

**O/1042/25**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF INTERNATIONAL REGISTRATION  
NO. WO0000001701330 IN THE NAME OF EPIC GAMES, INC.  
FOR THE FOLLOWING TRADE MARK:**

**EPIC GAMES MEGEVERSE**

**IN CLASSES 9, 35, 38, 41, 42 & 45**

**AND**

**IN THE MATTER OF THE OPPOSITION THERETO  
UNDER NO. 440651 BY  
MEGEVERSE LTD**

## BACKGROUND AND PLEADINGS

1. Epic Games, Inc. (“the holder”) is the holder of the International Registration (“the IR”) shown on the cover page of this decision. The IR was registered on 17 June 2022 and, with effect from the same date, the holder designated the UK as a territory in which it seeks to protect the IR under the terms of the Protocol of the Madrid Agreement. The IR was accepted and published in the Trade Marks Journal for opposition purposes on 3 February 2023. The holder seeks protection in the UK for the goods and services set out in **Annex 1** of this decision.
2. The IR enjoys a priority date of 24 December 2021 which stems from an earlier US trade mark owned by the holder, being that under number 97189701. This date is the relevant date for these proceedings.
3. On 3 May 2023, the IR was opposed by Megaverse Ltd (“the opponent”). The opposition is based upon sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). The section 5(2)(b) ground is reliant upon the following mark:

MEGAVERSE

UK registration no. 918245393

Filing date 28 May 2020; registration date 29 September 2020

Relying on all goods and services, namely:

Class 9: Augmented reality software; augmented reality game software; augmented reality software for education; augmented reality software for stimulation; head mounted augmented reality displays; virtual and augmented reality software; augmented reality software for use in mobile devices; augmented reality software for use in mobile devices for integrating electronic data with real world environments; computer game software; interactive multimedia computer games programmers;

downloadable mobile applications; software and applications for mobile devices.

Class 42: Design services; graphic design services; product design services; brand design services; engineering design services; website design services; technological design services; computer software design services; computer aided design services; design services relating to artwork; consultancy services relating to design; design services for temporary structures; consultancy services for designing information systems; design services relating to virtual reality software; software development; software design; developing computer software for others; development of interactive multimedia software; design of games; video game software design; design and development of computer game software and virtual reality software; development and design of mobile applications; design services for the interior of buildings; design services for display systems for exhibition; design services for display systems for promotional purposes.

("the opponent's mark").

4. The opponent's mark is a comparable mark based on an earlier EUTM. On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with existing EUTMs. These comparable marks enjoy the same filing and registration dates as their European counterparts.
5. Under the section 5(2)(b) ground, the opponent claims that the marks at issue are similar and that the goods and services at issue are identical or similar. Further, the opponent claims that its mark enjoys a higher degree of distinctive character owing to the use made of it. As such, the opponent claims that there is a strong

likelihood of confusion between the marks at issue, which includes a likelihood of association.

6. Under the section 5(4)(a) ground, the opponent relies on the unregistered sign “MEGAVERSE” which has been used throughout the UK since 2018 in respect of the following goods:

“Augmented reality software; augmented reality game software; design services; design services relating to virtual reality software; software development; software design”

7. Under this ground, it is claimed that as a result of the use of its unregistered sign, the opponent has generated substantial goodwill in the sign and that this is attached to the opponent itself. It is claimed that the IR and the sign are similar and, as such, the opponent’s position is that any use of the IR would result in a misrepresentation which would, in turn, lead to damage and a decrease in sales and custom for the opponent.
8. The holder filed a counterstatement wherein it denied the claims against it.
9. The holder is represented by Bird & Bird LLP and the opponent is represented by Briffa Legal Limited. Both parties filed evidence in chief with the opponent also electing to file evidence in reply. No hearing was requested and only the holder filed written submissions in lieu of the same. This decision is taken after careful consideration of the papers.
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.

## **EVIDENCE**

11. The opponent's evidence in chief came in the form of the witness statement of John Ingle dated 3 June 2024. Mr Ingle is the sole director of the opponent, a position he has held since the incorporation of the opponent on 21 June 2018. His statement is accompanied by 15 exhibits, being JI1 to JI15, and was adduced in order to demonstrate that the opponent's mark enjoyed an enhanced degree of distinctive character and that its sign enjoys a protectable level of goodwill.
12. The holder's evidence came in the form of the witness statement of Randy Gelber dated 31 July 2024. Mr Gelber is the Chief Financial Officer of the holder, a position he has held since 2020. His evidence is accompanied by 11 exhibits, being RG1 to RG11, and was adduced to demonstrate the size of the 'EPIC GAMES' brand.
13. The opponent's evidence in reply came in the form of the witness statement of Thomas Staveley dated 7 October 2014. Mr Staveley is a solicitor for the opponent's legal representative so is, therefore, duly authorised to file evidence on the opponent's behalf. Mr Staveley's evidence is accompanied by one exhibit, being TS1, and was adduced in order to demonstrate that the holder's evidence is of no impact to the section 5(2)(b) ground of the present opposition.
14. I do not intend to summarise the parties' evidence in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

## PRELIMINARY ISSUE

15. In its evidence in reply, the opponent introduced a decision of the Opposition Division of the EUIPO into these proceedings.<sup>1</sup> This was a decision issued under opposition number B 3 193 815 and involved proceedings between the same parties to the present proceedings. The marks at issue in that case were the same IR that is at issue here (insofar as it designated the EU) and the EUTM upon which the opponent's mark in the present case is based.
16. The evidence in respect of this decision refers to a specific excerpt which sets out that the right to the holder's EUTM began on the date it was filed. Therefore, the holder's evidence in that case from prior to the filing date of that mark was irrelevant because the right of the opponent was earlier than the holder's EUTM. In its written submissions, the holder set out that the EUIPO misunderstood its argument on this point and that rather than claiming the existence of an earlier right, its evidence was adduced in order to demonstrate that 'EPIC GAMES' is very well recognised and, as a result, is the dominant and most distinctive element within the IR. I will discuss this argument where necessary below.
17. In respect of the EUIPO decision generally, I can confirm that I have given it due consideration but note that I am not bound by the outcomes reached within it. Instead, the assessments I must make here are to be based on the evidence filed before me and the relevant statute and case law, which I will set out where necessary below.

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<sup>1</sup> TS1

## **DECISION**

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

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

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

(a) ...

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

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

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

“Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

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

“(6)(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark or international trade mark (UK) which has a date of application for registration earlier than that of the trade mark

in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

21. The opponent's mark qualifies as an earlier trade mark under the above provisions.

The opponent's mark did not complete its registration process more than five years before the priority date of the IR. As such, it is not subject to the use provisions and the opponent may, therefore, proceed to rely on all the goods and services for which its mark is registered.

22. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) ("OHIM")*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

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

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

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

- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

## Comparison of goods and services

23. The holder's goods and services are set out in Annex 1 of this decision. As for the opponent, its goods and services are set out at paragraph 3 above.

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

“Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

25. 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.

26. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (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.”

27. In *Gérard Meric v Office for Harmonisation in the Internal Market*, 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.”

28. I have submissions from the holder in respect of the goods and services comparison. While the opponent did not file any submissions, its notice of opposition did include comment as to the goods and services at issue. In considering the opponent’s position, I note that despite the breadth of the holder’s specification, its comments were relatively brief. For example, in respect of the class 9 goods at issue, the opponent simply set out that:

“The goods in class 9 of the Application bear a particular similarity with the goods in class 9 of the Earlier Mark. Specifically, the Earlier Mark is registered in *"Augmented reality software; augmented reality game software; computer game software"*, whereas the Application specifies *"Downloadable game software; downloadable computer and video game programs and software; Downloadable Augmented Reality Software"*. There is a clear cross over in respect of the goods in class 9 registered against the Earlier Mark and that of the Application.”

29. Clearly, where the goods do overlap (such as the examples given above), I have no issue in finding identity/similarity. However, the above comments ignore a vast amount of the holder’s class 9 goods. Given the technical nature of some of the holder’s class 9 goods, this offers some difficulty for the opponent as it is not clear to me what some of these terms cover and, even so, save for the comments reproduced above, the opponent has not identified where it considers there to be similarity between some goods. I raise this here because, in the case of *SmartX TM* (BL O/0911/24) Mr Iain Purvis K.C., sitting as the Appointed Person, addressed the issue of an opponent’s failure to identify similarity in respect of long specifications. Mr Purvis K.C. said:

“28. [...] 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 [...] 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.”

30. Further on in this decision, Mr Purvis K.C. stated:

“31(v). In fact (as I have pointed out) the Hearing Officer went beyond the written submissions in making findings of similarity in respect of a number of groups of goods on the basis of arguments which had not been raised by the Opponent. If the Applicant had complained about this by way of an Appeal, there would probably have been a good argument that he had been the victim of procedural unfairness. But this has of course not happened and to this extent the Opponent has benefited from the Hearing Officer’s generosity. However, it would obviously be perverse to say that the Hearing Officer ought therefore to have taken every other unpleaded and unargued point in the Opponent’s favour.”

31. While the case law cited above does not mean that I must dismiss any level of similarity between the parties’ goods and services simply due to the way in which the opponent has pleaded its case. However, the takeaway from *SmartX* is that it would be unfair for me to go through all of the opponent’s terms in order to assess each and every combination of goods and services. Instead, in the circumstances, I consider that a reasonable approach would be for me to identify what I reasonably consider to be the closest terms and carry out the comparison on that basis.<sup>2</sup> In doing so, I will remain mindful of the comments of Mr Purvis K.C. above regarding procedural unfairness.

32. Lastly, before moving on to the comparison itself, I consider it necessary to point out that I have given due consideration to the outcomes in the EUIPO decision included within the opponent’s evidence. Again, and for the avoidance of doubt, I am not bound by those same outcomes.

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<sup>2</sup> On this point, I also refer to the case of *MontyPay* (BL O/0924/24)

## Class 9

33. Before getting into the class 9 goods at issue, I consider it necessary to point out that while a wide range of goods in the holder's specification relate to 'computer software' or 'computer programs', I see no reason why this cannot cover software or programs for use on mobile devices. In my view, references to computer software are interchangeable with mobile device software. I say this because a mobile device can include a tablet which is a form of portable computer and whilst mobile phones may be referred to as phones, they operate, essentially, as handheld computers. For example, mobile device software executes tasks in the same way computer software does, albeit on a different operating system.

*Downloadable game software; downloadable computer and video game programs and software; downloadable interactive game programs; downloadable virtual reality game software; downloadable virtual reality software for playing computer games; downloadable augmented reality game software; downloadable augmented reality software for playing computer games.*

34. The above terms are all goods that cover different types of computer game software. Such goods are clearly identical, be that self-evidently or under the principle outlined in *Meric* with the opponent's term of "computer game software".

*Downloadable software for immersive experiences in 2D and 3D games, 2D and 3D interactive game [...] worlds, virtual environments, virtual reality, augmented reality, mixed reality and extended reality, 2D and 3D animations, simulations and visualizations, and real-time 3D sites; downloadable computer software for [...] downloading, [...] receiving, playing, [...] electronic games.*

35. While the above terms may not, technically, be items of computer game software, they are goods for use within computer games. This alone does not mean that they are similar to the opponent's "computer game software". However, while they may

differ in nature, method of use and purpose, the above goods are likely to be provided by the same undertakings as those who provide computer games themselves. Further, the users will be the same. In addition, the goods are complementary in the way described by the case law. I say this because I consider that the opponent's goods are important to the above terms and the relationship between them is such that consumers will believe them to originate from the same undertaking. Taking all of this into account, I find that these goods are similar to a medium degree.

*Downloadable virtual reality software; downloadable augmented reality software; downloadable mixed reality software; downloadable virtual reality software for providing metaverse experiences; downloadable software for providing access to an online multimedia virtual environment; downloadable virtual reality immersion software; downloadable software for experiencing interactive entertainment and virtual reality content; downloadable software for experiencing fully immersive and interactive animations, simulations, and visualizations for recreational, leisure, entertainment and educational purposes; downloadable software for immersive experiences [...] 2D and 3D interactive [...] non-game worlds, virtual environments, virtual reality, augmented reality, mixed reality and extended reality, 2D and 3D animations, simulations and visualizations, and real-time 3D sites; downloadable software for enabling users to experience virtual reality and augmented reality visualization, manipulation, and immersion; downloadable computer software for integrating electronic data with real world environments for the purposes of entertainment, communicating, and social networking; downloadable software for integrating electronic data with real world environments for the purposes of entertainment, education, gaming, communicating, and social networking; downloadable virtual goods, namely, computer programs featuring digital content for use in virtual environments created for entertainment purposes; downloadable graphics for computers, namely, images for use in an online multimedia virtual environment; downloadable virtual goods, namely, computer programs featuring avatars, clothing, pets, vehicles, weapons, tools, toys, emotes, and gestures for use in online worlds and virtual environments; virtual reality software for*

*creating multimedia content; augmented reality software for use in mobile devices for integrating electronic data with real world environments for the purposes of entertainment.*

36. While it is possible that all of the above terms relate to software used for gaming, I note that the opponent's specification includes the term "virtual and augmented reality software". Therefore, regardless of if the above goods cover games or not, they are all types of virtual or augmented reality software that fall within the opponent's term. As such, I find that these goods are identical under the principle outlined in *Meric*.

