O/0021/26

TRADE MARKS ACT 1994

IN THE MATTER OF INTERNATIONAL REGISTRATION NO. WO0000001759792
IN THE NAME OF ARTSTORM CYPRUS LTD
FOR THE FOLLOWING TRADE MARK:

Modern Warfront

IN CLASSES 9 AND 41

AND

AN APPLICATION FOR A DECLARATION OF INVALIDITY
UNDER NO. CA000507378 BY
ACTIVISION PUBLISHING INC.

BACKGROUND AND PLEADINGS

1. The international registration shown on the cover page of this decision ("the proprietor's mark") was registered on 20 June 2023 in the name of Artstorm Cyprus Ltd. With effect from the same date, the proprietor designated the UK as a territory in which it sought to protect the contested mark pursuant to the Protocol to the Madrid Agreement. Protection in the UK was granted on 10 May 2024. The mark claims priority from 20 December 2022 from the trade mark 018813356, and the proprietor's mark stands registered for the following goods and services:

Class 9: Game software; virtual reality game software; computer game software; video game software; computer game software, downloadable; computer game software, recorded; video game programs; electronic publications; games software for use with video game consoles; software for consumer video game apparatus; software for arcade video game machines; game software for mobile phones; game software for tablets; game software for portable video game consoles; game software for portable computers; computer software platforms, recorded or downloadable; downloadable digital files related to computer games and video games authenticated by non-fungible tokens or other digital tokens based on blockchain technology; augmented reality game software; computer software programs for in-game resources, tokens and virtual currency for use in video games and online virtual worlds.

Class 41: Entertainment services; Game services provided online; Game services provided online from a computer network; Online game services through mobile devices; Providing an online computer game; Video game entertainment services; Virtual reality game entertainment services; Augmented reality game entertainment services; Providing online information in the field of computer games; Providing interactive multi-player computer games online; Providing online interactive computer games; Providing online

video games; Providing information in the field of entertainment; Providing information in the field of computer games and computer enhancements for games; Arranging online computer and video game competitions; Education and training services related to computer games and other online entertainment; Organization of entertainment events; Organization of exhibitions for entertainment purposes; Providing analytic information of game competitions.

2. On 23 May 2024, Activision Publishing Inc. ("the cancellation applicant") applied to have the proprietor's mark declared invalid under section 47(2)(a) and 5(2)(b) of the Trade Marks Act 1994 ("the Act"). Under section 5(2)(b) of the Act, the cancellation applicant relies upon the following trade mark:

MODERN WARFARE
UK registration no. UK00908785347[1]
Filing date 28 December 2009
Registration date 23 June 2010
Relying upon all goods for which the mark is registered, namely:

Class 9: Computer game software and related instruction manual in electronic format sold together as a unit; interactive video game programs; computer game discs; downloadable software for use in connection with computer games; video game controllers; night vision goggles.

Class 25: Clothing, hats, caps, t-shirts, jackets, loungewear, boxers, briefs, sleepwear, hoodies, headbands, wristbands, belts.

[1] Following the end of the transition period of the UK's withdrawal from the EU, all international (EU) trade mark designations registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and consequently, have the same legal status as if they had been applied for and registered under UK law). A 'comparable trade mark (IR)' retains the same designation date (filing date), priority date (if applicable) and registration date of the international (EU) trade mark designation.

Class 28: Toys, toy wristwatches, hand-held games with liquid crystal displays, action figures and accessories therefor; arcade games; coin-operated video games; electric action toys; handheld unit for playing electronic video games.

3. The cancellation applicant relies upon all goods for which the earlier mark is registered.

4. In bringing the application, the cancellation applicant claims that the marks are highly similar and that the goods and services are identical or highly similar to the goods of the earlier mark.

5. The cancellation applicant filed a counterstatement wherein it denied the claims against it and put the proprietor to proof of use.

6. The cancellation applicant is represented by FRKelly and the proprietor is represented by Harbottle & Lewis LLP. The cancellation applicant and the proprietor both filed evidence in chief, and the proprietor filed written submissions with their evidence. The cancellation applicant filed written submissions in reply. No hearing was requested; however, the cancellation applicant 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 AND SUBMISSIONS

8. The cancellation applicant filed its evidence in chief in the form of the witness statement of Page Robinson, Senior Director of Litigation and IP at the cancellation

applicant. The witness statement, dated 03 December 2024, is accompanied by corresponding exhibits 1-15.

9. The proprietor filed evidence in the form of the witness statement of Filippa Anne Evans of Harbottle & Lewis LLP (the proprietor's legal representative). The witness statement, dated 04 February 2025, is accompanied by exhibits FAE1 – FAE8.

10. The proprietor also filed written submissions in the evidence rounds, dated 04 February 2025.

11. The applicant filed written submissions in reply, dated 31 March 2025.

12. I do not intend to summarise the evidence or submissions any further at this stage. However, in reaching my conclusion, it should be noted that I have had careful consideration of all the evidence and submissions. I will refer to them throughout my decision where I deem it necessary to do so.

DECISION

13. Section 5(2)(b) has application in invalidation proceedings pursuant to section 47 of the Act. Section 47 reads as follows:

> "47. –
>
> […]
>
> (2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-
>
> (a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or
>
> (b) […]

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

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

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

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

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

(c) the use conditions are met.

(2B) The use conditions are met if –

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

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

(ii) within the period of 5 years ending with the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application where, at that date, the five year period within which the earlier trade mark should have been put to genuine use as provided in section 46(1)(a) has expired, or

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

(2C) For these purposes –

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

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

(2D)-(2DA) [Repealed]

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

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

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

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

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

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

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

(3) […]

(4) […]

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

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

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

Section 5(2)(b): legislation

14. 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."

