

O/0884/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004105383

BY HALA NASRI

TO REGISTER:

GLITCHFITS

AS A TRADE MARK IN CLASSES 9, 16, 18, 25, 28, 36, 41 AND 42

AND

IN THE MATTER OF THE OPPOSITION THERETO

UNDER NO. 451912

BY TWITCH INTERACTIVE, INC.

BACKGROUND AND PLEADINGS

1. On 27 September 2024, Hala Nasri (“the applicant”) applied to register the trade mark shown on the cover page of this decision, in the UK. The application was accepted and published in the Trade Marks Journal on 18 October 2024 in respect of the following goods and services:

Class 9: *Application software; downloadable mobile applications; entertainment software; games software; media software; media content; animated cartoons; animated films; music recordings; downloadable music files; downloadable videos; downloadable digital art; downloadable electronic publications; downloadable digital files authenticated by non-fungible tokens [NFTs]; downloadable digital image files authenticated by non-fungible tokens [NFTs]; downloadable graphics authenticated by non-fungible tokens [NFTs]; digital art authenticated by non-fungible tokens [NFTs]; digital audio, video and multimedia files authenticated by non-fungible tokens [NFTs]; downloadable virtual goods for use in virtual worlds and video games, namely virtual video game characters and avatars, video game character and avatar skins, clothing, footwear, headgear, bags, eyewear, jewellery, time instruments, furniture, home décor, dwellings, buildings, real estate, vehicles, conveyances, sporting articles, toys, games, playthings, consumer electronics, badges, figurines, artwork, collectable cards, displays, signage, household utensils, kitchenware, tableware, cookware, food and beverages, animals, pets, plants.*

Class 16: *Printed matter relating to animation, anime, video games and music; posters; art prints; picture cards; trading cards; bookmarks; books; graphic novels; comics; manga comic books; notebooks; stationery; stationery cases.*

Class 18: *Bags; tote bags; backpacks; shoulder bags; handbags; pouches; wallets; purses; carrying cases; key cases.*

Class 25: *Clothing; footwear; headgear.*

Class 28: Toys, games, and playthings; toy figurines; collectible toy figures; accessories for toy figures; toy models; dolls; plush toys; playing cards and card games; trading card games.

Class 36: Issuing of digital assets, digital tokens, crypto assets, non-fungible tokens (NFTs), digital collectibles, cryptocurrencies, digital and virtual currencies; trading, exchange and transmission of digital assets, digital tokens, crypto assets, non-fungible tokens (NFTs), digital collectibles, cryptocurrencies, digital and virtual currencies; providing information relating to digital assets, digital tokens, crypto assets, non-fungible tokens (NFTs), digital collectibles, cryptocurrencies, digital and virtual currencies; information, advice and consultancy services relating to the aforesaid.

Class 41: Entertainment services relating to animation, anime, video games and music; audio, video and multimedia production relating to animation, anime, video games and music; video game services; providing online video games; online gaming services; video game production; production of animation and anime; production of music and music videos; music entertainment services; arranging, organising and conducting live entertainment events relating to animation, anime, video games and music; providing online videos, not downloadable; providing online music, not downloadable; providing electronic publications; information, advice and consultancy services relating to the aforesaid.

Class 42: Providing online, non-downloadable software; providing online, non-downloadable software relating to animation, anime, video games and music; software as a service [SaaS] featuring software platforms for animated content and electronic gaming; video game development services; design and development of video game software; advisory and consultancy services relating to computer and video games software; animation design for others; information, advice and consultancy services relating to the aforesaid.