*Downloadable software development tools; downloadable software development kits (SDK); downloadable software for use in creating, manipulating and participating in virtual environments; downloadable software for the creation of fully immersive and interactive animations, simulations, and visualizations for use in a metaverse environment; downloadable computer programs for creating video game programs and software; downloadable computer software for video game development and operation; downloadable computer software platform for video game development, distribution, and operation; downloadable software for use in the development of video games and 2D and 3D animations, simulations and visualizations; downloadable software for use in creating and designing virtual reality, mixed reality, augmented reality, and extended reality software; downloadable virtual reality software in the field of designing computer and video games; downloadable software for use in the creation, development, production, and operation of 2D and 3D games, 2D and 3D interactive game and non-game worlds, virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, animations, simulations and visualizations, real-time 3D sites, and video game platforms; downloadable software for creating and editing images; downloadable software development tools for the creation of computer-generated imagery, graphics, and content; downloadable software for the creation of computer-generated imagery, graphics and content for use in game and non-game worlds, online universes, and*

*metaverse environments; downloadable computer software for creating, authoring, distributing, [...] transmitting, [...] editing, extracting, encoding, decoding, displaying, storing and organizing [...] electronic games; downloadable software for creating digital animation and special effects; downloadable software for the creation of computer-generated imagery and graphics for use in the creation, development, production, and operation of 2D and 3D games, 2D and 3D interactive game and non-game worlds and virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, real-time 3D sites, and computer and video game platforms; downloadable software for writing and editing video game software; downloadable computer software for use in designing, creating, operating, and editing other computer software; downloadable software for building user interfaces; downloadable software for use as an application programming interface (API); downloadable application programming interface (API) software for writing and editing video game software; downloadable application programming interface (API) for computer software for developing and creating virtual reality, augmented reality and mixed reality experiences; computer software, namely, software development tools for the creation, debugging, and deployment of software applications for smart glasses, near-eye displays, head-mounted displays, and smartphones; downloadable computer software development tools for implementing a computer programming language; downloadable computer software for use in designing and creating other computer software.*

37. While the above goods are all forms of software, their purpose is to create or design software. As such, I do not consider that the above terms cover the same goods as the opponent's various software goods, none of which relate to the creating or design of software. In my view, it does not simply follow that there must be similarity between types of software simply because they are software goods. Such an approach would offer far too broad a level of protection for any and all software goods. In respect of this comparison, I note that the opponent's specification includes the broad terms of "downloadable mobile applications" and "software and applications for mobile devices". While these are not limited in any way, software

for creating or designing software is, as far as I am aware, not commonly used on mobile devices. On this point, I note that I have nothing to suggest otherwise.

38. The above being said, I note that the opponent's specification includes "software design" in class 42. This service is, plainly different in nature and method of use when compared to the above goods. In addition, the core purpose of the holder's goods is to give the user the facilities to create their own software. This is not the same as the opponent's service, the core purpose being to design something on the user's behalf. That being said, there is a fleeting overlap in end purpose as, ultimately, both the goods and services aim to create software. As for the user, I appreciate that the provider of the opponent's service will likely use the above software creation goods. However, this is not the consideration that is at issue here. Instead, I find that as someone looking to create software is unlikely to select both the goods and the services, there is not overlap in user. That being said, I do accept that there is a degree of competition between them on the basis that the end user may elect to design software themselves by using the above goods or, alternatively, seek the opponent's service to create such software on their behalf. In terms of trade channels, I see no reason why an offering that provides the design of software would also offer software to customers for them to design their own software and I have nothing before me to suggest that such a practice is common in the trade. Overall, while the goods and services discussed here are competitive in nature and share some degree of overlap in end purpose, such overlaps are not, in my view, sufficient to give rise to any meaningful degree of similarity between them. As a result, I find that the above goods are dissimilar to the opponent's goods and services.

*Downloadable graphics for computers, namely, 2D and 3D images for use in the creation of computer-generated imagery and graphics; downloadable graphics for computers, namely, 2D and 3D images for use in the production of video games, animations, simulations, visualizations, digital media, virtual environments, and virtual, augmented, mixed reality and extended reality experiences; downloadable graphics*

*for computers, namely, images for use in creating, manipulating, and participating in virtual environments; downloadable graphics software for use in creating multi-player game and non-game worlds.*

39. All of the above terms cover goods that are used for the purpose of creating images and graphics or for use in video games, virtual/augmented reality software or other forms of media. Such goods are technical in nature and I have no submissions from the opponent as to what they actually cover. For example, the lattermost term may relate to games, however, I have nothing to suggest how downloadable graphics software is applicable to the opponent's own goods. Therefore, for the same reasons set out in the preceding assessment, I consider that the best comparable term is "software design" in the opponent's specification. That being said, given that I have found the goods assessed in the preceding paragraph as dissimilar, I see no reason why the above goods bear any additional degrees of similarity with the opponent's service. If anything, there is no overlap whatsoever in respect of purpose on the basis that the above goods create graphics and not items of software. As such, I find that the above goods are dissimilar to any of the goods or services in the opponent's specification.

*Downloadable software for accessing and streaming multimedia entertainment content; downloadable application programming interface (API) software for capturing, downloading, editing, displaying, streaming, and sharing multimedia entertainment content, audio-visual content, video content, and associated text and data; downloadable software for accessing, browsing, and searching online databases, audio, video, and multimedia content, games, and software applications, and software application marketplaces; downloadable software for modifying photographs, images and audio, video, and audio-visual content; downloadable software for use in taking and editing photographs and recording and editing videos; downloadable software for processing images, graphics, audio, video, and text; downloadable computer software for creating, authoring, distributing, [...] transmitting, [...] editing, extracting, encoding, decoding, displaying, storing and organizing text, data, graphics, images, audio, video,*

*and multimedia content, and electronic publications; downloadable computer software for [...] downloading, [...] receiving, playing, [...] text, data, graphics, images, audio, video, and multimedia content, and electronic publications; downloadable software for capturing, downloading, editing, formatting, displaying, streaming, and sharing multimedia entertainment content, audio-visual content, video content, and associated text and data; computer software for modifying and enabling transmission of images, audio, audio visual and video content and data; computer software for modifying photographs, images and audio, video, and audio-visual content with photographic filters and virtual reality, mixed reality and augmented reality effects, namely, graphics, animations, text, drawings, geotags, metadata tags, and hyperlinks; computer software for processing images, graphics, audio, video, and text; downloadable software for processing, reproducing, synchronizing, recording, organizing, downloading, uploading, transmitting, streaming, receiving, playing and viewing text, multimedia and data files; downloadable software for searching, locating, compiling, indexing, correlating, navigating, obtaining, downloading, receiving, encoding, decoding, playing, storing and organizing text, data, images, graphics, audio and video on a global computer network; downloadable software for creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, interacting with, embedding, and sharing or otherwise providing electronic media, images, video, audio, audio-visual content, data, and information via the internet and communication networks; downloadable software for personalized, interactive television (TV) programming and for use in displaying and manipulating visual media, graphic images, text, photographs, illustrations, digital animations, video clips, film footage and audio data.*

40. While the above goods cover a wide range of purposes, I am of the view that they can all be said to relate to different forms of multimedia (such as streaming, posting images on social media or image editing software, for example) and describe software that is, as far as I understand it, commonly available on mobile phones. I say this because, for example, software for streaming videos is commonly used on

mobile phones. A further example is software that allows the editing of images, which can be downloaded on a mobile phone and used to alter photos prior to a user posting them on social media. As far as I am aware, such mobile phone software also exists for the editing of video files and other types of media. Taking all of this into account, I am of the view that in this context, the above goods can all be said to fall within the opponent's broad term of "downloadable mobile applications" and "software and applications for mobile devices". These goods are, therefore, identical under the principle outlined in *Meric*.

*Downloadable software for engaging in social networking and creating and interacting with online communities; downloadable software for creating, managing and accessing groups within virtual communities; application programming interface (API) for computer software which facilitates online services for social networking and for data retrieval, upload, download, access and management; downloadable computer software for creating, managing, and interacting with an online community; computer software, downloadable computer software and mobile application software for creating, managing and accessing groups within virtual communities; computer software, namely, an application providing social networking functionalities; downloadable computer software for finding content and content publishers, and for subscribing to content; downloadable software for creating and managing social media profiles and user accounts.*

41. The above goods can all be said to be types of social media software. These are commonly available on mobile phones. As such, I find that they all fall within the opponent's terms of "downloadable mobile applications" and "software and applications for mobile devices". These goods are, therefore, identical under the principle outlined in *Meric*.

*Downloadable software for real-time audio and video communication over the internet; downloadable messaging software.*

42. The above goods can reasonably be said to cover software such as those in the vein of Microsoft Teams or Skype. Such software is commonly available via mobile devices and following what I have said above, I find that they fall within the opponent's terms of "downloadable mobile applications" and "software and applications for mobile devices". These goods are, therefore, identical under the principle outlined in *Meric*.

*Parental control software; downloadable software and mobile application software providing a virtual marketplace; computer search engine software.*

43. Much like the goods I have discussed in my previous two comparisons, I find that the above goods can be used on mobile devices meaning that they fall within the terms of "downloadable mobile applications" and "software and applications for mobile devices" in the opponent's specifications. As a result, I find that these goods are identical under the principle outlined in *Meric*.

*Downloadable software for processing electronic payments and for transferring funds to and from others; downloadable software for use with digital and virtual currency; digital currency wallet and storage services software; downloadable software for digital currency payment and exchange transactions; downloadable software for implementing and recording financial transactions; downloadable e-commerce software to allow users to perform electronic business transactions via global computer and communication networks; downloadable software to allow users to perform e-commerce transactions via the internet and communications networks; downloadable computer software that allows users to make payments and transfer funds; downloadable computer software that enables online users to make payments and transfer funds across multiple websites and mobile applications; downloadable computer software for processing electronic payments.*

44. The above goods can describe software that facilitate payments. It is my understanding that such software is commonly available on mobile devices by way of mobile apps that allows users to perform a range of different financial transactions. As a result, I find that the above goods all fall within the terms of “downloadable mobile applications” and “software and applications for mobile devices” in the opponent’s specifications. I, therefore, find that these goods are identical under the principle outlined in *Meric*.

*Downloadable software that enables individuals, groups, companies, and brands to create and maintain an online presence for marketing purposes; downloadable software for use in creating, managing, measuring, and disseminating advertising of others; downloadable software for creating, sharing, disseminating and posting advertising; downloadable software that enables individuals, groups, companies, and brands to create and maintain an online presence and interact with online communities for marketing purposes.*

45. While I appreciate that many of the software goods discussed throughout this comparison are those that are used on mobile devices, I do not consider that this applies to the above goods. I say this because, as far as I understand it, the creation, management, dissemination and maintenance of an online presence for marketing/advertising purposes is not commonly conducted on a mobile device. On this point, I note that I have nothing before me to suggest that the provision of mobile software for advertising purposes is common in the trade and, without such, I am not convinced that it is. As a result, I do not consider that the above goods can be said to fall within the opponent’s terms of “downloadable mobile applications” and “software and applications for mobile devices”. I appreciate that the above goods and the opponent’s goods cover items of software, however, this alone is not sufficient to give rise to a finding that they are similar. In terms of trade channels and user, the very wide nature of the opponent’s terms may be said to give rise to some overlap here. That being said, in considering the terms at issue

here, I am reminded of the case of *Unicorn Studio Inc v Veronese* [2024] EWHC 1098 (Ch) wherein Mr Iain Purvis K.C., sitting as deputy High Court judge, set out at paragraph 24 of his judgement that:

“[A]ny finding of similarity in the end requires the exercise of common sense and requires the hearing officer to stand back and consider the overall question. It strikes me that here the hearing officer was engaging essentially in a box-ticking exercise, asking how many of the factors identified in *TREAT* or in *Canon* could be said to have been satisfied. Had the hearing officer stood back and considered the overall question of similarity, I believe she would have considered and certainly ought to have considered that the idea that figurines and works of art were similar to electric lamps, chandeliers or mirrors was nonsensical and it hardly needed a careful consideration of the *Canon* or *TREAT* factors to come to that conclusion. I therefore agree with the appellant that this category of goods should have been found dissimilar, and certainly it could not have reasonably been found similar to more than 'a very low degree'.”

46. While the above case involved a comparison of entirely different goods than those that are at issue here, I am of the view that the same principle applies. As such, I am of the view that upon taking a step back and considering the actual terms before me, a finding of similarity between them is nonsensical. On this point, I am of the view that to find similarity here would offer far too broad a level of protection to the opponent's terms. I say this because such an outcome would mean that any and all software goods were similar to one another regardless of if they were the type that were commonly provided for mobile devices, or not. Given how common software is amongst many different types of industries and areas of trade, I consider that such a finding is not supportable and neither is it reasonable. As a result, I find that the above goods of the holder are dissimilar to the opponent's goods (and services, for that matter).