15. By virtue of its earlier filing date, the trade mark upon which the applicant relies qualifies as an earlier trade mark pursuant to section 6 of the Act. As the earlier mark had completed its registration process more than 5 years before the date on which the application for a declaration of invalidity was filed, it is subject to the use provisions set out in section 47 above.

Proof of use

The law

16. As the Earlier Mark is a comparable mark, paragraph 8 of Part 1, Schedule 2A of the Act is also relevant. It reads:

"8.— Non-use as defence in infringement proceedings and revocation of registration of a comparable trade mark (EU)

(1) Sections 11A and 46 apply in relation to a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the period of five years referred to in sections 11A(3)(a) and 46(1)(a) or (b) (the "five-year period") has expired before [IP completion day]—

(a) the references in sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in sections 11A and 46 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 sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark, are to be treated as references to the corresponding EUTM; and

(b) the references in sections 11A and 46 to the United Kingdom include the European Union".

17. Section 100 of the Act is also relevant, which reads:

"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."

18. 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 I9223, 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 subcategory 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].”

19. As per section 47(2B) of the Act (cited above), the relevant periods for the present assessment are the five-year periods prior to the filing date of the contested

mark and the date of the application at issue. The relevant periods are, therefore, the first period of 5 years ending with the date of application for invalidity i.e. 24 May 2019 to 23 May 2024, and the second is the period of 5 years ending with the priority date of the proprietor's mark i.e. 21 December 2017 to 20 December 2022. My assessment of the evidence for proof of use will be directed to the evidence that relates to use between 21 December 2017 to 23 May 2024, but I will keep in mind the relevance of the two periods outlined.

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

Form of the mark

21. Before considering whether the cancellation applicant has made genuine use of the mark and, if so, for what goods, I shall deal with the question of the form of the mark. The cancellation applicant's registration can be seen below.

MODERN WARFARE

22. Alongside the use of the mark in the form of the word mark, the mark has also been demonstrated in the following forms:

[2] *Jumpman,* Case BL O/222/16

(Example 1)

(Example 2)

(Example 3)

(Example 4)

(Example 5)

(Example 6)

23. The proprietor submits that the mark 'Modern Warfare' will be perceived by consumers as merely a description of the series for which 'CALL OF DUTY' is an indication of origin. Specifically, the proprietor states that "CALL OF DUTY'- a name that has been used by the cancellation applicant for a number of years in relation to first person shoot games – that serves as the indication of origin, whereas MODERN

WARFARE merely designates the specific series and thereby concretises the games."[3]

24. . It is clear from the evidence that the cancellation applicant's primary branding is 'Call of Duty'. As such, the majority of the goods covered by the evidence before me include the 'Call of Duty' branding, as well as other brands such as Modern Warfare and Black Ops, for example. That being said, this in no way means that the cancellation applicant is not able to rely on its sub-brands, being the 'Modern warfare' mark relied upon here. On this point, I refer to the case of *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12 wherein the CJEU set out that so long as a mark continues to be perceived as indicative of the origin of the product at issue, it is permissible for a mark to be used as part of another mark and still be considered use of the mark as registered. In the present case, while other marks may be present, such as Call of Duty, the 'Modern Warfare' brand is still indicative of the origin of the goods shown in evidence.

25. Taking the above into account, I will start by assessing the variation in example 1. In example 1, the mark 'MODERN WARFARE' appears in white with a Union Jack contained in the letter 'D' with the words 'Call of Duty' above the mark and the roman numeral for 3, being 'III'. They are all presented above the background of a soldier. The cancellation applicant's mark is a word-only mark that is registered in black; such a registration protects use of the mark in any colour: see *Specsavers International Healthcare Limited & Ors v Asda Stores Limited,*[4] paragraph 5, and *J.W. Spear & Sons Ltd v Zynga, Inc.*[5] The examples above frequently appear in one colour, often white, although they do appear in other colour iterations. In relation to 'Call of Duty', I bear in mind the discussion above; other than that, I consider that the numeral 'III' will be viewed as the third iteration of the computer game. Modern Warfare still maintains is independent role as an indication of origin, even if the 'III' is considered by the average consumer to be part of the mark by the average consumer. The image of a soldier will be viewed as a decorative part of the video game cover, as it is a computer game concerning warfare. The Union Jack will also be allusive of the patriotism associated

[3] Proprietor's submissions, paragraph 26
[4] [2014] EWCA Civ 1294,
[5] [2015] EWCA Civ 290, paragraph 47.

with military warfare. I do not consider that these additional elements of the mark alter the distinctive character of the mark as registered to the point that it would not be considered use of the mark as registered.[6] Therefore, the mark shown in example 1 is an acceptable variant of the cancellation applicant's mark.

26. I also consider that examples 2 and 3 are acceptable variants. It is my view that within these variants 'Modern Warfare' maintains an independent role, the addition of 'MW', which will be seen as a shortform of the mark, does not change the distinctive character of the mark. As discussed above in relation to example 1, the additional elements of the colour of the text, the presence of the text 'Call of Duty', the image of the soldier, I do not consider that these additional elements alter the distinctive character of the mark, for the reasons outlined in the paragraph above. Therefore, I consider these examples to be acceptable variants.

27. However, examples 5 and 6 above are not acceptable variants of the mark as registered. The distinctive character of the mark lies in the words 'MODERN WARFARE'. Appearing as MW and MWIII alters the distinctive character of the marks. Therefore, these variants are not acceptable.

Evidence of use

28. For use to be genuine, it must have been real commercial exploitation of the mark, in the course of trade, sufficient to create or maintain a market for the goods at issue in the relevant territory during the relevant five-year period. In making my assessment, I am required to consider all relevant factors, including:

- the scale and frequency of the use shown;
- the nature of the use shown;
- the goods for which use has been shown;
- the nature of those goods and the market(s) for them; and
- the geographical extent of the use shown.

