

O/0078/23

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NO. UK3626014
IN THE NAME OF FEEV IP B.V.
TO REGISTER AS A TRADE MARK**

FEEV

**IN CLASSES 9, 16, 35, 36,
38, 41 and 42**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NUMBER 427886
BY FEVO, INC.**

BACKGROUND AND PLEADINGS

1. On 14 April 2021, Feev Holding B.V. (the original applicant) applied to register trade mark number UK3626014 for the mark “FEEV” in the United Kingdom. This case was filed pursuant to Article 59 of the Withdrawal Agreement between the United Kingdom and the European Union, based on its European Union (“EU”) designation of International Registration (“IR”) number 1554704. The EU date of designation was 09 January 2020, which claimed priority from Benelux TM No. 1398856, with a priority date of 09 July 2019.

2. The application was accepted and published for opposition purposes on 10 September 2021, in respect of goods and services in classes 9, 16, 35, 36, 38, 41 and 42, as shown under paragraph 23 of this decision.

3. With effect from 2 December 2021, ownership of the applied-for mark was transferred by assignment to FEEV IP B.V. (“the applicant”).¹

4. The application is opposed by Fevo, Inc. (“the opponent”). The opposition was filed on 01 November 2021 and is based upon Section 5(2)(b) and Section 5(3) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against all of the goods and services in the application.

5. The opponent relies upon the following mark, which was filed pursuant to Article 59 of the Withdrawal Agreement between the United Kingdom and the European Union, based on European Union Trade Mark (“EUTM”) No. 015390041. The EU filing date was 28 April 2016:

FEVO

UK trade mark registration number 3660182

¹ On 24 February 2022, the Tribunal wrote to the representatives of the new applicant to request confirmation that the applicant stood by the statement made in the counterstatement, and that it was aware of and accepted the liability for costs for the whole proceedings in the event that the opposition was successful. This was confirmed by the applicant’s representatives in its email in response dated 7 March 2022.

Filing date: 24 June 2021

Registration date: 31 December 2021

Registered in Classes 35, 36, 39, 41 and 42

Relying on all services, as shown under paragraph 23 of this decision.

The 5(2)(b) ground

6. The opponent submits that the marks are visually and aurally similar, and that the goods and services covered by the opposed mark are identical and similar to the services covered by the earlier mark, leading to a likelihood of confusion under Section 5(2)(b) of the Act.

The 5(3) ground

7. The opponent claims that the earlier mark has a reputation for all of the services covered by it, and that use of the applicant's mark would take unfair advantage of, or be detrimental to the distinctive character or reputation of that mark under Section 5(3) of the Act, such that the relevant public would believe that they are used by the same undertaking or think that there was an economic connection between them.

8. The applicant filed a counterstatement denying each of the claims in their entirety, and requests that the opposition be rejected, that the application proceed to registration, and that an award of costs be made in its favour.

9. Both parties filed written submissions which will be referred to as and where appropriate during this decision. Both parties filed evidence, which will be summarised to the extent considered necessary. Neither party requested a hearing, therefore this decision is taken following careful consideration of the papers.

10. In these proceedings, the opponent is represented by Barker Brettell LLP and the applicant is represented by Stevens Hewlett & Perkins².

² Stevens Hewlett & Perkins were appointed as the applicant's representatives following the filing of Form TM33, dated 24 January 2022.

EVIDENCE

Opponent's Evidence

11. The opponent's evidence consists of a witness statement, dated May 11, 2022, by Ari Daie, who is the founder and CEO of "Fevo, Inc.", a position which he confirms he has held since 2016. Attached to the witness statement are two exhibits, labelled **Exhibit JS1** and **Exhibit JS2** respectively.

12. The main purpose of the evidence is to demonstrate the opponent's claim to FEVO's fame and significant reputation.

Applicant's Evidence

13. The applicant's evidence consists of the joint witness statement of Duco Hiensch and Patryk Skoczylas, dated 11 July 2022, being the founders and directors of FEEV IP B.V.