## Class 35

*Marketing services; marketing in the framework of software publishing; advertising services; advertising via electronic media; dissemination of advertising for others via a global computer network.*

47. The opponent's mark is protected for software in class 9 and various design and development services in class 42. The above services clearly differ in nature, method of use and purpose with the opponent's goods and services. Further, there is no complementary or competitive relationship between them. I appreciate that the opponent may wish to market such goods and services, however, this does not constitute the provision of a service to customers. As such, I do not consider that the above services would be offered by undertakings that provide software or design services. Lastly, the user of the above will be business users looking to market their products and while said business users may also seek the opponent's design services, this does not create a meaningful overlap in user. Even if it did, any overlap in user alone is insufficient to give rise to a finding that the above services are similar to any degree with the opponent's goods and services. They are, therefore, dissimilar.

*Online retail store services in relation to game software, video games, computer games, and game programs.*

48. In *Oakley, Inc v OHIM*, Case T-116/06, at paragraphs 46 to 57, the GC held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree. Given that the opponent's specification includes "computer game software", I consider that the finding set out in *Oakley* can apply here. As such, because the goods and services are complementary and overlap in trade channels and user, I find that they are similar to a medium degree.

*Online retail store services in relation to virtual goods, namely, avatars, characters, environments, structures, props, furniture, vehicles, weapons, tools, toys, emotes, and gestures for use in online virtual worlds.*

49. While the opponent's specification does not include the exact goods covered by the above retail services, I note that in the case of *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, Mr Geoffrey Hobbs Q.C., sitting as the Appointed Person, set out that the GC's findings in Oakley did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered). I consider it reasonable to suggest that the virtual goods covered by the above service are likely to be those available within the computer games themselves, via microtransactions in an online store, for example. Therefore, I find that the above service is similar to the opponent "computer game software". While they are not complementary to one another in the same way as the retail of certain goods would be complementary to those exact goods, I find that there exists an overlap in trade channels and user. These overlaps are sufficient to give rise to a finding that these goods and services are similar to a low degree.

*Providing online marketplaces for sellers of goods and/or services.*

50. The above services describe something akin to eBay or Amazon Marketplace which provides a platform for third parties to sell various goods or services online. "Downloadable mobile applications" in the opponent's specification is so broad that it can realistically encompass the use of mobile applications for accessing online marketplaces. On this point, I consider that it is common in the trade for a provider of an online marketplace to make that marketplace accessible via a mobile device application. While the nature and method of use of the above differs to the opponent's term, there is some overlap in end purpose in that both the goods and

services aim to provide access to an online marketplace. Further, I consider it reasonable to conclude that the provider of the above service would produce and sell its own mobile application which would be sought by the same users that access the service. Overall, I find that these goods and services are similar to a medium degree.

*Organizing and conducting events, exhibitions, expositions and conferences for commercial purposes in the interactive entertainment, virtual reality, consumer electronics and video game entertainment industries.*

51. I appreciate that providers of video games and other types of software may wish to put on the sort of events covered by the above services. However, I am not aware that they would actually offer the service of organising and conducting of the same to third parties. Therefore, I do not consider that there is any overlap in trade channels between the above services and any of the goods or services covered by the opponent's specification. In respect of user, I see no material overlap in that the user of the opponent's goods and services would not likely seek the above services. Even if they were, any overlap would be fleeting and in light of the fact that the above services plainly differ in nature, method of use and purpose with the opponent's goods and services, I find them to be dissimilar.

### Class 38

*Telecommunications services, namely, electronic transmission of virtual reality content and data.*

52. While the above term relates to virtual reality content and data, I have nothing before me to suggest who the user of such services would be. As far as I am aware, the user of the opponent's "virtual and augmented reality software" would not ordinarily be the user of an electronic transmission service. Plainly, such goods and services differ in nature and method of use. As for purpose, the above services

are for the actual telecommunication and not the provision of the content itself. In addition, I am of the view that the provider of the above will be an undertaking that focuses on telecommunication and not the actual provider of the opponent's software itself. As has been the case at many stages throughout this comparison, I have nothing before me in evidence to suggest otherwise. Lastly, I do not consider that the goods and services are complementary in the way described by the case law and neither are they competitive. Overall, I consider that these services are dissimilar.

*Photo, video, and data sharing services, namely, electronic transmission of digital photo files, videos, and audio-visual content among internet users; telecommunication services, namely, electronic exchange of voice, data, audio, video, text and graphics accessible via the internet and other communications networks; telecommunications services, namely, electronic transmission of electronic media, data, messages, graphics, images, photos, videos, audio-visual content and files; telecommunication services, namely, data transmission and reception services via telecommunication networks.*

53. I appreciate that the above services can cover the transmission of media that is viewed on mobile applications. However, for the same reasoning as given in the preceding paragraph, I find that these services are dissimilar to any of the goods or services in the opponent's specification.

*Providing metaverse services to access virtual communities via the internet; providing an online community forum for users to share and stream information, audio, video, real-time news, entertainment content, or information, to form virtual communities, and to engage in social networking.*

54. The above services are merely the provision of access to virtual and online communities via the internet or online forums. The user of such services can access them via web-browsers, in-game applications or social media apps on their

mobile phones. As such, I consider that there exists some overlap in the above services and the opponent's terms of "computer game software" and "downloadable mobile applications". I consider that the provider of the software would also provide the access to the virtual communities covered by the above. So while the nature, method of use and purpose of these goods and services differ, and neither are the complementary or competitive in nature, the aforementioned overlaps in user and trade channels are, in my view, sufficient to give rise to a finding that they are similar to a low degree.

#### Class 41

*Online gaming services in the nature of a metaverse and metaversal environments; entertainment services, namely, providing online computer and video games; entertainment services, namely, providing online computer and video game platforms; providing games for use network-wide by network users; providing interactive, multiplayer and single player games played via computer or communications networks; providing online computer, video, and electronic games from a computer network; providing online virtual reality games; providing online augmented reality games.*

55. The above terms cover services for the provision of games so while they cannot be identical to the opponent's class 9 goods, namely "computer game software", I do consider them to be similar. I say this because whilst their natures and methods of use differ, they share the same end purpose in that both aim to provide games to the user. Further, an undertaking that provides games as goods is also likely to provide them via a service, be that via subscription or for free. As such, I find that there is an overlap in trade channels. The user of the above services is also likely to use the opponent's goods but, if not, there is a competitive relationship between the goods and services on the basis that the user may wish to play a game via a service or via a good (be that a downloadable software application or a game

installed via a disc or cartridge). Overall, I find that these goods and services are similar to a medium degree.

*Entertainment services, namely, providing online, non-downloadable virtual goods, namely, avatars, clothing, pets, vehicles, weapons, tools, toys, emotes and gestures for use in online worlds and virtual environments created for entertainment purposes; entertainment services, namely, metaverse experiences; entertainment services, namely, providing an online virtual environment; entertainment services, namely, providing virtual environments in which users can interact for recreational, leisure, or entertainment purposes; entertainment services, namely, providing interactive entertainment and virtual reality content.*

56. All of the above services relate to virtual reality content. I consider that such services are similar to the opponent's term of "virtual and augmented reality software". I say this because while they differ in nature and method of use, there is an overlap in end purpose (to ultimately provide virtual reality content), trade channels and user. As such, I find that these goods and services are similar to a medium degree.

*Organizing exhibitions and events in the field of interactive entertainment, virtual reality, mixed reality, and augmented reality, consumer electronics and video game entertainment industries for cultural or educational purposes; arranging and conducting competitions and entertainment events for players of video, computer, electronic or interactive multimedia games; organizing exhibitions, events, and conferences in the fields of culture, entertainment, education, and social networking for non-business and non-commercial purposes; entertainment services in the nature of organizing, arranging, and hosting performances and social entertainment events.*

57. While the above terms relate to virtual reality and games, they are organisational services and not the provision of virtual reality software and games. Plainly, these services differ in nature, method of use and purpose with the goods and services

of the opponent (being items of software in class 9 or a range of design services in class 42). I appreciate that providers of video games or virtual reality software may wish to put on exhibitions and events such as those covered by the above terms. However, I am not aware that such providers would necessarily offer these services to customers to the point that it could be said that there was an overlap in trade channels between the above and the goods (or services, for that matter) of the opponent. Additionally, the user of the above service is likely to be a virtual reality or gaming provider and not those that use the opponent's goods or services. On this point, I accept that users who play games may attend the events but they are not the ones seeking the organisation of the same. Taking all of this into account together with the fact that the parties' goods and services are not complementary to one another, nor are they competitive, I find that the above services are dissimilar to the opponent's goods and services.

*Virtual reality video production for entertainment purposes; augmented reality video production for entertainment purposes; entertainment services in the nature of production and post-production services of multimedia entertainment content; multimedia production services.*

58. While that the above services are likely to be provided by the same undertaking that provides "computer game software" or "virtual and augmented reality software", I am of the view that this is where any similarity ends. Firstly, these goods and services plainly differ in nature, method of use and purpose. As for user, I see no reason why there would be any overlap here. I say this because the above services will commonly be sought by business users looking for production of videos and not the end user that will watch the content or use the software. Lastly, I see no reason why the goods and services at issue would be complementary to one another as while the goods may be important to the production of the same, their relationship is not such that would result in consumers believing that they originate from a single undertaking. Taking all of this into account, I find that the above services are dissimilar to any of the opponent's goods and services.

*Multimedia publishing of software and games; multimedia publishing of interactive computer and video game programs and software; multimedia entertainment production and publishing services; publishing services, namely, publishing of electronic publications for others; electronic publishing services for others; online electronic publishing concerning social media content.*

59. In comparing the above services to the opponent's class 9 goods, I accept that the provider of the opponent's goods may seek the publishing of their computer games or other types of published products. However, this does not mean that these goods and services are similar. I say this because, plainly, the goods and services differ in nature, method of use and purpose. In addition, I am not aware that the provider of video games or augmented/virtual reality software would be the provider of the above services to third parties. Further, the user of the above services is likely to be the provider of the games/content and not the end user of the opponent's software goods. Taking all of this into account, I find that these goods and services are dissimilar.

*Entertainment services, namely, providing an online environment featuring streaming of entertainment content and live streaming of entertainment events; entertainment services, namely, providing online facilities for streaming entertainment content and live streaming video of entertainment events.*

60. The above services are entertainment services and while they relate to events, the comparison I have made in respect of the organisation of event services at paragraph 57 above is not applicable here. These services can, in my view, cover the provision of a streaming event that relates to a live computer game competition. Such a service, whilst different in nature, method of use and purpose with "computer game software", would be provided by the same undertaking that provides the computer game. Further, the players of the game would likely watch the event, even if they are not participating in it. As such, I find that the above

services overlap in trade channels and user with the opponent's goods. The goods are not complementary in the way described by the case law and neither are they competitive in nature. Overall, I consider that these goods and services are similar to a low degree.

*Entertainment services for sharing photo and video.*

61. I do not consider that sharing photos or videos covers the provision of live streaming events. That being said, in the context of video streaming or photography apps used on mobile phones, I consider that there is some overlap between the above and the opponent's "downloadable mobile applications". I say this because the downloadable apps can include video streaming/photograph apps which will commonly include the service of allowing users to share photos and videos for entertainment purposes. As such, I consider that the above service overlaps in trade channels and user with the opponent's good. In addition, the end purpose of both the goods and the service is to provide entertainment to the user. So while the goods and services differ in nature and method of use and neither are they complementary or competitive in nature, I find that the aforementioned overlaps are sufficient to give rise to a finding that the goods and services are similar to a medium degree.

*Entertainment services, namely, ongoing comedy, drama, documentary, docuseries, animated, mystery, and reality web and television series provided over the internet; providing online non-downloadable videos in the field of comedy, drama, documentary, docuseries, animated, mystery, and reality entertainment; entertainment and educational services, namely, providing non-downloadable movies, television shows, webcasts, audiovisual, and multimedia works via the internet.*

62. The above services can cover the provision of streaming services akin to Netflix or Amazon Prime. In such a context, I consider it reasonable to suggest that a provider of the above services would also allow users to access them via an

application on their mobile phone. As a result, I consider that the above services share an overlap in trade channels with “downloadable mobile applications” in the opponent’s specification. Further, and following similar reasons as those set out in the preceding paragraph, I find that the goods and services also overlap in end purpose and user. Even though the goods and services differ in nature and method of use and neither are complementary or competitive in nature, the aforementioned overlaps are sufficient to give rise to a finding that they are similar to a medium degree.

#### Class 42

*Providing temporary use of non-downloadable software for users to experience virtual reality visualization, manipulation and immersion; platform as a service (PAAS) featuring a computer software platform for immersive experiences in 2d and 3d games, 2d and 3d interactive game and non-game worlds, virtual environments, virtual reality, augmented reality, mixed reality and extended reality, 2d and 3d animations, simulations and visualizations, real-time 3d sites, and computer and video game programs and software; providing non-downloadable game software via a website.*

63. The above services cover the provision of video games and virtual/augmented reality software, albeit as a service as opposed to the actual goods themselves. Plainly, all of the above differ in nature and method of use with the opponent’s terms of “virtual and augmented reality software” and “computer game software”. That being said, even though the goods and services are accessed via different methods, their purposes are to allow the user to play a video game or explore a virtual or augmented reality environment. In addition, I consider it likely that an undertaking that provides the downloadable game is also likely to provide the game as a service also. Lastly, I consider it likely that there would be an overlap but, even if they did not, there is likely to be a degree of competition between the goods and services as some users may wish to access the games via a downloadable

software good over using a service for the provision of said game, or vice versa.  
Overall, I consider that these goods and services are similar to a medium degree.

