

BLO/847/22

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 3575033

BY

BRAND TRADEMARK LTD.

TO REGISTER THE TRADE MARK

Spotlyve

IN CLASSES 9, 35, 36, 38, 41 and 42

AND

THE OPPOSITION THERETO UNDER NO 424707

BY

SPOTIFY AB

BACKGROUND AND PLEADINGS

1. On 5 January 2021, Brand Trademark Ltd. ("the applicant") applied to register the above trade mark in classes 9, 35, 36, 38, 41 and 42.¹ The specification is lengthy and is attached at Annex A to this decision.²
2. The application was published on 26 February 2021, following which Spotify AB ("the opponent") filed a notice of opposition against all the goods and services in the application.
3. The opponent bases its case on sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("the Act").³
4. The mark relied on by the opponent is as follows:

Mark details:	Goods and services relied on:
<p>UKTM: 3219110</p> <p>SPOTIFY</p> <p>Filed: 16 March 2017</p> <p>Registered: 2 June 2017</p>	<p>Class 9</p> <p>Computer software for use in connection with websites in the Internet for music, other entertainment activities, meetings, chat and gaming; CD-recordings.</p> <p>Class 25</p> <p>Clothing, footwear, headgear.</p> <p>Class 38</p> <p>Sound and television broadcasting of music, performance and other entertainment activities via the Internet and other telecommunication systems,</p>

¹ International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).

² I also note that the specification for class 41 is half the length that it appears, as it is the same specification duplicated.

	<p>telecommunications in the Internet, letting of access to chat space and discussion forums in the Internet, digital pictures and services related to transmission of sound; information, consultancy and advisory services relating to the aforesaid.</p> <p>Class 41 Entertainment; music production; information about music, entertainment and gaming, even on-line; gaming services on-line via a network computer; services related to interactive games; rental of films, games and music via the Internet; information, consultancy and advisory services relating to the aforesaid.</p>
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Section 5(2)(b)

5. Under this ground the opponent claims that the application and the earlier trade mark are highly similar on all three levels - visually, phonetically and conceptually, on account of the coinciding element SPOT which appears at the beginning of both marks which, it concludes, makes the similarity all the more prominent. The opponent provides a list of some goods and services which it claims are identical, including 'entertainment services' in the application and 'entertainment' in the specification for its earlier mark. It submits, 'the remaining goods and services are either included or clearly overlap with the Opponent's goods and services'.

6. The opponent claims that its earlier mark enjoys an enhanced level of distinctive character for the following:⁴

⁴ See paragraph 9 of the opponent's skeleton argument.

Class 9 – Computer software for use in connection with websites in the Internet for music.

Class 35 – Disposal of advertisement space on the Internet.

Class 38 – Sound...broadcasting of music...via the Internet...; services related to the transmission of sound.

Class 41 – Entertainment; ...information about music, entertainment...on-line; ...rental of...music via the Internet.

7. It concludes that the level of attention paid by the average consumer to the purchase of its goods and services will be average and that accordingly, there will be a likelihood of confusion, including a likelihood of association between the respective marks.

Section 5(3)

8. The opponent claims a substantial reputation in the United Kingdom in relation to the goods and services identified in paragraph 6, above. It claims:⁵

19. Due to the high degree of similarity between the Mark and the Earlier Mark, the enhanced level of distinctiveness and the extent of the significant reputation of the Earlier Mark in relation to the Reputed Goods and Services, as well as the direct overlap between the relevant consumers of the Applicant's Goods and Services and the Reputed Goods and Services, a mental link between the Mark and the Earlier Mark will easily be made by the relevant public.

9. It concludes that use of the application, without due cause, would result in the applicant gaining unfair advantage by riding on the coat tails of the earlier mark. Furthermore, use of the later mark would cause detriment to the earlier mark's

⁵ See the statement of grounds attached to the opponent's notice of opposition.

reputation if the applicant's goods and services were of inferior quality and that detriment would be caused to the earlier mark's distinctive character as it would dilute its distinctiveness.

Section 5(4)(a)

10. Under this ground the opponent relies on the use of SPOTIFY throughout the UK, for audio streaming and media services, since at least February 2009. It claims that use of the applicant's marks for the applied for goods and services amounts to passing off in the UK.

11. The applicant filed a counterstatement in which it denied all the grounds of opposition.

12. Both sides filed evidence. The opponent filed a skeleton argument. A hearing took place before me on 7 July 2022 at which the opponent was represented by Guy Hollingworth, instructed by Taylor Wessing LLP. The applicant did not attend the hearing but was represented by Appleyard Lees IP LLP throughout the proceedings.

13. I make this decision having taken full account of all the papers before me and the submissions made at the hearing.

14. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

Preliminary issues

The applicant's evidence

15. The applicant's evidence is provided in a witness statement by David Moy, dated 17 January 2022. Mr Moy is a partner at the applicant's representative. Attached to his statement are 35 exhibits identified as DXM1-DXM35.

16. The evidence amounts to:

a) Searches of the UKIPO trade mark database for marks beginning or containing the word 'SPOT' and the term 'LYVE'⁶

17. In considering this evidence I bear in mind the guidance in *Zero Industry Srl v OHIM*,⁷ when the General Court stated that:

“73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word ‘zero’, it should be pointed out that the Opposition Division found, in that regard, that ‘... there are no indications as to how many of such trade marks are effectively used in the market’. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word ‘zero’ is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 *GfK v OHIM – BUS (Online Bus)* [2005] ECR II-4865, paragraph 68, and Case T-29/04 *Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH)* [2005] ECR II-5309, paragraph 71).”

18. And *TREAT Trade Mark*⁸ in which Jacob J said:

“Both sides invited me to have regard to the state of the register. Some traders have registered marks consisting of or incorporating the word “Treat”. I do not think this assists the factual inquiry one way or the other, save perhaps to confirm that this is the sort of word in which traders would like a monopoly. In particular the state of the register does not tell you what is actually happening out in the market and in any event one has no idea

⁶ See exhibits DXM1-4 and DXM 30-32.

⁷ *Case T-400/06*

⁸ [1996] RPC 281, p. 305.

what the circumstances were which led the registrar to put the marks concerned on the register. It has long been held under the old Act that comparison with other marks on the register is in principle irrelevant when considering a particular mark tendered for registration, see e.g. MADAME Trade Mark and the same must be true under the 1994 Act. I disregard the state of the register evidence.”

19. For the vast majority of the returned marks, Mr Moy has not provided any information beyond the simple existence of the hundreds of trade marks on the UK trade mark register which include the word SPOT or the term LYVE. The applicant has not given any indication of whether the marks are in use, or if they are, in which fields they are they being used. I do not find this ‘state of the register’ evidence helpful and will say no more about it.

b) Searches for companies using marks containing the word SPOT⁹

20. For some of the marks returned in the lists of search results referred to in the paragraph above, Mr Moy provides a copy of the mark details taken from the IPO trade mark register and a print from Google about the proprietor of the chosen mark. None of the results provided by the applicant show use of the marks at issue. All of the returned results are either used in completely different sectors, such as pest monitoring and business loans, and/or are owned by companies outside the UK with no obvious UK presence. The applicant has not provided any information to explain why this material is relevant to the matter to be decided nor does it advance any reason as to how this evidence assists its case. I will say no more about it.

c) Dictionary definitions¹⁰

21. Mr Moy provides dictionary definitions of SPOT and SPOT ADVERTISING from two online dictionaries. No additional narrative has been provided to explain why these exhibits assist the applicant’s case. Spot is a well-known word which will be

⁹ See exhibits DXM5 – DXM25.

¹⁰ See exhibits DXM26 and DXM27.

understood by the relevant public, but it is neither the mark applied for nor the earlier mark. SPOT ADVERTISING is also neither the mark applied for nor the earlier mark. I will say no more about this evidence.

d) Google searches for the suffixes 'lyve' and 'ify'¹¹

22. Neither of these returned results is helpful to the matter to be decided. Mr Moy has not explained why it might be or how these exhibits are helpful to the applicant's case. I will say no more about them.

The applicant's examination report¹²

23. Mr Moy exhibits a copy of the applicant's examination report from the UKIPO's examination department. Both sides have professional representatives and know full well that once a trade mark has been accepted by examination, it is published in the trade mark journal to await any third party opposition. The opponent has filed such an opposition and it falls to me to make a decision on the relevant matters before me. The examination report has no bearing on the matter to be decided and I will say no more about it.

DECISION

24. At the hearing, Mr Hollingworth suggested that, given the opponent's reputation, the 5(3) ground would be an appropriate ground with which to lead. I agree and will proceed on that basis. Section 5(3) of the Act states:

"A trade mark which-

is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom and the use of the later mark without due cause would take unfair

¹¹ See exhibits DXM28 and DXM29.

¹² See exhibit DXM35.

advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark”.

25. The relevant case law can be found in the following judgments of the Court of Justice of the European Union (CJEU): Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Adidas-Salomon*, [2004] ETMR 10 and C-487/07, *L’Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows:

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark’s reputation and distinctiveness; *Intel*, paragraph 42.

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact on the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation; *Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure*.

26. In *General Motors*,¹³ the CJEU held that:

¹³ Case C-375/97

“25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it.”