14. The witness statement, which includes screen shots of the opposing products being advertised through the apple store, has been submitted in support of the application and in response to the opponent's evidence.

15. I have read and considered all of the evidence and I will refer to the relevant parts at the appropriate points in the decision.

DECISION

16. Although the UK has left the European Union, 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. Therefore, this decision contains references to the trade mark case-law of the European courts.

Section 5(2)(b)

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

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

...

- (a) 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”.

18. Section 5A states:

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

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

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

- (a) a registered trade mark, international trade mark (UK) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

...”

20. The trade mark upon which the opponent relies qualifies as an earlier trade mark under the above provisions. As the trade mark had not been registered for more than five years at the date the application was filed, it is not subject to the use provisions contained in section 6A of the Act. The opponent is, therefore, entitled to rely upon it in relation to all of the services indicated without having to prove that genuine use has been made of them.

21. I am guided by the following principles which are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) ("OHIM")*, Case C-3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P 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 greater degree of similarity between the marks, and vice versa;

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

(i) mere association, in the strict sense that the later mark brings to mind the earlier mark, 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 will wrongly 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

22. Section 60A of the Act provides:

“(1) For the purposes of this Act goods and services —

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification;

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1979.”

23. The goods and services to be compared are:

Opponent’s services	Applicant’s goods and services
	<p><u>Class 9</u> <i>Data processing apparatus; computers and computer peripheral devices; computer programs recorded on strips, discs and other magnetic data media; computer software; image and sound carriers; magnetic data carriers; electronic apparatus and instruments, namely computerized machines for making reservations for sports events, cultural events, dancing events, entertainment events, business events, hotels, restaurants and flights; coin-operated mechanisms for vending machines, cash registers and calculators; apparatuses for automatically conducting of financial transactions; automatic paying machine; coded credit cards and cash cards; downloadable computer software applications; software applications for mobile communications apparatus, involving mobile telephone; computerized</i></p>

	<i>machines for reserving tickets, admission tickets and travel passes; computing devices and programs for booking seats and tickets for festivals, events, concerts, films, shows, sports events and other amusement, for issuing tickets and settling it.</i>
	<u>Class 16</u> <i>Tickets for festivals, concerts, films, shows, sports events and other amusement including transport tickets and vouchers for camping, hotels, motels and such kind of accommodation.</i>
<u>Class 35</u> <i>Management of event ticketing for others.</i>	<u>Class 35</u> <i>Commercial business consultancy, consulting and information; business management assistance, advisory, consulting and scheduling; business management analyzing; assistance and advising regarding management; commercial, business investigations, evaluations, surveys, analyses and studies, including the preparation of relevant reports; commercial information; office functions of the collecting, storing and processes of business and financial information and data, among other things for the compilation of statistics and indices; Compilation of statistics in the business and financial field, as well as economic analysis in this context; market valuation services, research and - studies related to business and financial matters; accountancy and office functions in connection with the reservation, issuing and sales of admission tickets.</i>

<p><u>Class 36</u></p> <p><i>Funding services by means of online sale of tickets.</i></p>	<p><u>Class 36</u></p> <p><i>Banking services; investment banking; mediation in acquisition, selling and trading in bonds, shares, stocks and other such securities; capital and fund investment; factoring invoices, financing, lending, credit and mortgages; leasing [hire-purchase finance]; insurance and mediation for business, involving financial guarantees [surety services]; financial and monetary services for investment companies and trusts investments funds; asset management; consulting and consultancy on the aforesaid services; financial consultancy and information; financial assistance, advisory and advice; financial planning and analyses; financial searches, evaluations, surveys, information and appraisals; financial studies, including the preparation of relevant reports; fiscal valuations; financial advising relating to financial issues; mediation in the purchase and sale of real estate; assessment and management of real estate; facilitating payment processing services; electronic payment services.</i></p>
	<p><u>Class 38</u></p> <p><i>Telecommunication; data communications; rental and other forms of providing data communication equipment in particular for financial transactions; providing access to and dissemination of information via whether or not wireless, electronic (communications) webs, websites, portals, electronic databases</i></p>

