

BL O/0295/23

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

**IN THE MATTER OF APPLICATION NOS. UK00003585089, UK00003585086 AND
UK00003585080**

**BY NCISOFT CORPORATION
TO REGISTER THE TRADE MARKS:**

FEVER MUSIC

IN CLASSES 9 AND 41

AND

PROJECT FEVER

IN CLASSES 9, 38 AND 41

AND

FEVER TV

IN CLASSES 9, 38 AND 41

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NOS. 425273, 425279 AND 425281
BY FEVER LABS, INC.**

BACKGROUND AND PLEADINGS

1. On 26 January 2021, claiming a Republic of Korea priority date of 11 September 2020, NCSOFT Corporation (“the applicant”) applied to register the trade marks **FEVER MUSIC (“089 Mark”)**, **PROJECT FEVER (“the 086 Mark”)** and **FEVER TV (“the 080 Mark”)** shown on the cover page of this decision in the UK. The applications were published for opposition purposes on 2 April 2021 and registration is sought for the goods and services set out in the Annex to this decision.

2. On 1 July 2021, the **089 Mark** was fully opposed, and the **086** and **080 Marks** were partially opposed, by FEVER LABS, INC. (“the opponent”) based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against the following goods and services, which is the same for all 3 of the applications:

Class 9 3D spectacles; digital music [downloadable] provided from MP3 Internet web sites; headsets for MP3 players; optical apparatus and instruments except for glasses and photographic apparatus; prerecorded motion picture videos; downloadable image files; downloadable music file; downloadable video files; downloadable software; recording apparatus; digital recorders; digital video recording and reproducing apparatus; digital cameras; musical video recordings; auxiliary battery packs; photographic apparatus and instruments; cinematographic films; cables for the transmission of sounds and images; ear phones; electric audio and visual apparatus and instruments; electric communication device; computer software.

Class 41 Rental of audio recordings; digital filming services; digital photography; providing of digital music via mobile devices; production of music videos; photographic reporting; recording, production and distribution of films, video and audio recordings, radio and television programs; production and presentation of audio and video recordings, and still and moving images; rental of audio equipment; providing online music, not downloadable; providing of game contents via online; rental of sound recordings and video recordings; production of audio recordings;

production of sound and video recordings; production and distribution of sound, movie and video recordings; providing information, commentary and articles in the field of music via computer networks; distribution (other than transportation) of television programmes; production of television programs.

3. Under section 5(2)(b) the opponent relies on the following trade mark:

FEVER

UK registration no. UK00917220021

Filing date 18 September 2017.

Registration date 1 February 2018.

Relying upon all of the goods and services for which the earlier mark is registered, namely:

Class 9 Electronic publications, downloadable.

Class 35 Renting of advertising spaces.

Class 41 Organizing community sporting and cultural events; social club services for entertainment purposes.

4. On 1 January 2021, the UK left the EU. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing EUTM. As a result, the opponent's earlier mark was automatically converted into a comparable UK trade mark. Comparable UK marks are now recorded on the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same.

5. The opponent claims that there is a likelihood of confusion because of the similarity of the marks and the identity/similarity of the goods and services.

6. The applicant filed counterstatements denying the claims made.

7. Only the opponent filed evidence in chief. A hearing took place before me on 19 January 2023. The opponent was represented by Mr Charles King of Maitland Chambers. The applicant was represented by Ms Stephanie Wickenden of Serle Court. I make this decision having taken full account of all the papers, referring to them as necessary.

8. 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 on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

EVIDENCE

9. The opponent's evidence consists of the witness statement of Tania Esparza dated 3 August 2022. Ms Esparza is the Head of Legal & Policy for the opponent, a position she has held since January 2020. Ms Esparza's statement was accompanied by 4 exhibits (TE01-TE04).

10. Whilst I do not propose to summarise all of it here, I have taken all of the evidence and the parties' submissions into consideration in reaching my decision and will refer to it where necessary below.

DECISION

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

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

(a)...

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

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

12. The earlier mark had not completed its registration process more than five years before the relevant date (the priority date of the marks in issue). Accordingly, the use provisions at s.6A of the Act do not apply. The opponent may rely on all of the goods and services it has identified without demonstrating that it has used the mark.

Section 5(2)(b) case law

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

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

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

Comparison of goods and services

14. As highlighted above, the **089 Mark** was fully opposed, and only class 9 and 41 of the **086** and **080 Marks** were opposed.

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

16. Guidance on this issue has come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;

- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors

17. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court (“GC”) stated that:

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

18. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... 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.”

19. I bear in mind the following applicable principles of interpretation from *Sky v Skykick* [2020] EWHC 990 (Ch), paragraph 56 (wherein Lord Justice Arnold, in the

course of his judgment, set out a summary of the correct approach to interpreting broad and/or vague terms):

“(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.”

20. Geoffrey Hobbs KC, sitting as an Appointed Person in the case of *Raleigh International Trade Mark* [2001] RPC 11:

“20. If the goods or services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered, the objection should be supported by evidence as to their "similarity" (whether or not the objection is directed to the use of an identical mark): Canon paragraph 22”

21. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the 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 the responsibility for those goods lies with the same undertaking.”

22. 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 are 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. (as he then was) noted, as the Appointed Person, in *Sandra Amalia Mary Elliot v LRC Holdings Limited*, BL-0-255-13:

“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.” 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.”