2. On 14 January 2025, the application was partially opposed by Twitch Interactive, Inc. (“the opponent”) based upon Sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against all the goods and services in classes 9, 41 and 42 (highlighted in grey), with the opponent relying upon, and claiming reputation for, the following mark and services:

UK00003557235

GLITCH

Filing date: 18 November 2020

Registration date: 02 July 2021

Class 42: *Storage of electronic media, namely, images, text, video, and audio data; Providing online software and software as a service for broadcasting, transmitting, receiving, accessing, viewing, uploading, downloading, sharing, integrating, encoding, decoding, displaying, formatting, organizing, storing, caching, transferring and streaming of data, text, games, game content, digital media, images, music, audio, video and animations; Providing online software and software as a service for electronic mail, messaging, chat and social networking; Providing online software and software as a service for creating, displaying and sharing emoticons; Providing online software and software as a service for purchasing and subscribing to digital media content; Providing online software and software as a service for software development; Providing online software and software as a service for developing and publishing applications for interactive streaming; Providing online software and software as a service to enable users to designate specific content for future viewing; Providing online software and software as a service for television (TV) programming; Providing online software and software as a service; Providing online software and software as a service for management and storage of digital media; Providing online software and software as a service for character and voice recognition; Providing online software and software as a service for creating, placing, transmitting and measuring the effectiveness of advertisements; Providing online software and software as a service for accessing, browsing and searching*

online databases; Providing online software and software as a service for filtering internet searches; Providing online software and software as a service for parental control enabling access to games, including electronic, computer and video games; Consulting services in the field of gaming technology and graphics software; Computer programming services; Providing temporary use of non-downloadable computer software for enhancing computer performance, for operation of integrated circuits, semiconductors, computer chipsets and micro-processors, and for gaming purposes; Providing temporary use of non-downloadable computer software for computer graphics; Providing temporary use of non-downloadable game software; Platform as a service (PaaS) featuring computer software platforms for gaming and graphic design; Providing virtual computer systems and virtual computer environments through cloud computing; Providing cloud computing services; Computer services, namely cloud hosting provider services; Providing virtual computer systems, graphics processing units (GPUs), and virtual computer environments through cloud computing; Design and development of computer hardware, software and peripherals for others; Application service provider (ASP), namely, hosting computer software applications of others; Hosting of third party content, photos, videos, audio, music, text, data, images, software, applications, games, web sites and other electronic works; Hosting of digital content; Computer hardware, software, application, and network consulting services; Digital and electronic file data transfer from one format to another; Provision of Internet and computer network search engines; Graphic design services; Software as a Service (SAAS) featuring software for facilitating audio, video and digital content creation, subscription services and one-time purchases; Creating an online community for computer users to participate in discussions, obtain feedback, form virtual communities, and engage in social networking; Software maintenance, installation and update services; Providing temporary use of non-downloadable analytics software, namely, software that provides statistics about the behavior of viewers of online advertising, videos, movies, music, pictures, images, text, photos, games, and other content; Software as a service that allows gamers to live broadcast their games from a gaming console, or to watch games being played by others; none of the aforesaid mentioned services relating to video game creation or development.

Class 45: *Online social networking services; Online social networking services, namely, facilitating social introductions or interactions among individuals; Social networking services in the fields of entertainment, gaming and application development; Providing an online social media platform; Providing social networking via the Internet and mobile communication devices for users to participate in online gaming, online games, online video games and online gaming applications; Providing information about social networks where users participate in online gaming, online video games and online video gaming applications; Social networking services, namely, providing virtual environments in which users can interact through social games for recreational, leisure or entertainment purposes; Providing online social networking services, namely, an online portal for consumers to play online computer games and electronic games and access and share enhancements within games; Online social networking services, namely, providing an online portal for consumers to share information relating to games provided online; Providing information, news, commentary, education, tutorials and advice to users of a social networking platform in the field of games and gaming activities; none of the aforesaid mentioned services relating to video game creation or development.*

3. By virtue of its earlier filing date, the trade mark relied upon by the opponent is an earlier mark in accordance with Section 6 of the Act. Since the opponent's mark had not been registered for more than five years at the filing date of the contested mark, it is not caught by the use conditions under Section 6A of the Act. Accordingly, the opponent can rely upon the services it has identified without demonstrating genuine use.