[6] *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22

29. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.[7] I note that, as the cancellation applicant's mark is a comparable mark, it is possible for the opponent to rely on evidence of use in the EU as set out in Tribunal Practice Notice 2/2020. [8]

30. In its witness statement, the cancellation applicant states that it sells goods that fall within is specification, specifically "*computer game software and related instruction manual in electronic format sold together as a unit; interactive video game programs; computer game discs; downloadable software for use in connection with computer games"* in class 9 and "*night vision goggles; Clothing, hats, caps, t-shirts, jackets, loungewear, boxers, briefs, sleepwear, hoodies, headbands, wristbands, belts; toys, toy wristwatches, hand-held games with liquid crystal displays, action figures and accessories therefor; arcade games; coin-operated video games; electric action toys; handheld unit for playing electronic video games"* from classes 9, 25 and 28.[9]

31. The cancellation applicant provided evidence consisting of website extracts, social media extracts, news articles, awards and more. I note the following regarding the evidence:

a) The cancellation applicant provided evidence in the form of articles from third parties, being i) VGChartz dated 1 January 2020 entitled *"1st Place on UK charts",* Gamingroi dated 28 December entitled "*Call of Duty dominates UK Christmas sales",* ii) an undated fandom.com snapshot, iii) wholesgame snapshot taken 25 November 2024 entitled *"Top 10 best-selling video games in the UK in the Year 2019",* iv) Kitguru snapshot taken 25 November 2024 entitled *"Call of Duty Modern Warfare beats Black Ops 4 in first week sales".* In relation to the fandom.com snapshot, firstly, the article is undated, and secondly, it is my understanding that this is a Wikipedia page that I must treat with caution because, as far as I understand it, Wikipedia is a community-based

[7] *New York SHK Jeans GmbH & Co KG v OHIM*, T-415/09
[8]https://www.gov.uk/government/publications/tribunal-practice-notice-22020-end-of-transition-period-impact-on-tribunal-proceedings/tribunal-practice-notice-22020-end-of-transition-period-impact-on-tribunal-proceedings accessed 1/2/2022.
[9] Witness statement of Ms Robinson, paragraph 5-6

encyclopaedia that any user can contribute to, meaning that the content may be unverified. Despite this, the information demonstrated on that page is echoed in relation to the wholesgame article (about the Call of Duty Modern Warfare game).

These articles indicate that Call of Duty Modern Warfare was the second best-selling video game in the UK in 2019, selling just over 1.192 million copies at retail.[10] Call of Duty Modern Warfare was the fifth biggest (digital and physical) game of 2020, with 897,000 games sold during the year in the UK.[11] In 2022, 'Call of Duty: Modern Warfare 2' was the top video game (Digital and Physical) in October.[12] In 2023, 'Call of Duty: Modern Warfare 3' was the top-selling physical game week ending 11 November in the UK.[13] I note that one article comments on the success of the 'Modern Warfare 3' in the US; those articles are not relevant as they do not address genuine use in the UK or the EU. [14]

b) I note that the cancellation applicant has provided snapshots from its website, taken on 25 November 2024, demonstrating use of the mark (or an acceptable variant of the mark); although some of the goods do not display acceptable variants of the mark. However, any use I identify will be based on the evidence as a whole. Use of the mark is demonstrated on a skateboard deck, desk mat, jumper, shirt, and hat. I note that this is dated outside of the relevant period. The proprietor submits that any evidence dated after the relevant date in the cancellation action remains irrelevant. Whilst I appreciate that this evidence is out of the relevant period, I do not consider that it automatically means that the evidence is irrelevant. Rather, it casts light backwards on the position at the relevant date.[15]

[10] wholesgame snapshot taken 25 November 2024 entitled *"Top 10 best-selling video games in the UK in the Year 2019*"
[11] Exhibit 8
[12] 'Call of Duty: Modern Warfare 2 UK Launch sales are up 92% over Vanguard UK Monthly Charts' from GamesIndusry.biz dated 9 November 2022
[13] 'Call of Duty: Modern Warfare 3 Sales start strong despite poor reviews' from Gamerant dated 15 November 2023 and 'Call of Duty: Modern Warfare 3 launches at No.1. UK Boxed Charts from GamesIndustry.biz dated 13 November 2023.
[14] Exhibit 12, pages 73 to 83
[15] *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others,* [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16).

c) The cancellation applicant also provided evidence of advertising on social media pages, specifically Instagram[16] and YouTube.[17] The screenshots on the Call of Duty Instagram are undated, but they demonstrate 12.3 million followers and 2,300 posts. I note that the page itself is in the name of 'Call of Duty', but reference is made to 'Modern Warfare' as a post which I can see was liked on 10 August 2023 and contains an image of Modern Warfare II. I am unable to determine the geographic location of the followers or when the followers were gained. All of the YouTube videos on the Call of Duty YouTube display the number of views, with the maximum number of views being 41million on a video entitled 'Official Reveal Trailer Call of Duty: Modern Warfare'. Reference is made to the time period of 5 years, 1 year and 1 month ago when the videos were published on the website, however, nothing has been provided, even in the narrative evidence, to definitively indicate when these snapshots were captured.

The cancellation applicant also provides screenshots of numerous UK-based YouTube creators being, JJ Olatunji (16.4 million subscribers), Simon Minter (1.49 million subscribers), Thomas Cassell (9.6 million subscribers), Deji (12.4 million subscribers) and Alistair Aiken (19.2 million subscribers) concerning various iterations of 'Modern Warfare'. The interaction with the video's ranges from 1.6million to 95 thousand views. The date on which these pages were captured is unclear.

