision of information service is such that consumers will consider that the information originates from the producer of the game. As a result, I consider that there is a degree of complementarity between these goods and services.

25. Taking all of the above into account, I consider that these goods and services are similar to between a low and medium degree. Even if my assessment as to complementarity in the preceding paragraph is incorrect, the goods and services will, as a result of overlapping user and trade channels, still be similar, albeit to a low degree.

Organization of electronic game competitions; organization of electronic sports competitions.

26. As far as I am aware, e-sports (being computer game competitions) are becoming increasingly popular in the video game trade. As a result, I consider that the above services are those that are often provided by producers of video games. Therefore, I consider that there is an overlap in trade channels between the above services and "computer game software" in the opponent's specification. While the user may differ in that a user of a computer game is not likely to seek the organisational

services of the applicant, they are likely to be the end consumer in that they will likely attend, watch or participate in such events. In respect of complementarity, it is my understanding that when a computer game competition is organised, it is focused solely on one game, be that a certain first-person shooter or a sport game. Therefore, those games are, plainly, important to the services themselves. In my view, the user of the goods and the end consumer watching the event is likely to believe that the organisation of the event was undertaken by the producer of the computer game itself. As a result, I consider that there is a degree of complementarity between these goods and services. Taking all of the above into account, I am of the view that these goods and services are similar to between a low and medium degree.

Video entertainment services; provision of non-downloadable videos.

27. In comparing the above terms with the opponent's "computer game software", I am of the view that they overlap in user and trade channels. However, because the user targeted by both the goods and services will be members of the general public at large, I consider that any overlap here is limited.³ As for trade channels, I appreciate that computer game software producers may release video trailers or gameplay videos, however, they will not necessarily provide the video entertainment services themselves. Instead, they are likely to upload them to social media or video streaming platforms. Therefore, I consider any overlap in trade channels is limited. The goods and services clearly differ in nature, method of use and purpose. Further, the goods and services are not in competition and neither are they complementary to one another. Overall, I do not consider that the nature of the aforementioned overlaps in user and trade channels are sufficient to give rise to a finding that there is any sufficient degree of similarity between them. As a result, I find that these goods and services are dissimilar.

28. Where there is no similarity of goods or services, there can be no likelihood of confusion under section 5(2)(b) grounds.⁴ As a result, my findings above mean that

³ I say this because the user base is so large that, inevitably, there will always be a degree of overlap between any goods/services selected by the general public at large.

⁴ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

the opposition fails in respect of the following services, being those that I have found dissimilar:

Class 41: Video entertainment services; provision of non-downloadable videos.

The average consumer and the nature of the purchasing act

29. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods and services. I must then decide the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. 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.”

30. The majority of the goods and services at issue will be selected by members of the general public. Some services, however, will be selected by business users looking to organise events. The goods and services aimed at the general public will be available via general retailers, specialist game retailers or from the producer directly. Further, these goods and services are likely to also be available online. In any of these scenarios, the consumer will view the goods on shelves or via images on webpages. As a result, the selection of these goods and services will be primarily visual, though I do not discount an aural component playing a role in the form of word of mouth recommendations and advice from sales assistants. The services aimed at business users are likely to be sought from the provider directly

and the selection will take place after the user has considered a list of services (either on a pamphlet, brochure or online). Even when selecting these services visually, the user is likely to engage in discussions with sales assistants meaning that I consider that aural component will play an equal role.

31. The frequency of selection and cost of the goods and services will vary. For example, users will likely buy computer games or use online gaming services on a relatively frequent basis whereas users looking for organisational services are likely to seek them far less frequently. As for costs, I appreciate that computer games may be cheap or even free (such as those downloaded on mobile phones, for example), however for the most part, they will be reasonably priced. As for the services aimed at business users, these may cover those that are on the more expensive end of the scale, depending on the size of the event.