	<i>and online communication capabilities; providing access to and dissemination of information related to payment transaction facilitation on an interactive online platform; aforementioned services also via electronic webs, like Internet, and via mobile means of communication.</i>
<u>Class 39</u> <i>Travel ticket reservation service; making transportation bookings and reservations for others by means of a website.</i>	
<u>Class 41</u> <i>Entertainment services, namely, arranging for ticket reservations for entertainment, educational, sporting and cultural events, performances, and parties.</i>	<u>Class 41</u> <i>Provision of entertainment information by electronic means; ticket reservation and booking services for entertainment events.</i>
<u>Class 42</u> <i>Providing an internet website portal in the fields of entertainment, fundraising, event planning, traveling, and temporary accommodations.</i>	<u>Class 42</u> <i>Scientific and technological services and research and design relating thereto; designs and development of computers, peripheral devices for computers, computer systems, software, software applications, web applications and mobile applications; providing software, computer software applications and mobile applications on global computer networks; all the aforementioned services also via electronic webs, like Internet, and via mobile means of communication.</i>

24. In *Gérard Meric v OHIM*, Case T-133/05, the General Court (“GC”) stated that:

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

where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.³

25. In *Canon*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) stated that:

“In assessing the similarity of the goods or services concerned, ... all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.⁴

26. Additionally, the factors for assessing similarity between goods and services identified in *British Sugar Plc v James Robertson & Sons Limited* (“*Treat*”) [1996] R.P.C. 281 include an assessment of the channels of trade of the respective goods or services.

27. 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”.⁵

28. For the purposes of considering the issue of similarity of goods, it is permissible to consider groups of terms collectively where appropriate. In *Separode Trade Mark*, BL O-399-10, Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person, said:

³ Paragraph 29

⁴ Paragraph 23

⁵ Paragraph 82

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”⁶

29. While making my comparison, I bear in mind the comments of Floyd J. (as he then was) in *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch):

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise. ... Nevertheless the principle should not be taken too far. ... 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.”⁷

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

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

31. In its written submissions, the opponent has provided examples of where it states that the opposed goods and services are directly overlapping with, or closely similar to, the opponent’s services. I do not intend to fully reproduce those submissions here, however, I have taken them into consideration in making my own comparisons. I also note that the opponent has not made a direct comparison in relation to all the

⁶ Paragraph 5
⁷ Paragraph 12

opposing services. In *RALEIGH INTERNATIONAL Trade Mark* [2001] RPC 11, Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person, observed that when goods or services are not identical or self-evidently similar, the opposition should be supported by evidence as to their similarity.⁸

32. I am mindful of the fact that the appearance of respective goods and services in the same class is not sufficient in itself to find similarity between those goods and services, and that likewise, neither are goods and services to be automatically found to be dissimilar simply because they fall in a different class.

33. *Commercy AG v OHIM* Case T-316/07 concerned the comparison between the applicant for cancellation's goods and services in class 9 and 42, which were "Computer software for the production of platform-independent internet shops and internet authoring systems chiefly for the reservation, booking and payment of accommodation"; and "Development and design of computer software, namely for internet shops and internet authoring systems, especially for the reservation, booking and payment of accommodation", and the registered proprietor's various goods and services, and in particular, "Information services relating to transportation services, including information services provided on-line from a computer database or the internet; travel reservation and travel booking services provided by means of the world wide web" in Class 39 and "Computerised hotel reservation services" in Class 42. The Board of Appeal ("BOA") had agreed with the Cancellation Division at OHIM that the parties' goods and services were sold to different publics and as such, the BOA held they were not in competition with each other. Despite the parties' signs being identical, there was no likelihood of confusion. The applicant for cancellation appealed and the GC stated in its judgment:

"49 In addition, the Board of Appeal examined whether the goods and services concerned may be complementary. According to its findings, complementarity had to be excluded in the present case since the public at large, for which the services covered by the mark at issue are intended, does not purchase the relevant goods and services covered by the earlier mark, which are exclusively

⁸ Paragraph 20

intended for businesses which, subsequently, provide services to the public at large.