*Providing temporary use of on-line non-downloadable software development tools; platform as a service (PAAS) featuring computer software platforms for designing and developing computer and video game programs and software; platform as a service (PAAS) services featuring computer software platforms for use in software development, video game development, and the creation, development and operation of game and non-game worlds, online universes, and metaverse environments; software as a service (SAAS) services featuring computer software for software development, video game development, and the creation, development and operation of game and non-game worlds, online universes, and metaverse environments; providing online, non-downloadable software development software, video game development software, and software for creating game and non-game worlds, online universes, and metaverse environments, all of which use virtual reality, augmented reality, extended reality, mixed reality and metaverse technology; providing non-downloadable software for use in software development, video game development, and the development and operation of game and non-game worlds, online universes, and metaverse environments; platform as a service (PAAS) featuring a computer software real-time 2d and 3d creation platform for use in the creation, development, production, and operation of 2d and 3d games, 2d and 3d interactive game and non-game worlds and virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, 2d and 3d animations, simulations and visualizations, and real-time 3d sites; providing temporary use of non-downloadable computer software for use in the creation, development, production, and operation of 2d and 3d games, 2d and 3d interactive game and non-game worlds and virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, real-time 3d sites, and computer and video game platforms; application service provider featuring application programming interface (API) software; application service provider featuring application programming interface (API) software for computer software development tools; providing temporary use of online*

*non-downloadable software for building user interfaces; software development in the framework of software publishing.*

64. The above terms cover a range of services for the creation or development of different types of software. On this point, I note that the opponent's specification includes the terms "software design" and "developing computer software for others". The opponent's terms can cover the design or development of any of the types of software covered by the holder's services. While the services at issue here relate to non-downloadable software, I see no reason why the comparison I have made at paragraph 38 above cannot apply here. In short, I consider that these services differ in nature and method of use. As for purpose, their core purposes differ although I do appreciate that there is some overlap in end purpose as both services aim to ultimately provide software for the user. In terms of trade channels, following what I have said above, I find that they are different. Lastly, the user will not be the same but there is a degree of competition between them. Taking all of this into account and, again, relying on the same findings I have reached at paragraph 38 above, I find that the overlaps discussed are not sufficient to give rise to a meaningful level of similarity between them. Overall, these services are dissimilar.

*Providing temporary use of non-downloadable software for creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, interacting with, embedding, transmitting, and sharing or otherwise providing electronic media, images, video, audio, audio-visual content, data, and information via the internet and communication networks; providing temporary use of non-downloadable software for modifying photographs, images and audio, video, and audio-video content; providing temporary use of non-downloadable computer software for use in taking and editing photographs and recording and editing videos; providing temporary use of non-downloadable software for curating online user-defined content; non-downloadable software for streaming multimedia entertainment content; non-downloadable software*

*for transmitting, sharing, receiving, downloading, displaying, interacting with and transferring content, text, visual works, audio works, audiovisual works, literary works, data, files, documents and electronic works; providing temporary use of non-downloadable software for creating, managing and accessing user-created and administered groups within virtual communities; providing temporary use of non-downloadable software for creating and managing social media profiles and user accounts; computer services in the nature of providing customized online pages featuring user-defined or specified information, personal profiles, virtual reality, mixed reality, and augmented reality content and data; computer services in the nature of customized electronic personal and group profiles or webpages featuring user-defined or specified information, including audio, video, images, text, content, and data; providing temporary use of non-downloadable software for finding content and content publishers, and for subscribing to content; providing temporary use of online non-downloadable software and applications for instant messaging, sharing files, and electronically sending and receiving voice, audio, video, text, images, graphics, and data; providing application programming interface (API) software for use in electronic messaging and transmission of audio, video, images, text, content and data; software as a service (SAAS) services featuring software for instant messaging, sharing files, and electronically sending and receiving voice, audio, video, text, images, graphics, and data; providing temporary use of online non-downloadable software and software as a service (SAAS) featuring software for capturing, downloading, editing, formatting, displaying, streaming and sharing multimedia entertainment content, audio-visual content, video content, and associated text and data; providing temporary use of non-downloadable computer software for enabling transmission of images, audio, audio visual and video content and data; providing temporary use of non-downloadable software that enables users to transfer personal identity data to and share personal identity data with and among multiple websites; providing temporary use of non-downloadable software for streaming multimedia entertainment content.*

65. All of the above terms can, in my view, be construed as covering services relating to software used for social media or streaming services. While not similar in nature

or method of use with “downloadable mobile applications” in the opponent’s specification, I consider that there is an overlap in purpose, trade channels and user. While I do not intend to go over all of the purposes covered by the above, I note, for example, that the purpose of the opponent’s software, in the context of social media, is such that it could be used to enable the user to modify photographs (with social media filters, for example) prior to the uploading of the same. This is the same purpose as some of the services listed above and, for the avoidance of doubt, a similar approach can be taken in respect of the remaining terms. The provider of the above services is also likely to provide a social media application for use on mobile phones. Lastly, in terms of user, I consider that the user of social media services would look to use them by accessing non-downloadable software (such as via a web browser, for example) and via a downloadable mobile app (whilst on the go, for example). Taking all of this into account, I find that these goods and services are similar to a medium degree.

*Providing temporary use of non-downloadable software for organizing events, searching for events, calendaring and managing events; providing temporary use of non-downloadable software for creating and maintaining an online presence for individuals, groups, companies, and brands.*

66. As far as I understand the above terms, they both cover social media offerings.

The first of which allow users to set up pages for the organisation of different events and can include information as to the amount of guests attending and the timings and location of the event.<sup>3</sup> The second term can be said to cover access to software to allow users to create and maintain social media profiles (be that for themselves as individuals, their businesses or fan groups, for example). As a result, I consider that the same findings I have made in the preceding paragraph are directly

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<sup>3</sup> I appreciate that a similar term to this appear in the holder’s class 9 list of goods and that I found this dissimilar. However, the difference is that, above, the term was limited to use in marketing whereas the term at issue here is not so may, therefore, cover social media use.

applicable here. As such, I find that these services are similar to a medium degree with the opponent's "downloadable mobile applications".

*Non-downloadable software for providing a virtual marketplace; non-downloadable software for processing electronic payments.*

67. The above services cover the provision of software for use in virtual marketplaces or for making electronic payments. While the above software is provided via a service, they are also commonly provided via mobile phone apps. Both the non-downloadable software (as a service) and the app will also be accessed by the same user. Therefore, in considering the above terms with the opponent's "downloadable mobile applications", I find that they overlap in trade channels and user. Further, as the opponent's term is not limited in any way, the end purposes can be said to overlap on the basis that a downloadable app can be used to access a virtual marketplace and make payments. As a result, despite the different nature and method of use, the above services and the opponent's term are similar to a medium degree.

*Providing temporary use of non-downloadable game software.*

68. Applying the same logic as set out in the preceding paragraph, I consider that the above term is similar to a medium degree with the opponent's term of "computer game software".

*Providing temporary use of non-downloadable software that gives users the ability to upload, modify and share virtual reality content, augmented reality content, mixed reality content, information, experiences and data; computer services, namely, creating an online community for users to access metaverse platforms.*

69. In considering the above services, I am of the view that the opponent's term of "virtual and augmented reality software" is the closest comparable term. I see no

reason why the opponent's term cannot be used to upload, modify and share virtual or augmented reality content. Further, such software can be used to create communities for users to access metaverse platforms on the basis that a metaverse can be viewed in virtual reality. As such, I am of the view that while the goods and services differ in nature and method of use, they do share a purpose. Further, the software itself and the provider of non-downloadable software is likely to be the same, meaning that the trade channels are the same. In respect of user, I consider that the same user will access both the software and the non-downloadable software service but, even if not, there is a competitive relationship between them as the user may elect to use one over the other. Overall, I consider that these goods and services are similar to a medium degree.

*Computer services, namely, hosting an on-line multimedia virtual environment; hosting an online community website featuring game and non-game worlds, online universes, and metaverse environments; interactive hosting services which allow the users to publish and share their own content and images online; hosting of virtual reality and augmented reality content on the internet; hosting of digital content on the internet.*

70. It is my understanding that when it comes to computer games or virtual/augmented reality content, users will often access the games/content online in order to experience it with others, be that via competitive gaming or exploring virtual reality content together. As far as I am aware, the hosting of this online content will be provided by the same undertaking that offers the game or virtual/augmented reality software. As such, I consider that the above services overlap in trade channels with the opponent's terms of "virtual and augmented reality software" and "computer game software". Further, I consider that the user of the software will also use the hosting service in order to access said game/content online. Lastly, I am of the view that the ability to access games or content online is, in the present marketplace, important to the video game and virtual/augmented reality software. I consider that such a relationship between them is likely to lead consumers to believing that the goods and services originate from the same undertaking,

meaning that they are complementary in nature. Overall, while the nature, method of use and purpose of the goods are not the same, I consider the aforementioned overlaps result in a finding that these goods and services are similar to a medium degree.

*Providing temporary use of non-downloadable software for use in metaverse applications to enable interoperability and information sharing between hardware devices, software systems, and the internet.*

71. The above service is highly technical in nature and I am unsure as to what it actually covers and how it can be said to relate to any of the opponent's goods and services. While it makes reference to the metaverse, it is not clear what is meant by enabling interoperability or how the sharing of information between hardware and software is something that is commonly offered via downloadable mobile software, computer games or augmented/virtual reality software (being the goods covered by the opponent's class 9 terms). Further, it is not clear as to whether it relates to design or development of software in a way that it can be said to be identical or similar to any of the opponent's class 42 services. Without any further submissions on this point, I am not convinced that there is any degree of similarity between the above and the goods/services of the opponent. As a result, I find that they are dissimilar.

*Providing temporary use of non-downloadable software for use in designing, managing, measuring, analyzing, disseminating, and serving advertising of others.*

72. I appreciate that I have made several comparisons with temporary non-downloadable software terms and the opponent's broad "downloadable mobile applications". However, this was on the basis that the non-downloadable software was also something that could reasonably be said to be provided via downloadable apps. For example, social media and streaming is commonly available to users on apps for mobile devices. I do not consider that to be the case here. I say this

because, as far as I am aware, software relating to the creation and management of advertising campaigns (which is what I understand the above term covers) is not commonly found on mobile devices. On this point, I have nothing before me to suggest otherwise and, without such, I do not consider it appropriate to infer that it does. In terms of user, I am of the view that given the wide nature of the opponent's goods there is inevitably some overlap but any such overlap is likely to be fleeting. Taking all of this into account and bearing in mind that the goods of the opponent differ in nature, method of use and purpose with the above services, I find that these goods and services are dissimilar.

#### Class 45

*Licensing of software in the framework of software publishing; licensing of intellectual property rights.*

73. I appreciate that an undertaking that offers the various types of software as covered by the opponent's specification is likely to seek the licensing of said software and the intellectual property rights in the same. However, this does not automatically mean that the above services are similar to the opponent's goods or services. On this point, I note that the natures, method of use and purposes all differ. In terms of trade channels, I have nothing before me to suggest that an undertaking that produces software also offers the above services to customers. Further, the user of the above service is likely to be a business user looking to license something to sell on to the end user. Such users are not the users of the opponent's software goods (or any of its services, for that matter). The above are neither complementary or competitive with any of the opponent's goods and services and, as such, I find them to be dissimilar.

### Conclusion in respect of the goods and services comparison.

74. In order for there to be a likelihood of confusion under section 5(2)(b) of the Act, a level of similarity between the goods and services is required.<sup>4</sup> Therefore, in light of my above findings, the present ground fails in respect of the dissimilar goods and services. Given the length of the specification at issue, I will refrain from reproducing those here but will, if necessary, discuss this further at the conclusion of my decision.

### **The average consumer and the nature of the purchasing act**

75. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

76. The goods and services at issue will be selected by members of the general public at large and business users. The goods and services are likely to be available via a number of different providers, be that general retailers, specialist retailers or

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<sup>4</sup> See paragraph 49 of *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

direct from the provider of the goods/services themselves. Additionally, the goods and services will be available online from the retailer's/provider's website. For the most part, I consider that the visual component will play the greater role during the selection process. I say this because the goods are likely to be self-selected by the consumer either after taking them from shelves, seeing an image of them on a website or selecting them from a list of goods. As for the services, these are likely to be selected from lists or pamphlets or via menus viewed on websites. I appreciate that there may also be an aural component to the selection process for all goods and services in the form of word-of-mouth recommendations or advice from sales assistants. That being said, I consider that there are some services selected by business users where attention will be paid to both the visual and aural element equally. For example, when selecting the design services offered by the opponent, consumers will view the mark but will also engage in detailed discussions with the provider.

77. The cost and frequency of selection for the goods and services at issue will vary quite considerably. For example, goods such as downloaded mobile phone applications will be selected frequently and, in some instances, may even be available for free. On the other end of the scale, design and development of software services are likely to be infrequently selected and may come at a substantial cost. In between these two ends of the scale sit goods and services that will be selected with a moderate degree of frequency and at a moderate cost.