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.”

Class 9

23. I note that the class 9 specifications for all the applicant’s marks are the same and, therefore, they will be dealt with as a collective. I also note that the opponent has compared some of the goods below to its class 41 “organizing community sporting and cultural events” services, however, I believe that the opponent’s best case relies upon its class 9 “electronic publications, downloadable”.

Downloadable image files

24. “Downloadable image files” in the applicant’s specification is self-descriptive. In my view, a downloadable image file could be used as a poster or flyer and, therefore,

considered a publication. As a result, this term will fall within the category of “electronic publications, downloadable” in the opponent’s specification. These goods are, therefore, identical under the principle outlined in *Merit*. However, if I am wrong in this finding, I am of the view that there is between a medium and high degree of similarity between them. This is because there will be an overlap in method of use as both the electronic images and publications will be downloaded in the same JPG format, or available/accessible via the same software. There may also be an overlap in user as the user base for both goods will be wide. An undertaking that provides an electronic image file may also provide electronic publications meaning that there may be an overlap in trade channels. However, I am of the view that the purposes will differ as one is an image and the other is a publication.

Downloadable video files

25. I also consider that the applicant’s above “downloadable video files” may overlap with the opponent’s “electronic publications, downloadable”. I note that in the applicant’s skeleton argument, they note that the all the goods can be “downloaded electronically, and there may be some overlap as to the sites from which they can be downloaded, as well as customers”. I agree that the goods overlap in method of use, trade channels and user. However, I do not consider that the goods are complementary, nor in competition. Consequently, the goods are similar to between a medium and high degree.

Digital music [downloadable] provided from MP3 Internet web sites; downloadable music file.

26. I consider that the applicant’s above goods overlaps with the opponent’s “electronic publications, downloadable”. I consider that there would overlap in trade channels and users. I also consider that the goods overlap in nature, as they are types of digital files, and method of use, to the extent that they are downloadable. However, the applicant’s goods would be listened to whereas the opponent’s goods would be read by the user. I do not consider that the goods are complementary, nor in competition. Thus, the goods are similar to between a medium and high degree.

Downloadable software; computer software.

27. The opponent's "electronic publications, downloadable", would include electronic versions of traditional media (such as e-books, electronic journals, online magazines and online newspapers) being viewed on electronic devices (such as tablets, smartphones and laptops). The viewing of the publications is facilitated by the means of software. Consequently there exists a complementary relationship between the applicant's software and the opponent's downloadable electronic publications. In addition, I consider that there would be an overlap in trade channels and nature. I also consider that the users would be the same. Therefore, taking the above into account, I consider that the goods are similar to a medium degree.

3D spectacles; optical apparatus and instruments except for glasses and photographic apparatus.

28. As highlighted by the applicant in its skeleton argument, the above goods are physical devices which are to be worn, and used in relation to the users eyes. I therefore do not consider that these goods are self-evidently similar to the opponent's "electronic publications, downloadable" which are downloadable electronic versions of traditional media. I also do not consider that there would be an overlap in trade channels, nature, method of use or purpose. I do not consider that the goods are in competition nor complementary. Therefore the goods are dissimilar.

Headsets for MP3 players; ear phones.

29. As submitted by the applicant in its skeleton argument, the above goods are pieces of equipment to be worn by a user to listen to audio sound. I therefore do not consider that they are self-evidently similar to the opponent's "electronic publications, downloadable". I do not consider that there would be an overlap in trade channels, nature, method of use or purpose as the applicant's goods are electronic devices to be worn by the user to listen to sound and the opponent's goods are downloadable electronic versions of traditional media. I also do not consider that the goods are in competition nor complementary. Consequently, the goods are dissimilar.

Prerecorded motion picture videos; musical video recordings; cinematographic films.

30. I do not consider that the applicant's above goods are self-evidently similar to the opponent's "electronic publications, downloadable". I do not consider that they overlap in nature, method of use or purpose, as the applicant's goods are films/videos to be watched by a user, whereas the opponent's goods would include electronic versions of traditional media which would be downloaded to be read by the user on a smartphone or laptop. Consequently, I do not consider that the goods are in competition nor complementary. There may be an overlap in user, but this is not enough on its own to establish similarity. I consider that the goods are dissimilar.

Electric audio and visual apparatus and instruments.

31. As highlighted by the applicant in its skeleton argument, the above goods are instruments used to record audio sound and visual images. Consequently, I do not consider that these goods are self-evidently similar to the opponent's "electronic publications, downloadable". They do not overlap in trade channels, nature, method of use or purpose as the applicant's goods are apparatus and instruments which convey images and sound, and the opponent's goods are downloadable electronic versions of traditional media. I do not consider that the goods are complementary or in competition. The goods are dissimilar.

Electric communication device.

32. As submitted by the applicant in its skeleton argument, the above device goods are used to communicate sound and images electronically. I therefore do not consider that these goods are self-evidently similar with, or overlap in trade channels, nature, method of use or purpose with the opponent's "electronic publications, downloadable". I also do not consider that the goods are complementary nor in competition. Consequently, the goods are dissimilar.

Recording apparatus; digital recorders; digital video recording and reproducing apparatus; digital cameras; auxiliary battery packs; photographic apparatus and instruments; cables for the transmission of sounds and images.