4. Under Section 5(2)(b), the opponent claims that there is a likelihood of confusion because the marks are highly similar, and the goods and services are identical or similar.

5. The claim under Section 5(3) was dropped by way of written submissions dated 5 June 2025 with the opponent electing not to file evidence. Hence, I will say no more about it.

6. The applicant filed a defence and counterstatement denying the claims made with the exception of the applied-for terms *Providing online, non-downloadable software; software as a service [SaaS] featuring software platforms for animated content and electronic gaming* which, the applicant concedes, is similar to the services covered by the opponent's earlier mark.

7. The applicant is represented by Marks & Clerk LLP, whereas the opponent is represented by MORGAN LEWIS & BOCKIUS UK LLP.

8. Neither party filed evidence in these proceedings, although the opponent filed written submissions dated 05 June 2025.

9. Neither party requested a hearing, and only the opponent filed written submissions in lieu. I make this decision having taken full account of all the papers, referring to them as necessary.

Relevance of EU Law

10. 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.

DECISION

Section 5(2)(b)

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

“5(2) A trade mark shall not be registered if because –

(a) ...

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

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

12. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*, [2025] UKSC 25:

(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 greater 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; and

(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

13. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended

purpose and their method of use and whether they are in competition with each other or are complementary.”

14. 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.

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

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

16. 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. 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 the responsibility for the goods and services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander QC noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited*, BL O/255/13:

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

17. Whilst on the other hand:

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

18. In *G rard Meric v OHIM*, Case T- 133/05, the GC stated that:

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

19. Before I turn to the comparison of the goods and services, I should clarify that whilst the opponent has provided a table identifying for each of the applied-for terms the corresponding similar services covered by the opponent’s mark, the opponent did not expand on (or explain), where it considers the overlap to lay. Furthermore, in *SMARTX*, BL-O/0911/24, Mr Iain Purvis KC, sitting as the Appointed Person, stated that if multiple combinations can be argued in relation to the similarity of the goods

and services, it is not the Hearing Officer's job to depart from those argued by the opponent:

“...it is for the Opponent to put forward the combinations of goods on which it relies for similarity (or identity). If it fails to identify a particular combination, it cannot expect the Hearing Officer to do the job for it. The approach for which Mr Wood contends would place an intolerable burden on Hearing Officers in cases of this nature in which there will be thousands of potential combinations of goods which could be relied on, and for each combination a slightly different argument for similarity could be made. Furthermore, such an approach would be unfair on the Applicant for the mark, since they will have had no opportunity to address points on similarity taken by the Hearing Officer if those points are not first raised by the Opponent.”

20. Accordingly, unless it is obvious where the similarity lies in respect of the terms identified by the opponent, I will conclude that the goods and services are dissimilar.

Class 9: Application software; downloadable mobile applications; entertainment software; games software; media software; media content; animated cartoons; animated films; music recordings; downloadable music files; downloadable videos; downloadable digital art; downloadable electronic publications; downloadable digital files authenticated by non-fungible tokens [NFTs]; downloadable digital image files authenticated by non-fungible tokens [NFTs]; downloadable graphics authenticated by non-fungible tokens [NFTs]; digital art authenticated by non-fungible tokens [NFTs]; digital audio, video and multimedia files authenticated by non-fungible tokens [NFTs]; downloadable virtual goods for use in virtual worlds and video games, namely virtual video game characters and avatars, video game character and avatar skins, clothing, footwear, headgear, bags, eyewear, jewellery, time instruments, furniture, home décor, dwellings, buildings, real estate, vehicles, conveyances, sporting articles, toys, games, playthings, consumer electronics, badges, figurines, artwork, collectable cards, displays, signage, household utensils, kitchenware, tableware, cookware, food and beverages, animals, pets, plants.