78. In terms of the level of attention paid, I consider that this will also vary quite considerably. I do not intend to go over each and every consideration for the range of goods and services at issue, however, I will briefly discuss the lowest and highest ends. On the lower end of the scale, I consider that because goods such as downloadable mobile applications can, as above, include free downloadable apps, they will attract a relatively low degree of attention. On the other end of the scale sits services such as design and development of software. Such services are likely to be selected after a considered thought process with attention paid to various

factors including the expertise of the provider and testimonials from previous customers. Further, when seeking the design of software, the consumer is likely to be doing so for business purposes with the software is likely to be an important factor for the successful running of said business. It will, therefore, be selected as a result of a more careful thought process. Such services, in my view, will attract a relatively high degree of attention, though not outright high. Lastly, between these two ends of the scale, I consider that the goods and services will range in the level of attention they attract. This will include a wide range of goods that will likely attract a medium degree of attention on the basis that they are likely to be ordinary selections that are unlikely to be selected casually.

### **Comparison of the marks**

79. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

80. 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.”

81. 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.

82. The respective trade marks are shown below:

The opponent's mark	The IR
MEGAVERSE	EPIC GAMES MEGEVERSE

83. I have comments/submissions from both parties in the respect of the comparison of the marks. I will not reproduce those submissions here but confirm that I have taken them into account in making the following comparison.

### Overall impression

#### *The IR*

84. The IR is a word only mark that consists of the words 'EPIC GAMES MEGEVERSE'. The holder has expended significant effort in proving the reputation of the branding 'EPIC GAMES' in order to support an argument that the 'EPIC GAMES' element is the distinctive element of the IR. While evidence of the reputation of a later mark may be of assistance when considering the conceptual comparison of the marks (more on this below), it does not carry the impact that the holder seems to believe that it does when it comes to the overall impression of the IR. Firstly, the comparison I must make here is a notional one based on the marks as they appear before me and not extraneous factors such as how the marks are used in the market, for example. Secondly, the holder's approach appears to be somewhat misguided. This is on the basis that the holder's position is that the word

'MEGAVERSE' has no impact at all and I say this because the holder's submissions in respect of the marks comparison ignore the presence of that word entirely. This is not the correct approach and even if it could be said that 'EPIC GAMES' was the most distinctive element of the IR, it does not mean that 'MEGAVERSE' is invisible for the purposes of this comparison. While I will return to discuss the holder's position in respect of the repute of the 'EPIC GAMES' element again in this decision, I will say no more about it here (save for in the conceptual comparison below).

85. It is my view that while average consumers do not dissect trade marks, at least a significant proportion of consumers will perceive 'EPIC GAMES' and 'MEGAVERSE' to be standalone elements with the IR. I appreciate that 'EPIC GAMES' sits at the beginning of the IR, however, I do not consider that this gives it any more distinctiveness than 'MEGAVERSE'. I say this because, for reasons I will discuss further below, 'EPIC GAMES' can be said to include laudatory/descriptive elements. If anything, this could be used to argue that it is 'MEGAVERSE' that plays the greater role in the overall impression of the mark as it is neither descriptive or allusive. However, despite this, I will proceed as though both 'EPIC GAMES' and 'MEGAVERSE' play an equal role in the overall impression of the IR.

#### *The opponent's mark*

86. The opponent's mark is a word only mark consisting solely of the word 'MEGAVERSE'. There are no other elements that contribute to the overall impression of the mark, which lies in the word itself.

#### Visual comparison

87. Visually, the marks share the word 'MEGAVERSE'. This word sits at the end of the IR but is the sole element of the opponent's mark. The marks differ in the presence

of the words 'EPIC GAMES'. These words sit at the beginning of the IR and, on this point, I note that the beginnings of marks tend to have more focus than their ends.<sup>5</sup> That being said, the shared use of the word 'MEGAVERSE' is a significant point of similarity and, in my view, is sufficient to give rise to a finding that these marks are visually similar to a medium degree.

#### Aural comparison

88. The IR consists of six syllables and the opponent's mark consists of three. Both marks will be pronounced in the ordinary way. In terms of similarity, the pronunciation of 'MEGAVERSE' will be identical across both marks. As for the points of difference, 'EPIC GAMES' at the start of the IR has no counterpart in the opponent's mark. Even taking into account what I have said regarding the beginning of marks above, I consider that the identity of three syllables (being the entirety of the opponent's mark and half of the IR) is sufficient to give rise to a finding that these marks are aurally similar to a medium degree.

#### Conceptual comparison

89. The concept of the opponent's mark lies in the word 'MEGAVERSE'. This is not a dictionary defined term. That being said, I note the opponent's position is that it will evoke the concept of a large universal space. I have no submissions in respect of its meaning from the holder. For the avoidance of doubt, I have given consideration as to whether consumers will take the concept of a 'metaverse' from the word. Having done so, I am not convinced that they would, especially in light of the submission of the opponent in respect of a 'mega universe'. Further, given the technical nature of the 'metaverse', it does not necessarily follow that such a connection would carry any obvious meaning to the consumer in any event, even if viewed on virtual/augmented reality goods/services. As such, I am inclined to

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<sup>5</sup> *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

agree with the holder in that 'MEGAVERSE' will be connected to the idea of a large universal space, i.e. a 'mega universe'.

90. Turning to the IR, I consider that the concept associated with the word 'MEGAVERSE' will be the same as above. As for the words 'EPIC GAMES', I find that 'GAMES' is clearly descriptive of a range of gaming goods/services and, further, the word 'EPIC' would inform the user that the games referred to are either *large or heroic*.<sup>6</sup> Such a meaning is clearly descriptive/laudatory. Alternatively, and as set out above, the holder has argued that the 'EPIC GAMES' element would be known by the consumer. This can have an effect here as a well-known concept associated with a later mark may be relevant for the conceptual meaning of that mark. This was set out by the CJEU in the joined cases of C-449/18 P and C-474/18 P, EU:C:2020:722, *EUIPO v Messi Cuccittini* and *J.M.-E.V. e hijos v Messi Cuccittini*. In the present case, I appreciate that the evidence shows that the holder operates a very large business operation under the 'EPIC GAMES' branding. However, I am not convinced that this necessarily changes anything in respect of the present comparison. This is on the basis that regardless of how 'EPIC GAMES' is perceived; it is not an element that is shared in the opponent's mark. As such, it acts as a point of conceptual difference whether consumers associate it with the holder or whether they attribute it its inherent meaning. Taking the IR as a whole, I do not consider that it carries any unitary meaning and, instead, consumers will attribute its meaning to the two different standalone elements discussed above, being 'EPIC GAMES' and 'MEGAVERSE'.

91. In comparing the concept of the marks at issue, 'EPIC GAMES' is clearly a point of difference between them, be that as a known entity or based on its inherent meaning. That being said, 'EPIC GAMES' does not outright negate the shared concept associated with the word 'MEGAVERSE'. Overall, I consider that this

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<sup>6</sup> <https://www.collinsdictionary.com/dictionary/english/epic>

shared concept gives rise to a finding that these marks are conceptually similar to a medium degree.

### **Distinctive character of the opponent's mark**

92. 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).”

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

character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced through use and, on this point, I note that the opponent has pleaded that its marks benefits from an enhanced distinctive character. I will, therefore, consider whether this evidence is sufficient to give rise to a finding that the distinctiveness of the opponent's mark has been enhanced through use. Before doing so, I will consider the inherent position.

94. The opponent's mark is, as above, a word only mark consisting solely of the word 'MEGAVERSE'. As I have also set out above, this is not a dictionary word but will be understood as a reference to a large universal space, i.e. 'a mega universe'. I remind myself that, above I gave consideration as to whether 'MEGAVERSE' will be associated with the 'metaverse'. I concluded that it did not but, even if such a connection was made, the technical nature of the metaverse is such that I am not convinced consumers would know what it meant. As such, I see no reason why the word 'MEGAVERSE' would have any allusive or descriptive qualities. Despite it not being a dictionary word, I find that the meaning determined above is such that the opponent's mark would attract a medium degree of inherent distinctive character.

95. I turn now to consider the position with regard to the opponent's claim that its mark enjoys an enhanced degree of distinctive character. The evidence sets out that the opponent began operations in June 2018 and that its aim is to merge digital innovation by using augmented, virtual and mixed reality technologies. In terms of the projects it has undertaken, the evidence sets out that the opponent's first product was something called 'Arctic Escape', which used augmented reality to transport children at a Children's Hospital to the arctic. The evidence describes a range of subsequent events, all of which include reference to augmented, virtual and mixed realities. Some of these projects were from 2022 and 2023, which is after the relevant date for these proceedings, being 24 December 2021 (the priority date of the IR).

96. In respect of revenue, the opponent has provided evidence as to its turnover between 2019 and 2023. This is as follows:

<b>Financial Year</b>	<b>Turnover (£)</b>
2019	14,444
2020	90,047
2021	116,869
2022	336,606
2023	515,031

97. A range of invoices are provided in support of the above figures.<sup>7</sup> Having considered these, I note that they cover invoices issued to customers in the UK between 2018 and September 2021. The invoices cover a range of goods and services that include, but are not limited to, the provision of software, virtual reality headsets for hire, development of software, filming, film editing, technology training consultation, research and something referred to as an 'SME Internship'. The invoices, in my view, present some difficulties for the opponent on the basis that some of them cover services that are not at issue here. For example, training, film editing, hire of goods and research are not relied upon under the opponent's mark. In addition, I have nothing to suggest what 'SME Internship' covers so I am unsure how it contributes to the distinctiveness of the mark.

98. In addition to the above, I have further issues with the opponent's turnover provided in that it covers the years 2022 and 2023, both of which are after the relevant date for these proceedings. I also note that the years covered are referred to simply as 'financial year'. I have nothing to suggest what the opponent's financial year covers. For example, if it covers the calendar year of January to December then the entirety of the figures for 2022 and 2023 are not relevant. However, if they

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<sup>7</sup> J13

cover the April of one year to the March of the next, then the figures for 2022 could reasonably be said to cover 1 April 2021 to 31 March 2022. While that would mean some of the 2022 figures were relevant here, it is not possible for me determine how much of this stems from 1 April 2021 to 24 December 2021. In short, without any explanation on this point, I consider that it is only reasonable to proceed on the basis that the opponent's turnover covers just those figures for 2019 to 2021. This means that the entirety of the opponent's turnover sits at £221,360. If this is incorrect then I consider it reasonable to suggest that the opponent ought to have filed clarifying evidence on this point.

99. The opponent's evidence includes a focus on awards it obtained and publications in which it was featured in prior to 2022. I note that, of this evidence, MEGEVERSE was:

- a. named as one of twenty groundbreaking immersive projects that were shown at the Digital Catapult and Arts Council England collaboration between 9 and 10 October 2019. Coverage of this is provided by way of an article from the publication 'BROADCAST'.<sup>8</sup>
- b. named as one of the 'trailblazing immersive projects' by Digital Catapult.<sup>9</sup> While this article is undated, it makes reference to an event in 2019.
- c. shown in online coverage regarding a project entitled 'Colour Wall' which was used to create immersive experiences at Sheffield's Children Hospital. The coverage includes printouts from Sheffield NHS's own website, the 'Talking Art and Health' section of the website Medium<sup>10</sup> and The Star.<sup>11</sup> In respect of the 'Colour Wall', it is featured in the annual report and accounts of the Sheffield Children's Hospital.<sup>12</sup>

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<sup>8</sup> J15

<sup>9</sup> J14

<sup>10</sup> J17

<sup>11</sup> J18

<sup>12</sup> J19

- d. acknowledged by the UK Research and Innovation (UKRI) in an article on 'Powering the Creative Industries'.<sup>13</sup> This article is undated, however, it makes reference to the launch of the programme in 2018.
- e. the winner of awards such as 'Design Weeks App Design Award' and the 'Design Weeks Interaction Design Award' for its 'Arctic Escape' app (which I have discussed at paragraph 95 above) and its 'Colour Wall' project.<sup>14</sup>

100. The above evidence is noted. However, I do not consider that it necessarily speaks to a widespread level of use that can be said to point to an enhancing of the distinctiveness of the opponent's mark. For example, as far as I am aware, the articles referred to in respect of the Colour Wall project (at point c. above) do not come from well-known publications and without any readership figures in respect of the same, it is not possible for me to accurately determine their reach. On this point, the annual report from the Sheffield's Children Hospital is, in my view, unlikely to have any significant readership base outside of those with an interest in the running/operation of the hospital. As such, it is of very little assistance here. Further, having considered the articles themselves, I note that while they do refer to the 'Colour Wall', their focus appears to be more so on the activities of the hospital with 'MEGAVERSE' only appearing sparingly within them.

101. In addition to the above, the awards won appear to be relatively niche awards relating to the design industry. In respect of these, I have nothing to suggest how they were voted on, be that via a select judging panel or votes from members of the relevant public. Additionally, I have nothing before me to suggest the reach of these awards and whether they are well-known across the average consumer base in the UK.

102. Lastly, I note that the evidence includes awards from after 2022 but given that the relevant date was 24 December 2021, these are of no assistance here.