33. I note that the opponent submits that the applicant's above goods, which were all grouped together in the opponent's skeleton argument, are "closely related" to its "electronic publications, downloadable" goods because they would be sold with "instruction manuals". Therefore, the users would believe that the goods originate from the same undertaking.

34. I note that at the hearing, Ms Wickenden noted that "there is no evidence of whether the goods and services at issue in the case are used together, or whether it is important they are together". Mr King in his submissions in reply stated that "it simply cannot be right that an opponent or party in these sorts of proceedings needs to provide evidence to support every single submission on similarity of goods and services" and that the Hearing Officer can rely on judicial notice to establish complementarity between these goods.

35. Firstly, albeit evidence does not have to be provided within these proceedings to establish complementarity, the assertion that it *simply cannot be right to provide evidence to support* submissions on complementarity is misguided. This notion was explored in *Axogen Corporation v Aviv Scientific Ltd* [2022] EWHC 95 (Ch). At paragraphs 26 to 28, Mrs Justice Joanna Smith observed that in a number of key paragraphs within the decision, the Hearing Officer had expressly pointed out the absence of evidence. The appellant had highlighted that "evidence as to complementarity and in particular as to "pairwise interactions" between sets of goods and services would be unwieldy and administratively undesirable and that in any event it was not formally necessary to produce evidence of specific procedures where the real question is whether consumers "may think" that the responsibility for the goods/services lies with the same undertaking". However, Mrs Justice Joanna Smith stated the following:

"28. I have no intention of prescribing the circumstances in which evidence should be filed in support of Oppositions of this sort (although I note that evidence was filed in various of the cases to which I was referred including *Sandra Amelia Mary Elliot v LRC Holdings Ltd* O/255/13-135), but I make the following, I hope helpful, observations:

- i) I would expect a specialist Hearing Officer to have a very good understanding of the circumstances in which evidence is likely to be necessary in order to assist her in making a multi-factorial evaluation.
- ii) Where, as here, the Hearing Officer has made clear that her Decision is made "in the absence of evidence to assist me" or in circumstances where she is lacking in evidence to demonstrate a particular factor that might otherwise be relevant to her analysis, the clear inference must be that the Hearing Officer considers that evidence would or might have been of assistance. This court would be very cautious before determining that she was wrong about that.
- iii) Whilst I accept Mr Baran's point that it is difficult to give evidence of the, somewhat esoteric, question of what the average consumer "may think", evidence of factors relevant to the question of similarity (such as overlapping nature, method of use or purpose) may, on the facts of the particular case, be necessary to support the proposition that the average consumer may think responsibility for the goods and services lies with the same undertaking. What the average consumer "may think" can only be informed by a proper understanding of the goods and services themselves (on a slightly different point but to similar effect see *Bionecs* ECLI:EU:T:2015:888 at [29]: "...the common purpose of the goods covered by the signs at issue, which are intended to improve health, and their similar ingredients are sufficient for the relevant public to perceive them as having the same nature and purpose")."

36. It was concluded at paragraph 66 that as "an experienced tribunal with a day-to-day familiarity with trade mark applications, the specialist tribunal is in the best position to assess whether it needs further evidence. Certainly, the Hearing Officer had no evidence of any specific relationship between the goods and services of the type

identified in *Boston*, *Citracal* and *Biofarma* and I see no reason to suppose that she was required to speculate as to what that relationship might be”.

37. Consequently, and as highlighted by the above case law, evidence may be imperative for a Hearing Officer to find an overlap in *Treat* factors, or to establish complementarity, between the goods and services.

38. In the present case, I consider that the link Mr King was trying to establish between the above goods is tenuous at best. If I was provided with further evidence that it was ordinary within the applicant’s above parts of trade, that such goods would always be supported by downloadable instruction manuals, this would have solidified his argument. However, without any evidence before me, it is not to my knowledge whether those who supply the applicant’s above goods would also produce its own downloadable instruction manuals, and that the average consumer would consider that these goods were provided by the same undertaking.

39. I therefore do not consider that the goods overlap in trade channels, nor are they complementary. I also do not consider that the goods overlap in method of use, nature or purpose. Nor do I consider that the goods are in competition. As established above, even if the goods overlap in user, this is not enough on its own to establish similarity. Consequently, I consider that the goods are dissimilar.

Class 41

40. I note that class 41 of all the applicant’s marks has the same specification, therefore, they will also be dealt with as a collective.

Providing information, commentary and articles in the field of music via computer networks.

41. I do not have any submissions from either party regarding the meaning of the applicant’s above services. However, I find that the applicant’s services would provide articles online which are about music. I consider that this therefore overlaps with the opponent’s class 9 “electronic publications, downloadable” which would include

publications about music. I consider that there would be an overlap in trade channels as the same undertaking would provide the opponent's goods, downloadable electronic publications on music, through the applicant's services, which are to provide information, commentary and articles in the field of music via computer networks. Consequently, the goods and services are complementary because the users would believe that the goods and services originate from the same undertaking, as well as goods and services being important/indispensable to one another. Taking the above into account, I consider that the opponent's goods and the applicant's services are similar to a medium degree.

Photographic reporting.

