O/0241/25

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3771697 BY HELESI PODER TO REGISTER THE TRADE MARK:

(SERIES OF THREE)

Source

source

SOURCE

IN CLASSES 9, 35, 38, 42 & 45

AND

OPPOSITION THERETO UNDER NO. 438033 BY GIFT UNIVERSE GROUP LIMITED

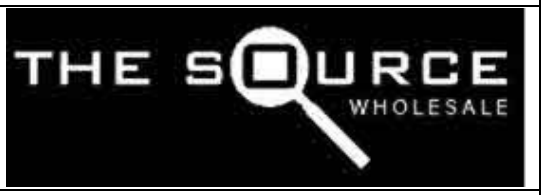
BACKGROUND & PLEADINGS

1. Helesi Poder ("**the applicant**"), applied to register the series of trade marks shown on the front page of this decision in the United Kingdom on 30 March 2022. It was accepted and published in the Trade Marks Journal on 16 September 2022. Registration is sought for goods and services in Classes 9, 35, 38, 42 and 45 set out in the Annex of this decision.

2. For ease of reference, I will refer to the series of marks as the "**contested mark**", unless it becomes necessary to differentiate between the marks which comprise the series.

3. On 15 December 2022, Gift Universe Group Limited ("**the opponent**") partially opposed the application on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (**"the Act"**)[1]. The opposition is directed solely against the applied-for Class 9 goods and Class 35 services (which are set out in full at paragraph 22 of this decision). The opponent is the proprietor of the following three marks, upon which it relies:

[1] 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.

Trade Mark no.	UK00003314465 (‘465)
Trade Mark	
Goods & Services for which the mark is registered	Classes 9, 11, 28 & 35
Filing date	31 May 2018
Date of entry in register	31 August 2018

Trade Mark no.	UK00003423487 (‘487)
Trade Mark	
Goods & Services for which the mark is registered	Classes 9, 11, 28 & 35
Filing date	23 August 2019
Date of entry in register	16 September 2022

Trade Mark no.	UK00003201995 (‘995)
Trade Mark	THE SOURCE WHOLESALE
Goods & Services for which the mark is registered	Classes 9, 11, 28 & 35
Filing date	13 December 2016
Date of entry in register	5 May 2017

4. For the purpose of this opposition, the opponent relies on its Classes 9, 28 and 35 of the earlier marks which are set out in paragraph 22 of this decision.

5. The opponent’s marks qualify as earlier marks under Section 6(1) of the Act. Further, as registration of the opponent’s earlier marks was completed less than five years before the filling date of the contested mark, proof of use is not relevant in these proceedings as per Section 6A of the Act.

6. The opponent argues that there are visual, aural, and conceptual similarities between the marks. It also contends that the competing goods

and services are identical and/or similar. Therefore, registration of the contested application should be refused under Section 5(2)(b) of the Act.

7. The applicant filed a defence and counterstatement denying the claims made.

8. In these proceedings, the opponent is represented by Reddie & Grose LLP and the applicant is a litigant in person.

9. During the evidence rounds, the applicant filed evidence. The opponent initially informed the Registry with a letter dated 4 April 2024 of its intention to file evidence of fact in reply. However, with its letter dated 3 May 2024, it reconsidered its position and elected not to file any evidence. The evidence rounds were thereby concluded. The opponent filed submissions in lieu of an oral hearing dated 18 June 2024.

10. Neither party requested an oral hearing, and so I have taken this decision following a careful consideration of the papers.

Evidence

Applicant's Witness Statement

11. The applicant filed evidence in the form of a witness statement from Helesi Poder. Her witness statement is dated 4 March 2024 and is accompanied by 6 exbibits which primarily focus on the dissimilarity of the competing specifications and the commercial activities of the parties. The opponent has criticised the witness statement for containing submissions, however, I do not consider it too onerous a task to separate the opinions of Ms Poder from her statements of fact. Therefore, I will adopt a pragmatic approach, treating the submissions as legal arguments and/or opinions rather than factual statements, even though they are nevertheless conveyed in a witness statement accompanied by a statement of truth.

DECISION

Section 5(2)(b)

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

> "5(2) A trade mark shall not be registered if because-
>
> […]
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark".

13. Section 5A states:

> "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. The principles considered in this opposition stem from the decisions of the European 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 BV* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v Office for Harmonisation 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-334/05 P) and Bimbo SA v OHIM (Case C-519/12 P):

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

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

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

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

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

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

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

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

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

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

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

Comparison of Goods and Services

15. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In *Canon Kabushiki Kaisha*, the Court of Justice of the European Union (CJEU) stated that:

> "23. In assessing the similarity of the goods or services concerned […], all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or complementary."

16. Guidance on this issue was also given by Jacob J (as he then was) in *British Sugar Plc v James Robertson & Sons Limited ("Treat")* [1996] RPC 281. At [296], he identified the following relevant factors:

> "(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."

17. The General Court (GC) confirmed in *Gérard Meric v OHIM*, Case T-133/05, paragraph 29, that, even if goods or services are not worded identically, they can still be considered identical if one term falls within the scope of another, or vice versa:

> "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".

18. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, Lord Kitchin set out the proper approach to considering terms in specifications:

> "365. […] The correct approach, as a matter of principle, in considering a specification of services which is defined by terms which are not clear or precise, is to confine the terms used to the substance or core of their possible meanings: see, for example, *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 159; [2004] RPC 40, at para 43. So too, if a specification of goods is defined by terms which are ambiguous, then it should be confined to those goods which are clearly covered. These principles are consistent with first, the requirement that the specifications of goods and services must be clear and precise so that others know what they

can and cannot do; and secondly, general fairness because any ambiguity is the responsibility of the owner of the mark. If despite this, the words used are still unclear so that they cannot be interpreted, then it is permissible to disregard them. But, in my opinion, that will rarely be the case."

19. In *YouView TV Ltd v Total Ltd,* [2012] EWHC 3158 (Ch), paragraph 12, Floyd J (as he then was) gave the following guidance on construing the words used in specifications:

> "[…] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless, the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words of phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

20. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU held that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods or services. The GC clarified the meaning of "complementary" goods or services in *Boston Scientific Ltd v OHIM*, Case T-325/06, at paragraph 82:

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

21. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

> "In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase."

22. The competing goods and services to be compared are shown in the following table:

Opponent's Goods & Services	**Applicant's Goods & Services**
<u>Earlier mark '465</u> **Class 9:**Computers, laptops, personal digital assistants; computer accessories; keyboards; laser keyboards; computer mice; power packs, cables and chargers for computers, tablets, laptops and mobile telephones; scanners, printers, negative and slide scanners; mobile telephones, telephones; walkie-talkies; MP3 players, hi-fi equipment, record players, tape players, radios, clock radios; computer games, computer games for use with television receivers; televisions, video recorders, projectors, home entertainment apparatus and instruments, apparatus for playing or recording audio or video; apparatus for converting audio or video recordings from one media to another, DJing apparatus, karaoke machines, jukeboxes, speakers, headphones, portable speakers; cameras, spy cameras, portable cameras, webcams; camera accessories; camera lenses; selfie-sticks; listening devices; digital photo frames; monitors; calculators, electronic translating devices, electronic word search devices, electronic dictionaries; binoculars, telescopes, night vision goggles; parts, fittings, cases and accessories for any of the aforesaid goods; power adaptors, power chargers, solar chargers, wind up chargers; remote controllers; mousemats; fridge magnets;	**Class 9:** Software for online messaging; Community software; Mobile software; Platform software; Telecommunications software; Communications software; Mobile apps; Downloadable mobile applications; Downloadable software; Networking software; Software downloadable from the internet; E-commerce software. **Class 35:** Provision of an online marketplace for buyers and sellers of goods and/or services.

sunglasses, spectacle frames, cases for glasses and sunglasses; virtual reality goggles; 3D simulation eyewear; metal detectors; food timers; digital timers; fitness trackers; GPS apparatus; electronic locks; electronic tags for locating objects. **Class 28:** Toys, games and playthings; remote control toys, remote control planes and helicopters, remote control cars, remote control ships and boats; toy model vehicles; drones [toys]; andriods [toys]; robots [toys]; handheld computer games; pool table, air-hockey games, table football games, darts and dart boards; parts, fittings, cases and accessories for any of the aforesaid goods; novelty toys; golf games; board games; playing cards; card games; jigsaw puzzles; puzzles; plush toys; action figures; robot toys; construction kits; outdoor toys; fitness equipment; fitness apparatus; skateboards; skateboard games; surfboards; toys for use in water; inflatable water toys; sports equipment; Christmas decorations; electronically wired chairs for use with computer games; none of the aforementioned in relation to fishing. **Class 35:** Online and store retail services connected with the sale of cosmetics and toiletries, men's grooming apparatus, jewellery items, costume jewellery, cufflinks, personalised jewellery, personalised keyrings, watches, smart watches, MP3 players, record players, cassette decks, CD players, DVD players, cameras, activity trackers, health monitors, massage apparatus, computer gadgets, USB sticks, cases for mobile telephones, tablets and computers, personalised phone covers, charms for mobile phones, chargers for phones or tablets, holders and stands for phones or tablets, smartphone operated toys, stylus for smartphones or tablets, speakers, headphones, radio control apparatus, radio control toys, hand tools, power tools, clocks and watches, toys and games, puzzles, personalised jigsaw puzzles, cases, bags, luggage, stationery, pens, printed matter, gift books, greetings cards, gift wrap, personalised artwork, signs or posters,	