50 Finally, the Board of Appeal found, in the same context, that users of the internet who purchase travel services on-line are not likely to be aware of who provided the software that allows an internet shop to operate and are, in any event, able to distinguish between a company that provides sophisticated technology and another company that sells travel services via the internet.

51 Those findings must be upheld. They show, to the requisite legal standard, that the goods and services concerned differ in respect of their nature, intended purpose and method of use and are neither in competition with each other nor complementary. First of all, the relevant goods and services covered by the earlier trade mark are computer-related whereas the information, booking and reservation services covered by the mark at issue are different and use computer technology only to support the transmission of information or to make it possible to reserve hotel accommodation or travel.

52 Further, the relevant goods and services covered by the earlier trade mark are especially intended for businesses in the hotel and travel sector, and the information, booking and reservation services covered by the trade mark at issue are intended for the public at large.

53 In addition, the relevant goods and services covered by the earlier mark are used to enable a software system, and, more specifically, an internet shop, to function, whereas the information, booking and reservation services covered by the trade mark at issue are used to reserve hotel accommodation or travel.

54 The mere fact that the information, booking and reservation services covered by the trade mark at issue are exclusively provided via the internet and therefore require software support such as that provided by the goods and services covered by the earlier trade mark does not suffice to remove the essential differences between the goods and services concerned in terms of their nature, their intended purpose and their method of use.

55 Computer goods and computer services are used in nearly all sectors. Often, the same goods or services – for example, a certain type of software or operating system – may be used for very different purposes, and that does not mean that they become different or distinct goods or services. Conversely, travel agency services do not become something else – in terms of their nature, intended purpose or method of use – solely because they are provided via the internet, particularly since, nowadays, use of computer applications for the provision of such services is almost essential, even where those services are not provided by an internet shop.

56 Moreover, the goods and services concerned are not substitutable, since they are intended for different publics. Therefore, the Board of Appeal was right to find that those goods and services are not in competition with each other.

57 Finally, those same goods and services are also not complementary. It must be recalled in this respect that goods or services which are complementary are those where 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 consumers may think that the responsibility for the production of those goods or provision of those services lies with the same undertaking (Case T-169/03 *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60; judgment of 15 March 2006 in Case T-31/04 *Eurodrive Services and Distribution v OHIM – Gómez Frías (euroMASTER)*, not published in the ECR, paragraph 35; and Case T-420/03 *El Corte Inglés v OHIM – Abril Sánchez and Ricote Saugar (Boomerang TV)* [2008] ECR I-0000, paragraph 98).

58 That case-law definition implies that complementary goods or services can be used together, which presupposes that they are intended for the same public. It follows that there can be no complementary connection between, on the one hand, the goods and services which are necessary for the running of a commercial undertaking and, on the other, the goods and services produced or supplied by that undertaking. Those two categories of goods or services are

not used together since those in the first category are used by the relevant undertaking itself whilst those in the second are used by customers of that undertaking.

59 Although it accepts that the end users of the goods and services concerned are different, the applicant maintains that a likelihood of confusion cannot be ruled out in the present case since the relevant goods and services covered by the earlier mark have the sole purpose of making it possible to provide the information, booking and reservation services covered by the mark at issue. As a general rule, the public concerned by those services does not know who developed the necessary software and likewise cannot distinguish between the information on the intervener's website which comes from the intervener itself and that which derives from the software or services provided by an undertaking specialised in computing, such as the applicant. In short, on the intervener's website the services covered by the mark at issue are indissociable from the relevant goods and services covered by the earlier mark.