42. The applicant in its skeleton argument states that "photographic reporting involves recording and/or commenting on events through the capture and arrangement of still images". I agree, and also consider that it is therefore a type of journalism. I consider that an undertaking which offers photographic reporting may also offer the report to be downloaded electronically. I therefore consider that there would be an overlap in trade channels and user with the opponent's "electronic publications, downloadable". However, the goods and services do not overlap in nature, method of use or purpose. They are not in competition, nor complementary as the goods and services are not indispensable nor important to one another. Consequently, the goods and services are similar to between a low and medium degree.

43. For the remainder of the applicant's class 41 services, I consider that the opponent's strongest case is to compare them against its own class 41 services.

Rental of audio recordings; rental of audio equipment; rental of sound recordings and video recordings.

44. I consider that the applicant's above services are dissimilar to the opponent's "organizing community sporting and cultural events". The opponent's services are those which would be organised by the local community, including its residents, the council or even by charities. These would include events such as local fun runs or art exhibits/shows and cultural events such as Diwali and Pride. I therefore do not

consider that there would be an overlap in trade channels with the applicant's services which would be provided by multimedia specialists. I also do not consider that there would be an overlap in method of use, nature or purpose. The services are neither in competition nor complementary. Consequently, I consider that the services are dissimilar.

45. I also do not consider that the applicant's above services are similar to the opponent's "social club services for entertainment purposes". I consider that a social club either describes a group of people, or the place where they meet, which is formed on the basis of a common interest, which in this instance, would be for entertainment purposes. Therefore, I do not consider that there would be an overlap in trade channels, nature, method of use or purpose with the applicant's above services which would be provided by multimedia specialists. I note that there may be an overlap in user, however, this is not enough on its own to establish similarity. The services are neither in competition nor complementary. I therefore consider that the services are dissimilar.

Digital filming services; digital photography; providing of digital music via mobile devices; production of music videos; recording, production and distribution of films, video and audio recordings, radio and television programs; production and presentation of audio and video recordings, and still and moving images; production of audio recordings; production of sound and video recordings; production and distribution of sound, movie and video recordings; distribution (other than transportation) of television programmes; production of television programs.

46. I note that in its skeleton argument, the opponent states that the applicant's above services are similar to its "organizing community sporting and cultural events" services on the basis that "where an event is put on and (for example) audio recordings are made, these are services by which the opponent could provide consumers with access to that media". Even if this was true, not that I have any evidence to support this, I consider that the local community which organises community sporting and cultural events, would outsource the applicant's services from multimedia specialist companies. Therefore, I do not consider that the services overlap in trade channels. I also do not consider that the services are complementary as they are neither important

nor indispensable to one another, nor would the average consumer believe that the services originate from the same undertaking. The services do not overlap in nature, method of use or purpose. They are also not in competition. There may be an overlap in user, however, this is not enough on its own to establish similarity. Therefore, the services are dissimilar.

47. I also do not consider that the applicant's above services are similar to the opponent's "social club services for entertainment purposes". I do not consider that there would be an overlap in trade channels, nature, method of use or purpose with the applicant's above services which would be provided by multimedia specialists. The services are neither in competition nor complementary. Consequently, I consider that the services are dissimilar.

Providing online music, not downloadable.

48. I do not consider that the applicant's above services overlaps with the opponent's "organizing community sporting and cultural events" and "social club services for entertainment purposes" services. I consider that the applicant's services would be provided by music streaming undertakings and therefore doesn't overlap in trade channels with the opponent's services. I also do not consider that the services overlap in nature, method of use or purpose, nor are they in competition or complementary. The services are dissimilar.

Providing of game contents via online.

49. I do not consider that the applicant's above services overlaps with the opponent's "organizing community sporting and cultural events" and "social club services for entertainment purposes" services. I consider that the applicant's services would be provided by gaming platforms. Therefore, the services do not overlap in trade channels. I also do not consider that the services overlap in nature, method of use or purpose, nor are they in competition or complementary. Consequently, I consider that the services are dissimilar.

50. It is a prerequisite of section 5(2)(b) that the goods and services be identical or at least similar.

51. The opposition will, therefore, fail in respect of the above goods and services that I have found to be dissimilar.¹

52. The opposition under section 5(2)(b) fails for the following goods and services:

089, 086 and 080 Marks

Class 9 3D spectacles; headsets for MP3 players; optical apparatus and instruments except for glasses and photographic apparatus; prerecorded motion picture videos; recording apparatus; digital recorders; digital video recording and reproducing apparatus; digital cameras; musical video recordings; auxiliary battery packs; photographic apparatus and instruments; cinematographic films; cables for the transmission of sounds and images; ear phones; electric audio and visual apparatus and instruments; electric communication device.

Class 41 Rental of audio recordings; digital filming services; digital photography; providing of digital music via mobile devices; production of music videos; recording, production and distribution of films, video and audio recordings, radio and television programs; production and presentation of audio and video recordings, and still and moving images; rental of audio equipment; providing online music, not downloadable; providing of game contents via online; rental of sound recordings and video recordings; production of audio recordings; production of sound and video recordings; production and distribution of sound, movie and video recordings; distribution (other than transportation) of television programmes; production of television programs.