21. Application software; downloadable mobile applications; entertainment software; games software; media software. The opponent identified the closest clash as being with various services consisting of the provision of specific types of software in class 42. However, I can see that the opponent's specification includes *Providing online software and software as a service* which would cover any type of software. Based on this term, whilst the opponent's specification in class 42 covers services, and the applicant's specification in class 9 cover goods, the end-products provided through the opponent's services are identical to the software goods for which the applicant seeks registration. In this connection, I bear in mind that the opponent's services *Providing online software and software as a service* is limited by the restriction "*none of the aforesaid mentioned services relating to video game creation or development*"; as such, the only type of software which are excluded from the opponent's services are those used for video game creation or development. Consequently, the opponent's services include the provision of software which is identical to the applicant's *Application software; downloadable mobile applications; entertainment software; games software; media software* – in particular, the applied-for *games software* is a software used by gamers whilst the software which is excluded by the opponent's specification is a software used by games developers. Although the nature and method of use of the goods and services is different, the goods and services have the same purpose, target the same users, are likely to be distributed through the same trade channels, and are in competition although they are not complementary. I consider these goods and services to be similar to a **high degree**.

22. Media content; animated cartoons; animated films; music recordings; downloadable music files; downloadable videos; downloadable digital art; downloadable electronic publications; downloadable digital files authenticated by non-fungible tokens [NFTs]; downloadable digital image files authenticated by non-fungible tokens [NFTs]; downloadable graphics authenticated by non-fungible tokens [NFTs]; digital art authenticated by non-fungible tokens [NFTs]; digital audio, video and multimedia files authenticated by non-fungible tokens [NFTs]; downloadable virtual goods for use in virtual worlds and video games, namely virtual video game characters and avatars, video game character and avatar skins, clothing, footwear, headgear, bags, eyewear, jewellery, time instruments, furniture, home décor, dwellings, buildings, real estate, vehicles, conveyances, sporting articles, toys, games,

playthings, consumer electronics, badges, figurines, artwork, collectable cards, displays, signage, household utensils, kitchenware, tableware, cookware, food and beverages, animals, pets, plants. The opponent identified the closest clash as being with the earlier *Providing online software and software as a service for broadcasting, transmitting, receiving, accessing, viewing, uploading, downloading, sharing, integrating, encoding, decoding, displaying, formatting, organizing, storing, caching, transferring and streaming of data, text, games, game content, digital media, images, music, audio, video and animations* (in class 42). I agree that there is a degree of similarity between these goods and services, because they belong to the same market sector of IT/computer related goods and services. In addition, the applied-for goods are all related to digital media, images, music, audio, video and animation and the opponent's services are for processing, downloading, storing and streaming digital and media content and will be used to download and store the digital and media goods in the applicant's specification. Hence, there is a strong overlap in users. Whilst I acknowledge that the opponent's software-related services are indispensable or important for the use of the applicant's goods, consumers are unlikely to think that they come from the same undertaking; nevertheless, given the specific nature of the goods and services (both of which relate to accessing media content online), and their closeness, I consider that the overlap in users will give rise to, at least, a **low degree** of similarity.

Class 41: *Entertainment services relating to animation, anime, video games and music; audio, video and multimedia production relating to animation, anime, video games and music; video game services; providing online video games; online gaming services; video game production; production of animation and anime; production of music and music videos; music entertainment services; arranging, organising and conducting live entertainment events relating to animation, anime, video games and music; providing online videos, not downloadable; providing online music, not downloadable; providing electronic publications; information, advice and consultancy services relating to the aforesaid.*

23. Most of the applied-for services are entertainment services related to animation, anime, music, music videos, video games, and online gaming. The applied-for

specification also includes live events relating to animation, music, music videos, video games and online gaming, and production services.