27. Under this section of the Act the opponent relies upon its UK trade mark, SPOTIFY.

28. The conditions of section 5(3) are cumulative. First, the opponent must satisfy me that its earlier marks have achieved a level of knowledge/reputation amongst a significant part of the public. Secondly, it must establish that the level of reputation and the similarities between the marks will cause the public to make a link between them, in the sense of the earlier mark(s) being brought to mind by the later mark. Thirdly, assuming that the first and second conditions have been met, section 5(3) requires that one or more of three types of damage claimed by the opponent will occur. It is unnecessary for the purposes of section 5(3) that the goods be similar although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

The opponent's evidence of reputation

29. The opponent's evidence is provided by two witness statements by Mark Owen, a partner at the opponent's representative, and a witness statement by Olga Puzanova, the head of consumer marketing for Spotify UK & Ireland.

30. Mr Owen's first statement is dated 26 October 2021. Attached to this statement are 14 exhibits. The first six of these relate to decisions on trade marks and in domain name disputes in which the decision maker has highlighted the fame and repute of the opponent's brand. The remaining exhibits relate to the opponent's engagement figures for its social media channels (which were accessed after the relevant date), and in addition dictionary definitions for the opponent's brand.

31. Mr Owen's second statement concerns the applicant's 'use' of its mark, and I will refer to this later in the decision.

32. At the hearing I advised the opponent that I was prepared to accept its considerable reputation and goodwill for music streaming services. However, since this dispute goes wider than those services, it is necessary for me to consider the full extent of the opponent's reputation and so I will go on to consider Olga Puzanova's statement which comprises the full extent of the opponent's evidence of reputation. Ms Puzanova's statement is dated 16 November 2021 and I take the following from it:

Company background

33. The opponent is a subsidiary of Spotify Technology SA which is a publicly listed company on the New York Stock Exchange.

34. Spotify was founded by Daniel Ek and Martin Lorentzon in Stockholm in 2006. The aim of the creators was to provide a solution to music piracy.¹⁴

35. Ms Puzanova states the following with regard to the opponent's launch in the UK:

¹⁴ See exhibit OP2 – BBC News, *'How Spotify came to be worth billions'*, 1 March 2018.

*“12. Spotify’s services were launched to the public by invitation only on 7 October 2008 in Scandinavia, the United Kingdom, France and Spain. A limited, free offering was rolled out fully in the UK in 2009...”*¹⁵

36. Ms Puzanova describes the way the opponent’s platform is made available to users as a ‘freemium’ model. The service can be accessed for free via a ‘without charge’ tier which is supported by advertising. Alternatively, users can subscribe to the premium service which is advertising-free and allows users to listen to music offline. A range of pricing models is available, including Student, Family and Duo. The opponent’s revenue is generated by its premium subscribers and by the sale of display, video and audio advertising which is part of the free service offered to customers.

37. The opponent also provides ‘Spotify for Artists’ services which include areas of its platform dedicated to a particular artist and assistance for artists to make their new releases known to editors of influential playlists on its platform.

Revenue and recognition

38. In terms of numbers of users, Ms Puzanova states that in 2015 the opponent had 91 million users globally, 28 million of those being premium subscribers.¹⁶ By the fourth quarter of 2020 the opponent’s monthly active users numbered 345 million, worldwide, with 155 million of those being premium subscribers.¹⁷ Approximately 44% of the opponent’s users listen on a daily basis.¹⁸

39. The opponent’s UK annual revenue figures are provided in Euros, as follows:

Year	Revenue
2016	342 million

¹⁵ See exhibit OP3 – Mirror, ‘History of Spotify: How the Swedish streaming company changed the music industry’, 3 April 2018.

¹⁶ See exhibit OP7.

¹⁷ See exhibit OP8.

¹⁸ See exhibit OP9.

2017	444 million
2018	576 million
2019	727 million
2020	836 million

40. Its UK revenue from subscriptions in the period 2014-2016 is as follows:

Year	Revenue (£)
2016	215,722,930
2015	171,697,185
2014	119,157,973

41. Ms Puzanova states that figures after this date are not available as the opponent's accounting method has changed and does not enable breakdown of the UK figures. She submits that the figures provided 'could serve as a sufficient illustration of the proportion of the figures expected for the UK in the following years'.¹⁹

42. In the UK, the opponent is believed to be the top music streaming platform among consumers under the age of 55, particularly in the 18-34 age group.²⁰ It has been reported that Spotify has more listeners than Radio 1.²¹

43. MIDiA Research estimated that 22 million people in the UK were subscribing to a music streaming service in 2020, of which the opponent was considered the leader.²²

44. The UK's Digital, Culture, Media and Sport committee recognised the opponent as one of the market leaders best exemplifying the music streaming business model in the UK during its 2021 inquiry into the economics of music.²³

¹⁹ See paragraph 25 of Ms Puzanova's witness statement, dated 16 November 2021.

²⁰ See exhibit OP13, a report of a YouGov study on streaming habits. The report is published after the relevant date but refers to streaming habits in 2020.

²¹ See Music Business Worldwide, '*Spotify Now Officially Has More Listeners Than BBC Radio 1*', 18 May 2017.

²² See exhibit OP15.

²³ See exhibit OP11, which is taken from the UK Parliament website listing committees. The article is dated 15 October 2020.

45. With regard to the size of the market for music streaming Ms Puzanova states that in 2020 music streaming accounted for 80.6% of total UK music consumption, with over £1 billion in revenue.²⁴ The British Phonographic Industry estimated that in the same year UK consumers listened to 139 billion audio streams.²⁵

Promotions and partnerships

46. In terms of the opponent's promotional and marketing strategy in the UK, Ms Puzanova states that the exact figures are not available. She provides global figures which are 826 million euros for 2019 and 1.029 billion euros for 2020 and numerous examples of campaigns in the UK which, 'illustrate [the opponent's] serious investment in building and sustaining its reputation in the UK'. A few examples of these are:

- 2013 – Vodafone became a partner of Spotify.²⁶ Spotify premium was bundled with Vodafone's 4G service in the UK. Ms Puzanova confirms that this partnership was still ongoing at the filing date of the contested application.
- 2014 - Uber and Spotify launch car music playlist partnership, BBC News, 1 November 2014.²⁷ This allowed customers to link their Spotify and Uber accounts to build music playlists for journeys.
- 2016 - Tinder and Spotify have collaborated "to enhance your swiping experience", Elle, 21 September 2016.²⁸ Tinder users were able to create a section on their profile which allowed potential matches to see their music tastes on Spotify.
- 2016 - Spotify teamed up with Headspace to combine meditation and music.²⁹ The partnership enabled users to bundle Headspace's meditation platform with Spotify, in one subscription.

²⁴ See exhibits OP10 and OP11.

²⁵ See exhibit OP12.

²⁶ See exhibit OP33.

²⁷ See exhibit OP26.

²⁸ See exhibit OP28.

²⁹ See exhibit OP29.

- 2018 – The opponent partnered with Samsung. From March 2019 Samsung mobile phones came with Spotify installed.³⁰
- 2019 – Xbox Game Pass Ultimate members were offered a free 6-month trial of Spotify Premium, beginning on 1 October 2019.³¹
- March 2020 – The opponent offered six months of Spotify Premium membership for free when customers bought qualifying products at Currys.³² Qualifying products included, inter alia, wireless speakers, soundbars, tablets, wireless headphones.
- December 2020 – The opponent signed up Prince Harry and Meghan Markle to do a series of podcasts.³³

47. Ms Puzanova states that in addition to the partnerships listed, the opponent has partnered with the makers of popular smart devices to ensure seamless integration between its streaming service and a wide range of audio devices. The opponent's service is compatible with, at least, Siri on Apple IOS devices, Apple TV, Samsung devices, Bose smart speakers, Google Nest Hub, Sonos Speakers, Amazon Alexa speakers and many smart watches.

Live events

48. Ms Puzanova states that live events have become an increasingly important part of the opponent's offering, with its branded events including carnivals, live events and secret socials.

Secret Socials

³⁰ See exhibit OP30.

³¹ See exhibit OP34.

³² See exhibit OP35.

³³ See exhibit OP36.

49. In order to increase subscriptions from students the opponent created its 'always on' programme directed at students and delivered on campus and on social media. The secret social is described as:

*"...the culmination of the year long student programme giving students one epic night of music, discovery and post-exam partying at a mystery location after dark."*³⁴

50. 250 student competition entrants were randomly picked from around the UK and were transported to a secret location. Three events happened between 2014 and 2017 and showcased Stormzy, MNEK, Big Narstie and Jungle. Seed Marketing Agency reported that the campaign reached 50% of UK students.

Concerts

51. In 2017 – 2019 the opponent organized 'Who We Be.' a live music event featuring well-known performers from rap and grime music scenes.

52. The first was put on at Alexandra Palace and included Cardi B and Dizzy Rascal in the line-up. The 2018 show was staged in Alexandra Palace and the O2 in Birmingham and included AJ Tracey, French Montana, Raye, Jaykae, Mabel and others. The 2019 show was staged at the O2 Victoria Warehouse in Manchester and included performances from Aitch and Tion Wayne.³⁵

*"50... 'Who We Be' celebrates UK Rap, Grime and R&B and the original Spotify playlist (which the event is named after) has become the largest urban playlist in the UK and Ireland, with over half a million followers. The show was hailed as a 'momentous success for the streaming platform's first foray into live events' and was said to 'cement Spotify's reputation within the rap, hip hop and grime scene' in the UK."*³⁶

Fans first gigs

³⁴ See exhibit OP39.

³⁵ See exhibit OP41.

³⁶ See Ms Puzanova's witness statement.

53. Ms Puzanova describes these gigs in the following terms:³⁷

“52. Spotify continued its foray into the live events space, bringing fans and popular artists closer by collaborating with artists to host intimate “fans first” gigs.”