¹ eSure Insurance v Direct Line Insurance, [2008] ETMR 77 CA

The average consumer and the nature of the purchasing act

53. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J (as he then was) described the average consumer in these terms:

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

54. I note that in its skeleton argument, the opponent submits that there are two potential consumers of the goods and services; the general public and business consumers. The opponent also submits that there is “nothing to suggest that the average consumer would employ a particularly high level of attention when purchasing the relevant goods and services, even in the case of a business consumer”. I agree. I consider that the cost of purchase is likely to vary. The frequency of the purchase is also likely to vary, although it is unlikely to be particularly regular. Even where the cost of the purchase is low, various factors will be taken into consideration such as cost, ease of use, accessibility, and suitability for the user's needs. Consequently, I consider that a medium degree of attention will be paid during the purchasing process.

55. The goods are likely to be purchased from multimedia websites which allows you to download music, videos and images. The services are likely to be purchased from online undertakings which specialise in providing articles in the field of music. Alternatively, the goods and services may be purchased following perusal of

advertisements. Consequently, visual considerations are likely to dominate the selection process. However, I do not discount that there may be an aural component to the purchase of the goods and services given that a recommendation may have been given through word-of-mouth.

Comparison of the trade marks

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

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

57. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

58. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade marks
	FEVER MUSIC (“089 Mark”)

FEVER	PROJECT FEVER (“086 Mark”) FEVER TV (“080 Mark”)
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Overall Impression

59. The opponent’s mark consists of the word FEVER. There are no other elements to contribute to the overall impression which lies in the word itself.

60. The 089 Mark consists of the words FEVER MUSIC. I consider that, for the reasons I will come to discuss in the conceptual comparison, the word “MUSIC” is either descriptive or allusive of the applicant’s goods and services. Therefore, I consider that the word FEVER is the most dominant and distinctive element within the mark, and plays a greater role in the overall impression, with the word MUSIC playing a lesser role.

61. The 086 Mark consists of the words PROJECT FEVER. I consider that the overall impression of the mark lies in the combination of these elements.

62. The 080 Mark consists of the words FEVER TV. I consider that, for the reasons I will come to discuss in the conceptual comparison, the word “TV” is allusive of the applicant’s goods and services. Therefore, I consider that the word FEVER is the most dominant and distinctive element within the mark, and plays a greater role in the overall impression, with the word TV playing a lesser role.

Visual Comparison

The opponent’s mark and the 089 Mark

63. At the hearing, Ms Wickenden accepted that there is “some level of similarity between the marks because of the inclusion of the word FEVER”. However, the 089 Mark ends in the word MUSIC, which although plays a lesser role in the overall impression of the mark, it contributes visually, and therefore acts as a visual point of difference. I also bear in mind that the average consumer tends to pay more attention to the beginning of the marks. Thus, I consider that the marks are visually similar to between a medium and high degree.

The opponent’s mark and the 086 Mark

64. The marks coincide in the presence of the word FEVER. This acts as a visual point of similarity. However, the 086 Mark starts with the word PROJECT. As highlighted above, the average consumer tends to pay more attention to the beginning of the marks. Therefore, I consider that the marks are similar a medium degree.

The opponent’s mark and the 080 Mark

65. The marks coincide in the presence of the word FEVER, however, the 080 Mark ends in the word TV. Although the word “TV” plays a lesser role in the overall impression of the mark, it contributes visually, and therefore acts as a visual point of difference. I also bear in mind that the average consumer tends to pay more attention to the beginning of the marks. Consequently, I consider that the marks are visually similar to between a medium and high degree.

Aural Comparison

The opponent’s mark and the 089 Mark

66. The opponent’s mark will be pronounced as FEE-VER. The 089 Mark will be pronounced as FEE-VER MYOO-ZIC. Therefore, as the marks coincide in the 2 beginning syllables, I consider that the marks are aurally similar above a medium degree.

The opponent’s mark and the 086 Mark

67. The 086 Mark will be pronounced as PRO-JECT FEE-VER. The beginning of the marks differ aurally. However, as the marks coincide in the pronunciation of “FEVER”, I consider that the marks are aurally similar to a medium degree.

The opponent’s mark and the 080 Mark

68. The 080 Mark will be pronounced as FEE-VER TEE-VEE. As the marks coincide in the beginning 2 syllables, I consider that the marks are aurally similar to above a medium degree.

Conceptual Comparison

The opponent’s mark and the 089 Mark

69. In its counterstatement, the applicant submits that the word FEVER would be given its ordinary dictionary meaning of “a condition in which the body’s temperature is higher than usual” (noun) or “a state of great excitement or enthusiasm” (verb). I consider that the average consumer would most likely assign the latter verb meaning to the opponent’s mark, due to its positive connotations.

70. I note that the word FEVER is followed by the word MUSIC in the 089 Mark. I note that the word MUSIC is an ordinary dictionary word which would be recognised by the average consumer.

71. I consider that the word MUSIC in the 089 Mark is weaker in distinctiveness as it can be used as a generic descriptor that can apply to a variety of the applicant’s goods and services. For example, the word MUSIC will be viewed as being directly descriptive of the applicant’s downloadable music, digital music, providing information in the field of music etc. However, it may also be considered allusive of the applicant’s downloadable software or computer software which are not limited in any way and can, therefore, be used in relation to music. Consequently, I consider that the word FEVER is the dominant and distinctive element of the 089 mark. Regardless, as both

marks share the word FEVER, I consider that they are conceptually similar to between a medium and high degree.

The opponent's mark and the 086 Mark

72. In the hearing, Ms Wickenden stated that "PROJECT FEVER has no particular meaning. The fact that PROJECT precedes FEVER is less likely to suggest that it is a project related to a fever of some kind". However, Ms Wickenden did not elaborate as to why she believed that this is the case.