I am unable to determine when the snapshots of the pages were taken, and the jurisdiction of '.com' is a worldwide jurisdiction (on Instagram) making it difficult for me to see whether they target UK consumers and whether UK consumers would consider that they are targeted at them. *Athleta (ITM) Inc. v Sports Group Denmark A/S & Anor*[18] addresses this issue in relation to use for a revocation action, specifically where some of the use relied upon pertained to use on a US website and social media. David Stone, sitting as a Deputy High Court Judge, found that *"purely foreign use cannot count as relevant use for the purposes of*

[16] Exhibit 5
[17] Exhibit 5
[18] [*2024] EWHC 2449 (Ch) (30 September 2024)*

a United Kingdom revocation for non-use counterclaim". The judge referred to the notion of targeting of websites etc. saying that it required more than mere accessibility. He stated:

> "54. […] Take, for example, a physical store in Sydney, Australia with no on-line presence. This use would not count as use of a UK trade mark even if British tourists were known to visit Sydney, and were known to visit the store and purchase goods. The proprietor is attempting to create and maintain a market for those goods in Sydney, not in the United Kingdom. The same must be true of the on-line world - it is not sufficient (as I have set out above) to say that British consumers can access the website and purchase goods. There must be something more - and that something more is the targeting described by the Supreme Court in *Lifestyle Equities*. Will consumers accessing the site consider that it is targeted at them?"

Further, the judge commented on US social media sites, outlining that they were in much the same position regarding targeting, stating the following:

> "57. […] in order for that use to count as genuine use in the United Kingdom/European Union (as appropriate), it will be necessary to show that the postings were targeted at consumers in the relevant jurisdiction. It is not enough to say that UK/EU consumers could access the postings - they have to consider that the postings are targeted at them, and, in my judgment they would not so consider the postings which were in evidence in these proceedings."

Taking the above case law into account, based on the applicant's evidence, I am unable to determine that the websites and social media pages target UK/EU consumers or that UK/EU consumers would consider that it targets them. This is on the basis that no evidence has been provided of the location or reach to the visitors of the websites and social media pages. Whilst evidence of the

followers of the social media pages and websites have been provided, no evidence has been given of the number of those that originate in the UK/EU. Therefore, although they can reach customers in the UK/EU, the evidence does not demonstrate that they have been targeted.

d) The cancellation applicant has provided evidence to assist me on the matter of the size of the UK market for the goods concerned. The evidence demonstrates that 42.7 million games were sold in the UK in 2020,[19] which is inclusive of both physical retail sales and download sales from most of the major games companies. Those companies include Steam, Xbox Live, PlayStation Network and Nintendo eshop. Of those figures, 24.5 million were downloaded. The evidence also demonstrates that the physical games market in the UK (in 2020) was worth over £2.1 billion, inclusive of consoles and accessories, so less than pertaining to physical and downloaded games only. Whilst I do not have evidence to indicate the cost of each game sold in digital/physical format, and there is an added difficulty interpreting the number of sales to the associated monetary value; I can see that the opponent selling just over 1.192 million copies at retail in 2019[20] with 897,000 games sold during the year in 2020, and harvesting over $1billion in 10 days after the launch of 'Call of Duty: Modern Warfare II'[21] would amount to a moderate market share.[22]

e) The cancellation applicant also won a series of awards in 2019 for 'Best online multiplayer'[23], 'Best Audio Design',[24] 'NAVGTR Use of Sound, Franchise',[25] and 'Best Audio Mix'.[26] In addition, in 2020, they won the Golden Joystick Awards award for 'Best Esport Game'.[27] Further, in 2022, they won the Navgtr 'outstanding game, Franchise Action' award.[28] The applicant also won best

[19] Exhibit 8
[20] wholesgame snapshot taken 25 November 2024 entitled *"Top 10 best-selling video games in the UK in the Year 2019*"
[21] Exhibit 10, 'The majority of Call of Dury Modern Warfare II sales were on PS5 and PS4 in the UK' from wccftech.com dated 9 November 2022
[22] Exhibit 8
[23] Exhibit 9 from vg247.com
[24] Exhibit 9, gamespot.com
[25] Exhibit 9, Navgtr.org
[26] Exhibit 9, variety.com
[27] Exhibit 9, Gamesradar dated November 2020
[28] Exhibit 11

original score for a video game; however, it is unclear when that was awarded.[29] They were also nominated for 'Sound Designer in Video Games' in 2019. The evidence does not make it clear which geographic territory is associated with the awards. [30]

f) Lastly, I noted that the cancellation applicant's evidence, specifically exhibits 11 and 13, includes Wikipedia articles. By virtue of this evidence's origin being Wikipedia, I must treat it with caution. This is on the basis that, as mentioned above, I understand that Wikipedia is a community-based encyclopaedia that any user can contribute to, meaning that the content may be unverified.

Assessment of the evidence

32. 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, 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."

[29] Exhibit 9
[30] Exhibit 9, Variety.com

33. I also note Mr Alexander Q.C.'s comments in *Guccio Gucci SpA v Gerry Weber International AG*, Case BL O/424/14. He stated:

> "The Registrar says that it is important that a party puts its best case up front – with the emphasis both on "best case" (properly backed up with credible exhibits, invoices, advertisements and so on) and "up front" (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. […] The rule is not just "use it or lose it" but (the less catchy, if more reliable) "use it – and file the <u>best evidence first time round</u> – or lose it"" [original emphasis]

34. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd,* Case BL 0/404/13*,* 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."

35. Clearly, there are problems with the cancellation applicant's evidence. For example, whilst evidence of advertising on social media has been provided, there is a lack of information concerning the geographic scope of the advertising and its reach. In addition, there is a lack of evidence concerning turnover figures and no breakdown of figures.