54. She provides the following examples of some of the opponent’s ‘fans first’ gigs:³⁸

- In 2017, super fans of Giggs on Spotify were treated to a secret boat party gig in London organised by Spotify. Spotify identified and invited down the top 100 fans of Giggs on Spotify for this special event.
- In 2018, Spotify organised a fan event that saw Kylie Minogue perform in concert in London for her top listeners on Spotify.
- Spotify organised a late-night show for 300 Spotify Premium UK fans after the 2018 BRIT awards, where Justin Timberlake performed a full set in Camden, London.
- Kacey Musgraves fans were invited to a special preview of the Country music superstar's forthcoming album at a Spotify Fans First Event in London.
- In 2019, Spotify teamed up with Sam Fender to celebrate the singer's debut album topping the charts with a homecoming show in Fender's hometown of North Shields, England.
- To celebrate British rapper Stormzy's 25th birthday, Spotify flew his biggest UK fans to his birthday party in Menorca, Spain, where they were treated to a special concert performance by him.

³⁷ As above.

³⁸ See exhibit OP42.

- In May 2019, Spotify partnered with Skepta to throw a 'Spotify x Skepta Ignorance is Bliss Listening Party', where Skepta's top fans were invited to a live first listen of his fifth studio album.

Awards

55. Some of the awards won by the opponent are:

2011 – Spotify Premium won the readers award in What Hi-Fi magazine.³⁹

2016 – Spotify took the overall award at the 2016 Webby Awards and the 'best brand strategy' and 'best visual design' website award.⁴⁰

2019 – Best AI product in entertainment at the CogX Innovation Awards.⁴¹

2020 – Media Week Awards, Sales Team of the Year.

2020/21 - CLIO music awards, design category winner.

Media coverage

56. Ms Puzanova provides details of a variety of press and promotional articles:

- Campaign Magazine London, 'Spotify app tops Apple Store in less than 48 hours', 9 September 2009.
- BBC News, 'Ed Sheeran owes career to Spotify', 12 December 2014.⁴²
- Verdict, 'Apple's App Store anniversary: what are the most popular apps of all time?', 10 July 2018. Spotify was joint number one with Facebook Messenger in 2015 and 2016.⁴³

³⁹ See exhibit OP52.

⁴⁰ See exhibit OP53.

⁴¹ See exhibit OP55.

⁴² See exhibit OP79.

⁴³ See exhibit OP67.

- Getintothis – ‘Spotify launches Spotify Singles – a lifeline for the UK Singles Chart?’, 6 December 2016.⁴⁴

“Spotify Singles will launch with new tracks from over 20 artists including Tove Lo, Local Natives, the Naked and Famous, Hamilton Leithauser, John Legend and more who have recorded their tracks in Spotify’s new recording studio at its New York office”.

- The Independent, ‘Spotify: 11 useful features you may not know about; Ever-present in the popular sections of both the App Store and Google Play, it’s one of the first apps people download when they get a new phone’, 29 December 2017.⁴⁵
- The Independent, ‘Music piracy fallen dramatically over the last five years thanks to streaming services such as Spotify and Tidal, survey reveals’, 2 August 2018.⁴⁶

“Spotify has everything from new releases to old songs, it filled the vacuum, there was no longer a need for using unverified sources,’ said one respondent.”

- Music:)ally, ‘Spotify launches its self-serve Ad Studio in the UK and Canada’, 13 March 2018.⁴⁷ The platform is described as follows:

“The self-serve advertising platform lowers the minimum price of an audio-ad campaign on Spotify, opening it up to smaller businesses – music companies included.”

- The Guardian, ‘We’ve got more money swirling around’: How streaming saved the music industry’, 24 April 2018.⁴⁸

⁴⁴ See exhibit OP70.

⁴⁵ See exhibit OP62.

⁴⁶ See exhibit OP60.

⁴⁷ See exhibit OP71.

⁴⁸ See exhibit OP76.

“...over time, it has become clear that the fraction of a penny you receive from a stream can't be seen in the same context as the royalty on a CD sale. The money an artist made from a physical album was a one-off payment; within weeks of it being released, this revenue frequently dried up.

On Spotify, every time a listener wants to play the song the artist gets a tiny bit of money. If a listener adds the song to one of their own playlists, that can mean it will be repeatedly revisited over a lifetime. If it gets added to one of Spotify's curated mood playlists - Acoustic Spring, for example - the artist can expect tens of millions of plays. Acts whose biggest hits came well before the streaming era are banking huge new revenues from their existing catalogue. Fleetwood Mac have 11 million monthly listeners; that's more than Stormzy, George Ezra or Harry Styles. They will collect a huge cheque every month without doing anything”.

- BBC News, ‘Spotify splashes out millions of dollars on podcasts’, 6 February 2019.

“Spotify said it wanted Gimlet for its podcast studio, while it said Anchor, which allows individuals and companies to create and publish podcasts, would bring a growing number of new content creators”.

- Evening Standard, ‘Spotify's Sound Up diversity in podcasts is back and focused on Black women and non-binary people’, 20 July 2020.⁴⁹

“Now in its third year, the programme will see 20 Black women and non-binary people come together for a digital four-week course that will feature workshops focusing on storytelling and production, as well as giving them the tools to create their own podcast trailer.”

⁴⁹ See exhibit OP75.

- Kantar, 'Spotify is shaking off the competition in the UK audio', 24 June 2020.⁵⁰

“According to data from Kantar’s new Entertainment on Demand (EoD) service for the UK audio subscription market, Spotify is dominant in the category, with 62% of subscribers holding an account”.

57. In his skeleton argument, Mr Hollingworth said:

“9. On the basis of the material summarised above,⁵¹ it cannot seriously be disputed that the SPOTIFY mark has a huge reputation in relation to at least its ‘core’ goods and services and in particular:

- *Computer software for use in connection with websites in the Internet for music (Class 9)*
- *Disposal of advertisement space on the Internet (Class 35)*
- *Sound ... broadcasting of music...via the Internet...; services related to transmission of sound (Class 38)*
- *Entertainment; ...information about music, entertainment... on-line; ... rental of ...music via the Internet (Class 41)*

10. In the interests of proportionality, Spotify relies upon the above goods and services for the purposes of its claim to enhanced distinctive character under s. 5(2)(b) and its claim to reputation under s. 5(3)...”

58. I have accepted the opponent’s reputation in respect of its SPOTIFY mark for music streaming services and find that it is in fact a very substantial reputation. The UK is the opponent’s second largest market after the US, generating total revenue of 836 million euros in the UK in 2020. In the UK streaming accounts for 80.6% of music consumption and the opponent is the most popular music platform in the UK. Having considered the evidence filed by the opponent, I am satisfied that its entertainment offering goes beyond music streaming services and includes podcasts and live events.

⁵⁰ See exhibit OP 63.

⁵¹ Mr Hollingworth refers to a brief summary of the opponent’s evidence of reputation provided in his skeleton argument.

In some cases, those live events are streamed for fans and in some cases, such as the ‘fans first’ gigs, the opponent puts on live music events for its online customers to attend. The live events are closely linked to its online business as streaming trends and artist popularity clearly lead the opponent’s thinking in what live events it should provide. On occasion, it also uses its platform to select attendees for events, for example for the ‘secret socials’. As part of its operating model, the opponent provides opportunities for advertisers to access its customers, mainly in the context of its free service which, in order to remain free, generates revenue by including advertising as part of the user experience. Advertisers themselves can use their own platform on the opponent’s website to buy advertising space which will enable them to target the opponent’s customers. For most users of the opponent’s services the software used to access them is made available in ‘app’ form. This can be used on, inter alia, mobile phones, smart watches, games, consoles, smart tvs and smart speakers. In some cases the opponent’s ‘app’ comes ready loaded on those devices, due to the opponent’s marketing efforts.

59. Having considered all of the evidence presented to me, I find that the earlier mark has a very strong reputation in the UK for at least the list of goods and services identified by Mr Hollingworth in his skeleton argument and itemised in paragraph 57 above.

Link

60. In addition to the earlier marks having a reputation, a link must be made between the mark applied for and the earlier marks. In *Intel Corporation Inc v CPM (UK) Ltd*⁵² (“*Intel*”) the CJEU provided guidance on the factors to consider when assessing whether a link has been established. It stated:

“41 The existence of such a link must be assessed globally, taking into account all factors relevant to the circumstances of the case...”

61. Those factors include:

⁵² C-252-07.

The degree of similarity between the conflicting marks

62. In *Intra-Press SAS v OHIM*,⁵³ the CJEU stated that:

“72...The Court has consistently held that the degree of similarity required under Article 8(1)(b) of Regulation No 40/94, on the one hand, and Article 8(5) of that regulation, on the other, is different. Whereas the implementation of the protection provided for under Article 8(1)(b) of Regulation No 40/94 is conditional upon a finding of a degree of similarity between the marks at issue so that there exists a likelihood of confusion between them on the part of the relevant section of the public, the existence of such a likelihood is not necessary for the protection conferred by Article 8(5) of that regulation. Accordingly, the types of injury referred to in Article 8(5) of Regulation No 40/94 may be the consequence of a lesser degree of similarity between the earlier and the later marks, provided that it is sufficient for the relevant section of the public to make a connection between those marks, that is to say, to establish a link between them (see judgment in *Ferrero v OHMI*, C-552/09 P, EU:C:2011:177, paragraph 53 and the case-law cited).”

63. In other words, the level of similarity required for the public to make a link between the marks for the purposes of 5(3) may be less than the level of similarity required to create a likelihood of confusion.