73. I consider that the word PROJECT in the 089 Mark will be given its ordinary dictionary meaning; being a type of activity that someone works on for a prolonged period of time. Therefore, combined with the word FEVER, I consider that the average consumer will understand the conceptual message of the 086 Mark as it is presented; 'a project named FEVER'.

74. I therefore do not consider that the word "PROJECT" makes a significant change to the concept of "FEVER". Consequently, I consider that the marks are conceptually similar to between a medium and high degree.

The opponent's mark and the 080 Mark

75. I note that the word FEVER is followed by the word TV in the 080 Mark. The word TV will be assigned its ordinary dictionary meaning. I consider that the "TV" element is weaker in distinctiveness because, again, it can be used as a generic descriptor that can apply to a variety of the applicant's goods and services. For example, the word TV may be considered as allusive of the applicant's downloadable video files which would be watched in the same way a user watches its TV, and can also be used as a replacement of watching TV. This is because streaming services/streaming platforms normally provide the user with a "download" option for its video files which can then be watched "on the go". The word "TV" could also be considered as allusive of the applicant's downloadable software/computer software which are not limited in any way and can, therefore, be used in relation to downloading and watching video files. I therefore consider that the word FEVER is the most dominant and distinctive element.

76. Regardless, as both marks share the word FEVER, I consider that they are conceptually similar to between a medium and high degree.

Distinctive character of the earlier trade mark

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promotion of the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

78. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

79. I will begin by assessing the inherent distinctive character of the opponent's mark.

80. The opponent argues that its mark is inherently distinctive to a high degree. I note that the word FEVER is neither allusive nor descriptive of the opponent's goods and services, however, it is an ordinary dictionary word which will be recognised and assigned its ordinary dictionary meaning. Consequently, I consider that the opponent's mark is inherently distinctive to a medium degree.

81. I note that in its skeleton argument, the opponent states that "the opponent has also adduced evidence demonstrating enhanced distinctiveness through use" at **exhibit TE04**. I note that 41 screenshots are contained within this exhibit, from the opponent's website, demonstrating the goods and services that they have offered "across the UK since at least 2015". However, as highlighted by the Ms Wickenden at the hearing, these screenshots are all dated "02/08/2022", which falls after the relevant date (the priority date of the applications).

82. Ms Wickenden also further highlights that the above "is simply not sufficient, by any means, to make a claim to acquired distinctiveness" because it "tells us nothing about the scale or intensity of use or the effect on distinctiveness in the marketplace".

83. Firstly, I agree that as the screenshots exhibited within **TE04** are dated after the relevant date, they cannot be used to support a finding of enhanced distinctiveness. I also agree that, in the case of enhanced distinctiveness, it is typical to see evidence such as turnover figures, advertising figures, market share percentage, numbers of units sold and invoices showing the sale of goods and services to customers. It is not an absolute requirement that this type of evidence has to be provided to establish enhanced distinctiveness, and therefore the absence of it is not automatically fatal. However, in the present case, the evidence, taken as a whole, is clearly not sufficient to warrant a finding of enhanced distinctiveness.

Likelihood of confusion

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

average consumer realises the marks are not the same but puts the similarity that exists between the marks and the services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services and vice versa. It is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

85. The following factors must be considered to determine if a likelihood of confusion can be established:

089 MARK AND 080 MARK

- The opponent's mark consists of the word FEVER. There are no other elements to contribute to the overall impression which lies in the word itself.
- The 089 Mark consists of the words FEVER MUSIC. The word MUSIC is generally descriptive or allusive of the applicant's goods and services. Therefore the word FEVER is the most dominant and distinctive element within the mark, and plays a greater role in the overall impression, with the word MUSIC playing a lesser role.
- The 080 Mark consists of the words FEVER TV. The word TV is generally allusive of the applicant's goods and services. Therefore the word FEVER is the most dominant and distinctive element within the mark, and plays a greater role in the overall impression, with the word TV playing a lesser role.
- I have found the opponent's mark and the 089 and 080 Marks to be visually similar to between a medium and high degree.
- I have found the opponent's mark and the 089 and 080 Marks to be aurally similar to above a medium degree.

- I have found the opponent's mark and the 089 and 080 Marks to be conceptually similar to between a medium and high degree.
- I have found the opponent's mark to be inherently distinctive to a medium degree.
- I have identified the average consumer to be members of the general public and business users who will select the services primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process for the goods and services.
- I have found the parties' goods and services to be identical or similar to a medium degree.

86. Taking all of the factors listed in paragraph 85 into account, bearing in mind the principle of imperfect recollection, I consider that there may be a likelihood of direct confusion. This is particularly the case given that the marks are visually similar to between a medium and high degree and the predominantly visual purchasing process. As established above, the beginning of marks tend to make more of an impact than the ends. Therefore, as the applicant's marks both begin with the word FEVER, which is the more dominant and distinctive element of the applicant's marks, and the opponent's mark in its totality is the word FEVER, I consider that the average consumer may overlook the words MUSIC and TV, in the applicant's marks, especially as they generic descriptors which are directly descriptive or considered as allusive of the applicant's goods and services. Consequently, I consider there to be a likelihood of direct confusion.