clothing, belts, outerwear, sportswear, sports equipment, footwear, headgear, confectionery, food and drink, personalised gift confectionery packs, baking tools, bakeware, kitchen utensils, mugs, glasses, decanters, tableware, engraved flasks, personalised mugs, electrical juicers, electrical popcorn machines, beer fridges, teatowels, aprons, bedlinen, tablecloths, cushions, vases, sculptures, pictures, picture frames, lighting, furniture; information and advice relating to any of the aforesaid services. **Earlier mark '995** **Class 9:** Computers, laptops, personal digital assistants; computer accessories; keyboards; laser keyboards; computer mice; power packs, cables and chargers for computers, tablets, laptops and mobile telephones; scanners, printers, negative and slide scanners; mobile telephones, telephones; walkie-talkies; MP3 players, hi-fi equipment, record players, tape players, radios, clock radios; computer games, computer games for use with television receivers; televisions, video recorders, projectors, home entertainment apparatus and instruments, apparatus for playing or recording audio or video; apparatus for converting audio or video recordings from one media to another, DJing apparatus, karaoke machines, jukeboxes, speakers, headphones, portable speakers; electronically wired chairs for use with computer games; cameras, spy cameras, portable cameras, webcams; camera accessories; camera lenses; selfie-sticks; listening devices; digital photo frames; monitors; calculators, electronic translating devices, electronic word search devices, electronic dictionaries; binoculars, telescopes, night vision goggles; parts, fittings, cases and accessories for any of the aforesaid goods; power adaptors, power chargers, solar chargers, wind up chargers; remote controllers; mousemats; fridge magnets; sunglasses, spectacle frames, cases for glasses and sunglasses; virtual reality goggles; 3D simulation eyewear; metal detectors; food timers; digital timers; fitness	

trackers; GPS apparatus; electronic locks; electronic tags for locating objects. **Class 28:** Toys, games and playthings; remote control toys, remote control planes and helicopters, remote control cars, remote control ships and boats; toy model vehicles; drones [toys]; andriods [toys]; robots [toys]; handheld computer games; pool table, air-hockey games, table football games, darts and dart boards; parts, fittings, cases and accessories for any of the aforesaid goods; novelty toys; golf games; board games; playing cards; card games; jigsaw puzzles; puzzles; plush toys; action figures; robot toys; construction kits; outdoor toys; fitness equipment; fitness apparatus; skateboards; skateboard games; surfboards; toys for use in water; inflatable water toys; sports equipment; Christmas decorations; none of the aforementioned in relation to fishing. **Class 35:** Online and store retail services connected with the sale of cosmetics and toiletries, men's grooming apparatus, jewellery items, costume jewellery, cufflinks, personalised jewellery, personalised keyrings, watches, smart watches, MP3 players, record players, cassette decks, CD players, DVD players, cameras, activity trackers, health monitors, massage apparatus, computer gadgets, USB sticks, cases for mobile telephones, tablets and computers, personalised phone covers, charms for mobile phones, chargers for phones or tablets, holders and stands for phones or tablets, smartphone operated toys, stylus for smartphones or tablets, speakers, headphones, radio control apparatus, radio control toys, hand tools, power tools, clocks and watches, toys and games, puzzles, personalised jigsaw puzzles, cases, bags, luggage, stationery, pens, printed matter, gift books, greetings cards, gift wrap, personalised artwork, signs or posters, clothing, belts, outerwear, sportswear, sports equipment, footwear, headgear, confectionery, food and drink, personalised gift confectionery packs, baking tools, bakeware, kitchen utensils, mugs, glasses,	

decanters, tableware, engraved flasks, personalised mugs, electrical juicers, electrical popcorn machines, beer fridges, teatowels, aprons, bedlinen, tablecloths, cushions, vases, sculptures, pictures, picture frames, lighting, furniture; information and advice relating to any of the aforesaid services. **<u>Earlier mark '487</u>** **Class 9:** Computer accessories; keyboards; laser keyboards; computer mice; power packs, cables and chargers for computers, tablets, laptops and mobile telephones; scanners, printers, negative and slide scanners; mobile telephones, telephones; walkie-talkies; MP3 players, clock radios; computer games, computer games for use with television receivers; home entertainment apparatus and instruments, in the nature of rojectors, karaoke machines, jukeboxes, speakers, headphones, portable speakers; cameras, spy cameras, portable cameras, webcams; camera accessories; camera lenses; selfie-sticks; listening devices; digital photo frames; monitors; calculators, electronic translating devices, electronic word search devices, electronic dictionaries; binoculars, telescopes, night vision goggles; parts, fittings, cases and accessories for any of the aforesaid goods; power adaptors, power chargers, solar chargers, wind up chargers; remote controllers; mousemats; fridge magnets; sunglasses, spectacle frames, cases for glasses and sunglasses; virtual reality goggles; 3D simulation eyewear; metal detectors; food timers; digital timers; fitness trackers; GPS apparatus; electronic locks; electronic tags for locating objects; none of the aforesaid being for use in professional audio, visual or audio-visual production, re-production, editing, recording, or processing. **Class 28:** Toys, games and playthings; remote control toys, remote control planes and helicopters, remote control cars, remote control ships and boats; toy model vehicles; drones [toys]; andriods [toys]; robots [toys]; handheld computer games; pool table, air-	