32. In respect of the level of attention paid, I am of the view that this will vary. For example, consumers will, when selecting video games, pay a medium degree of attention whilst giving consideration to various factors such as genre, graphics/gameplay features and reviews. That being said, there are some computer games (such as those downloaded on mobile phones) that are free and will, therefore, only attract a low degree of attention. As for the services selected by business users, I find that they are likely to be considered selections as the impact of the event will be important to these users' business. These consumers will, in my view, consider factors such as the proposed capacity of the event, venue/amenities, the health and safety record of the organiser and also testimonials from past customers. As a result, I find that business users will pay a relatively high degree of attention.

Comparison of the marks

33. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the


overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

34. 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.”

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

36. The respective trade marks are shown below:

The opponent's mark	The applicant's mark
	CM GAMES

Overall impression

37. The applicant's mark is a word only mark that consists of the letters 'CM' followed by the word 'GAMES'. Because the goods and services for which the applicant seeks registration are all related to video games or entertainment, I consider that 'GAMES' will play a lesser role, with 'CM' playing the stronger role. As for the opponent's mark, this is a figurative mark. I note that the applicant argues that

consumers may not even recognise the opponent's mark as the letters 'CM'. I agree that some may not and will, instead, view it as 'CNT' or simply a figurative device element, for example. That being said, I consider that there exists at least a significant proportion of consumers that will see it as the letters 'CM'. It is upon these consumers that I will focus my decision upon.⁵ In respect of the overall impression, I find that because consumers' eyes tend to focus on the parts of marks that can be read, the letters 'CM' will play the greater role. While the stylisation of those letters will not go overlooked, it will play a lesser role.

Visual comparison

38. Visually, the marks share the letters 'CM'. While I appreciate that word only marks (such as the applicant's) are protected for use in any standard typeface, I do not consider that this extends to the stylisation used in the opponent's mark. As a result, I find that the stylisation of the opponent's mark is a point of visual difference, regardless of the role the said stylisation plays in that mark. Further, the marks differ in the presence of the word 'GAMES'. While this plays a lesser role in the applicant's mark, it still acts as a point of visual difference. Taking all of this into account, I find that the marks are visually similar to a medium degree.

Aural comparison

39. Despite the descriptive nature of 'GAMES' in the applicant's mark, it will still be pronounced. I say this whilst bearing in mind the comments of Mr Phillip Harris, sitting as the Appointed Person, in the case of *Purity Hemp Company Improving Life as Nature Intended* (Case BL O/115/22) wherein he stated that the descriptiveness of an element does not render it aurally invisible. As a result, the pronunciation of the applicant's mark will consist of three syllables, being 'SEE-EMM-GAYMS'. As for the opponent's mark, this will consist of two syllables, being

⁵ Doing so represents the opponent's best case and this is an approach I am entitled to take as the case of *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41 suggests that if a significant proportion of consumers is confused then a court may properly find infringement. While this case was an infringement case, the principle applies equally to section 5(2)(b) oppositions. It follows that if these consumers are confused then I may find a likelihood of confusion. However, if I find that they will not be confused then it follows that the other consumers who view the mark differently will also not be confused on the basis that the marks, in this scenario, are clearly similar to a lesser degree.

'SEE-EMM'. Given that two of the three syllables in the applicant's marks are identical to the opponent's entire aural element and bearing in mind the role that 'GAMES' plays, I consider that the marks are aurally similar to a high degree.

Conceptual comparison

40. Conceptually, the letters 'CM' in either mark will have no obvious meaning to the consumer in the UK. UK consumers will simply see it as an initialism with no indication as to what the individual letters stand for. As this is the element that dominates the opponent's mark and because the stylisation used does not carry any concept, I find that this mark has no immediately graspable meaning. As for the applicant's mark, the addition of the word 'GAMES' will be understood as an ordinary dictionary word with a well-known meaning. In comparing the marks as wholes, I find that they are conceptually dissimilar owing to the difference created by the word 'GAMES'. However, I will say that the dominant element of the marks is conceptually neutral.