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<sup>13</sup> JI10

<sup>14</sup> JI11 and JI12

103. Taking all of the evidence into account, I see no reason why it would point to an enhancement of the distinctiveness of the opponent's mark. The use is not particularly longstanding and neither is it at a high level. In respect of this point, I remind myself that a number of the invoices in support of the opponent's turnover cover services that are not actually found within the opponent's specification so have no value here. Lastly, as set out above, the press coverage and awards obtained are of little assistance due to the lack of supporting information in relation to the same. As a result, I find that the inherent position applies, namely that the opponent's mark enjoys a medium degree of distinctive character.

### **Likelihood of confusion**

104. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle, i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their minds.

105. I have found the goods and services at issue to range from being identical to similar to a low degree. The average consumer base is formed of members of the

general public and business users. The consumers will pay varying degrees of attention when selecting the goods and services at issue and this will range from low to relatively high. The selection process will, for the most part, be predominately visual but an aural component will not be ignored. That being said, some goods/services sought by business users may be selected with equal attention being paid to the visual and aural components. In respect of the marks at issue, I have found the IR is visually, aurally and conceptually similar to a medium degree with the opponent's mark. Lastly, I have found that the opponent's mark possesses a medium degree of inherent distinctiveness. On this point, despite the pleading to the contrary, the opponent's mark does not benefit from an enhanced degree of distinctive character.

106. Bearing the above in mind and also factoring in the principle of imperfect recollection, I do not consider that there exists a likelihood of direct confusion between the marks at issue. In short, the consumer would not overlook the words 'EPIC GAMES' at the beginning of the IR and, despite the shared use of the word 'MEGaverse', the consumer would be able to accurately recall and remember the marks for one another.

107. I will now proceed to consider the issue of indirect confusion and, in respect of the same, I remind myself of the case of *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, wherein Mr Iain Purvis Q.C., as the Appointed Person, explained that:

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later

mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: 'The later mark is different from the 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)".

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

109. Further, I note the case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, wherein Arnold LJ referred to the comments of

James Mellor Q.C. (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at paragraph 16 that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

110. The holder’s position in respect of a likelihood of confusion is that it would be obvious to the consumer that the IR originates from the renowned brand ‘EPIC GAMES’. Further, the holder submits that the public would not undertake a thought process whereby they attribute the common element, being ‘MEGAVERSE’, to the same or economically connected undertaking. It is claimed that it is immediately obvious that the IR belongs to EPIC GAMES and that the goods and services would emanate from that commercial undertaking and not another.

111. The issue I have with the holder’s position is that if such an argument were to be successful, then it would follow that any large company could avoid a finding of confusion simply by adding its renowned branding before a word, regardless of if that word was subject to a trade mark registration owned by a third party. This cannot be the case as it would offer far too broad a scope of protection for large companies when applying for new trade marks.

112. While I do not doubt that the holder’s evidence demonstrates that EPIC GAMES is a large undertaking and that this element of the mark will clearly be noticed, I am of the view that the necessary assessment here involves the *Medion* principle. The correct approach to this was set out by Arnold J. (as he then was) in the case of *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch). In this case, the judge considered the impact of the CJEU’s judgment in *Bimbo*, Case C-591/12P, on the court’s earlier judgment in *Medion v Thomson*.<sup>15</sup> He said:

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<sup>15</sup> *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04

“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 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.”

113. In the present case, I have found that the IR would not be viewed wholistically as a unit. Instead, I found that when consumers are confronted by the IR, they will identify that it consists of two signs, one being ‘EPIC GAMES’ and the other being ‘MEGAVERSE’. Each of these elements have a distinctive significance independent of the whole of the IR. I say this because the two elements are in no way connected, either through positioning or meaning. Put simply, I consider that ‘EPIC GAMES’ will be viewed as the house mark with ‘MEGAVERSE’ being a secondary indicator of origin. In light of this, I consider it reasonable to conclude that when consumers are confronted by the marks at issue, they will be indirectly confused as to their commercial origin. As ‘MEGAVERSE’ has its own distinctive significance within the IR, I find that consumers will consider it logical for such a word to also be used on its own, without the wording ‘EPIC GAMES’. For example, if the consumer was to view ‘EPIC GAMES MEGEVERSE’ on product packaging and then see ‘MEGAVERSE’ in promotional materials for identical or similar goods, they would likely believe that the marks originated from the same or economically linked undertakings.<sup>16</sup> On this point, I do not consider that use of marks with or without their house branding is particularly uncommon and the average consumers will not consider the admission or omission of ‘EPIC GAMES’ to be particularly surprising. Consequently, even bearing in mind the comments reproduced from the case law discussed at paragraph 109 above, I consider that there exists a likelihood of indirect confusion between the marks at issue, regardless of the level of similarity between the goods and services at issue or the level of attention paid by the consumer.

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<sup>16</sup> See *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, regarding “wrong way round confusion”, referring to *Comic Enterprises* (cited above) at paragraphs 75-84. In that case Kitchin LJ explained that “right way round” or “wrong way round” confusion may be a consequence of nothing more meaningful than the order in which the consumer happened to come across the mark and the sign. He explained further that in both instances the consumer thinks that the goods or services in issue come from the same undertaking or economically linked undertakings, and they may be equally damaging to the distinctiveness and functions of the mark.

114. As a result of the above, I find that the section 5(2)(b) ground of opposition succeeds but only in respect of those goods and services for which I have found a degree of similarity. Given the length of the specification at issue, I do not intend to summarise the extent of this success at this point. Instead, I will reserve doing so until the conclusion of my decision. For now, I will proceed to consider the section 5(4)(a) ground of opposition.

### **Section 5(4)(a)**

115. Section 5(4)(a) of the Act states as follows:

“5(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -

a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

aa)...

b) ...

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark”.

116. Subsection (4A) of section 5 of the Act states:

“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

117. I can deal with the present ground briefly. I say this because, in considering the present ground, it does not add anything further to the opposition beyond the partial success of the section 5(2)(b) ground assessed above. My reasons follow.

118. Under the present ground, the goods and services for which the opponent claims a goodwill are as follows:

“Augmented reality software; augmented reality game software; design services; design services relating to virtual reality software; software development; software design”

119. I do not intend to repeat the opponent’s evidence here but, instead, refer to my summary at paragraphs 95 to 102 above. I remind myself that while the overall turnover is not at a high level (being just £221,360), this is not fatal to a claim for the existence of protectable goodwill as a small business can still sustain a claim for passing off under the present ground.<sup>17</sup> However, my primary issue with the evidence before me is the fact that the invoices covering the opponent’s use includes reference to a range of services that are not at issue here. On this point, I refer to paragraph 97 above wherein I identified that the opponent’s invoices covered services for the hiring of goods, research, consultation and film editing, amongst others. Such services are not covered by the terms relied upon here and I note that the opponent has not filed anything that enables me to accurately attribute the turnover to the actual goods and services at issue. Without any guidance on this point, it is not possible for me to determine what the turnover was in respect of the relevant goods and services as at the relevant date. In such circumstances, the only option available for me to reach a finding of there being goodwill would be to simply infer that, despite the above issues, there must be a sufficient level of use apportionable to the relevant goods and services relied upon.

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<sup>17</sup> See *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590, for example.

Such an inference would, in my view, be entirely unreasonable and, as such, it is not one that I am willing to make. As a result, I consider that the evidence falls short of being able to prove the existence of goodwill in the opponent's sign as at the relevant date. Therefore, the present ground fails at the first hurdle.

120. Having said all of the above, even if I was wrong and that the opponent did enjoy a protectable level of goodwill in its business, it would not advance the level of success of the opposition overall beyond that which was reached under the section 5(2)(b) ground above. I say this because, at best, the goods and services for which the opponent would enjoy a protectable level of goodwill in would be limited to software and design/development relating to augmented reality. Such goods/services are significantly more limited than those goods/services relied upon under the section 5(2)(b) ground. Therefore, any success under the present ground would only extend to those goods/services in the holder's specification that can be said to be within the same field of activity as the goods/services of the opponent.<sup>18</sup> In support of this point, I note that there is no evidence before me to demonstrate that there would be misrepresentation despite there being no common field of activity.<sup>19</sup> Given the size of the specification at issue, I do not intend to go over this in any detail but, plainly, the goods/services that can be said to be within the same field of activity are far more limited than those for which the section 5(2)(b) ground succeeded.<sup>20</sup> Therefore, even if the opponent did benefit from a protectable level of goodwill and there were misrepresentation between the IR and the opponent's sign, it would add nothing to the section 5(2)(b) ground.

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<sup>18</sup> On this point, I remind myself of the case of *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, wherein Kitchin LJ set out that it was doubtful whether the difference between the legal tests for likelihood of confusion and misrepresentation will (all other factors being equal) produce different outcomes. I consider this applicable here given the identity of the opponent's mark and the opponent's sign.

<sup>19</sup> Here, I remind myself that the burden for overcoming the distance between fields of activity under the present ground is a heavy one. See *Harrods Limited v Harrodian School Limited* [1996] RPC 697 (CA) and *Stringfellow v. McCain Foods (G.B.) Ltd.* [1984] R.P.C. 501

<sup>20</sup> In respect of this point, I have set out at Annex 2, the goods and services in the IR for which the present ground would succeed if I were minded to find that the opponent enjoyed a protectable level of goodwill in "augmented reality software" and "design services relating to virtual reality software".

121. Taking all of the above into account, my primary finding is that the opponent failed to establish that it benefited from a protectable level of goodwill as at the relevant date. However, even if this is incorrect, the level of success of the present ground would fail to eclipse that of the section 5(2)(b) ground.

## **CONCLUSION**

122. The opposition has enjoyed a partial degree of success and the IR is, subject to any successful appeal of my decision, hereby refused protection in the UK for the goods and services that I have found to be identical or similar under the section 5(2)(b) ground. However the IR is, again subject to any successful appeal of my decision, permitted protection in the UK for the following goods and services, being those that I found to be dissimilar to the opponent's goods and services:

Class 9: Downloadable software that enables individuals, groups, companies, and brands to create and maintain an online presence for marketing purposes; downloadable software for use in creating, managing, measuring, and disseminating advertising of others; downloadable software for creating, sharing, disseminating and posting advertising; downloadable software that enables individuals, groups, companies, and brands to create and maintain an online presence and interact with online communities for marketing purposes; downloadable software development tools; downloadable software development kits (SDK); downloadable software for use in creating, manipulating and participating in virtual environments; downloadable software for the creation of fully immersive and interactive animations, simulations, and visualizations for use in a metaverse environment; downloadable computer programs for creating video game programs and software; downloadable computer software for video game development and operation; downloadable computer software platform for video game development, distribution, and operation; downloadable software for use

in the development of video games and 2D and 3D animations, simulations and visualizations; downloadable software for use in creating and designing virtual reality, mixed reality, augmented reality, and extended reality software; downloadable virtual reality software in the field of designing computer and video games; downloadable software for use in the creation, development, production, and operation of 2D and 3D games, 2D and 3D interactive game and non-game worlds, virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, animations, simulations and visualizations, real-time 3D sites, and video game platforms; downloadable software for creating and editing images; downloadable software development tools for the creation of computer-generated imagery, graphics, and content; downloadable software for the creation of computer-generated imagery, graphics and content for use in game and non-game worlds, online universes, and metaverse environments; downloadable computer software for creating, authoring, distributing, transmitting, editing, extracting, encoding, decoding, displaying, storing and organizing electronic games; downloadable software for creating digital animation and special effects; downloadable software for the creation of computer-generated imagery and graphics for use in the creation, development, production, and operation of 2D and 3D games, 2D and 3D interactive game and non-game worlds and virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, real-time 3D sites, and computer and video game platforms; downloadable software for writing and editing video game software; downloadable computer software for use in designing, creating, operating, and editing other computer software; downloadable software for building user interfaces; downloadable software for use as an application programming interface (API); downloadable application programming interface (API) software for writing and editing video game software; downloadable application

programming interface (API) for computer software for developing and creating virtual reality, augmented reality and mixed reality experiences; computer software, namely, software development tools for the creation, debugging, and deployment of software applications for smart glasses, near-eye displays, head-mounted displays, and smartphones; downloadable computer software development tools for implementing a computer programming language; downloadable computer software for use in designing and creating other computer software; downloadable graphics for computers, namely, 2D and 3D images for use in the creation of computer-generated imagery and graphics; downloadable graphics for computers, namely, 2D and 3D images for use in the production of video games, animations, simulations, visualizations, digital media, virtual environments, and virtual, augmented, mixed reality and extended reality experiences; downloadable graphics for computers, namely, images for use in creating, manipulating, and participating in virtual environments; downloadable graphics software for use in creating multi-player game and non-game worlds.

Class 35: Marketing services; marketing in the framework of software publishing; advertising services; advertising via electronic media; dissemination of advertising for others via a global computer network.

Class 38: Telecommunications services, namely, electronic transmission of virtual reality content and data; photo, video, and data sharing services, namely, electronic transmission of digital photo files, videos, and audio-visual content among internet users; telecommunication services, namely, electronic exchange of voice, data, audio, video, text and graphics accessible via the internet and other communications networks; telecommunications services, namely, electronic transmission of electronic media, data, messages, graphics, images, photos, videos,

audio-visual content and files; telecommunication services, namely, data transmission and reception services via telecommunication networks.