hockey games, table football games, darts and dart boards; parts, fittings, cases and accessories for any of the aforesaid goods; novelty toys; golf games; board games; playing cards; card games; jigsaw puzzles; puzzles; plush toys; action figures; robot toys; construction kits; outdoor toys; fitness equipment; fitness apparatus; skateboards; skateboard games; surfboards; toys for use in water; inflatable water toys; sports equipment; Christmas decorations; electronically wired chairs for use with computer games; none of the aforementioned in relation to fishing. **Class 35:** Online and store retail services connected with the sale of cosmetics and toiletries, men's grooming apparatus, jewellery items, costume jewellery, cufflinks, personalised jewellery, personalised keyrings, watches, smart watches, MP3 players, cameras, activity trackers, health monitors, massage apparatus, computer gadgets, USB sticks, cases for mobile telephones, tablets , personalised phone covers, charms for mobile phones, chargers for phones or tablets, holders and stands for phones or tablets, smartphone operated toys, stylus for smartphones or tablets, home entertainment apparatus and instruments in the nature of speakers and headphones, radio control apparatus, radio control toys, hand tools, power tools, clocks and watches, toys and games, puzzles, personalised jigsaw puzzles, cases, bags, luggage, stationery, pens, printed matter, gift books, greetings cards, gift wrap, personalised artwork, signs or posters, clothing, belts, outerwear, sportswear, sports equipment, footwear, headgear, confectionery, food and drink, personalised gift confectionery packs, baking tools, bakeware, kitchen utensils, mugs, glasses, decanters, tableware, engraved flasks, personalised mugs, electrical juicers, electrical popcorn machines, beer fridges, teatowels, aprons, bedlinen, tablecloths, cushions, vases, sculptures, pictures, picture frames, lighting, furniture; none of the aforesaid services relating to goods for use in professional audio, visual or audio visual production, re-production, editing, recording,	

or processing; information and advice relating to any of the aforesaid services.	

23. The opponent has provided lengthy submissions, including comparison tables for the competing terms and decisions of UK IPO Hearing Officers to support its claims, which I will not reproduce here but have taken into consideration. However, I note that these decisions are not binding upon me, and I will conduct my assessment based on the principles set out above and the competing terms before me. It is also noted that Class 28 goods are not included in the opponent's comparisons even though the opponent relies on its Class 28 goods as a basis for its opposition. I will proceed to the notional assessment of the respective goods and services based on Classes 9 and 35 as per the opponent's submissions.

24. The applicant has denied any similarity between the competing terms. Also, in her witness statement, Ms Poder provides details as to the goods and services which the parties actually trade in, along with extracts from the opponent's website. However, I bear in mind that the assessment I must make is based on a notional and fair use of the terms as registered against all the potential or intended uses of the goods and services and not necessarily just the ones currently being used by either party in their trade. Nor is it a relevant consideration that, at present, the parties are trading in what the applicant regards as discrete business sectors.

25. I also note that the limitations "*none of the aforesaid being for use in professional audio, visual or audio-visual production, re-production, editing, recording, or processing*" in Class 9 and "*none of the aforesaid services relating to goods for use in professional audio, visual or audio visual production, re-production, editing, recording, or processing*" in Class 35 of the opponent's specifications regarding mark '487 do not prevent a finding of similarity between the respective goods/services, especially where broad terms are present in the applicant's specification.

26. For the purpose of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where

they are sufficiently comparable to be assessed in essentially the same way for the same reasons.[2]

Preferred Approach

27. Although all of the earlier specifications contain a long list of terms, they overlap to a great extent. Thus, I will conduct a single comparison, in which my analysis will be based on terms that the earlier marks share and rely upon. As a result, the findings below apply to the comparison of all the competing marks.

Class 9

Mobile software; Mobile apps; Downloadable mobile applications; Downloadable software; Software downloadable from the internet

28. Broadly speaking, software is a collection of instructions, data, or computer programs that enable a computer to perform specific tasks. As such, I find that the contested goods are broad terms that would readily cover the opponent's "*computer games, computer games for use with television receivers*" goods, which are also a form of software. Therefore, the competing goods are considered identical in line with the principle set out in *Meric*.

Platform software

29. The contested term is the operating software that provides the environment necessary for applications to run, including software tools for developing and executing such applications, while ensuring compatibility. It is my view that the best comparable terms from the opponent's specification are "*computer games, computer games for use with television receivers*". The contested term ("*platform software*") is a broad term that

[2] *Separode Trade Mark* BL O-399-10 and *BVBA Management, Training en Consultancy v BeneluxMerkenbureau* [2007] ETMR 35 at paragraphs 30 to 38.

would readily cover gaming software platforms that support the development, distribution, and gameplay of computer games. Thus I consider that the competing goods are identical as per *Meric*. Alternatively, I consider the goods to be highly similar as they will overlap in nature, users, method of use, and trade channels, and there could be a degree of complementarity and competition between the goods.

Community software

30. The contested term refers to software specifically designed to facilitate interaction, collaboration, and engagement among users. I consider that the closest comparator from the earlier specification is the term "*computer games, computer games for use with television receivers*". This is because computer games could incorporate integrated communication systems such as in-game chat systems, player forums, and community hubs (e.g. guilds or clans), enabling users to connect with each other, share content, cooperate and foster community interaction. In this regard, the competing terms overlap in nature, users, method of use, and trade channels, but they are different in purpose. Even though the competing goods could be used together, this is not enough on its own to lead to complementarity since they are not indispensable or important for the use of the other in such a way that consumers may think that responsibility for the production of those goods lies with the same undertaking. In addition, the competing terms are not in competition. Consequently, they are similar to a low degree.