60 That argument cannot be accepted. The commercial origin of the software and the computer services which enable the intervener's website to function is not generally of the slightest interest to the public for which the services covered by the mark at issue, which are supplied via that website, are intended. For that public, the intervener's website is a mere tool for the online reservation of travel and accommodation. What is of importance is that it functions well and not who provided the software and computer services which enable it to function.

61 If, however, some of the intervener's customers wonder about the commercial origin of the software and the software development and design services which are necessary for the functioning of the intervener's website, they are capable, as was correctly pointed out by the Board of Appeal, of making a distinction between the specialised undertaking which supplies those goods and services and the intervener which supplies services relating to the tourism and travel sector over the internet. Since the services covered by the

mark at issue are, by definition, supplied exclusively over the internet, it must be assumed that the intervener's customers have at least some basic knowledge of computing. They are thus aware that an online reservation system cannot be set up by merely any computer user and that it requires software and software development and design services which are provided by a specialised undertaking.

62 The applicant's claim that the intervener's customers cannot distinguish information which comes from the intervener itself from that which derives from software and computer services of the kind covered by the earlier mark is likewise incorrect. The information likely to be of interest to the intervener's customers is that relating to travel arrangements, the availability of hotel accommodation and their prices. The provision of that information is precisely what constitutes the services covered by the mark at issue. The goods and services covered by the earlier mark serve only to convey that information and do not themselves transmit other separate information to the persons concerned."

34. At first glance, some of the contested goods in the matter before me are of a nature that they are likely to be utilised by the provider of the earlier services to facilitate the provision of such services. Therefore, as per *Commercy*, the respective goods and services are targeted at different consumers. I will consider this further in relation to the specific goods and services at issue.

Class 9

electronic apparatus and instruments, namely computerized machines for making reservations for sports events, cultural events, dancing events, entertainment events, business events, hotels, restaurants and flights; computerized machines for reserving tickets, admission tickets and travel passes; computing devices and programs for booking seats and tickets for festivals, events, concerts, films, shows, sports events and other amusement, for issuing tickets and settling it.

35. The opponent submits that the applicant's above goods are closely similar to its own "*Providing an internet website portal in the fields of entertainment, fundraising,*

event planning, traveling, and temporary accommodations” in Class 42. I disagree. Although there is some overlap as users may choose to either make a direct reservation via an internet portal, or they may elect to visit premises where the reservation will be made for them using the goods at issue, the nature and method of use of the services are not the same as for the goods. I do not consider that the respective goods and services share trade channels, with the users of the applicant’s goods likely to be businesses concerned with making reservations for the end user, while the opponent’s services may be accessed by both the end user or a middle-man, and may or may not include a booking facility. Neither do I consider the goods and services at issue to be complementary in a trade mark sense. As such, my considerations of the competing goods and services are analogous to the findings under paragraphs 49 - 51 of *Commercy*. Overall, I find that any link between the applicant’s *“electronic apparatus and instruments, namely computerized machines for making reservations for sports events, cultural events, dancing events, entertainment events, business events, hotels, restaurants and flights; computerized machines for reserving tickets, admission tickets and travel passes; computing devices and programs for booking seats and tickets for festivals, events, concerts, films, shows, sports events and other amusement, for issuing tickets and settling it”* and the opponent’s *“Providing an internet website portal in the fields of entertainment, fundraising, event planning, traveling, and temporary accommodations”* to be insufficient for a finding of similarity.

Data processing apparatus; computers and computer peripheral devices; computer programs recorded on strips, discs and other magnetic data media; computer software; image and sound carriers; magnetic data carriers; coin-operated mechanisms for vending machines, cash registers and calculators; apparatuses for automatically conducting of financial transactions; automatic paying machine; coded credit cards and cash cards; downloadable computer software applications; software applications for mobile communications apparatus, involving mobile telephone.