87. In the event that I am wrong in that regard, and for the sake of completeness, I will also assess if there is a likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C. (as he then was), sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it

is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

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

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

88. I consider that the shared common use of the word FEVER in all of the marks will lead the average consumer to conclude that the marks originate from the same or economically linked undertakings. As established above, I consider that the dominant, distinctive and beginning element of the applicant's marks is the word FEVER. This is because the average consumer will see the additional words MUSIC and TV, in the

applicant's marks, as generic descriptor which is either directly descriptive or considered as allusive of its goods and services. The average consumer will therefore perceive them as alternative marks for a sub-brand of FEVER specifically focussed on MUSIC or TV related goods and services.

89. Therefore, as the average consumer will perceive the applicant's marks as a sub-brand of the opponent, I consider there to be a likelihood of indirect confusion.

086 MARK

- The opponent's mark consists of the word FEVER. There are no other elements to contribute to the overall impression which lies in the word itself.
- The 086 Mark consists of the words PROJECT FEVER. I consider that the overall impression of the mark lies in the combination of these elements.
- I have found the opponent's mark and the 086 Mark to be visually and aurally similar to a medium degree.
- I have found the opponent's mark and the 086 Mark to be conceptually similar to between a medium and high degree.
- I have found the opponent's mark to be inherently distinctive to a medium degree.
- I have identified the average consumer to be members of the general public and business users who will select the services primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process for the goods and services.
- I have found the parties' goods and services to be identical or similar to a medium degree.

90. As highlighted above, the beginning of marks tend to make more of an impact than the ends. Therefore, I do not consider that the average consumer would overlook the word PROJECT at the beginning of the applicant's mark. I consider that this is particularly the case given the medium degree of visual similarity between the marks and the predominantly visual purchasing process. I therefore do not consider that there

is a likelihood of direct confusion between the opponent's mark and the applicant's PROJECT FEVER mark.

91. However, I consider that there would be a likelihood of indirect confusion. This type of confusion arises where the average consumer recognises that the marks are different but, because of the common element(s), concludes that the marks originate from the same or economically linked undertakings.

92. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

93. In the present case, the opponent's and applicant's mark both share the concept of FEVER which is neither allusive nor descriptive of the parties' goods and services. The addition of the word project will be recognised as meaning a type of activity that someone works on for a prolonged period of time. The mark, therefore, as a whole, will convey the meaning of 'a project named FEVER'. I do not consider that the word "PROJECT" makes a significant change to the concept of the mark. Consequently, I consider that the average consumer will see the addition of the word "PROJECT" at the beginning of the applicant's mark as a logical brand extension of the opponent's FEVER mark, with PROJECT FEVER being a sub-brand of FEVER.

94. Taking the above into account, I consider there to be a likelihood of indirect confusion for all of the applicant's goods and services.

CONCLUSION

95. The opposition is partially successful in respect of the following goods and services, for which the application is refused:

089, 086 and 080 MARKS

- Class 9 Digital music [downloadable] provided from MP3 Internet web sites; downloadable image files; downloadable music file; downloadable video files; downloadable software; computer software.
- Class 41 Photographic reporting; providing information, commentary and articles in the field of music via computer networks;

96. The application can proceed to registration in respect of the following goods and services for which the opposition has been unsuccessful:

089, 086 and 080 MARKS

- Class 9 3D spectacles; headsets for MP3 players; optical apparatus and instruments except for glasses and photographic apparatus; prerecorded motion picture videos; recording apparatus; digital recorders; digital video recording and reproducing apparatus; digital cameras; musical video recordings; auxiliary battery packs; photographic apparatus and instruments; cinematographic films; cables for the transmission of sounds and images; ear phones; electric audio and visual apparatus and instruments; electric communication device.
- Class 41 Rental of audio recordings; digital filming services; digital photography; providing of digital music via mobile devices; production of music videos; recording, production and distribution of films, video and audio recordings, radio and television programs; production and presentation of audio and video recordings, and still and moving images; rental of audio equipment; providing online music, not downloadable; providing of game contents via online; rental of sound recordings and video recordings; production of audio recordings; production of sound and video recordings; production and distribution of sound, movie and video

recordings; distribution (other than transportation) of television programmes; production of television programs.

97. The opposition was not directed against the following services for which the application can proceed to registration:

086 and 080 MARKS

Class 38 Broadcasting programs via global computer network; on-demand transmission services of data/audio/video/gaming and multimedia content; transmission of digital music by telecommunications; transmission of digital image; providing access to multimedia content on-line; transmission of video/audio via the mobile and internet; transmission of video via the mobile and internet; transmission of message/image via the mobile and internet; transmission, broadcasting and reception of audio, video, still and moving images, text and data in real time; broadcasting of film and television features; transmission, broadcasting and reception of audio, video, still and moving images, text and data; audio broadcasting; television broadcasting specializing in on-line games; transmission of online video; transmission of online music; broadcasting services and provision of telecommunication access to video and audio content provided via a video-on-demand service via the Internet; broadcasting of television programs, motion picture films, and other audiovisual and multimedia content via Internet protocol and communication networks; television transmission.