Software for online messaging; Telecommunications software; Communications software; Networking software

31. The contested goods are types of software, including mobile apps, that enable communication and data exchange between devices and users. I consider that the opponent's "*mobile telephones*" is the closest comparable term in the specification. The contested terms are essential for the operation of mobile phones, which makes them important for the

functioning of the earlier goods. Thus, the average consumer is likely to think that the goods originate from the same undertaking. In this context, the goods are complementary, as established by case law. Although the goods differ in nature and purpose, they may share users and channels of trade. There is no degree of competition between the goods. Considering these factors, I find that the goods are similar to a low degree.

E-commerce software

32. The contested term is the software designed to allow users to conduct online sales, manage and operate online stores. The earlier specifications contain the provision of "*online […] retail services…*" involving the online selling of various goods to the public. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as complementary and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, as they are here. The purpose of examining whether there is a complementary relationship between goods and services is to assess whether the relevant public are liable to believe that responsibility for the goods and services lies with the same undertaking. In this regard, it is my view that there is a sufficiently pronounced complementary relationship between the competing terms in the sense that e-commerce software could be indispensable or important for the provision of online retail services in such a way that consumers may think that they could be offered by the same or commercially linked undertakings. Although the competing terms differ in nature (goods v services), purpose, method of use, and trade channels, they overlap in users. I do not consider that there is any degree of competition between the competing terms. I find that they are similar to a low degree.

Class 35

Provision of an online marketplace for buyers and sellers of goods and/or services

33. The contested services involve the provision of a digital platform where users can buy and sell products/services. The opponent's term "*Online […] retail services connected with the sale of…*", which lists various goods retailed under the Class 35 services, is the closest comparable term. However, the contested term is a broad term with no limitation as to the goods and/or services available through the online marketplace. As a result, the competing services overlap in nature, purpose, and users. They share the same trade channels as a provider of a retail store may also offer an online marketplace, or vice versa. Lastly, there might be a degree of competition between the services, as a consumer looking to purchase something online may choose to do so via a direct retail service or via a marketplace. Consequently, I find that these services are similar to a medium degree.

34. I must reiterate here that the limitations "*none of the aforesaid being for use in professional audio, visual or audio-visual production, re-production, editing, recording, or processing*" in Class 9 and "*none of the aforesaid services relating to goods for use in professional audio, visual or audio visual production, re-production, editing, recording, or processing*" in Class 35 added to earlier specification in relation to mark '487, do nothing to materially affect my assessment above.

Average Consumer and the Purchasing Act

35. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purposes of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods and services in question: *Lloyd Schuhfabrik Meyer,* Case C-342/97. In *Hearst Holdings & Anor v A.V.E.L.A. Inc & Ors*, [2014] EWHC 439 (Ch),

at paragraph 70, Birss J (as he then was) described the average consumer in these terms:

> "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 word 'average' denotes that the person is typical. The term 'average' does not denote some form of numerical mean, mode or median."

36. The average consumer of the Class 9 goods will be a member of the general public and professionals/business users. Such goods are usually offered for sale in online stores, brochures, and catalogues but I do not exclude entirely their availability in high street retail stores. The goods most likely will be available via online stores, where consumers will select the goods relying on the images displayed on the relevant web pages or mobile applications. Therefore, visual considerations will dominate the selection of the goods in question, but aural considerations will not be ignored in the assessment, as advice may be sought from a sales assistant or representative when a purchase is made in a high street store. The cost of the goods may vary, but in any case, and irrespective of the cost, the average consumer may examine the products to ensure software/hardware compatibility with other components or systems or that the goods possess the required features. In this regard, the average consumer is likely to pay a medium degree of attention when selecting the goods at issue.

37. The average consumer for the services at issue will be a member of the general public or business users/professionals. The consumers will select such services by looking through brochures, websites or mobile apps so the visual element will be important. However, I do not discount the aural element, as word-of-mouth recommendations may influence consumers'

decisions. I consider that the average consumer will pay a medium degree of attention in choosing the service provider.

Comparison of Trade Marks

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

> "[…] it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

39. 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.

40. The marks to be compared are:

<table>
<tr><th>Earlier Mark ‘465</th><th>Contested Mark</th></tr>
<tr><td> 
</td><td rowspan="6">(Series of three)
Source
source
SOURCE</td></tr>
<tr><td>Earlier Mark ‘487</td></tr>
<tr><td> 
</td></tr>
<tr><td>Earlier Mark ‘995</td></tr>
<tr><td>THE SOURCE WHOLESALE</td></tr>
</table>

Overall Impression

41. The earlier mark ‘465 is a composite mark consisting of a device and the word elements “THE SOURCE” and “WHOLESALE” in white on a black background. “THE SOURCE” are more prominent in size than “WHOLESALE”, appearing in a standard upper case typeface and bold font. The letter ‘O’, embedded within a white device, is square-shaped and slightly larger than the other letters. I note that the average consumer will still recognise the letter ‘O’ even though it is surrounded by a device element. In the centre of the mark, there is a white device, which resembles a magnifying glass, having a prominent size (and certainly more prominent than the verbal element “WHOLESALE”). The word “WHOLESALE” appears below “SOURCE” in a significantly smaller upper case font and in a standard typeface. Despite the size difference, I consider that the word elements “THE SOURCE” and the device element make a roughly equal

contribution to the overall impression. I also find, in accordance with settled case law,[3] that the word elements will have more impact as the relevant public is more likely to keep verbal elements in mind to identify and quote the mark instead of describing its figurative element. The word element "WHOLESALE", being the smallest element in the mark, is suggestive of goods sold in bulk, thereby playing a secondary role in the overall impression. Lastly, the interplay between the black background and the white font will have a minimal (if any) impact on the overall impression.