64. The similarity of signs under sections 5(2) and 5(3) of the Act is assessed in the same way.⁵⁴

65. The application is for the term ‘Spotlyve’. The opponent’s mark is ‘SPOTIFY’.

⁵³ Joined cases C-581/13P & C-582/13P.

⁵⁴ See the principles established 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 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.

66. The opponent claims the marks are of similar length and both begin with the four letters S-P-O-T. The applicant denies that its application is similar to the earlier mark, drawing my attention to the suffixes of both marks, being 'IFY' and 'lyve'.

67. Clearly the first four letters are the same and the ends of each mark are different. The application is two syllables long, the opponent's mark three. The case in which each is presented is not relevant as fair and notional use of both marks would allow use in either upper or lower case.⁵⁵ Overall, I find these marks visually similar to a medium degree.

68. With regard to aural similarity the whole of each mark will be pronounced by the consumer. Both begin with the letters SPOT, which will be pronounced as the common English word. The remainder of the application will be pronounced the same as the common English word 'LIVE'. The remainder of the opponent's mark will be pronounced 'I-FY' or 'IF-EYE'. I find these marks aurally similar to a medium degree.

69. Conceptually, neither mark has an obvious meaning. The application is arguably two known words, 'SPOT' and 'LIVE', but these do not create an understandable meaning for the relevant public, the combination resulting in an invented word. The earlier mark is an invented word, the 'IFY' element at the end of the mark not resulting in an identifiable word or term. The marks are conceptually neutral.

The strength of the earlier mark's reputation

70. For the reasons I have already given, the opponent's mark had a very strong reputation at the relevant date.

The degree of the earlier mark's distinctive character, whether inherent or acquired through use

⁵⁵ See *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41, paragraph 22.

71. The earlier mark is inherently distinctive to a high degree, being an invented word and having no obvious meaning in respect of the goods and services for which it is registered. The opponent has enhanced its distinctiveness to the very highest degree by the use made of its mark, such that the opponent's SPOTIFY mark is very highly distinctive of the opponent.

The nature of the goods or services for which the conflicting marks were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public

72. For the purposes of detriment and/or unfair advantage under section 5(3) of the Act it is not a requirement that there must be identity or similarity between the respective goods and services, though the issue remains relevant to the overall analysis. In the current case, I have found the opponent to have a very strong reputation for all of the goods and services for which it claimed such a reputation. These are:

- Computer software for use in connection with websites in the Internet for music (Class 9)
- Disposal of advertisement space on the Internet (Class 35)
- Sound ... broadcasting of music...via the Internet...; services related to transmission of sound (Class 38)
- Entertainment; ...information about music, entertainment... on-line; ... rental of ...music via the Internet (Class 41)

73. The opponent has helpfully provided an annexe which identifies the goods and services in the application which it considers identical, highly similar, similar and lowly similar to the goods and services for which it has a reputation.

74. The applicant puts the opponent to proof that there is any similarity between the respective specifications and makes no submissions with regard to its own position regarding the similarity or otherwise of the goods and services.

75. As has already been noted, the applicant's specification is vast, amounting to ten pages of 10pt type in the annexe filed by the opponent (and attached to its skeleton argument). It clearly includes some identical terms, such as 'entertainment' in class 41. I find the applicant's submissions unhelpful with regard to the goods and services comparison.

76. With regard to the assessment of similarity between the respective goods and services, I bear in mind *Gérard Meric v OHIM*,⁵⁶ in which the GC stated that:

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

77. In *Canon*,⁵⁷ the Court of Justice of the European Union (CJEU) stated at paragraph 23 of its judgment that:

"In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary".

78. 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;

⁵⁶ Case T-133/05.

⁵⁷ Case C-39/97.

- (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.”

79. Terms in the respective specifications should be given their ordinary and natural meanings. In *YouView Ltd v Total Ltd*,⁵⁸ Floyd J stated:

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

⁵⁸ [2012] EWHC 3158 (Ch) at [12].

80. With regard to broad terms in specifications, I bear in mind *Sky v Skykick* [2020] EWHC 990 (Ch), in which Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term ‘computer software’. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

“...the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded.”

81. On the matter of complementarity, in *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the 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”.

82. And in *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in

circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public is liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amalia Mary Elliot v LRC Holdings Limited* BL-O-255-13:

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

83. Whilst on the other hand:

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

84. Having taken account of all of the necessary criteria such as users, uses, nature, trade channels, complementarity and whether or not the services are in competition, I find that in classes 9, 35, 38 and 41 there are goods and services which are identical, some which are similar and some where I find no similarity. The applicant’s services in class 42 are similar to the extent that they relate to the design, development and online provision of the services for which the opponent has a reputation.

85. Having considered all of the goods for which the applicant seeks registration in class 36, which are financial and fundraising services, I can find no meaningful areas of similarity between these services and those for which the opponent has a reputation.

86. In the case of an opposition under section 5(3), the similarity of goods and services is not a necessary requirement but rather, one of the factors to be considered in establishing whether there would be a link. In other words, what is important is not necessarily the specific level of similarity between each term in the application and the

terms for which the opponent has a reputation but rather, which goods and services in the applicant's specification will, when sold under the Spotlyve mark, create a link with the opponent's Spotify mark in the mind of the consumer. This can, and in this case will, extend beyond the goods and services for which there are degrees of similarity. This is because of the very high reputation enjoyed by the opponent in respect of its SPOTIFY mark and the similarity between the respective marks.

87. With regard to that reputation, Mr Hollingworth submitted to me at the hearing that the applicant's evidence, far from helping its case, actually shows that there are no other 'SPOT' marks in the same field as the opponent. Whilst I am not convinced the applicant's evidence shows very much at all, I do agree that the opponent has a very strong position in its field of activity and its mark is so distinctive of it that the applicant's Spotlyve mark will result in a link being made between it and the opponent. Put simply, the relevant public will make a link between the opponent's mark and the application for all of the goods and services in the application, with the exception of the following:

Class 9

Magnetic, optical or electronic membership cards. Downloadable e-commerce computer software to allow users to perform electronic business transactions via a global computer and communication networks; Software providing location-based weather information; Software for facilitating and arranging for the financing and distribution of fundraising and donations; Software for online charitable fundraising services and financial donation services; air traffic electrical controllers, mobility electrical controllers, access electrical controllers, remote port electrical controllers, antennas, electronic radio components;

Class 35

Facilitating the exchange and sale of services and products of third parties via computer and communication networks; Providing online marketplaces for sellers of goods and/or services; Providing online facilities for connecting sellers with buyers; Business networking; Employment and recruiting services; Charitable services, in particular promoting public awareness about charitable, philanthropic, volunteer, public and community service

and humanitarian activities; Providing contest and incentive award programs designed to recognize, reward and encourage individuals and groups which engage in self-improvement, self-fulfilment, charitable, philanthropic, volunteer, public and community service and humanitarian activities and sharing of creative work product; Organizing, promoting and conducting exhibitions, and tradeshow for business purposes; Providing telephone directory information via global communications networks; Business management consulting services to enable business entities, non-governmental organizations and non-profit organizations to develop, organize, and administer programs to offer greater access to global communications networks. Providing telephone directory information via global communications networks; Business assistance and consulting services; Providing online facilities to allow user comments concerning business organizations, service providers and other resources provided online; Providing online business directories featuring restaurants, bars, cinemas, dance clubs, museums, art galleries, and other cultural and social spaces; Business consultation in the field of telecommunications; Business management consulting services to enable business entities, non-governmental organizations and non-profit organizations to develop, organize, and administer programs to offer greater access to global communications networks.

Class 36

Financial transaction processing services, namely, providing secure commercial transactions and payment options, electronic funds transfer; clearing and reconciling financial transactions; providing a wide variety of payment and financial services, namely, credit card services, issuing credit cards and lines of credit, electronic payment services involving electronic processing and subsequent transmission of bill payment data, bill payment services with guaranteed payment delivery, all conducted via a global communications network; Electronic funds transfer services; reimbursement of funds for disputed items in the field of electronic payment purchases; providing purchase protection services for goods and services purchased by others via a global computer network and wireless networks;

Credit card, debit card, and gift card transaction processing services; Merchant services, namely, payment transaction processing services; Providing electronic mobile payment services for others; Financial services; Payment processing services; Financial transaction services; Facilitating and arranging for the financing and distribution of fundraising and donations; Online charitable fundraising services and financial donation services; electronic foreign exchange payment processing; payment processing services, namely, providing virtual currency transaction processing services for others.

Class 38

Video conferencing services; Providing technical support services regarding the usage of communications equipment; Providing facilities and equipment for video conferencing.

Class 41

Contest and incentive award programs designed to recognize, reward and encourage individuals and groups which engage in self-improvement, self-fulfilment, charitable, philanthropic, volunteer, public and community service and humanitarian activities and sharing of creative work product; Organizing, promoting and conducting exhibitions and tradeshow and events for business purposes;

Class 42

Providing non-downloadable e-commerce software to allow users to perform electronic business transactions via the internet and communications networks; Computer services, in particular, application service provider featuring application programming interface (API) software to allow users to perform electronic business transactions via a global computer network; Providing user authentication services using single sign-on and software technology for e-commerce transactions; Providing user authentication services of electronic funds transfer, credit and debit card and electronic check transactions using single sign-on and software technology; Providing an application programming interface (API) to allow

users to perform electronic business transactions via the internet; Providing software for processing electronic payments; Platform as a service (PAAS) services featuring computer software to allow users to perform business and e-commerce transactions; Mapping services; Providing software for mapping services; Application service provider (ASP) featuring software for mapping services; Providing software for identifying and allowing users to contact government representatives; E-commerce software to allow users to perform electronic business transactions via the internet; Technical support services, namely, troubleshooting in the nature of diagnosing computer hardware and software problems; Providing software for facilitating and arranging for the financing and distribution of fundraising and donations; Providing software for online charitable fundraising services and financial donation services.