Distinctive character of the opponent's mark

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

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

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been

registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

42. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The opponent has not filed any evidence of use and, therefore, I have only the inherent position to consider.

43. In considering the distinctiveness of the opponent’s mark, I will first assess the letters ‘CM’. As above, these letters have no obvious meaning and, as such, they are not descriptive or allusive of any of the goods upon which this opposition proceeds. While such a finding may ordinarily result in a finding of a higher level of distinctiveness, I do not consider that is the case here. This is on the basis that the use of a two-letter initialism is not particularly remarkable from a trade mark perspective and, on the contrary, I consider that consumers are well accustomed to seeing two-letter marks in the marketplace. As a result, I find that the letters ‘CM’ carry a slightly less than medium degree of distinctive character. As for the stylisation used, I do not consider it to be an overly remarkable stylisation. That being said, I do consider that it is unique enough so as to contribute to the distinctive character of the mark, though not considerably so. Overall, I consider that when the elements of the mark are taken as a whole, it will enjoy a medium degree of inherent distinctive character.

Likelihood of confusion

44. 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. 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. 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. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's mark, the average consumer for the goods and 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 they have retained in their minds.

45. I have found the goods and services at issue to be identical or similar to between a low and medium degree (though I have made an alternative finding in respect of some of the goods, namely that they are similar to a low degree). The average consumer base is formed of members of the general public and business users. These consumers will, respectively, select the goods and services via primarily visual means (although I do not discount an aural component) or via both visual and aural means. I have concluded that the level of attention paid will range from between a low to a relatively high degree. I have found the marks at issue to be visually similar to a medium degree, aurally similar to a high degree and conceptually dissimilar (though I appreciate that the dominant elements of the marks are conceptually neutral). I have found the opponent's mark to enjoy a medium degree of inherent distinctive character.

46. Taking all of these factors into account and particularly bearing in mind the principle of imperfect recollection, I consider that the parties' marks will be misremembered or inaccurately recalled for one another. I say this because when the consumer

attempts to recall the marks, they are likely to focus their recollection on the letters 'CM', being the dominant element of both marks. As such, they will forget which mark consisted of the descriptive word 'GAMES' and which was the stylised mark. On this point, I remind myself that case law sets out that consumers tend to focus on beginnings of marks,⁶ which is where the common element of these marks lies. For the avoidance of doubt, I consider that this applies even though I have found that the letters 'CM' are only distinctive to a slightly below medium degree. I say this because such a finding is not one that could be said to support an argument that consumers would consider the shared use of 'CM' on identical or similar goods to be coincidental. Consequently, I consider that there exists a likelihood of direct confusion between the marks at issue. Given that the recollection of the consumer hinges on the same letters in both marks, being 'CM', I find that the confusion applies in circumstances where the consumer views the marks on goods and services that are only similar to between a low and medium degree and where the average consumer pays a relatively high degree of attention. For the avoidance of doubt, I am of the view that this applies also in respect of my alternative finding of similarity to a low degree for some services.

47. For the sake of completeness, I will proceed to consider whether there exists a likelihood of indirect confusion. In doing so, I remind myself of the case of *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, wherein Mr Iain Purvis Q.C., 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

⁶ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

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)”.

48. While the above examples in *L.A. Sugar* are noted, they are not intended to be treated as an exhaustive list of the only instances wherein indirect confusion occurs.