36. The opponent has not expressly stated how it believes that the applicant’s above mentioned goods are similar to its own services. In the absence of evidence to the contrary, I find nothing to suggest that the average consumer would make the link between the respective goods and services. I therefore find the applicant’s *“Data processing apparatus; computers and computer peripheral devices; computer*

programs recorded on strips, discs and other magnetic data media; computer software; image and sound carriers; magnetic data carriers; coin-operated mechanisms for vending machines, cash registers and calculators; apparatuses for automatically conducting of financial transactions; automatic paying machine; coded credit cards and cash cards; downloadable computer software applications; software applications for mobile communications apparatus, involving mobile telephone” to be dissimilar to the services relied upon under the earlier mark.

Class 16

Tickets for festivals, concerts, films, shows, sports events and other amusement including transport tickets and vouchers for camping, hotels, motels and such kind of accommodation.

37. The opponent submits that the applicant’s various tickets as listed above are closely similar to its own “*Management of event ticketing for others*” (in Class 35) and “*Travel ticket reservation service; making transportation bookings and reservations for others by means of a website*” (in Class 39). I consider that the provider of the opponent’s services may issue a physical ticket as a result of either managing event ticketing for others or when making travel/transportation bookings and reservations, however, the respective goods and services are different in physical nature and in purpose, with the applicant’s goods being a by-product of the opponent’s services. As such, it may be argued that there is a degree of complementarity, as without the reservation services, there would be no need for the resulting ticket. It would not be unreasonable for the consumer to expect both goods and services to be provided by the same or economically linked undertakings. Consequently, I find there to be a medium degree of similarity between “*Tickets for festivals, concerts, films, shows, sports events and other amusement including transport tickets and vouchers for camping, hotels, motels and such kind of accommodation*” and “*Management of event ticketing for others*”.

Class 35

accountancy and office functions in connection with the reservation, issuing and sales of admission tickets.

38. The opponent has likened the above services to its own “*Funding services by means of online sale of tickets*” in Class 36. However, I consider that the applicant’s services are more akin to the opponent’s broad term “*Management of event ticketing for others*” (also in Class 35), which in my view would encompass the applicant’s “*accountancy and office functions in connection with the reservation, issuing and sales of admission tickets*”. As such, I consider them identical as per the principle outlined in *Meric*.

39. Apart from the above services, the opponent has not made any specific submissions regarding the similarity of the applicant’s remaining services in Class 35 against its own services, aside from the general statement that “goods and services need not be identical or even closely similar in order for confusion to be found; they simply must be sufficiently related such that consumers would mistakenly believe that they emanate from the same source.”⁹

Commercial business consultancy, consulting and information; business management assistance, advisory, consulting and scheduling; business management analyzing; assistance and advising regarding management; commercial, business investigations, evaluations, surveys, analyses and studies, including the preparation of relevant reports; commercial information.

40. I consider that the applicant’s services above to be broad terms that cover business services at large, none of which seem to encompass the specific services being relied upon by the opponent. Without any evidence to the contrary, I do not consider the applicant’s “*Commercial business consultancy, consulting and information; business management assistance, advisory, consulting and scheduling; business management analyzing; assistance and advising regarding management; commercial, business investigations, evaluations, surveys, analyses and studies, including the preparation of relevant reports; commercial information*” to be similar to any of the opponent’s services to the extent that consumers would mistakenly believe that they emanate from the same source. Overall, I consider the contested services dissimilar to those of the opponent.

⁹ See opponent’s written submissions dated 10 November 2022.

office functions of the collecting, storing and processes of business and financial information and data, among other things for the compilation of statistics and indices; Compilation of statistics in the business and financial field, as well as economic analysis in this context; market valuation services, research and - studies related to business and financial matters.

41. The contested services listed above are related to processes in connection with business and financial information and data, including analysis, compilation of statistics and market valuation in the business and financial fields. For the same reasons as given under paragraph 39, I consider the contested services dissimilar to any of the services being relied upon by the opponent.

Class 36

facilitating payment processing services; electronic payment services.