24. Entertainment services relating to video games; video game services; providing online video games; online gaming services. The opponent identified the closest clash as being with, inter alia, the earlier *Providing social networking via the Internet and mobile communication devices for users to participate in online gaming, online games, online video games and online gaming applications; Providing information about social networks where users participate in online gaming, online video games and online video gaming applications* in class 45 and *Providing temporary use of non-downloadable game software; Platform as a service (PaaS) featuring computer software platforms for gaming and graphic design* in class 42. I agree that the earlier services in class 45 consisting of the provision of social networking via the Internet and mobile communication devices for users to participate in online gaming, online games, online video games and online gaming applications has a strong component of entertainment and it is closely connected to the provision of entertainment. Whilst the opponent's services are registered in class 45 because of their social element (the heading of class 45 being *Legal services; security services for the physical protection of tangible property and individuals; dating services, online social networking services; funerary services; babysitting*) online social networking is also a form of entertainment, and so I would consider the services to be identical despite being registered and applied-for in different classes.¹ If I am wrong, and the services have a different nature, they nonetheless target the same users, have a similar purpose, i.e. providing entertainment through access to video games, and are highly complementary as someone who provides the opponent's *social networking via the Internet and mobile communication devices for users to participate in online gaming, online games, online video games and online gaming applications* will also provide *entertainment services relating to video games; video game services; providing online video games*. If not identical, these services are similar to a **high degree**.

25. Entertainment services relating to animation, anime, and music; music entertainment services. The opponent identifies the closest clash as being that with

¹ See Section 60A of the Act

the earlier *Providing online software and software as a service for broadcasting, transmitting, receiving, accessing, viewing, uploading, downloading, sharing, integrating, encoding, decoding, displaying, formatting, organizing, storing, caching, transferring and streaming of data, text, games, game content, digital media, images, music, audio, video and animations* in class 42. I agree. For example, the broadcasting of a concert by the BBC is both a broadcasting service as well as an entertainment service. As such, the broadcasting of a live music concert through the BBC iPlayer online application amounts to the provision of music entertainment but is also provided through on online software (iPlayer) for streaming media content (which could be supplied through the opponent's services). Hence, the competing services target the same users and are complementary. The same applies to the other entertainment services which relate to animation and anime and would include the broadcasting of cartoons as an entertainment service supplied through the opponent's software provided as a service. These services are similar to a **low degree**. It also applies to *Providing online videos, not downloadable; providing online music, not downloadable; providing electronic publications.*

26. *Arranging, organising and conducting live entertainment events relating to animation, anime, video games and music.* The closest clash identified by the opponent is with the earlier class 42 - *Software as a service that allows gamers to live broadcast their games from a gaming console, or to watch games being played by others* and class 45 - *Social networking services in the fields of entertainment, gaming and application development*. I agree. The applied-for live entertainment services can be provided live through various platforms using the opponent's software as a service and social networking services in the fields of entertainment (which include music) and gaming. Hence, the competing services target the same users and are complementary. These services are **similar to a low degree**.

27. *Audio, video and multimedia production relating to animation, anime, video games and music; video game production; production of animation and anime; production of music and music videos.* The opponent's services expressly exclude *services relating to video game creation or development*. Hence, I consider *Audio, video and multimedia production relating to video games; video game production* to be one step removed from the opponent's services as the users, uses, nature and purpose of the

services is different, the trade channels do not coincide and the services are neither complementary nor in competition. These services are **dissimilar**. As regards the other services, i.e. Audio, video and multimedia production relating to animation, anime, and music; production of animation and anime; production of music and music videos, the opponent identifies the closest clash as being with the following services *Providing online software and software as a service for broadcasting, transmitting, receiving, accessing, viewing, uploading, downloading, sharing, integrating, encoding, decoding, displaying, formatting, organizing, storing, caching, transferring and streaming of data, text, games, game content, digital media, images, music, audio, video and animations; Providing temporary use of non-downloadable computer software for enhancing computer performance, for operation of integrated circuits, semiconductors, computer chipsets and micro-processors, and for gaming purposes; Providing temporary use of non-downloadable computer software for computer graphics; Providing temporary use of non-downloadable game software; Platform as a service (PaaS) featuring computer software platforms for gaming and graphic design*. However, it is not obvious to me why a production service would be similar to these services and in the absence of any argument from the opponent as to why these services are similar, I find them to be **dissimilar**.