Damage

88. The opponent has claimed that the applicant's trade mark will take unfair advantage of its earlier rights. It also pleads that there will be a detriment to its reputation and that the distinctive character of its earlier rights will be diluted. I will deal first with unfair advantage.

89. In *Jack Wills Limited v House of Fraser (Stores) Limited*⁵⁹ Arnold J. (as he then was) considered the earlier case law and concluded that:

"80. The arguments in the present case give rise to two questions with regard to taking unfair advantage. The first concerns the relevance of the defendant's intention. It is clear both from the wording of Article 5(2) of the Directive and Article 9(1)(c) of the Regulation and from the case law of the Court of Justice interpreting these provisions that this aspect of the legislation is directed at a particular form of unfair competition. It is also clear from the case law both of the Court of Justice and of the Court of Appeal that the defendant's conduct is most likely to be regarded as unfair

⁵⁹ [2014] EWHC 110 (Ch)

where he intends to benefit from the reputation and goodwill of the trade mark. In my judgment, however, there is nothing in the case law to preclude the court from concluding in an appropriate case that the use of a sign the objective effect of which is to enable the defendant to benefit from the reputation and goodwill of the trade mark amounts to unfair advantage even if it is not proved that the defendant subjectively intended to exploit that reputation and goodwill.”

90. It is fairly unusual in cases before this tribunal that there is evidence of the intended use of an application when we come to make an assessment on the likelihood of damage. However, in this case Mr Owen’s second witness statement provides evidence of the applicant’s business intentions. Having been asked by the opponent, the applicant’s representative confirmed that the website, spotlyve.com, was the applicant’s business site and further confirmed that it shows ‘how the mark is intended to be used’.⁶⁰ A page from the website shows the ‘spotlyve’ mark in the top left corner. The Instagram brand is shown on the top right corner. The website shows a still from a video in which a man is shown, sitting at a laptop, wearing headphones. The strapline for the site is, ‘The platform for the people’. The words, ‘monetise your passion’ and ‘host events, build your brand, design your life with freedom’, appear on the page.⁶¹

91. Mr Owen provides a transcript of the video, which includes the following:

“[00:00:18]: SPOTLYVE is an integrated online education, video communication and social media edutainment platform that puts an end to lost time and wasted energy spread across multiple platforms. Everything that independent professionals, businesses, and content creators need to brand themselves, and generate revenue online can now be accomplished in one SPOTLYVE account. No other platform compares when it comes to being seen by a relevant audience and monetising digital content.”

⁶⁰ See exhibit MO15.

⁶¹ See exhibit MO16.

[00:00:48]: Using SPOTLYVE for making video calls, hosting online events, or browsing edutainment content is easy and intuitive. Simply login in with one click, choose an option from your personalized menu and you're on your way. A personal website is mostly a waste of time and money and requires more maintenance and investment than it returns. This is why we offer SPOTLYVE hosts, a complementary personal branding page, that acts as their store front and business card. With direct booking capabilities and our in-app, text messenger feature, connecting and interacting with your audience has never been so easy. Every function and feature built into SPOTLYVE reflects this goal, and results in an unmatched experience for both hosts and users.”

92. The opponent sums up its position in its skeleton argument:

“51. The Applicant has not started its intended business. It has provided no evidence of its own marketing efforts to launch its unused and unknown brand. By choosing a brand so similar to the famous SPOTIFY brand, for use in connection with on-line services involving social media and events, it will inevitably benefit from the power of attraction, the reputation and prestige of the SPOTIFY Mark and exploit, without paying any financial compensation, the marketing effect expended by Spotify in order to create and maintain the mark’s image.”

93. The opponent also draws my attention to the fact that foreclosing a trade mark owner’s future options could be regarded as a form of unfair advantage. It relies on the comments of Jacob LJ in *L’Oreal SA v Bellure*:⁶²

“93...Consider a very distinctive mark famous for a particular kind of product, perfumes say. The trade mark owner may reasonably one day contemplate a line extension—perhaps into jewellery or wines. If another used that self-same mark, or a confusingly similar one, for these different

⁶² [2007] EWCA Civ 968; [2008] R.P.C. 9.

goods, then, even if no-one is confused, he would foreclose the trade mark owner's future options. I do not see why that should not be regarded as "unfair."

94. I agree. The success of the earlier mark and its standing amongst users of, in particular, online entertainment services, will make it easier for the attraction of the earlier mark to be projected on to the applicant's mark. I find that there is a risk, which is not hypothetical, that use of the contested mark will make it easier for the applicant to offer its goods and services to a section of the relevant public. Damage will extend to the goods and services for which I have found a link to made, which include goods and services which the average consumer would think it reasonable for the opponent to provide, giving its current very high level of reputation.

95. As I have found for the opponent under the first head of damage, I do not consider it necessary to go on to consider the remaining heads of damage pleaded.

96. Having found the 5(3) ground to have been made out the only defence left for the applicant is to show that it has due cause to use the mark applied for.

97. In its counterstatement the applicant submits:

"21. Notwithstanding the above, and without prejudice to the Applicant's arguments that there is no likelihood of confusion, the above Section 5(3) requires the use of a conflicting mark to be without due cause. The Applicant submits that if the Applicant's use is with due cause in relation to the goods and services applied for and now opposed [sic]."

98. And:

"32. The Opposition seeks to extend the rights of the Opponent far beyond those protected under the Act. To do so would inhibit, without any justification, the Applicant from continuing to trade honestly and fairly under the Mark."

99. Notwithstanding the typographical error, I take this to mean that the applicant seeks to rely on use of the contested mark with due cause. The opponent clearly concurs with this approach. In his witness statement, Mr Hollingworth, for the opponent, submits:

“17. The Applicant’s Counterstatement [120] purports to contend that the Applicant has ‘due cause’ to use the mark SPOTLYVE in relation to the goods and service applied for (para 21) and complains that upholding the present opposition ‘would inhibit, without any justification, the Applicant from continuing to trade honestly and fairly under the Mark’ (para 32, emphasis added).”

100. In his second witness statement, Mr Owen states that the applicant’s spotlyve website links to an Instagram page which states that the Applicant’s offering is ‘Launching summer 2022’.⁶³ Clearly, the applicant was not trading at the commencement of these proceedings. However, it is for the applicant to prove its case, as is clear from *Leidseplain Beheer BV v Red Bull*⁶⁴ in which the CJEU held:

“44...Onus is on the third party using a sign similar to the mark with a reputation, to establish that he has due cause for using such a sign.”

101. The applicant has not provided any explanation or evidence in support of a claim of due cause and so I need consider it no further.

CONCLUSION

102. The opponent succeeds under section 5(3) for all of the goods and services in the application, except those listed in paragraph 87 above.

⁶³ See the second witness statement of Mark Owen, paragraphs 6-8.

⁶⁴ C-65/12

The remaining grounds

103. I have considered whether or not to deal with the opponent's claim under section 5(2)(b) and have decided against it. The case under 5(2)(b) requires a closer connection between the contested goods and services than is the case under the 5(3) ground and so even with the inevitable uplift for the distinctiveness of the mark being amplified by the use made of it, the opponent is likely to succeed in respect of a smaller number of goods and services in the applicant's specification than it already has under the 5(3) ground.

104. With regard to the 5(4) ground, the opponent relies upon a much smaller specification, namely, music streaming services, and again, given the parameters of that ground, is likely to succeed for a smaller number of goods and services than has been the case under 5(3).

105. In any case, neither of the remaining grounds will succeed in relation to goods and services which are dissimilar, which are the only ones for which the opponent has failed under section 5(3).

Costs

106. Spotify AB has been largely successful under section 5(3) and is entitled to a contribution towards its costs. At the hearing Mr Hollingworth requested costs on the scale but at the higher end,⁶⁵ to take account of the additional hearing preparation required as a result of extremely limited pleadings from the applicant and the work carried out by the opponent in assessing the applicant's nearly 300 pages of, essentially, state of the register evidence, which provided no assistance in the determination of this case, but which the opponent needed to consider. I agree that such an award is appropriate and I award costs on the following basis:

Official Fee -

£200

⁶⁵ See the tribunal's scale of costs is contained in TPN 2/2016.