42. The earlier mark '487 is a figurative mark consisting of the verbal elements "THE", "SOURCE", and "WHOLESALE" in a white font, arranged in a stacked format on a black background. The word "THE" appears at the top of the mark in a smaller, bold white font. Positioned at the centre of the mark, the word element "SOURCE" is the largest element of the mark, also in upper case and bold font, with a stylised 'O' in light blue and purple. By comparison, the word "WHOLESALE", placed at the bottom of the mark in upper case and standard font, is the smallest element in the mark and will receive minimal attention due to its size and position. Because of its central position and size, the word "SOURCE" will be the dominant and distinctive element of the mark, having the greatest weight in the overall impression. The definite article "THE", being smaller, is non-distinctive, and the word "WHOLESALE" is the smallest element in the mark and has a suggestive nature, thereby playing a secondary role in the overall impression. Again, in this instance, the black background and the white font will have a minimal (if any) impact on the overall impression.

43. The earlier mark '995, "THE SOURCE WHOLESALE", is a word mark. Registration of word marks protects the words in the marks.[4] The overall impression of the mark lies in the words themselves. As will be detailed later in this decision, the word elements will not form a unit. In addition, the

[3] See for instance: *MigrosGenossenschafts-Bund v EUIPO*, T-68/17; and *Wassen International Ltd v OHIM (SELENIUM-ACE)*, Case T-312/03, paragraph 37.

[4] See *LA Superquimica v EUIPO*, T-24/17, para 39; and *Bentley Motors Limited v Bentley 1962 Limited*, BL O/158/17, paragraph 16.

word “WHOLESALE” will be seen as having a suggestive significance and will play a secondary role in the overall impression. I have already noted that the definitive article “THE” is non-distinctive, it therefore would not be seen by the consumer as denoting trade origin. As a result, the word “SOURCE” will play the dominant role in the overall impression of the mark.

44. The contested mark is a series of three in word-only format. Each mark within the series comprises the word “SOURCE”. The overall impression resides in the word itself.

Visual Comparison

Earlier mark ‘465 and contested mark

45. The earlier mark contains the word elements “THE SOURCE” and “WHOLESALE”, whereas the contested mark is the single word mark “SOURCE”. The marks share the same word element “SOURCE”, differing in the rest of the word elements. Whilst it is not legitimate to perform a comparison between a word mark and a stylised word mark by considering specific ways in which the word might be presented, the typeface in which the earlier mark is presented in this case does not provide a point of distinction in itself,[5] nor does the colour (white font on black background) provide a point of distinction – since fair and notional use of a black and white mark means that it should normally be considered on the basis that it could be used in any colour.[6] However, I consider that the presence/absence of the device would create a point of difference between the marks. Taking all this into account, including the overall impression of the marks, I find that the marks are similar to a medium degree overall.

[5] See *HERNO S.p.A. v Miss Sparrow Ltd*, BL O/954/22.

[6] Colour (as opposed to extraneous matter) is an implicit component of a trade mark registered/applied for in black and white - see the Court of Appeal decisions in: *Specsavers* [2014] EWCA Civ 1294, paragraph 5; and *J.W. Spear & Sons Ltd v Zynga, Inc.* [2015] EWCA Civ 290, at paragraph 47.

Earlier mark '487 and contested mark

46. The earlier mark consists of three verbal elements, namely "THE", "SOURCE" and "WHOLESALE", whereas the contested mark is the single word mark "SOURCE". Again in this case, the marks share the identical verbal element "SOURCE". However, they diverge in the presence/absence of the rest of the word elements. I note that the protection of a word mark is not limited to any particular typeface, capitalisation or colour. As advanced above, the typeface and colour (white font on black background) in which the earlier mark is presented does not provide a point of distinction in itself. I also bear in mind my finding on the overall impression of the earlier mark i.e. that the word "SOURCE" is the dominant and distinctive element of the mark. That said, the stacked presentation of the earlier mark and the stylised 'O' are still points of visual difference. Taking all this into account, including the overall impression of the marks together with the size and relative position of the elements within the respective marks, I find that the marks are similar to a medium degree.

Earlier mark '995 and contested mark

47. The earlier word mark "THE SOURCE WHOLESALE" consists of three words being 18 letters long, as opposed to the contested mark "SOURCE", which is only 6 letters. The competing word marks share the word "SOURCE". The presence/absence of the word "THE" and the suggestive word "WHOLESALE" in the competing marks are the only visual differences. Considering all the factors, including my findings on the overall impression of the earlier mark, the respective marks are visually similar to a medium degree.