36. However, the cancellation applicant has provided evidence of a substantial number of sales in 2019, 2020 and 2022. I am unable to determine where the consumers were geographically located within the UK, as the location of retail sales and physical downloads has not been provided. The cancellation applicant provided evidence to assist me on the size of the UK market for video games in 2020, demonstrating that 42.7 million games were sold in 2020. Whilst I do not have figures to indicate the market share throughout any other time period, selling over 1.192 million copies of Modern Warfare in 2019, 897,000 games sold during 2020 and collecting over $1 billion in 10 days after launch in 2022 in the UK would suggest substantial sales and a reasonable market share in the UK at least within 2019,2020, and 2022. I am satisfied that the sales are not demonstrative of one-off sales but are repeated throughout the relevant period. Plainly, the cancellation applicant operates a global business with a significant UK presence, with a focus on computer games. Whilst there is some evidence of the mark used in relation to other goods such as

clothing, I note this dates from after the relevant periods. Further, the indicators associated with sales figures only make mention of computer games. The extent to which clothing was sold under the mark during the relevant period is not clear, and I am mindful not to take a broad-brush approach in apportioning use in relation to the goods at issue. Accordingly, I consider that the average consumer would interpret the goods displayed by the evidence as:

> Class 9*: Computer game software; interactive video game programs; computer game discs; downloadable computer game software.*

DECISION

37. 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

38. The competing goods are as follows:

The cancellation applicant's goods	The proprietor's goods and services
Class 9: Computer game software; interactive video game programs; computer game discs; downloadable computer game software.	Class 9: Game software; virtual reality game software; computer game software; video game software; computer game software, downloadable; computer game software, recorded; video game programs; electronic publications; games software for use with video game consoles; software for consumer video game apparatus; software for arcade video game machines; game software for mobile phones; game software for tablets; game software for portable video game consoles; game software for portable computers; computer software platforms, recorded or downloadable; downloadable digital files related to computer games and video games authenticated by non-fungible tokens or other digital tokens based on blockchain technology; augmented reality game software; computer software programs for in-game resources, tokens and virtual currency for use in video games and online virtual worlds. Class 41: Entertainment services; Game services provided online; Game

	services provided online from a computer network; Online game services through mobile devices; Providing an online computer game; Video game entertainment services; Virtual reality game entertainment services; Augmented reality game entertainment services; Providing online information in the field of computer games; Providing interactive multi-player computer games online; Providing online interactive computer games; Providing online video games; Providing information in the field of entertainment; Providing information in the field of computer games and computer enhancements for games; Arranging online computer and video game competitions; Education and training services related to computer games and other online entertainment; Organization of entertainment events; Organization of exhibitions for entertainment purposes; Providing analytic information of game competitions.

39. Section 60A of the Act sets out that goods or services are not to be considered similar simply because they appear in the same classes. Alternatively, section 60A also states that goods or services are not to be considered dissimilar simply because they appear in different classes.

40. When making the comparison, all relevant factors relating to the goods 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".

41. 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.

42. In Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) case T-133/05, the General Court ("GC") stated:

> "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 the trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or when the goods

designated by the trade mark application are included in a more general category designated by the earlier mark."

43. The cancellation applicant submits that all of the proprietor's class 9 goods are identical or similar to its class 9 goods. The proprietor denies that there is any similarity between the cancellation applicant's goods in classes 25 and 28 and its goods and services in classes 9 and 41. They submit that the comparison that should be undertaken between the goods and services should be solely on the basis of the goods in class 9 that the cancellation applicant seeks to rely on. Whilst noted, as there is no agreement between the parties in this matter, I must still carry out my comparison of the goods and services in relation to all of the goods and services at issue.

Class 9

44. The term *"Computer game software"* in the cancellation applicant's specification encompasses all of the following terms in the proprietor's specification and are identical on the principle outlined in *Meric:*

Game software; virtual reality game software; computer game software; video game software; computer game software, downloadable; computer game software, recorded; video game programs; games software for use with video game consoles; software for consumer video game apparatus; software for arcade video game machines; game software for mobile phones; game software for tablets; game software for portable video game consoles; game software for portable computers; augmented reality game software.

Downloadable digital files related to computer games and video games authenticated by non-fungible tokens or other digital tokens based on blockchain technology

45. In relation to the proprietor's above term, firstly I note that the 13th edition of the Nice Classification applies the definition that a non-fungible token is *"a unique digital identifier that cannot be copied, substituted, or subdivided, that is recorded in a blockchain, and that is used to certify authenticity and ownership (as of a specific*

digital asset and specific rights relating to it).”[31] Therefore, I interpret the term to represent downloadable game files or files related to games, that are connected to an NFT or other digital token to certify their authenticity and any rights that may relate to the digital asset. I consider that this good is similar to *“computer games software”* in the cancellation applicant’s specification. It is my view that the goods will overlap in trade channels and providers. In addition, I consider that the goods will target the same consumers and there will be an overlap in nature. It is not my view that the goods are in competition; however, there may be a level of complementarity between the goods at issue. Taking the above into account, I find the goods to be similar to a medium degree.

Computer software programs for in-game resources, tokens and virtual currency for use in video games and online virtual worlds.