Preparing a statement and considering the other side's statement -	£400
Filing evidence and considering the other side's evidence -	£1100
Preparing for and attending a hearing -	£1100
Total	£2800

107. I order Brand Trademark Ltd to pay Spotify AB the sum of £2800. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 29th day of September 2022

**Al Skilton
For the Registrar,
the Comptroller General**

Annex 1

The specification for the trade mark application - **Spotlyve**

Class 9

Data, documents, information, video, sound, text and other media or multi-media, all being electronically recorded or downloadable from the Internet, extranets or other communications networks; downloadable electronic publications; computer hardware, apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers; recording discs; data processing equipment; computer software; communications software; magnetic, optical or electronic membership cards; computer games; Software for social networking and interacting with online communities; Computer software development tools; Software for use as an application programming interface (API); Application programming interface (API) for use in building software applications; Application programming interface (API) for software which facilitates online services for social networking and for data retrieval, upload, download, access and management; Software for creating, managing, and interacting with an online community; Software for organizing events, searching for events, calendaring and managing events; Software for creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, embedding, transmitting, and sharing or otherwise providing electronic media or information via computer the internet and communication networks; Software for modifying and enabling transmission of images, audio, audio visual and video content and data; Software for modifying photographs, images and audio, video, and audio-visual content with photographic filters and augmented reality (AR) effects, namely, graphics, animations, text, drawings, geotags, metadata tags, hyperlinks; Software for the collection, managing, editing, organizing, modifying, transmission, sharing, and storage of data and information; Downloadable e-commerce computer software to allow users to perform electronic business transactions via a global computer and communication networks; Software for sending and receiving electronic messages, alerts, notifications and reminders; Search engine software; Magnetically encoded gift cards; Software for use in creating, managing, measuring, and disseminating advertising of others; Ad server, namely, a computer server for storing advertisements and delivering advertisements to websites; Software providing a virtual marketplace; Software providing location-based weather information; Software providing, linking to, or streaming news or current events information; Parental control software; Software for facilitating interaction and communication between humans and AI (artificial intelligence) platforms; Software in the nature of a mobile application for creating, sharing, disseminating and posting advertising; Software for geo-location based advertising and product and service promotion; Application programming interface (API) software for allowing data retrieval, upload, access and management; Software for viewing and interacting with a feed of images, audio-visual and video content, and associated text and data; Downloadable computer software for finding content and content publishers, and for subscribing to content; Software for organizing images, video, and audio-visual content using metadata tags; Software for creating and managing social media profiles and user accounts; Software for uploading, downloading, streaming, archiving, transmitting, and sharing images, audio-visual and video content and associated text and data; Software for advertisers to communicate and interact with online communities; Software for streaming multimedia entertainment content; Software for providing consumer information; Messaging software; Software for facilitating and arranging for the financing and distribution of

fundraising and donations; Software for online charitable fundraising services and financial donation services; Software for use in facilitating voice over internet protocol (VOIP) calls, phone calls, video calls, text messages, instant message and online social networking services; Telecommunications equipment for providing third party access to, and enabling the transmission of video, data and voice over, global communications networks, namely, mobile and access computer and mobile telephone terminals, base transceiver stations and wireless radio parts thereof, data transceivers, data repeaters, routers and switches, transmission circuits, integrated circuits, computer hardware, mobile cloud clients and servers, multiplexers, digital signal processors, radio frequency signal processors, mobile switching circuits, air traffic electrical controllers, mobility electrical controllers, access electrical controllers, remote port electrical controllers, radio ports, antennas, electronic radio components, software for telecommunications applications, and mobile core networks comprising data transceivers, wireless networks and gateways for collection, transmission and management of data, voice and video; Communication software and communication computer hardware for providing access to the Internet.

Class 35

Marketing, advertising and promotion services; Provision of market research and information services; Promoting the goods and services of others via computer and communication networks; Business and advertising services, namely, media planning and media buying for others; Business and advertising services, namely, advertising services for tracking advertising performance, for managing, distributing and serving advertising, for analysing advertising data, for reporting advertising data, and for optimizing advertising performance; Consulting services in the fields of advertising and marketing; Facilitating the exchange and sale of services and products of third parties via computer and communication networks; Online retail store services featuring a wide variety of consumer goods of others, gift cards, and delivery of digital media, virtual reality headsets, and virtual reality content and data; Providing online marketplaces for sellers of goods and/or services; Providing online facilities for connecting sellers with buyers; Business networking; Employment and recruiting services; Advertising and information distribution services, in particular, providing classified advertising space via the global computer network; Providing online computer databases and online searchable databases in the field of classifieds; Pre-paid gift card services, in particular, issuing gift card certificates that may be redeemed for goods or services; Charitable services, in particular promoting public awareness about charitable, philanthropic, volunteer, public and community service and humanitarian activities; Providing contest and incentive award programs designed to recognize, reward and encourage individuals and groups which engage in self-improvement, self-fulfilment, charitable, philanthropic, volunteer, public and community service and humanitarian activities and sharing of creative work product; Organizing exhibitions and events in the field of software and hardware development for commercial or advertising purposes; Association services that promote the interests of professionals and businesses in the field of mobile software application development; Online advertising and promoting the goods and services of others via the internet; Marketing and advertising consultation services; Market research services; Advertising, marketing and promoting the goods and services of others by means of providing photo and video equipment at special events; Providing online facilities for live streaming video of promotional events; Arranging and conducting special events for commercial, promotional or advertising purposes; Advertising via electronic media; Organizing, promoting and conducting exhibitions, tradeshow and events for business purposes; Online retail store services featuring virtual reality and augmented reality headsets, games, content and digital media; Providing telephone directory information via global communications networks; Electronic catalogue services; Customer relationship management; Business assistance and consulting services; Providing online facilities to allow user comments concerning business organizations, service providers and other resources provided online; Advertising services; Dissemination of advertising for others via

a global computer network; Advertising services, namely, advertising campaign management, targeting, implementation and optimization services; Marketing research, namely, advertising campaign and consumer preferences research and analysis; Promoting the goods and services of others by means of distributing video advertising on the internet; Advertising services, namely, scheduling, tracking, and reporting advertising for others; Preparation and realization of media and advertising plans and concepts; Ad serving, namely, placing advertisements on websites for others; Advertising services, namely, targeting and optimization of online advertising; Business information management, namely, reporting of business information and business analytics in the fields of advertising and marketing; Business management; Business administration, office functions; Business consultation regarding marketing activities; Media planning and media buying services; Brand consulting; Design of advertising materials for others; Providing online business directories featuring restaurants, bars, cinemas, dance clubs, museums, art galleries, and other cultural and social spaces; Business consultation in the field of telecommunications; Business management consulting services to enable business entities, non-governmental organizations and non-profit organizations to develop, organize, and administer programs to offer greater access to global communications networks.

Class 36

Financial transaction processing services, namely, providing secure commercial transactions and payment options, electronic funds transfer; clearing and reconciling financial transactions; providing a wide variety of payment and financial services, namely, credit card services, issuing credit cards and lines of credit, electronic payment services involving electronic processing and subsequent transmission of bill payment data, bill payment services with guaranteed payment delivery, all conducted via a global communications network; Electronic funds transfer services; reimbursement of funds for disputed items in the field of electronic payment purchases; providing purchase protection services for goods and services purchased by others via a global computer network and wireless networks; Credit card, debit card, and gift card transaction processing services; Merchant services, namely, payment transaction processing services; Providing electronic mobile payment services for others; Financial services; Payment processing services; Financial transaction services; Facilitating and arranging for the financing and distribution of fundraising and donations; Online charitable fundraising services and financial donation services; electronic foreign exchange payment processing; payment processing services, namely, providing virtual currency transaction processing services for others.

Class 38

Photo sharing and video sharing services, namely, electronic transmission of digital photo files, videos and audio visual content among internet users; Telecommunications; Providing access to computer, electronic and online databases; Telecommunications services, namely, electronic transmission of electronic media, data, messages, graphics, images, audio, video and information; Providing online forums for communication on topics of general interest; Providing online communications links which transfer mobile device and internet users to other local and global online locations; Facilitating access to third party websites or to other electronic third party content via a universal login; Providing online chat rooms, instant messaging services, and electronic bulletin boards; Audio, text and video broadcasting services over the internet or other communications networks; Voice over internet protocol (VOIP) services; Telephony communication services; Providing access to computer databases in the fields of social networking and social introduction and dating; Peer-to-peer photo and data sharing services, namely, electronic transmission of digital photo files, graphics and audio content among internet users; Telecommunications and peer-to-peer network computer services, namely, electronic transmission of images, audio-visual and video content, photographs, videos, data, text, messages, advertisements, media

advertising communications and information; Chatroom services for social networking; Streaming and live streaming of video, audio-visual, and interactive audio-visual content via the internet; Telecommunications services, namely, electronic transmission of virtual reality content and data; Providing electronic bulletin boards for transmission of messages among users in the field of general interest; Video conferencing services; Providing technical support services regarding the usage of communications equipment; Providing facilities and equipment for video conferencing; Teleconferencing; 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; Telecommunication services, namely, data transmission and reception services via telecommunication networks; Mobile phone communication services; Web messaging; Video teleconferencing; Instant messaging services; Electronic exchange of voice, data, audio, video, text and graphics accessible via computer and telecommunications networks; Encrypted electronic transmission and delivery of recovered data; Provision of access to telecommunication networks and the internet; Internet Connectivity; Information about telecommunication; Consulting in the field of telecommunication services, namely, transmission of voice, data, and documents via telecommunications networks.