COSTS

98. The applicant has enjoyed a greater degree of success in the opposition and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. I will make an appropriate reduction in the award of costs made to reflect the applicant's partial success. In the circumstances, I award the applicant the sum of **£850** as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Considering the Notice of opposition and preparing a Counterstatement	£150
Preparation for and attendance of hearing	£700
Total	£850

99. I therefore order FEVER LABS, INC. to pay NCSOFT Corporation the sum of £850. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 22nd day of March 2023

L FAYTER

For the Registrar

ANNEX

FEVER MUSIC (“089 MARK”)

Class 9

3D spectacles; digital music [downloadable] provided from MP3 Internet web sites; headsets for MP3 players; optical apparatus and instruments except for glasses and photographic apparatus; prerecorded motion picture videos; downloadable image files; downloadable music file; downloadable video files; downloadable software; recording apparatus; digital recorders; digital video recording and reproducing apparatus; digital cameras; musical video recordings; auxiliary battery packs; photographic apparatus and instruments; cinematographic films; cables for the transmission of sounds and images; ear phones; electric audio and visual apparatus and instruments; electric communication device; computer software.

Class 41

Rental of audio recordings; digital filming services; digital photography; providing of digital music via mobile devices; production of music videos; photographic reporting; recording, production and distribution of films, video and audio recordings, radio and television programs; production and presentation of audio and video recordings, and still and moving images; rental of audio equipment; providing online music, not downloadable; providing of game contents via online; rental of sound recordings and video recordings; production of audio recordings; production of sound and video recordings; production and distribution of sound, movie and video recordings; providing information, commentary and articles in the field of music via computer networks; distribution (other than transportation) of television programmes; production of television programs.

PROJECT FEVER (“086 MARK”)

Class 9

3D spectacles; digital music [downloadable] provided from MP3 Internet web sites; headsets for MP3 players; optical apparatus and instruments except for glasses and photographic apparatus; prerecorded motion picture videos; downloadable image files; downloadable music file; downloadable video files; downloadable software; recording apparatus; digital recorders; digital video recording and reproducing

apparatus; digital cameras; musical video recordings; auxiliary battery packs; photographic apparatus and instruments; cinematographic films; cables for the transmission of sounds and images; ear phones; electric audio and visual apparatus and instruments; electric communication device; computer software.

Class 38

Broadcasting programs via global computer network; on-demand transmission services of data/audio/video/gaming and multimedia content; transmission of digital music by telecommunications; transmission of digital image; providing access to multimedia content on-line; transmission of video/audio via the mobile and internet; transmission of video via the mobile and internet; transmission of message/image via the mobile and internet; transmission, broadcasting and reception of audio, video, still and moving images, text and data in real time; broadcasting of film and television features; transmission, broadcasting and reception of audio, video, still and moving images, text and data; audio broadcasting; television broadcasting specializing in on-line games; transmission of online video; transmission of online music; broadcasting services and provision of telecommunication access to video and audio content provided via a video-on-demand service via the Internet; broadcasting of television programs, motion picture films, and other audiovisual and multimedia content via Internet protocol and communication networks; television transmission.

Class 41

Rental of audio recordings; digital filming services; digital photography; providing of digital music via mobile devices; production of music videos; photographic reporting; recording, production and distribution of films, video and audio recordings, radio and television programs; production and presentation of audio and video recordings, and still and moving images; rental of audio equipment; providing online music, not downloadable; providing of game contents via online; rental of sound recordings and video recordings; production of audio recordings; production of sound and video recordings; production and distribution of sound, movie and video recordings; providing information, commentary and articles in the field of music via computer networks; distribution (other than transportation) of television programs; production of television programs.

FEVER TV (“080 MARK”)

Class 9

3D spectacles; digital music [downloadable] provided from MP3 Internet web sites; headsets for MP3 players; optical apparatus and instruments except for glasses and photographic apparatus; prerecorded motion picture videos; downloadable image files; downloadable music file; downloadable video files; downloadable software; recording apparatus; digital recorders; digital video recording and reproducing apparatus; digital cameras; musical video recordings; auxiliary battery packs; photographic apparatus and instruments; cinematographic films; cables for the transmission of sounds and images; ear phones; electric audio and visual apparatus and instruments; electric communication device; computer software.

Class 38

Broadcasting programs via global computer network; on-demand transmission services of data/audio/video/gaming and multimedia content; transmission of digital music by telecommunications; transmission of digital image; providing access to multimedia content on-line; transmission of video/audio via the mobile and internet; transmission of video via the mobile and internet; transmission of message/image via the mobile and internet; transmission, broadcasting and reception of audio, video, still and moving images, text and data in real time; broadcasting of film and television features; transmission, broadcasting and reception of audio, video, still and moving images, text and data; audio broadcasting; television broadcasting specializing in on-line games; transmission of online video; transmission of online music; broadcasting services and provision of telecommunication access to video and audio content provided via a video-on-demand service via the Internet; broadcasting of television programs, motion picture films, and other audiovisual and multimedia content via Internet protocol and communication networks; television transmission.

Class 41

Rental of audio recordings; digital filming services; digital photography; providing of digital music via mobile devices; production of music videos; photographic reporting; recording, production and distribution of films, video and audio recordings, radio and television programs; production and presentation of audio and video recordings, and still and moving images; rental of audio equipment; providing online music, not

downloadable; providing of game contents via online; rental of sound recordings and video recordings; production of audio recordings; production of sound and video recordings; production and distribution of sound, movie and video recordings; providing information, commentary and articles in the field of music via computer networks; distribution (other than transportation) of television programs; production of television programs.