Class 41: Organizing exhibitions and events in the field of interactive entertainment, virtual reality, mixed reality, and augmented reality, consumer electronics and video game entertainment industries for cultural or educational purposes; arranging and conducting competitions and entertainment events for players of video, computer, electronic or interactive multimedia games; organizing exhibitions, events, and conferences in the fields of culture, entertainment, education, and social networking for non-business and non-commercial purposes; entertainment services in the nature of organizing, arranging, and hosting performances and social entertainment events; virtual reality video production for entertainment purposes; augmented reality video production for entertainment purposes; entertainment services in the nature of production and post-production services of multimedia entertainment content; multimedia production services; multimedia publishing of software and games; multimedia publishing of interactive computer and video game programs and software; multimedia entertainment production and publishing services; publishing services, namely, publishing of electronic publications for others; electronic publishing services for others; online electronic publishing concerning social media content.

Class 42: Providing temporary use of on-line non-downloadable software development tools; platform as a service (PAAS) featuring computer software platforms for designing and developing computer and video game programs and software; platform as a service (PAAS) services featuring computer software platforms for use in software development, video game development, and the creation, development and operation of game and non-game worlds, online universes, and metaverse

environments; software as a service (SAAS) services featuring computer software for software development, video game development, and the creation, development and operation of game and non-game worlds, online universes, and metaverse environments; providing online, non-downloadable software development software, video game development software, and software for creating game and non-game worlds, online universes, and metaverse environments, all of which use virtual reality, augmented reality, extended reality, mixed reality and metaverse technology; providing non-downloadable software for use in software development, video game development, and the development and operation of game and non-game worlds, online universes, and metaverse environments; platform as a service (PAAS) featuring a computer software real-time 2d and 3d creation platform for use in the creation, development, production, and operation of 2d and 3d games, 2d and 3d interactive game and non-game worlds and virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, 2d and 3d animations, simulations and visualizations, and real-time 3d sites; providing temporary use of non-downloadable computer software for use in the creation, development, production, and operation of 2d and 3d games, 2d and 3d interactive game and non-game worlds and virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, real-time 3d sites, and computer and video game platforms; application service provider featuring application programming interface (API) software; application service provider featuring application programming interface (API) software for computer software development tools; providing temporary use of online non-downloadable software for building user interfaces; software development in the framework of software publishing; providing temporary use of non-downloadable software for use in metaverse applications to enable interoperability and information sharing between hardware devices, software systems, and

the internet; providing temporary use of non-downloadable software for use in designing, managing, measuring, analyzing, disseminating, and serving advertising of others.

Class 45: Licensing of software in the framework of software publishing; licensing of intellectual property rights.

## **COSTS**

123. On balance, the opponent has enjoyed the greater degree of success in these proceedings. It is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. That being said, I consider that any costs award should be reduced to reflect the partial success of the holder in defending a significant portion of the terms in the IR. In the circumstances, I award the opponent the sum of £700 as a contribution towards its costs. The sum is calculated as follows:

Preparing a notice of opposition and considering a counterstatement:	£250
Filing evidence and considering the opponent's evidence:	£600
<u>Sub-total:</u>	<u>£850</u>
<i>Reduction:</i>	-£350
Official fees (not subject to a reduction):	£200
<b>Total:</b>	<b>£700</b>

124. I hereby order Epic Games, Inc. to pay Megaverse Ltd the sum of £700. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

**Dated this 10<sup>th</sup> day of November 2025**

**A COOPER  
For the Registrar**

## ANNEX

### Class 9

Downloadable game software; downloadable computer and video game programs and software; downloadable interactive game programs; downloadable virtual reality game software; downloadable virtual reality software for playing computer games; downloadable augmented reality game software; downloadable augmented reality software for playing computer games; downloadable virtual goods, namely, computer programs featuring avatars, clothing, pets, vehicles, weapons, tools, toys, emotes, and gestures for use in online worlds and virtual environments; downloadable virtual reality software; downloadable augmented reality software; downloadable mixed reality software; downloadable virtual reality software for providing metaverse experiences; downloadable software for providing access to an online multimedia virtual environment; downloadable virtual reality immersion software; downloadable software for experiencing interactive entertainment and virtual reality content; downloadable software for experiencing fully immersive and interactive animations, simulations, and visualizations for recreational, leisure, entertainment and educational purposes; downloadable software for immersive experiences in 2D and 3D games, 2D and 3D interactive game and non-game worlds, virtual environments, virtual reality, augmented reality, mixed reality and extended reality, 2D and 3D animations, simulations and visualizations, and real-time 3D sites; downloadable software for enabling users to experience virtual reality and augmented reality visualization, manipulation, and immersion; downloadable software for accessing and streaming multimedia entertainment content; downloadable software development tools; downloadable software development kits (SDK); downloadable software for use in creating, manipulating and participating in virtual environments; downloadable software for the creation of fully immersive and interactive animations, simulations, and visualizations for use in a metaverse environment; downloadable computer programs for creating video game programs and software; downloadable computer software for video game development and operation; downloadable computer software platform for video game development, distribution, and operation;

downloadable software for use in the development of video games and 2D and 3D animations, simulations and visualizations; downloadable software for use in creating and designing virtual reality, mixed reality, augmented reality, and extended reality software; downloadable virtual reality software in the field of designing computer and video games; downloadable software for use in the creation, development, production, and operation of 2D and 3D games, 2D and 3D interactive game and non-game worlds, virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, animations, simulations and visualizations, real-time 3D sites, and video game platforms; downloadable software for creating and editing images; downloadable software development tools for the creation of computer-generated imagery, graphics, and content; downloadable software for the creation of computer-generated imagery, graphics and content for use in game and non-game worlds, online universes, and metaverse environments; downloadable software for creating digital animation and special effects; downloadable software for the creation of computer-generated imagery and graphics for use in the creation, development, production, and operation of 2D and 3D games, 2D and 3D interactive game and non-game worlds and virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, real-time 3D sites, and computer and video game platforms; downloadable graphics for computers, namely, 2D and 3D images for use in the creation of computer-generated imagery and graphics; downloadable graphics for computers, namely, 2D and 3D images for use in the production of video games, animations, simulations, visualizations, digital media, virtual environments, and virtual, augmented, mixed reality and extended reality experiences; downloadable graphics for computers, namely, images for use in creating, manipulating, and participating in virtual environments; downloadable graphics for computers, namely, images for use in an online multimedia virtual environment; downloadable graphics software for use in creating multi-player game and non-game worlds; downloadable virtual goods, namely, computer programs featuring digital content for use in virtual environments created for entertainment purposes; downloadable software for writing and editing video game software; downloadable computer software for use in designing, creating, operating, and editing other computer software; downloadable software for building

user interfaces; downloadable software for use as an application programming interface (API); downloadable application programming interface (API) software for writing and editing video game software; downloadable application programming interface (API) for computer software for developing and creating virtual reality, augmented reality and mixed reality experiences; downloadable application programming interface (API) software for capturing, downloading, editing, displaying, streaming, and sharing multimedia entertainment content, audio-visual content, video content, and associated text and data; virtual reality software for creating multimedia content; augmented reality software for use in mobile devices for integrating electronic data with real world environments for the purposes of entertainment; downloadable software for modifying photographs, images and audio, video, and audio-visual content; downloadable software for use in taking and editing photographs and recording and editing videos; downloadable software for processing images, graphics, audio, video, and text; downloadable computer software for creating, authoring, distributing, downloading, transmitting, receiving, playing, editing, extracting, encoding, decoding, displaying, storing and organizing text, data, graphics, images, audio, video, and multimedia content, and electronic publications, and electronic games; computer software for modifying and enabling transmission of images, audio, audio visual and video content and data; computer software for modifying photographs, images and audio, video, and audio-visual content with photographic filters and virtual reality, mixed reality and augmented reality effects, namely, graphics, animations, text, drawings, geotags, metadata tags, and hyperlinks; computer software for processing images, graphics, audio, video, and text; downloadable software for accessing, browsing, and searching online databases, audio, video, and multimedia content, games, and software applications, and software application marketplaces; downloadable software for processing, reproducing, synchronizing, recording, organizing, downloading, uploading, transmitting, streaming, receiving, playing and viewing text, multimedia and data files; downloadable software for personalized, interactive television (TV) programming and for use in displaying and manipulating visual media, graphic images, text, photographs, illustrations, digital animations, video clips, film footage and audio data; downloadable software for

searching, locating, compiling, indexing, correlating, navigating, obtaining, downloading, receiving, encoding, decoding, playing, storing and organizing text, data, images, graphics, audio and video on a global computer network; computer software, namely, software development tools for the creation, debugging, and deployment of software applications for smart glasses, near-eye displays, head-mounted displays, and smartphones; downloadable software for creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, interacting with, embedding, and sharing or otherwise providing electronic media, images, video, audio, audio-visual content, data, and information via the internet and communication networks; downloadable software for enabling transmission of images, audio, audio-visual, and video content and data; downloadable computer software development tools for implementing a computer programming language; downloadable computer software for use in designing and creating other computer software; downloadable software for engaging in social networking and creating and interacting with online communities; downloadable software for creating, managing and accessing groups within virtual communities; application programming interface (API) for computer software which facilitates online services for social networking and for data retrieval, upload, download, access and management; downloadable software for real-time audio and video communication over the internet; downloadable computer software for creating, managing, and interacting with an online community; downloadable computer software for integrating electronic data with real world environments for the purposes of entertainment, communicating, and social networking; computer software, downloadable computer software and mobile application software for creating, managing and accessing groups within virtual communities; computer software, namely, an application providing social networking functionalities; downloadable computer software for finding content and content publishers, and for subscribing to content; downloadable software for creating and managing social media profiles and user accounts; downloadable software for integrating electronic data with real world environments for the purposes of entertainment, education, gaming, communicating, and social networking; downloadable messaging software; parental control software;

downloadable software for capturing, downloading, editing, formatting, displaying, streaming, and sharing multimedia entertainment content, audio-visual content, video content, and associated text and data; downloadable software and mobile application software providing a virtual marketplace; downloadable software for processing electronic payments and for transferring funds to and from others; downloadable software for use with digital and virtual currency; digital currency wallet and storage services software; downloadable software for digital currency payment and exchange transactions; downloadable software for implementing and recording financial transactions; downloadable software that enables individuals, groups, companies, and brands to create and maintain an online presence for marketing purposes; downloadable e-commerce software to allow users to perform electronic business transactions via global computer and communication networks; computer search engine software; downloadable software for use in creating, managing, measuring, and disseminating advertising of others; downloadable software for creating, sharing, disseminating and posting advertising; downloadable software that enables individuals, groups, companies, and brands to create and maintain an online presence and interact with online communities for marketing purposes; downloadable software to allow users to perform e-commerce transactions via the internet and communications networks; downloadable computer software that allows users to make payments and transfer funds; downloadable computer software that enables online users to make payments and transfer funds across multiple websites and mobile applications; downloadable computer software for processing electronic payments.

### Class 35

Marketing services; marketing in the framework of software publishing; online retail store services in relation to game software, video games, computer games, and game programs; online retail store services in relation to virtual goods, namely, avatars, characters, environments, structures, props, furniture, vehicles, weapons, tools, toys, emotes, and gestures for use in online virtual worlds; advertising services; advertising via electronic media; dissemination of advertising for others via a global computer

network; providing online marketplaces for sellers of goods and/or services; organizing and conducting events, exhibitions, expositions and conferences for commercial purposes in the interactive entertainment, virtual reality, consumer electronics and video game entertainment industries.

### Class 38

Telecommunications services, namely, electronic transmission of virtual reality content and data; providing metaverse services to access virtual communities via the internet; providing an online community forum for users to share and stream information, audio, video, real-time news, entertainment content, or information, to form virtual communities, and to engage in social networking; telecommunications services, namely, electronic transmission of electronic media, data, messages, graphics, images, photos, videos, audio-visual content and files; telecommunication services, namely, data transmission and reception services via telecommunication networks; photo, video, and data sharing services, namely, electronic transmission of digital photo files, videos, and audio-visual content among internet users; telecommunication services, namely, electronic exchange of voice, data, audio, video, text and graphics accessible via the internet and other communications networks.