Class 41⁶⁶

Entertainment services; Providing access to interactive electronic and online databases of user-defined content, third-party content, photos, video, audio, visual, and audio-visual material in the field of general interest; Photosharing and video sharing services; Electronic publishing services for others; Entertainment services, namely, facilitating interactive and multiplayer and single player game services for games played via the internet or communication networks; Providing information about online computer games and video games via computer or communication networks; Arranging and conducting competitions and facilitating events for video gamers and computer game players; Providing online resources for software developers; Contest and incentive award programs designed to recognize, reward and encourage individuals and groups which engage in self-improvement, self-fulfilment, charitable, philanthropic, volunteer, public and community service and humanitarian activities and sharing of creative work product; Organizing and sponsoring contest and incentive award programs for software developers; Publication of educational materials, namely, publishing of books, journals, newsletters, and electronic publications; Educational services, in particular, organizing and conducting conferences, courses, seminars, and online training in the fields of advertising, marketing, social networking, the internet, and social media, and distribution of course material in connection therewith; Online journals, namely, weblogs (blogs) featuring user-defined content; Entertainment services, namely, providing virtual reality games, interactive entertainment and virtual reality content; Entertainment services, namely, providing augmented reality games, interactive entertainment and augmented reality content; Entertainment services, namely, providing mixed reality games, interactive entertainment and mixed reality content; Providing a computer game for use network-wide by network users; Providing online virtual reality games; Providing online augmented reality games; Providing online mixed reality games; Entertainment services, namely, providing online video games; Organizing exhibitions in the field of interactive entertainment, virtual reality, consumer electronics and video game entertainment industries for cultural or educational purposes; Arranging and conducting educational conferences; Organizing exhibitions and events in the field of software development for educational purposes; Educational services, namely, organizing and conducting conferences and seminars in the fields of artificial intelligence and the internet of things; Training in the field of design, advertising and communication technologies; Training in the field of strategic media planning relating to advertising, marketing and business; Online journals, namely, blogs featuring advertising, marketing and

⁶⁶ Note: the application is made for the same specification repeated.

business; Providing computer, electronic and online databases in the field of entertainment; Publishing services, namely, publishing of electronic publications for others; Rental of photography and/or videography kiosks for capturing, uploading, editing and sharing of pictures and videos; Entertainment services, namely, providing online facilities for streaming entertainment content and live streaming video of entertainment events; Organizing live exhibitions and conferences in the fields of culture, entertainment and social networking for non-business and non-commercial purposes; Providing online games; Entertainment services, namely, providing virtual reality games, interactive entertainment and virtual reality content and experiences; Entertainment services, namely, providing augmented reality games, interactive entertainment and augmented reality content and experiences; Entertainment services, namely, providing mixed reality games, interactive entertainment and mixed reality content and experiences; Entertainment services, namely, arranging and conducting of competitions for encouraging use and development of interactive entertainment, virtual reality, augmented reality, consumer electronics, and video game entertainment software and hardware; Organizing exhibitions and events for cultural, educational, or entertainment purposes; Production of video and computer game software; Virtual reality arcade services; Augmented reality arcade services; Virtual reality game services provided online from a computer network; Augmented reality game services provided online from a computer network; Providing online computer games and interactive games; Augmented reality video production; Virtual reality video production; Production of video and computer game software; Providing online game software; Entertainment services, namely, providing interactive games; Multimedia entertainment software production services; Multimedia production services; Entertainment services in the nature of development, creation, production and post- production services of multimedia entertainment content; Entertainment services, namely, providing augmented reality games and interactive entertainment content; Entertainment services, namely, providing online virtual reality environments; Entertainment services, namely, providing online augmented reality environments; Providing entertainment information from searchable indexes and databases of information, including text, electronic documents, databases, graphics, photographic images and audio visual information, via the internet and communication networks; Organizing, promoting and conducting exhibitions, tradeshow and events for business purposes; Providing information about online computer games and video games via computer or communication networks; Arranging and conducting competitions and facilitating events for video gamers and computer game players; Organizing exhibitions in the field of interactive entertainment, virtual reality, consumer electronics and video game entertainment industries for cultural or educational purposes arranging and conducting educational conferences organizing exhibitions and events in the field of software development for educational purposes; Providing a website featuring non-downloadable publications about virtual reality technology; Providing a website featuring non-downloadable publications about augmented reality technology; Education; Providing of training; Sporting and cultural activities; Entertainment and educational services, namely, providing non-downloadable movies, television shows, webcasts, audio-visual, and multimedia works via the internet, as well as information, reviews, and recommendations regarding movies, television shows, webcasts, audio-visual, and multimedia works; Providing computer, electronic and online databases for educational, recreational and amusement use in the field of entertainment and in the fields of secondary, collegiate, social and community interest groups; Entertainment services; Providing access to interactive electronic and online databases of user-defined content, third-party content, photos, video, audio, visual, and audio-visual material in the field of general interest; Photo sharing and video sharing services; Electronic publishing services for others; Entertainment services, namely, facilitating interactive and multiplayer and single player game services for games played via the internet or communication networks; Providing information about online computer games and video games via computer or communication networks; Arranging and conducting competitions and facilitating events for video gamers and computer game players; Providing online resources for software developers; Contest and incentive award

programs designed to recognize, reward and encourage individuals and groups which engage in self-improvement, self-fulfilment, charitable, philanthropic, volunteer, public and community service and humanitarian activities and sharing of creative work product; Organizing and sponsoring contest and incentive award programs for software developers; Publication of educational materials, namely, publishing of books, journals, newsletters, and electronic publications; Educational services, in particular, organizing and conducting conferences, courses, seminars, and online training in the fields of advertising, marketing, social networking, the internet, and social media, and distribution of course material in connection therewith; Online journals, namely, weblogs (blogs) featuring user-defined content; Entertainment services, namely, providing virtual reality games, interactive entertainment and virtual reality content; Entertainment services, namely, providing augmented reality games, interactive entertainment and augmented reality content; Entertainment services, namely, providing mixed reality games, interactive entertainment and mixed reality content; Providing a computer game for use network-wide by network users; Providing online virtual reality games; Providing online augmented reality games; Providing online mixed reality games; Entertainment services, namely, providing online video games; Organizing exhibitions in the field of interactive entertainment, virtual reality, consumer electronics and video game entertainment industries for cultural or educational purposes; Arranging and conducting educational conferences; Organizing exhibitions and events in the field of software development for educational purposes; Educational services, namely, organizing and conducting conferences and seminars in the fields of artificial intelligence and the internet of things; Training in the field of design, advertising and communication technologies; Training in the field of strategic media planning relating to advertising, marketing and business; Online journals, namely, blogs featuring advertising, marketing and business; Providing computer, electronic and online databases in the field of entertainment; Publishing services, namely, publishing of electronic publications for others; Rental of photography and/or videography kiosks for capturing, uploading, editing and sharing of pictures and videos; Entertainment services, namely, providing online facilities for streaming entertainment content and live streaming video of entertainment events; Organizing live exhibitions and conferences in the fields of culture, entertainment and social networking for non-business and non-commercial purposes; Providing online games; Entertainment services, namely, providing virtual reality games, interactive entertainment and virtual reality content and experiences; Entertainment services, namely, providing augmented reality games, interactive entertainment and augmented reality content and experiences; Entertainment services, namely, providing mixed reality games, interactive entertainment and mixed reality content and experiences; Entertainment services, namely, arranging and conducting of competitions for encouraging use and development of interactive entertainment, virtual reality, augmented reality, consumer electronics, and video game entertainment software and hardware; Organizing exhibitions and events for cultural, educational, or entertainment purposes; Production of video and computer game software; Virtual reality arcade services; Providing online computer games and interactive games; Providing online game software; Entertainment services, namely, providing interactive games; Multimedia entertainment software production services; Multimedia production services; Entertainment services in the nature of development, creation, production and post- production services of multimedia entertainment content; Entertainment services, namely, providing augmented reality games and interactive entertainment content; Entertainment services, namely, providing online virtual reality environments; Entertainment services, namely, providing online augmented reality environments; Providing entertainment information from searchable indexes and databases of information, including text, electronic documents, databases, graphics, photographic images and audio visual information, via the internet and communication networks; Organizing, promoting and conducting exhibitions, tradeshows and events for business purposes; Education; Providing of training; Sporting and cultural activities; Entertainment and educational services, namely, providing non-downloadable movies, television shows, webcasts, audio-visual, and multimedia works via the internet, as well as information, reviews, and recommendations

regarding movies, television shows, webcasts, audio-visual, and multimedia works; Providing computer, electronic and online databases for educational, recreational and amusement use in the field of entertainment and in the fields of secondary, collegiate, social and community interest groups.

Class 42

Design and development of computer hardware and software; Computer services, namely, creating virtual communities for registered users to organize groups, meetings, and events, participate in discussions and engage in social, business and community networking; Computer services, in particular, hosting electronic facilities for others for organizing and conducting meetings, events and interactive discussions via the internet and communication networks; 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; Computer services, namely, providing search engines for obtaining data via the internet and communications networks; Providing online facilities featuring technology that enables online users to create personal profiles featuring social and business networking information, to transfer and share such information among multiple online facilities to engage in social networking, and to manage their social networking accounts; Providing software for social networking, creating a virtual community, and transmission of audio, video, images, text, content, and data; Application service provider (ASP) services, namely, hosting software applications of others; Application service provider (ASP) featuring software to enable or facilitate the creating, editing, uploading, downloading, accessing, viewing, posting, displaying, tagging, blogging, streaming, linking, annotating, indicating sentiment about, commenting on, embedding, transmitting, and sharing or otherwise providing electronic media or information via the internet and communications networks; Providing an online network service that enables users to transfer personal identity data to and share personal identity data with and among multiple online facilities; Providing information from searchable indexes and databases of information, including text, electronic documents, databases, graphics, electronic media, images and audio visual content, via the internet and communications networks; Providing non-downloadable e-commerce software to allow users to perform electronic business transactions via the internet and communications networks; Computer services, in particular, application service provider featuring application programming interface (API) software to allow users to perform electronic business transactions via a global computer network; Software as a service (SAAS) services featuring software for sending and receiving electronic messages, notifications and alerts and for facilitating electronic business transactions via the internet and communications networks; Providing software for use in designing, managing, measuring, analysing, disseminating, and serving advertising of others; Application service provider featuring application programming interface (API) software for managing, tracking, reporting and measuring media planning, media buying and advertising of others; Online ad-buying platform provider, namely, providing non-downloadable software programs for allowing buyers and sellers of online advertising to purchase and sell advertising inventory; Platform as a service (PAAS) featuring computer software platforms for use in purchasing and disseminating advertising; Application service provider (ASP) featuring software for use in buying, selling, designing, managing, tracking, valuing, optimizing, targeting, analysing, delivery, and reporting of online advertising and marketing; Application service provider (ASP) featuring software for use in designing and managing online advertising and marketing campaigns; Designing and developing computer game software and video game software for use with computers, video game program systems and computer networks; Development of hardware for use in connection with electronic and interactive multimedia games; Electronic and interactive multimedia game development services; Providing online sites that gives users the ability to upload, modify and share virtual reality content, information, experiences and data; Providing online sites that gives users the ability to upload, modify and share augmented reality content,