28. Information, advice and consultancy services relating to the aforesaid. Insofar as these services include services relating to other services which I found to be similar, they are also similar to the opponent's earlier services to a **low degree**.

Class 42: *Providing online, non-downloadable software; providing online, non-downloadable software relating to animation, anime, video games and music; software as a service [SaaS] featuring software platforms for animated content and electronic gaming; video game development services; design and development of video game software; advisory and consultancy services relating to computer and video games software; animation design for others; information, advice and consultancy services relating to the aforesaid.*

29. Providing online, non-downloadable software; providing online, non-downloadable software relating to animation, anime, video games and music; software as a service [SaaS] featuring software platforms for animated content and electronic gaming. The

opponent's services in class 42 include *providing online software and software as a service* which encompass the above services. These services are **identical**.

30. *Video game development services; design and development of video game software.* The opponent's services cover a range of software, but it expressly excludes *services relating to video game creation or development*. Hence, I consider these services to be one step removed from the opponent's services. These services are **dissimilar**.

31. *Animation design for others.* The closest clash identified by the opponent is with the earlier *Platform as a service (PaaS) featuring computer software platforms for gaming and graphic design*. Even considering that the opponent provides a software for graphic design and the applicant provides animation design services, I do not consider that there is a true competitive relationship between the services, as someone who seeks the applicant's animation design services use the services of an animator whilst someone who seeks the opponent's services is a gamer or someone who wishes to use a software of image editing and layout. The uses and users of the services are different, as are their nature and purpose. The services are neither complementary nor in competition and I have nothing to suggest that they share distribution channels. These services are **dissimilar**.

32. *Advisory and consultancy services relating to computer and video games software; information, advice and consultancy services relating to the aforesaid.* Insofar as these services include services relating to other services which I found to be similar, they are also similar to the opponent's earlier services to a **low degree**.

33. Some similarity of goods and services is essential.² In *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated that:

“49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be

² *Waterford Wedgwood plc v OHIM* – C-398/07 P (CJEU)

shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity.

34. Since I found that there is no similarity between the following services for which the applicant seeks registration and the opponent's services, the opposition fails in relation to them:

Class 41: Audio, video and multimedia production relating to animation, anime, video games and music; video game production; production of animation and anime; production of music and music videos; information, advice and consultancy services relating to the aforesaid.

Class 42: Video game development services; design and development of video game software; Animation design for others; information, advice and consultancy services relating to the aforesaid.

Average consumer

35. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

36. In *Iconix Luxembourg Holdings* (cited above), the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

(a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;

(b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;

(c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;

(d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by enabling courts and tribunals to determine such issues so far as possible without the need for evidence;

(e) The average consumer's level of attention varies according to the category of goods or services in question; and

(f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

37. The average consumer of the competing goods and services is a member of the general public or a business.

38. The goods will typically be selected visually in retail outlets, catalogues and online. While I do not discount the possibility of oral selection by requests to staff, consumers are still likely to have viewed the goods before purchase. The selection process will therefore be predominantly visual. The services are likewise to be selected primarily by visual means, although I do not discount aural considerations through word-of-mouth recommendations.

39. The goods and services at issue include software goods as well as software provided as a service, media content, entertainment services, and online gaming services. The average consumer is likely to consider factors such as the type of software provided, the compatibility and technical aspects of the goods and services, as well as the accessibility of the entertainment and the nature of it, however, neither the goods nor the services are particularly expensive and they will not attract more than a medium degree of attention.

Comparison of marks

40. 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.”

41. 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. The respective marks are shown below:

The applied-for mark	The earlier mark
GLITCHFITS	GLITCH

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42. Both marks are word-only marks.