46. In the absence of any submissions or evidence to the contrary, it is my understanding that these are goods that are programs that are used to exchange currency, tokens or in-game resources with various items that can be purchased in the game. The in-game resources, tokens and virtual currency may be acquired in the game or purchased using real-world resources and exchanged. There is an overlap in nature between these goods and the cancellation applicant’s *“computer games software”*, as one is software and the other is software programs However, the specific purpose of the goods will differ as one of the goods will provide software for users to play, whereas the other will provide a program to allow the purchase of items in video games and virtual worlds. I consider that the specific users of the goods will be different, but the end users will overlap; the proprietor’s goods will be purchased by businesses such as app developers, and the cancellation applicant’s users will be individuals playing computer games. The end users will be individuals playing games. It is my view that there may be an overlap in provider and trade channels. I also am of the view that the goods are complementary, as games software is required to provide a program that exchanges in-game resources etc. in virtual worlds. In addition, I consider that the average consumer would be of the view that they come from the

[31] *Merriam-Webster Online Dictionary copyright © 2023 Merriam-Webster, Incorporated*

same undertaking. However, the goods are not in competition. Taking all of the above into consideration, I find the goods to be similar to at least a medium degree.

Computer software platforms, recorded or downloadable

47. I consider that the proprietor's goods and the cancellation applicant's "computer games software" are similar. It is my view that the goods will overlap in nature as they are software or related to software. However, the purpose of the goods will differ, as the cancellation applicant's goods turn data into information in the context of games, whereas a computer software platform is used to host an application or service. I consider that they may coincide in producer as a game software provider may create/provide a computer software platform upon which its software is to be played. I also find that the goods will be provided by the same undertakings and share the same trade channels. Further, it is my view that the goods will be complementary as the computer software platform is the environment in which software runs and software is the executable code that operates on the platform. I also consider that average consumers will consider that they come from the same undertaking. Given the different purposes, there will be no competition between the goods. Therefore, I find the goods to be similar to a medium to high degree.

Electronic publication

48. I note that the proprietor's goods are not limited to a specific context and therefore, they can be inclusive of publications in relation to games, alongside other topics/ I consider that these goods are similar to *"computer games software"* in the cancellation applicant's specification. The goods may coincide in the producers and distribution channels, as they are likely to be sold by the same businesses that sell computer games and may target the same public. There may also be a level of complementarity between the goods. Taking all of the above into consideration, I find the goods to be similar to a medium degree.

Class 41

49. The cancellation applicant submitted that there is similarity between the proprietor's class 41 services and "*computer game software and related instruction manual in electronic format sold together as a unit"* and *"downloadable software for use in connection with computer games"* in its specification, which following genuine use is the term *"computer games software"* and *"downloadable computer games software"*. I agree with the cancellation applicant that there is similarity between the goods and services at issue.

Entertainment services; Video game entertainment services; Virtual reality game entertainment services; Augmented reality game entertainment services; arranging online computer and video game competitions.

50. The above services are entertainment services, and while they are related to events, these services can, in my view, cover the provision of a streaming event that relates to a live computer game competition. Such a service, whilst different in nature, method of use and purpose with "computer game software", would be provided by the same undertaking that provides the computer game. Further, the players of the game would likely watch the event, even if they are not participating in it. As such, I find that the above services overlap in trade channels and users with the cancellation applicant's goods. The goods are not complementary to the services in the way described by case law, and neither are they competitive in nature. Overall, I consider that these goods and services are similar to a low degree.

Game services provided online; Game services provided online from a computer network; Providing an online computer game; Providing interactive multi-player computer games online; Providing online interactive computer games; Providing online video games; Online game services through mobile devices.

51. The above terms cover services for the provision of games, so while they cannot be identical to the cancellation applicant's goods, namely "computer game software", I consider them to be similar. I say this because, whilst their nature and method of use will differ, they share the same end purpose in that both aim to provide games to the user. Further, an undertaking that provides games as goods is also likely to provide them as a service, be that via subscription or for a fee. As such, I find that

there is an overlap in trade channels. The user of the above services is also likely to use the cancellation applicant's goods but, if not, there is a competitive relationship between the goods and services on the basis that the user may wish to play a game via a service or via a good (be that a downloadable software application or game installed via a disc or cartridge). Overall, I find that these goods and services are similar to a medium degree.

Providing online information in the field of computer games; Providing information in the field of entertainment; Providing information in the field of computer games and computer enhancements for games

52. I consider that there is similarity between the above terms and the cancellation applicant's term *"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 aim of the services is to provide information, whereas the cancellation applicant'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 about those games. Therefore, these goods and services overlap in user. In addition, it is my understanding that it is common for producers of video game software to also provide information relating to those 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.

53. It is my view that information concerning computer enhancement 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. Similarly, in

relation to the other terms, I consider that the average consumer will consider that the information originates from the producer of the game for bother entertainment and informative purposes. As a result, I consider that there is a degree of complementarity between these goods and services.

54. 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.

55. Applying the findings in relation to treat factors discussed above, I also find that there is a low degree of similarity between the cancellation applicant's *"computer game software"* and "*providing analytic information of game competitions"* in the proprietor's specification.

Education and training services related to computer games and other online entertainment

56. Comparing these services with the cancellation applicant's *"computer game software",* I consider that the goods and services will overlap in user; however, that is where the similarity between the goods and services will end. The goods and services will differ in nature, as one is a service and the other a good, and in purpose, as one is to train and educate about computer games and the other is to provide entertainment via playing computer games. The methods of use will also differ, and I do not consider that they will be provided by the same undertaking, so they do not share trade channels. They are not in competition nor are they complementary, applying the case law above. Whilst I appreciate that computer games are indispensable/important to teaching and education services concerning computer games and other online entertainment, it is not my view that the average consumer would perceive the goods and services as originating from the same undertakings. It is not my view that an overlap in users is sufficient to substantiate similarity between the goods and services. Therefore, I find the goods and services to be dissimilar.

Organization of entertainment events; Organization of exhibitions for entertainment purposes.