Aural Comparison

Earlier mark '465 and contested mark

48. The verbal elements in the earlier mark will be pronounced as "THE-SORSS-HOHL-SAYL", whereas the contested mark is a monosyllabic

word which will be pronounced as “SORSS”. The marks share only the second syllable and differ in the first and the last two. Whilst there is no phonetic counterpart of the additional word element “HOHL-SAYL” in the contested mark, I do not consider that the average consumer will attempt to articulate it due to its size and position in the mark. Also, I do not consider that the average consumer will attempt to verbalise the magnifying glass device. Consequently, I find that the marks are aurally similar to between a medium and high degree (though lower where the word “WHOLESALE” is spoken).

Earlier mark ‘487 and contested mark

49. Again, in this instance, the marks share the verbal element “SORSS” differing in the verbal elements “THE” and “HOHL-SAYL”. However, despite the presence/absence of the additional word elements “THE” and “HOHL-SAYL” in the earlier mark, I do not consider that the average consumer will attempt to articulate them. This is because the word element “SORSS”, being in larger font and at the middle of the mark, signals to the consumer that this is the key part to focus on and to refer to the goods/services. I find that the marks are aurally similar to a high degree (though lower where the words “THE” and “WHOLESALE” are spoken).

Earlier mark ‘995 and contested mark

50. Similarly, here, the pronunciation of the signs coincides in the word “SORSS”, present identically in both marks, and to that extent the marks are aurally similar. The pronunciation differs in the word elements “THE” and “HOHL-SAYL” of the earlier mark, which have no phonetic counterparts in the contested mark, however, given my assessment of the relative weight these words play in the overall impression of the earlier mark, this only creates a slight point of difference. Therefore, I find that the marks are aurally similar to a medium degree.

Conceptual Comparison

51. In its written submissions, the opponent states:

> "29. Conceptually, the marks coincide in the concept of "source". As a result, the Applicant's Marks are conceptually identical or, in the alternative, highly similar to each of the Opponent's Earlier Marks."

52. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the General Court and the CJEU including *Ruiz Picasso v OHIM* [2006] ECR I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer.

53. The competing marks share the common word "SOURCE", which has more than one meaning, but, in my view, will be understood as the point or place from which something originates.

54. The earlier mark also includes the definite article "THE", which will be perceived as such, and the dictionary term "WHOLESALE", commonly understood as the sale of goods in larger quantities. In the absence of evidence, I do not consider that the average consumer will perceive these words as forming a unit that conveys a single concept derived from the earlier marks as a whole. This is due to the disjointed grammatical structure of the phrase, which prevents the words from naturally coming together to convey a coherent meaning that the average consumer would grasp immediately. Although the additions of the non-distinctive definite article "THE", the suggestive term "WHOLESALE", and the magnifying glass device in the '465 mark, introduce some conceptual distinctions, the shared word element "SOURCE" has an identical concept across all marks. Therefore, taking into account the overall impression of the marks, I find that the marks are conceptually similar to between a medium and high degree.

DISTINCTIVE CHARACTER OF THE EARLIER TRADE MARKS

55. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, paragraph 22 and 23, the CJEU stated that:

> "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).
>
> 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)."

56. Registered trade marks possess varying degrees of inherent distinctive character from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

57. The opponent has not provided any evidence of use of its marks, and therefore I only have the inherent distinctiveness of the mark to consider. I bear in mind that only the common elements between the respective marks should be considered to evaluate the relevant distinctiveness; this is because *"if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it."*[7] As detailed above, the word "SOURCE" is the only element that the competing marks have in common. While this has no descriptive or allusive qualities to the goods and services upon which the opponent relies, it is an ordinary dictionary word with a well-known meaning. As such, I consider that it enjoys a medium degree of distinctive character. Given my assessment of the relative weight this word plays in the overall impression of the earlier marks, I do not consider the other elements making up the marks elevate the distinctiveness of those marks overall – it is nonetheless the word 'SOURCE' which is the distinctive and dominant element in all three earlier marks.

LIKELIHOOD OF CONFUSION

58. In assessing the likelihood of confusion, I must adopt the global approach set out in the case law to which I have already referred above in this decision. Such a global assessment is not a mechanical exercise. I must also have regard to the interdependency principle, that a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa.[8] It is essential to keep in mind the distinctive character of the opponent's trade mark since the more distinctive the trade mark, the greater may be the likelihood of confusion. I must also keep in mind that the average consumer rarely has the

[7] See *Kurt Geiger v A-List Corporate Limited*, BL O-075-13.

[8] See *Canon Kabushiki Kaisha*, paragraph 17.

opportunity to make direct comparisons between trade marks and must instead rely upon imperfect recollection.[9]

59. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other. Indirect confusion is where the consumer notices the differences between the marks but concludes that the later mark is another brand of the owner of the earlier mark or a related undertaking.

60. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Iain Purvis Q.C., (as he then was) sitting as the Appointed Person, explained that:

> "16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.
>
> 17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:
>
> (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark

[9] See *Lloyd Schuhfabrik Meyer*, paragraph 27.

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)."

These examples are not exhaustive. Rather, they were intended to be illustrative of the general approach.[10]

61. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. (as he then was) considered the impact of the CJEU's judgment in *Bimbo*, on the court's earlier judgment in *Medion v Thomson*. He stated:

"18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there

[10] See *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207.

are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER)."