43. The opponent's earlier mark consists of the single word 'GLITCH' presented in capital letters. There are no other elements that contribute to the overall impression which resides in the word itself.

44. The applied-for mark consists of the words 'GLITCH' and 'FITS'. Although the words are conjoined, they both consist of well-known English words and, despite being presented as one word, do not form a meaningful expression or a new word, and will continue to be readily identifiable within the mark. I agree with the opponent that the word 'GLITCH' is slightly more distinctive than the word 'FITS' because it is placed at the beginning of the mark and it is longer than the word 'FITS' (six letters versus four).

45. Visually and aurally the marks coincide in the presence of the word 'GLITCH' that is the only element of the earlier mark and the first and longer element of the application. The point of difference between the marks is the presence of the word 'FITS' in the application which has no counterpart in the earlier mark, however, consumers tend to focus on the beginnings of marks, and in this case the coinciding element has more weight because it is longer and it is placed at the beginning of the applicant's mark. I consider the marks to be visually and aurally similar to a medium to high degree.

46. Conceptually, the word 'GLITCH' has the same meaning in both marks, namely that of *"a problem which stops something from working properly or being successful"*. I also agree with the opponent that in the context of the goods and services at issue which relate to IT and computers, the word 'GLITCH' will bring to mind the concept of a temporary malfunction or fault of equipment.

47. The word 'FITS' in the application has various meanings, for example, it is either the third person of the verb 'to fit' which means 'to be the right size or shape to go into a particular space' or it is the plural of the word 'fit' which means 'a sudden attack of uncontrolled movement'. Either way, it will be perceived independently within the mark

because it does not form a unit with the word 'GLITCH'. Overall, bearing in mind that the marks share the identical concept conveyed by the word 'GLITCH' but differ in the concept conveyed by the word 'FITS' in the application, I consider the marks to be conceptually similar to a medium to high degree.

Distinctive character of the earlier mark

48. 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).”

49. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as

invented words, which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it.

50. The earlier mark consists of the word 'GLITCH'. Whilst the word 'GLITCH' evokes a fault in computer technology, a glitch is not a characteristic of the opponent's services – consequently, the word 'glitch' is neither allusive nor descriptive of the opponent's services and I consider it to be distinctive to a medium degree. Absent any evidence of use I am unable to make an assessment as to whether the distinctiveness of the mark has been enhanced.

Likelihood of confusion

51. 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, including that a lesser degree of similarity between the respective marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. I must keep in mind the distinctive character of the earlier mark, the average consumer for the goods and services and the nature of the purchasing process. I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

52. Confusion can be direct or indirect. In *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: 'The later mark is different from the

earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark’.

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

- (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (‘26 RED TESCO’ would no doubt be such a case).
- (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as ‘LITE’, ‘EXPRESS’, ‘WORLDWIDE’, ‘MINI’ etc.).
- (c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (‘FAT FACE’ to ‘BRAT FACE’ for example).”

53. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ approved Mr Purvis’s formulation but added:

“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.”

54. It is not sufficient that a mark merely calls to mind another mark: *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17. This is mere association not indirect confusion.

55. Earlier in this decision I found that:

- The marks are visually, aurally and conceptually similar to a medium to high degree.
- The parties' goods and services range from identical to similar to a low degree.
- The average consumer is a member of the general public or a business user who will select the goods and services mainly visually, with no more than a medium degree of attention.
- The earlier mark is inherently distinctive to a medium degree.