57. Whilst I appreciate that the above terms may be in relation to computer games, they are organisational services and not for the provision of computer games software. Plainly, these services differ in nature, method of use and purpose with the goods of the cancellation applicant. I appreciate that the entities responsible for computer games may wish to put on exhibitions and events such as those covered by the above terms. However, I am not aware that such providers would necessarily offer these services to customers to the point that it could be said that there was an overlap in trade channels between the above and the goods of the cancellation applicant. Additionally, the user of the above service is likely to be a virtual reality or gaming provider and not those who use the opponent's goods or services. On this point, I accept that users who play games may attend the events, but they are not the ones seeking the organisation of the same. Taking all of this into account, together with the fact that the parties' goods and services are not complementary to one another, nor are they competitive, I find that the above services are dissimilar to the cancellation applicant's goods.

58. As some degree of similarity between the goods and services is necessary to engage the test for a likelihood of confusion, my findings above mean that the invalidation aimed against those services I have found to be dissimilar will fail.[32] For ease of reference, the invalidation fails against the following services in the proprietor's specification:

> Class 41: *Organization of entertainment events; Organization of exhibitions for entertainment purposes; education and training services related to computer games and other online entertainment.*

The average consumer and the nature of the purchasing act

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

59. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods 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."

60. 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 the services visually, the user is likely to engage in discussions with sales assistants, meaning that I consider that the aural component will play an equal role in relation to the services.

61. 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.

62. 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. 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. As a result, I find that business users will pay a relatively high degree of attention.

Comparison of the marks

63. 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.

64. 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."

65. 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.

66. The respective trade marks are as follows:

The cancellation applicant's mark	The proprietor's mark
MODERN WARFARE	Modern Warfront

Overall impression

67. The proprietor submits that the word 'Modern', which appears in both marks, has no distinctive character, is purely descriptive and that this will not be recognised by the average consumer. Applying this logic, it would mean that at the very least, the greater impression of the marks would lie in 'Warfront' and 'Warfare'. I disagree with the proprietor that the 'modern' element of the marks is descriptive of the goods and services at issue and find that the marks would be viewed as a unit by the average consumer.

68. The cancellation applicant's mark consists of the text 'MODERN WARFARE' which appears capitalised in a standard font. There are no other elements that contribute to the overall impression of the mark, which lies in the text as a whole. Similarly, the proprietor's mark, which consists of the text 'Modern Warfront' which appears in title case, has no other elements that contribute to the overall impression of the mark. The overall impression lies in the text as a whole.

Visual comparison

69. I note that the cancellation applicant submits that both marks are composed of two words, of which the first word 'Modern' is identical, and the second word in both marks commence with 'WAR'. Subsequently, it is submitted that the marks are visually highly similar. The proprietor, on the other hand, argues that 'modern' contains no distinctive character and this part of the marks will not be recognised, which would

leave the comparison as ‘warfare’ vs ‘warfront’. As discussed above, I do not consider that the marks will be broken down by the average consumer and the comparison is between the marks as wholes.

70. I agree with the cancellation applicant and recognise that the marks share the text ‘Modern warf’. The endings of the words are where the points of difference lie, being ‘are’ and ‘ront’ respectively. I note that as the proprietor’s mark is a word-only mark it could be used in any standard typeface, form and colour;[33] the upper and title case difference between the marks is not a factor of difference to note. Taking all of this into account, I consider the marks to be visually highly similar.

Aural comparison

71. Aurally, I consider that the marks will be given their ordinary pronunciations and will overlap in the pronunciation of ‘Modern-Warf’. They will only differ in the pronunciation of the ending of the second words being ‘are’ and ‘ront’. Taking all the above into consideration, I find the marks to be highly similar aurally.

Conceptual comparison

72. In its submissions in lieu, the cancellation applicant drew my attention to UKIPO decision O/027/20, I have noted this decision but am not bound by the decision of other Hearing Officers. In their submissions, neither party disputes the definition of ‘modern’ within the marks, the point of contention lies in the additional words ‘Warfront’ and ‘Warfare’ that make up the units for the marks ‘Modern Warfront’ and ‘Modern Warfare’ and how each of the parties definitions of the word are interpreted in terms of conceptual similarity between the marks. With the proprietor arguing that that the meaning conveyed by the marks is very different; as one will be perceived as the overall concept of military practice and operations and the other as a description of a particular geographical place in which military action is taking place.[34]

[33] *LA Superquimica v EUIPO*, Case T-24/17, at paragraph [39]
[34] Witness statement if the registered proprietor, paragraph 10

73. As mentioned previously, both parties agree 'modern' in the mark will be given its ordinary dictionary meaning. As for the 'warfront' element the cancellation applicant submits that the word 'Warfront' will be defined as a region or line along which the opposing armies engage in combat. The proprietor submits that 'Warfront' is defined as *"the foremost part of the field of operations of opposing armies*."[35] Whilst they may be phrased differently, I consider that both parties agree that the 'warfront' is a place where opposing parties engage in conflict – technically, the definitions provided are of the same thing. Taking this into account, I consider that the mark 'modern warfare' as a unit will convey the concept of conflict taking place post the advancement and use of new technology.

74. In relation to the mark 'Modern warfare' as I mentioned previously, there is no contention between the parties on the meaning of modern. The cancellation applicant submits that 'warfare' refers to engagement in or the activities involved in war or conflict, and the proprietor defines this element it as 'an overall concept of military practice and operations.[36] As above, whilst they are worded differently the concepts submitted in relation to this element of the mark remains the same. Taking this into account, as a whole I consider the mark conveys the concept of military practice and operations taking place post the advancement and use of new technology.

75. Whilst I appreciate that there are nuances between 'modern warfare' and a 'modern warfront' , I agree with the cancellation applicant that they both refer to war, specifically the advancement and the use of new technology in war and will generate the concept of being associated with war. It is my view that the marks will coincide with the concepts of modern war, although I do recognise that there are differences in the specific aspects of war associated with the words. Taking the above into account, I find the marks to be highly similar conceptually.