49. In the event that the consumer notices the differences between the marks, I consider it likely that they will believe that the marks originate from the same or economically linked undertakings. It is my view that the addition of the word ‘GAMES’ will simply be seen as an indicator of a sub-brand of the ‘CM’ brand that focuses on games. As for the stylisation of the letters ‘CM’ in the opponent’s mark, I consider that this will simply be viewed as an alternative stylisation used by the same undertaking in different contexts. For example, the word only mark may be

considered that which is used in promotional materials whereas the stylised letters are those that are used on product packaging. Consequently, I consider that there exists a likelihood of confusion between the marks. In making this finding, I consider that, regardless of the stylisation used, consumers will identify the indicator of origin for both marks as 'CM'. As a result, the identical reference to 'CM' (notwithstanding the stylisation used by the opponent) is such that my finding of confusion will apply in circumstances where the consumer views the marks on goods and services that are only similar to between a low and medium degree and where the average consumer pays a relatively high degree of attention. Again, for the avoidance of doubt I will say that this applies also in respect of my alternative finding of similarity to a low degree for some services.

CONCLUSION

50. The opposition succeeds against all of those goods and services that I have found to be identical or similar. Therefore, subject to any successful appeal, the applicant's mark is refused registration for the following goods and services:

Class 9: Game software; downloadable game software; downloadable game related software applications; video game programs; electronic game programs; virtual reality game software; downloadable electronic game programs; interactive computer game programs; electronic game software for wireless devices; computer application software for mobile phones; computer game software for use on mobile devices; interactive game software.

Class 41: Entertainment services, namely, providing on-line computer games; providing interactive multi-player computer games via the internet and electronic communication networks; online game services through mobile devices; interactive computer game services; provision of entertainment information via the internet; providing information on-line relating to computer games and computer enhancements for games; organization of electronic game competitions; organization of electronic sports

competitions; computer and video game amusement services;
video game services; video game entertainment services;

51. However, given that I have found some services to be dissimilar, the applicant's mark may, subject to any successful appeal against my decision, proceed to registration for the following services:

Class 41: Video entertainment services; provision of non-downloadable videos.

COSTS

52. As the opponent has enjoyed the greater degree of success, I consider that it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. Given that the evidence filed by the opponent was of no assistance, I do not consider it appropriate to make a costs award in respect of the same. Further, while I appreciate that the applicant successfully defended two terms, I do not consider this sufficient to warrant a reduction of the opponent's costs award.

53. In the circumstances, I hereby award the opponent the sum of £350 as a contribution towards its costs. The sum is calculated as follows:

Preparing the notice of opposition and considering the counterstatement:	£250
Official fees:	£100
Total:	£350

54. I hereby order Creative Mobile OU to pay CHEETAH MOBILE SINGAPORE PTE. LTD. the sum of £350. 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 8th day of October 2024

A COOPER

For the Registrar

ANNEX

Class 9

Computer security and privacy software; computer antivirus software; utilities software; computer software for the creation of firewall; computer software for use in browsing the Internet; computer software for system cleaning and optimization; computer software for developing and operating cloud computer networks and applications; computer software platforms for cloud computing networks and applications for use in database management and electronic storage of data; computer software used for providing search engine services; computer software for use in testing and evaluating the function of mobile devices and computers; computer game software; computer hardware; robot electronic accessories, namely, microphones, audio speakers, cameras, video cameras, electric wires, charging cables and battery charging devices, power supply connectors, batteries, power supply adaptors, computer hardware, computer networking hardware, mobile device cradles, computer printers, multimedia projectors, computer screens, computer peripherals therefor, structural parts for personal robot external appearance customization, and carrying cases, holders, and protective cases all specially adapted for holding the aforementioned robot electronic accessories; robotic software and hardware, namely, robot operating system programs, software for interfacing with a robot, actuator interfaces, environmental mapping software, navigation software, software for simulating computer-generated personalities, speech recognition, and voice synthesis software, remote modeling and feedback software, software for configuring and maintaining robots; air analysis apparatus; Audio and video transmitters and receivers; Automatic cash register; Automatic teller machine; Battery chargers; Batteries and chargers for robots for personal, educational and hobby use; Battery chargers for vacuum cleaners, automatic floor cleaning machines, home outdoor and lawn care maintenance and industrial robots; Cable television installations in the nature of cable television transmitters; Cameras; Cases for smartphones; Computer chatbot software for simulating conversations; Computer hardware and software for use in multitasking and network programming for motion control of robots; Computer memory devices; Computer software development programs for developing software for robots and robotic enhanced products; Computer software for controlling a smart lamp; Computer software for controlling robots for personal, educational and hobby use; Computer