### Class 41

Online gaming services in the nature of a metaverse and metaversal environments; entertainment services, namely, providing online computer and video games; entertainment services, namely, providing online computer and video game platforms; providing games for use network-wide by network users; providing interactive, multiplayer and single player games played via computer or communications networks; providing online computer, video, and electronic games from a computer network; providing online virtual reality games; providing online augmented reality games; organizing exhibitions and events in the field of interactive entertainment, virtual reality, mixed reality, and augmented reality, consumer electronics and video game entertainment industries for cultural or educational purposes; arranging and conducting competitions and entertainment events for players of video, computer,

electronic or interactive multimedia games; entertainment services, namely, providing online, non-downloadable virtual goods, namely, avatars, clothing, pets, vehicles, weapons, tools, toys, emotes and gestures for use in online worlds and virtual environments created for entertainment purposes; entertainment services, namely, metaverse experiences; entertainment services, namely, providing an online virtual environment; entertainment services, namely, providing virtual environments in which users can interact for recreational, leisure, or entertainment purposes; entertainment services, namely, providing interactive entertainment and virtual reality content; virtual reality video production for entertainment purposes; augmented reality video production for entertainment purposes; entertainment services in the nature of production and post-production services of multimedia entertainment content; multimedia production services; entertainment services for sharing photo and video; entertainment services in the nature of organizing, arranging, and hosting performances and social entertainment events; multimedia publishing of software and games; multimedia publishing of interactive computer and video game programs and software; multimedia entertainment production and publishing services; publishing services, namely, publishing of electronic publications for others; electronic publishing services for others; online electronic publishing concerning social media content; entertainment services, namely, providing an online environment featuring streaming of entertainment content and live streaming of entertainment events; entertainment and educational services, namely, providing non-downloadable movies, television shows, webcasts, audiovisual, and multimedia works via the internet; organizing exhibitions, events, and conferences in the fields of culture, entertainment, education, and social networking for non-business and non-commercial purposes; entertainment services, namely, ongoing comedy, drama, documentary, docuseries, animated, mystery, and reality web and television series provided over the internet; providing online non-downloadable videos in the field of comedy, drama, documentary, docuseries, animated, mystery, and reality entertainment; entertainment services, namely, providing online facilities for streaming entertainment content and live streaming video of entertainment events.

## Class 42

Providing temporary use of non-downloadable software for users to experience virtual reality visualization, manipulation and immersion; providing temporary use of on-line non-downloadable software development tools; platform as a service (PAAS) featuring computer software platforms for designing and developing computer and video game programs and software; platform as a service (PAAS) services featuring computer software platforms for use in software development, video game development, and the creation, development and operation of game and non-game worlds, online universes, and metaverse environments; software as a service (SAAS) services featuring computer software for software development, video game development, and the creation, development and operation of game and non-game worlds, online universes, and metaverse environments; providing online, non-downloadable software development software, video game development software, and software for creating game and non-game worlds, online universes, and metaverse environments, all of which use virtual reality, augmented reality, extended reality, mixed reality and metaverse technology; providing non-downloadable software for use in software development, video game development, and the development and operation of game and non-game worlds, online universes, and metaverse environments; platform as a service (PAAS) featuring a computer software real-time 2d and 3d creation platform for use in the creation, development, production, and operation of 2d and 3d games, 2d and 3d interactive game and non-game worlds and virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, 2d and 3d animations, simulations and visualizations, and real-time 3d sites; providing temporary use of non-downloadable computer software for use in the creation, development, production, and operation of 2d and 3d games, 2d and 3d interactive game and non-game worlds and virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, real-time 3d sites, and computer and video game platforms; application service provider featuring application programming interface (API) software; application service provider featuring application programming interface (API) software for computer software development tools; providing temporary use of online non-downloadable software for building user interfaces; providing

temporary use of non-downloadable software for creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, interacting with, embedding, transmitting, and sharing or otherwise providing electronic media, images, video, audio, audio-visual content, data, and information via the internet and communication networks; providing temporary use of non-downloadable software for modifying photographs, images and audio, video, and audio-video content; providing temporary use of non-downloadable computer software for use in taking and editing photographs and recording and editing videos; providing temporary use of non-downloadable software for curating online user-defined content; non-downloadable software for streaming multimedia entertainment content; non-downloadable software for transmitting, sharing, receiving, downloading, displaying, interacting with and transferring content, text, visual works, audio works, audiovisual works, literary works, data, files, documents and electronic works; providing temporary use of non-downloadable software that gives users the ability to upload, modify and share virtual reality content, augmented reality content, mixed reality content, information, experiences and data; computer services, namely, creating an online community for users to access metaverse platforms; hosting an online community website featuring game and non-game worlds, online universes, and metaverse environments; interactive hosting services which allow the users to publish and share their own content and images online; providing temporary use of non-downloadable software for creating, managing and accessing user-created and administered groups within virtual communities; providing temporary use of non-downloadable software for creating and managing social media profiles and user accounts; computer services in the nature of providing customized online pages featuring user-defined or specified information, personal profiles, virtual reality, mixed reality, and augmented reality content and data; computer services in the nature of customized electronic personal and group profiles or webpages featuring user-defined or specified information, including audio, video, images, text, content, and data; providing temporary use of non-downloadable software that enables users to transfer personal identity data to and share personal identity data with and among multiple websites; providing temporary use of non-

downloadable software for finding content and content publishers, and for subscribing to content; providing temporary use of non-downloadable software for organizing events, searching for events, calendaring and managing events; providing temporary use of online non-downloadable software and applications for instant messaging, sharing files, and electronically sending and receiving voice, audio, video, text, images, graphics, and data; providing application programming interface (API) software for use in electronic messaging and transmission of audio, video, images, text, content and data; software as a service (SAAS) services featuring software for instant messaging, sharing files, and electronically sending and receiving voice, audio, video, text, images, graphics, and data; providing temporary use of online non-downloadable software and software as a service (SAAS) featuring software for capturing, downloading, editing, formatting, displaying, streaming and sharing multimedia entertainment content, audio-visual content, video content, and associated text and data; hosting of digital content on the internet; software development in the framework of software publishing; providing temporary use of non-downloadable software for use in metaverse applications to enable interoperability and information sharing between hardware devices, software systems, and the internet; computer services, namely, hosting an on-line multimedia virtual environment; platform as a service (PAAS) featuring a computer software platform for immersive experiences in 2d and 3d games, 2d and 3d interactive game and non-game worlds, virtual environments, virtual reality, augmented reality, mixed reality and extended reality, 2d and 3d animations, simulations and visualizations, real-time 3d sites, and computer and video game programs and software; hosting of virtual reality and augmented reality content on the internet; non-downloadable software for providing a virtual marketplace; non-downloadable software for processing electronic payments; providing temporary use of non-downloadable software for use in designing, managing, measuring, analyzing, disseminating, and serving advertising of others; providing temporary use of non-downloadable software for creating and maintaining an online presence for individuals, groups, companies, and brands; providing temporary use of non-downloadable game software; providing non-downloadable game software via a website; providing temporary use of non-downloadable computer

software for enabling transmission of images, audio, audio visual and video content and data; providing temporary use of non-downloadable software for streaming multimedia entertainment content.

Class 45

Licensing of software in the framework of software publishing; licensing of intellectual property rights.

## ANNEX 2

### Class 9

Downloadable augmented reality game software; downloadable augmented reality software for playing computer games; downloadable virtual goods, namely, computer programs featuring avatars, clothing, pets, vehicles, weapons, tools, toys, emotes, and gestures for use in online worlds and virtual environments; downloadable software for immersive experiences in 2D and 3D games, 2D and 3D interactive game [...] worlds, virtual environments, virtual reality, augmented reality, mixed reality and extended reality, 2D and 3D animations, simulations and visualizations, and real-time 3D sites; downloadable virtual reality software; downloadable augmented reality software; downloadable mixed reality software; downloadable virtual reality software for providing metaverse experiences; downloadable software for providing access to an online multimedia virtual environment; downloadable virtual reality immersion software; downloadable software for experiencing interactive entertainment and virtual reality content; downloadable software for experiencing fully immersive and interactive animations, simulations, and visualizations for recreational, leisure, entertainment and educational purposes; downloadable software for immersive experiences [...] 2D and 3D interactive [...] non-game worlds, virtual environments, virtual reality, augmented reality, mixed reality and extended reality, 2D and 3D animations, simulations and visualizations, and real-time 3D sites; downloadable software for enabling users to experience virtual reality and augmented reality visualization, manipulation, and immersion; downloadable computer software for integrating electronic data with real world environments for the purposes of entertainment, communicating, and social networking; downloadable software for integrating electronic data with real world environments for the purposes of entertainment, education, gaming, communicating, and social networking; downloadable virtual goods, namely, computer programs featuring digital content for use in virtual environments created for entertainment purposes; downloadable graphics for computers, namely, images for use in an online multimedia virtual environment; downloadable software development tools; downloadable software development kits (SDK); downloadable software for use in

creating, manipulating and participating in virtual environments; downloadable software for the creation of fully immersive and interactive animations, simulations, and visualizations for use in a metaverse environment; downloadable computer programs for creating video game programs and software; downloadable computer software for video game development and operation; downloadable computer software platform for video game development, distribution, and operation; downloadable software for use in the development of video games and 2D and 3D animations, simulations and visualizations; downloadable software for use in creating and designing virtual reality, mixed reality, augmented reality, and extended reality software; downloadable virtual reality software in the field of designing computer and video games; downloadable software for use in the creation, development, production, and operation of 2D and 3D games, 2D and 3D interactive game and non-game worlds, virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, animations, simulations and visualizations, real-time 3D sites, and video game platforms; downloadable software for creating and editing images; downloadable software development tools for the creation of computer-generated imagery, graphics, and content; downloadable software for the creation of computer-generated imagery, graphics and content for use in game and non-game worlds, online universes, and metaverse environments; downloadable software for creating digital animation and special effects; downloadable software for the creation of computer-generated imagery and graphics for use in the creation, development, production, and operation of 2D and 3D games, 2D and 3D interactive game and non-game worlds and virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, real-time 3D sites, and computer and video game platforms; downloadable graphics for computers, namely, 2D and 3D images for use in the creation of computer-generated imagery and graphics; downloadable graphics for computers, namely, 2D and 3D images for use in the production of video games, animations, simulations, visualizations, digital media, virtual environments, and virtual, augmented, mixed reality and extended reality experiences; downloadable graphics for computers, namely, images for use in creating, manipulating, and participating in virtual environments; downloadable graphics software for use in creating multi-player

game and non-game worlds; downloadable software for writing and editing video game software; downloadable computer software for use in designing, creating, operating, and editing other computer software; downloadable software for building user interfaces; downloadable software for use as an application programming interface (API); downloadable application programming interface (API) software for writing and editing video game software; downloadable application programming interface (API) for computer software for developing and creating virtual reality, augmented reality and mixed reality experiences; virtual reality software for creating multimedia content; augmented reality software for use in mobile devices for integrating electronic data with real world environments for the purposes of entertainment; computer software, namely, software development tools for the creation, debugging, and deployment of software applications for smart glasses, near-eye displays, head-mounted displays, and smartphones; downloadable computer software development tools for implementing a computer programming language; downloadable computer software for use in designing and creating other computer software; computer software for modifying photographs, images and audio, video, and audio-visual content with photographic filters and virtual reality, mixed reality and augmented reality effects, namely, graphics, animations, text, drawings, geotags, metadata tags, and hyperlinks; computer software for processing images, graphics, audio, video, and text; downloadable software for processing, reproducing, synchronizing, recording, organizing, downloading, uploading, transmitting, streaming, receiving, playing and viewing text, multimedia and data files; downloadable software for searching, locating, compiling, indexing, correlating, navigating, obtaining, downloading, receiving, encoding, decoding, playing, storing and organizing text, data, images, graphics, audio and video on a global computer network.

#### Class 41

Providing online augmented reality games.

#### Class 42

Providing temporary use of non-downloadable software for users to experience virtual reality visualization, manipulation and immersion; platform as a service (PAAS) featuring a computer software platform for immersive experiences in 2d and 3d games, 2d and 3d interactive game and non-game worlds, virtual environments, virtual reality, augmented reality, mixed reality and extended reality, 2d and 3d animations, simulations and visualizations, real-time 3d sites, and computer and video game programs and software; providing non-downloadable game software via a website; Providing temporary use of on-line non-downloadable software development tools; platform as a service (PAAS) featuring computer software platforms for designing and developing computer and video game programs and software; platform as a service (PAAS) services featuring computer software platforms for use in software development, video game development, and the creation, development and operation of game and non-game worlds, online universes, and metaverse environments; software as a service (SAAS) services featuring computer software for software development, video game development, and the creation, development and operation of game and non-game worlds, online universes, and metaverse environments; providing online, non-downloadable software development software, video game development software, and software for creating game and non-game worlds, online universes, and metaverse environments, all of which use virtual reality, augmented reality, extended reality, mixed reality and metaverse technology; providing non-downloadable software for use in software development, video game development, and the development and operation of game and non-game worlds, online universes, and metaverse environments; platform as a service (PAAS) featuring a computer software real-time 2d and 3d creation platform for use in the creation, development, production, and operation of 2d and 3d games, 2d and 3d interactive game and non-game worlds and virtual environments, virtual reality, augmented reality, mixed reality and extended reality experiences, 2d and 3d animations, simulations and visualizations, and real-time 3d sites; providing temporary use of non-downloadable computer software for use in the creation, development, production, and operation of 2d and 3d games, 2d and 3d interactive game and non-game worlds and virtual environments, virtual reality, augmented reality, mixed reality and extended reality

experiences, real-time 3d sites, and computer and video game platforms; application service provider featuring application programming interface (API) software; application service provider featuring application programming interface (API) software for computer software development tools; providing temporary use of online non-downloadable software for building user interfaces; software development in the framework of software publishing; computer services in the nature of providing customized online pages featuring user-defined or specified information, personal profiles, virtual reality, mixed reality, and augmented reality content and data; providing temporary use of non-downloadable software that gives users the ability to upload, modify and share virtual reality content, augmented reality content, mixed reality content, information, experiences and data; computer services, namely, creating an online community for users to access metaverse platforms; hosting of virtual reality and augmented reality content on the internet; hosting of digital content on the internet.