Distinctive character of the cancellation applicant's mark

[35] Exhibit FAE1
[36] Witness statement of the registered proprietor paragraph 6 and Exhibit FAE1

76. 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)."

77. 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, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctive character of a mark can be enhanced by virtue of the use that has been made of it.

78. The cancellation applicant's mark consists of two ordinary dictionary words. The mark conveys the concept of military practice and operations taking place post the advancement and use of new technology. In relation to the goods at issue, the mark is somewhat allusive, as it is not uncommon for games that relate to warfare in a

modern environment. I consider that the mark is inherently distinctive to a low to medium degree.

79. As previously mentioned, the cancellation applicant has not provided turnover figures demonstrating sales throughout the relevant periods; however, it has shown substantial sales of physical and online video games in the UK, as demonstrated by the awards for sale of physical and online games. The cancellation applicant provided evidence to assist me on the size of the UK market for video games in 2020, demonstrating that 42.7 million games were sold in 2020. Whilst I do not have figures to indicate the market share throughout any other time period, selling over 1.192 million copies of Modern Warfare in 2019, 897,000 games sold during 2020 and collecting over $1 billion in 10 days after launch in 2022 would suggest substantial sales and a reasonable market share at least within 2019,2020, and 2022, directly prior to the relevant date. In addition, I note that the game was the second best-selling video game in 2019,[37] Call of Duty Modern Warfare was the fifth biggest (digital and physical) game of 2020.[38]The cancellation applicant has not provided any evidence concerning the amount that they invested in promoting the mark. The sales figures would suggest that the sales are intensive; however, no breakdown has been provided concerning the geographic scope of the UK customers. Accordingly, I am unable to identify the geographic scope of sales within the UK. As for the long-standing nature of use, the evidence provided clearly demonstrates use of the mark in 2019, 2020, and 2022. On the balance of all of the evidence, especially taking into account the sales figures, market share and sales within the UK in 2019,2020 and 2022, I consider that the distinctive character of the mark has been enhanced through use, from medium to high. Subsequently, the mark enjoys a medium to high degree of enhanced distinctive character.

Likelihood of confusion

80. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the

[37] wholesgame snapshot taken 25 November 2024 entitled *"Top 10 best-selling video games in the UK in the Year 2019*"
[38] Exhibit 8

average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods 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 vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the cancellation applicant's mark, the average consumer for the goods 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.

81. I have found the goods and services to vary in similarity from identical to a low degree of similarity. I have found the marks to be visually, aurally and conceptually similar to a high degree. From the evidence provided, I have found that the degree of distinctive character has been enhanced through use to a medium to high degree of distinctive character. The average consumer will consist of members of the general public and business users who will have a varied degree of attention from medium to high, depending on the goods and services. Further, the goods will be purchased by primarily visual means, although aural considerations are not discounted. In relation to the purchasing of services, aural consideration and visual considerations will play an equal role.

82. Taking all of the above into account and bearing in mind the principle of imperfect recollection, I consider that the difference between the marks is insufficient to avoid confusion. I am of the view that the average consumer will overlook or misremember the differences between the marks, given that the points of difference are the presence/absence of 'ront' and 'are'. I especially consider this to be the case, taking into account the high visual, aural and conceptual similarity. As noted above, I did find that the degree of attention of the average consumer will vary between low and high. Even applying a high degree of attention, the marks will be misremembered or mistakenly recalled as each other. I find that there is a likelihood of direct confusion

between the marks. This finding extends to the goods and services that I have found to be similar to a low degree.

83. However, even if the differences were noticed and recalled, in my view, consumers would believe that the marks are a sub-brand of marks used by the same undertaking in different specific game environments. For example, the cancellation applicant's mark could be used as a sub-brand to indicate that they are a different game within a series or franchise.

CONCLUSION

84. The invalidation has succeeded in part. The proprietor's mark will be declared invalid in respect of the following goods and services:

Class 9: Game software; virtual reality game software; computer game software; video game software; computer game software, downloadable; computer game software, recorded; video game programs; electronic publications; games software for use with video game consoles; software for consumer video game apparatus; software for arcade video game machines; game software for mobile phones; game software for tablets; game software for portable video game consoles; game software for portable computers; computer software platforms, recorded or downloadable; downloadable digital files related to computer games and video games authenticated by non-fungible tokens or other digital tokens based on blockchain technology; augmented reality game software; computer software programs for in-game resources, tokens and virtual currency for use in video games and online virtual worlds.

Class 41: Entertainment services; Game services provided online; Game services provided online from a computer network; Online game services through mobile devices; Providing an online computer game; Video game entertainment services; Virtual reality game entertainment services; Augmented reality game entertainment services; Providing online information in the field of computer games; Providing interactive multi-player computer games online; Providing online

interactive computer games; Providing online video games; Providing information in the field of entertainment; Providing information in the field of computer games and computer enhancements for games; providing analytic information of game competitions; arranging online computer and video game competitions.

85. The proprietor's mark will remain registered in the UK for the following services, against which the application for invalidation has been unsuccessful:

Class 41: Organization of entertainment events; Organization of exhibitions for entertainment purposes; education and training services related to computer games and other online entertainment.

COSTS

86. The cancellation applicant has enjoyed a greater degree of success and, therefore, is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023.

Preparing a statement and considering the other side's statement	£250
Preparing evidence and considering/commenting on the other side's evidence	£600
Preparation of submissions	£350

87. I hereby order Artstorm Cyprus Ltd to pay Activision Publishing Inc.the sum of £1200. 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 15th day of January 2026

A KLASS
For the Registrar