software for controlling the movements of robots; Computer software for home video game consoles; Computers; Document printers for computer; Downloadable communication equipment namely, wireless communication devices for voice, data or image transmission; Downloadable computer application software for providing language interpretation and translation; Downloadable computer software and computer application software for interfacing personal robots with other electronic devices, computers, robots, databases, networks, and online and mobile services; Downloadable electronic books in the field of artificial intelligence and robotics; Downloadable image files; Downloadable music files; Electrical sockets for use with artificial intelligence; Electronic access control systems for interlocking doors; Electronic book readers; Electronic doorbell for use with artificial intelligence; Electronic interpreter in the nature of hand-held electronic dictionaries; Electronic pocket translators; Electronic publications; Electronic scale being a scale featuring body mass analysis and measurement; Electric theft prevention installations, namely theft alarms; Electronic translation machines and electronic interpreter apparatus and their parts; Electronically encoded identity wristbands; Entertainment robots for personal or hobby use; Face recognition equipment in the nature of cameras and facial recognition and imaging processing software; Humanoid robots with artificial intelligence; Laboratory robots; Mobile computers and communication devices for voice, data, or image transmission for use with robots; Mobile robotic system comprised primarily of robots, operating software, cameras, communication systems, sensors, computers for personal human use; Multilingual electronic hand-held translators; Non-medical surveillance devices with artificial intelligence in the nature of security cameras; Personal digital assistants; Personal robots for video and audio monitoring, surveillance, and communication; Personal robots, namely, interactive social and emotive robots for personal use that provide information, entertainment, education, and communications capabilities; Remote control devices for controlling robots through a wireless communication device connection, wireless local area networking connection, and via the internet; Remote controls for vacuum cleaners, automatic floor cleaning machines, and industrial robots; Replacement parts and accessories in the nature of configuring and maintaining of robots for personal, educational and hobby use; Robotic software and hardware for controlling beverage and snack vending machines; Robots for personal, educational, or hobby use; Safety and surveillance robot surveillance devices for use with artificial intelligence, namely,

electronic security tags and labels, acoustic tags, magnetic tags; Scales with body mass analyzers; Security surveillance robots; Smart bracelet in the nature of wearable activity trackers; Smartphones; Software and sensors that allow a robotic cleaning device to sense and respond to environmental inputs; Software for configuring and maintaining robots all for use in the fields of artificial intelligence, robotics, natural language processors, algorithms, machine learning technology, case based reasoning technology; Software for translators; Speakers for use with artificial intelligence; Teaching robots; Television monitors; Television transmitters; Video cameras; Voice recognition machines and software therefor; Voice synthesizer and software therefore; Wearable computers in the nature of smartwatches and smart glasses; Wearable electronic devices, namely, wearable cameras; Wearable video display monitors; Weighing equipment, namely, scales and balances; Wired and wireless headset for smartphones.

Class 35

Advertising and marketing services; online advertising services for others; business management concerning home pages; operation and management of a communication network system; operation and management of a computer system; consultation services in the field of advertising via the Internet; business management analysis or business consultancy; marketing research or analysis; providing information concerning commercial sales; compilation of information into computer databases; providing business assistance to others in the operation of data processing apparatus namely, computers and office machinery; retail services or wholesale services for communication machinery and apparatus; Rental of vending machines.

Class 42

Cloud computing; electronic data storage; computer software design, computer programming, and maintenance of computer software; computer virus protection service; computer security services; computer software consulting; providing search engines services; consulting services in the field of cloud computing; hosting computer databases; hosting web sites; providing of computer programs by application service provider; rental of computer programs by application service provider; hosting on-line platforms; troubleshooting of computer hardware and software.