56. Bearing in mind the interdependency principle, and in particular, the medium to high degree of visual, aural and conceptual similarity between the marks, the identity or similarity between the goods and services, and the medium degree of distinctive character of the earlier mark, I consider that there is a likelihood of confusion based on the coincidence of the identical element 'GLITCH'. The earlier mark is simply 'GLITCH' which is distinctive to a medium degree and remains equally as distinctive in the applied-for mark which is a longer composite mark. Whilst the addition of 'FITS' in the application creates a longer overall mark, it does not erase the presence of 'GLITCH' which remains the most distinctive and dominant element; in addition, I do not consider that 'GLITCHFITS' will be perceived as a unitary expression or a coined term. Admittedly, 'GLITCHFITS' is not 'GLITCH' plus a merely descriptive/non-distinctive addition, however, the categories listed in *L.A. Sugar* are not exhaustive.

57. My primary finding is that the addition of the letters 'FITS' at the end of the applicant's mark might go unnoticed and be lost due to imperfect recollection giving rise to direct confusion. Alternatively, if the average consumer noticed the letters 'FITS' at the end of the applied-for mark, they will readily recognise that the element 'GLITCH' is identical to the opponent's earlier mark, and given the identity/similarity of the goods and the medium degree of distinctiveness of 'GLITCH', they will conclude that the goods and services originate from the proprietor of 'GLITCH' or from an economically

connected undertaking, for example, they will assume that 'GLITCHFITS' is a sub-brand of 'GLITCH' because it does not produce a sufficiently different overall impression. There is a likelihood of confusion.

OUTCOME

58. The partial opposition succeeds in relation to the following goods and services which will be refused registration:

Class 9: *Application software; downloadable mobile applications; entertainment software; games software; media software; media content; animated cartoons; animated films; music recordings; downloadable music files; downloadable videos; downloadable digital art; downloadable electronic publications; downloadable digital files authenticated by non-fungible tokens [NFTs]; downloadable digital image files authenticated by non-fungible tokens [NFTs]; downloadable graphics authenticated by non-fungible tokens [NFTs]; digital art authenticated by non-fungible tokens [NFTs]; digital audio, video and multimedia files authenticated by non-fungible tokens [NFTs]; downloadable virtual goods for use in virtual worlds and video games, namely virtual video game characters and avatars, video game character and avatar skins, clothing, footwear, headgear, bags, eyewear, jewellery, time instruments, furniture, home décor, dwellings, buildings, real estate, vehicles, conveyances, sporting articles, toys, games, playthings, consumer electronics, badges, figurines, artwork, collectable cards, displays, signage, household utensils, kitchenware, tableware, cookware, food and beverages, animals, pets, plants.*

Class 41: *Entertainment services relating to animation, anime, video games and music; video game services; providing online video games; online gaming services; music entertainment services; arranging, organising and conducting live entertainment events relating to animation, anime, video games and music; providing online videos, not downloadable; providing online music, not downloadable; providing electronic publications; information, advice and consultancy services relating to the aforesaid.*

Class 42: *Providing online, non-downloadable software; providing online, non-downloadable software relating to animation, anime, video games and music; software as a service [SaaS] featuring software platforms for animated content and electronic gaming; advisory and consultancy services relating to computer and video games software; information, advice and consultancy services relating to the aforesaid.*

59. The partial opposition fails in relation to the following goods and services which will proceed to registration along with the unopposed terms:

Class 41: *Audio, video and multimedia production relating to animation, anime, video games and music; video game production; production of animation and anime; production of music and music videos; information, advice and consultancy services relating to the aforesaid.*

Class 42: *Video game development services; design and development of video game software; Animation design for others; information, advice and consultancy services relating to the aforesaid.*

COSTS

60. The opponent has been more successful than the applicant and is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, applying a reduction of 20% I award the opponent sum of £800,³ calculated as follows:

Preparing opposition	
and considering the counterstatement:	£350
Written submissions:	£350
Submissions in lieu:	£200
Official fees:	£100
Total:	£1000

³ Since the Sections 5(3) has not been supported by any evidence I have only awarded £100 for the Section 5(2)(b) ground.

-20%

£800

61. I therefore order Hala Nasri to pay Twitch Interactive, Inc. the sum of £800. This sum is to 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 29th day of September 2026

TERESA PINTO

For the Registrar