information, experiences and data; Providing online sites that gives users the ability to upload, modify and share mixed reality content, information, experiences and data; Design, engineering, research, development and testing services in the field of mobile application software development related to the use and functionality of hyperlinks; Technical consultation in the field of mobile application software development related to the use and functionality of hyperlinks; Providing software enabling development, assessment, testing, and maintenance of mobile software applications for portable computing devices; Educational services, namely, organizing and conducting conferences and seminars in the fields of artificial intelligence and the internet of things; Providing user authentication services using single sign-on and software technology for e-commerce transactions; Providing user authentication services of electronic funds transfer, credit and debit card and electronic check transactions using single sign-on and software technology; Providing an application programming interface (API) to allow users to perform electronic business transactions via the internet; Providing software for processing electronic payments; Platform as a service (PAAS) services featuring computer software to allow users to perform business and e-commerce transactions; Providing application programming interface (API) software for use in electronic messaging and transmission of audio, video, images, text, content and data; Platform as a service (PAAS) featuring computer software platforms for electronic messaging and transmission of audio, video, photographic images, text, graphics and data; Providing software for electronic messaging; Mapping services; Providing software for mapping services; Application service provider (ASP) featuring software for mapping services; Providing software for sharing and displaying a user's location, planning activities with other users and making recommendations; Application service provider (ASP) featuring software to enable or facilitate the sharing and displaying a user's location, planning activities with other users and making recommendations; Providing software for social and destination mapping; Application service provider (ASP) featuring software to enable or facilitate social and destination mapping; Providing software for making reservations and bookings; Application service provider (ASP) featuring software to enable or facilitate making reservations and bookings; Providing software for ordering and/or purchasing goods and services; Application service provider (ASP) featuring software to enable or facilitate ordering and/or purchasing goods and services; Providing location-aware software for searching, determining and sharing the location of goods, services and events of interest; Application service provider (ASP) featuring location-aware software for searching, determining and sharing the location of goods, services and events of interest; Providing software for creating, managing and accessing user-created and administered private groups within virtual communities; Providing software for searching and identifying local and location-based points of interest, events, landmarks, employment opportunities, entertainment, cultural events, shopping and offers; Providing software for searching and identifying employment opportunities; Providing software for identifying and allowing users to contact government representatives; Providing software for providing a virtual marketplace; Providing software for providing location-based weather information; Providing software for providing, linking to, or streaming news or current events information; Providing software for facilitating interaction and communication between humans and AI (artificial intelligence) platforms; Application service provider (ASP) featuring software to enable or facilitate interaction and communication between humans and AI (artificial intelligence) platforms; Design of augmented reality and virtual reality effects for use in modifying photographs, images, videos and audio-visual content; Providing online sites that gives users the ability to upload, modify and share virtual reality content and data; Providing online sites that gives users the ability to upload, modify and share augmented reality content and data; Providing online sites that gives users the ability to upload, modify and share mixed reality content and data; Online video ad-buying platform provider, namely, providing non-downloadable software programs for allowing buyers and sellers of online video advertising to purchase and sell video advertising inventory; Platform as a service (PAAS) featuring computer software platforms for use in purchasing and disseminating advertising; Application service provider (ASP) featuring software for use in buying, selling,

tracking, valuing, optimizing, targeting, analysing, delivery, and reporting of online advertising and marketing; Application service provider (ASP) featuring software for use in designing and managing online video advertising and marketing campaigns; Providing online facilities that give users the ability to engage in social networking and manage their social networking content; Providing software for creating and managing social media profiles and user accounts; Providing software for modifying photographs, images and audio, video, and audio-video content with photographic filters and augmented reality (AR) effects, namely, graphics, animations, text, drawings, geotags, metadata tags, hyperlinks; Software for viewing and interacting with a feed of electronic media, namely, images, audio-visual and video content, live streaming video, commentary, advertisements, news, and internet links; Providing software for finding content and content publishers, and for subscribing to content; Providing software for organizing images, video, and audio-visual content using metadata tags; Computer services, namely, creating a virtual community for registered users to share, view, subscribe to and interact with images, audio-visual and video content and related data and information; Application service provider (ASP) featuring software for social networking, managing social networking content, creating a virtual community, and transmission of images, audio-visual and video content, photographs, videos, data, text, messages, advertisements, media advertising communications and information; Application service provider (ASP) featuring application programming interface (API) software which facilitates online services for social networking, developing software applications; Platform as a service (PAAS) featuring software platforms for social networking, managing social networking content, creating a virtual community, and transmission of images, audio-visual and video content, photographs, videos, data, text, messages, advertisements, media advertising communications and information; Rental of software that gives users the ability to upload, edit, and share images, videos and audio-visual content; Computer services, namely, curating online user-defined content and advertisements and creating social media feeds; Providing software for taking photographs and recording audio, audio-visual and video content; Providing software for uploading, downloading, archiving, enabling transmission of, and sharing images, audio-visual and video content and associated text and data; Providing software for streaming multimedia entertainment content; Providing software for creating and maintaining an online presence for individuals, groups, companies, and brands; Providing software for advertisers to communicate and interact with online communities; Personal assistant software; Social assistant software; Providing online facilities featuring temporary use of non-downloadable software for sending and receiving electronic messages, instant messages, electronic message alerts and reminders, photographs, images, graphics, data, audio, videos and audio-visual content via the internet and communication networks; E-commerce software to allow users to perform electronic business transactions via the internet; Providing temporary use of non-downloadable computer software for accessing, collecting, displaying, editing, linking, modifying, organizing, tagging, streaming, sharing, storing, transmitting, and otherwise providing electronic media, photographs, images, graphics, audio, videos, audio-visual content, data and information via the internet and communication networks; Providing temporary use of non-downloadable computer software for use in facilitating voice over internet protocol (VOIP) calls, phone calls, video calls, text messages, electronic message, instant message, and online social networking services; Application service provider (ASP) services featuring software to enable or facilitate voice over internet protocol (VOIP) calls, phone calls, video calls, text messages, electronic message, instant message, and online social networking services; Computer services, namely, providing information in the fields of technology and software development via the internet and communication networks; Providing software for use in taking and editing photographs and recording and editing videos; Application service provider (ASP) featuring software to enable or facilitate taking and editing photographs and recording and editing videos; Design and development of computer game hardware and software; Design and development of virtual reality hardware and software; Design and development of mixed reality hardware and software; Design and development of video game hardware and software; Providing temporary use of non-

downloadable software applications for social networking, creating a virtual community, and transmission of virtual reality content and data; Computer services in the nature of providing customized online pages featuring user-defined or specified information, personal profiles, virtual reality, and augmented reality content and data; Computer programming services for creating virtual reality videos and games; Design and development of augmented reality hardware and software; Software development; Development of interactive multimedia software; Maintenance and repair of computer software; Providing temporary use of non-downloadable computer software for transmitting, sharing, receiving, downloading, displaying, interacting with and transferring content, text, visual works, audio works, audio-visual works, literary works, data, files, documents and electronic works; Computer services, namely, providing information in the fields of technology and software development via a global computer network; Technical support services, namely, troubleshooting in the nature of diagnosing computer hardware and software problems; Computer services, namely, cloud hosting provider services; Providing temporary use of online non-downloadable cloud computing software for use in electronic storage of data; Providing temporary use of online non-downloadable cloud computing software for virtual, augmented reality applications and environments; File sharing services, namely, providing online facilities for others featuring technology enabling users to upload and download electronic files; Computer services, namely, hosting electronic facilities for others for interactive discussions via communication networks; Providing online non-downloadable software; Application service provider, namely, providing, hosting, managing, developing, and maintaining applications, software, web sites, and databases in the fields of wireless communication, mobile information access, and remote data management for wireless delivery of content to handheld computers, laptops and mobile electronic devices; Application service provider (ASP); Providing online facilities that give users the ability to upload, modify and share audio, video, photographic images, text, graphics and data; Providing temporary use of online non-downloadable software and applications for instant messaging, voice over internet protocol (VOIP), video conferencing, and audio conferencing; Computer services, namely, creating an online community for registered users to engage in social networking; Data encryption services; Encrypted electronic transmission and delivery of recovered data; Providing software and applications for customer relationship management (CRM); Application service provider (ASP) featuring software for customer relationship management (CRM); Providing online software platform services that give users the ability to post ratings, reviews, referrals and recommendations relating to businesses, restaurants, service providers, events, public services and government agencies; Computer services, in particular, application service provider featuring application programming interface (API) software for customer relationship management (CRM); Hosting of digital [virtual reality and augmented reality] content on the internet; Scientific and technological services and research and design relating thereto; Industrial analysis and research services; Computer services, namely, providing remote management of devices via computer networks, wireless networks or the internet; Providing software for facilitating and arranging for the financing and distribution of fundraising and donations; Providing software for online charitable fundraising services and financial donation services.