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors."

62. In *Liverpool Gin Distillery Ltd and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207, the Court of Appeal dismissed an appeal against a ruling of the High Court that trade marks for the words EAGLE RARE registered for whisky and bourbon whiskey were infringed by the launch of a bourbon whiskey under the sign "American Eagle". In his decision, Lord Justice Arnold stated that:

"13. As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/219/16) at [16] "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Mr Mellor went on to say that, if there is no likelihood of direct confusion, "one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion". I would prefer to say that there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion."

63. Earlier in this decision I have concluded that:

- the goods and services at issue range from identical to a low degree of similarity;
- the average consumer of the goods and services will be a member of the general public or business users/professionals, who will select the goods by predominantly visual means, but without dismissing the aural means. The average consumer will pay a medium degree of attention, when selecting the goods and services at issue;
- the contested mark and the earlier mark '465 are visually similar to a medium degree, aurally similar to between a medium and high degree (though lower where the word "WHOLESALE" is spoken) and conceptually to between a medium and high degree;
- the contested mark and the earlier mark '487 are visually similar to a medium degree, aurally similar to a high degree (though lower where words "THE" and "WHOLESALE" are spoken) and conceptually to between a medium and high degree;
- the contested mark and the earlier mark '995 are visually similar to a medium degree, aurally similar to a medium degree and conceptually to between a medium and high degree;
- the earlier marks are inherently distinctive to a medium degree.

64. Based on my analysis above, I am of the view that the earlier mark ‘487 is the closest in terms of similarity to the applicant’s mark, and I do not find the other two earlier marks to put the opponent in any better position. Therefore, my assessment on the likelihood of confusion will be based on the opponent’s mark ‘487.

65. While I appreciate that the opponent’s mark presents the verbal elements “THE” “SOURCE”, and “WHOLESALE” arranged in a stacked format and not alongside each other, I find that the similarity between the marks coupled with the identical/similar goods and services in play will result in the average consumer imperfectly recollecting the earlier mark and directly confusing it with the contested mark. This is on the basis that the marks share the identical element “SOURCE”, which not only has an independent distinctive role but also is the dominant and distinctive element in the earlier mark. Regardless of how this is presented, I am of the view that consumers will misremember which mark consisted of the word presented simply as “SOURCE” and which had a stylised “O”. In addition, the average consumer may overlook the word elements “THE” and “WHOLESALE”, playing a secondary role in the overall impression in the earlier mark due to their presentation and smaller size. Therefore, taking all of the above into account and bearing in mind the principle of imperfect recollection, I find that there exists a likelihood of direct confusion between the contested mark and the opponent’s mark.

66. I also find that there is a likelihood of indirect confusion. It is my view that the contested mark would be likely perceived as a brand variation of the earlier mark or a sub-brand. In particular, while the average consumer will recognise the differences between the marks, they will identify the common word element shared in the respective marks. Given the identity/similarity of the goods and services in question, the common use of the dominant word “SOURCE” in the marks will lead the consumers to erroneously conclude that the goods/services are offered by the same or an economically linked undertaking to the earlier mark. Thus, given the visual, aural, and conceptual similarity of the competing marks, the

contested mark could be perceived as a brand variation or sub-brand of the earlier mark giving rise to a likelihood of indirect confusion.

67. For completeness, the above findings extend to the goods and services I have found to be similar at any degree.

Final remarks

68. Although I have determined that there is a likelihood of confusion based on the earlier '487 mark, as a matter of completeness, I note that I would have also found a likelihood of confusion between the contested mark and the other two earlier marks, on much the same line of reasoning, particularly when bearing in mind my findings on the similarity of those respective marks and the identity/similarity of the completing goods and services.

OUTCOME

69. The partial opposition under Section 5(2)(b) of the Act is successful. Therefore, subject to appeal, the application will be refused in relation to Class 9 goods and Class 35 services only. However, it will proceed to registration in relation to the unopposed Classes 38, 42 and 45.

COSTS

70. The opponent has been successful and is entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 2/2016. I award costs as follows:

Official opposition fee	**£100**
Preparing a statement and considering the counterstatement	**£250**
Preparing and filing submissions	**£350**
Total	**£700**

71. I, therefore, order, Helesi Poder to pay to Gift Universe Group Limited the sum of £700. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 18th day of March 2025

Dr Stylianos Alexandridis
For the Registrar,
The Comptroller General

ANNEX

Class 9: Search engine software; Database engine; Software for online messaging; Community software; Mobile software; Platform software; Telecommunications software; Communications software; Mobile apps; Downloadable mobile applications; Downloadable software; Networking software; Software downloadable from the internet; E-commerce software.

Class 35: Provision of an online marketplace for buyers and sellers of goods and/or services.

Class 38: Telecommunication; Electronic network communications; Digital network telecommunications services; Internet communication; Internet chartrooms and Internet forums; Providing Internet chatrooms.

Class 42: Software as a service [SAAS]; Software as a service; Platform as a service [PaaS].

Class 45: Online social networking services; Online social networking services accessible by means of downloadable mobile applications.