42. The opponent submits that the applicant's "*facilitating payment processing services; electronic payment services*" are "closely similar" to its own "*Funding services by means of online sale of tickets*". To my understanding, the term "funding" means the provision of money from one source to another, in order to cover a particular purpose, be that in the form of a grant or through Government or company schemes, or through some other source. Meanwhile, facilitating payments merely provides the means to process a payment between two parties, rather than providing the actual funds in the first instance. While funds may be generated through the online sale of tickets, for whatever purpose, I do not see any significant overlap with the applicant's "*facilitating payment processing services; electronic payment services*", and I consider that each of the competing services would be provided by specialist providers. I therefore find that overall, the services are dissimilar.

Banking services; investment banking; mediation in acquisition, selling and trading in bonds, shares, stocks and other such securities; capital and fund investment; factoring invoices, financing, lending, credit and mortgages; leasing [hire-purchase finance]; insurance and mediation for business, involving financial guarantees [surety services]; financial and monetary services for investment companies and trusts investments funds; asset management; consulting and consultancy on the aforesaid services; financial consultancy and information; financial assistance, advisory and

advice; financial planning and analyses; financial searches, evaluations, surveys, information and appraisals; financial studies, including the preparation of relevant reports; fiscal valuations; financial advising relating to financial issues.

43. For the remaining services listed above, I consider them to include both general financial services, for example *Banking services; financial consultancy and information* at large and niche financial services, such as *investment banking*, none of which I again consider to be similar to the opponent's services to the extent that consumers would mistakenly believe that they emanate from the same source. Overall, I consider the aforementioned contested services dissimilar to those services covered by the registration of the earlier mark.

mediation in the purchase and sale of real estate; assessment and management of real estate.

44. I consider services relating to real estate to be a specialist service which has no connection with any of the services relied upon by the opponent. Consequently, I find "*mediation in the purchase and sale of real estate; assessment and management of real estate*" dissimilar to all of the opponent's earlier services.

Class 38

providing access to and dissemination of information via whether or not wireless, electronic (communications) webs, websites, portals, electronic databases and online communication capabilities; aforementioned services also via electronic webs, like Internet, and via mobile means of communication.

45. To my mind, there is a link between the applicant's provision of access and the opponent's "*Providing an internet website portal in the fields of entertainment, fundraising, event planning, traveling, and temporary accommodations*" (in Class 42) in as much that access to the network is indispensable to the provision (hosting) of the website portal. The nature of the respective services differs, as web hosting relates to a service provided by a business who hosts the websites of others on its server, whereas the provision of website and database access delivers the necessary telecommunications links. That being said, I consider it reasonable that the average consumer would expect the same or economically linked undertakings to provide both services and as such, I find the competing services to be complementary to one

another, as per *Kurt Hesse*. Overall, I consider “*providing access to and dissemination of information via whether or not wireless, electronic (communications) webs, websites, portals, electronic databases and online communication capabilities; aforementioned services also via electronic webs, like Internet, and via mobile means of communication*” to be similar to “*Providing an internet website portal in the fields of entertainment, fundraising, event planning, traveling, and temporary accommodations*” to a medium degree.

providing access to and dissemination of information related to payment transaction facilitation on an interactive online platform; aforementioned services also via electronic webs, like Internet, and via mobile means of communication.

46. The applicant’s aforementioned services relate specifically to payment transaction facilitation. I consider there to be an overlap with users of the opponent’s “*Providing an internet website portal in the fields of entertainment, fundraising, event planning, traveling, and temporary accommodations*” in Class 42, as the user may wish to make a payment for goods and services purchased through the internet website portal. Again, although the nature of the respective services differs, I consider them to be complementary, and realistically, both services could be provided by the same or economically linked undertakings. To my mind, the competing services are similar to a medium degree.

Telecommunication; data communications; aforementioned services also via electronic webs, like Internet, and via mobile means of communication.

47. I am mindful of the guidance regarding the correct approach to scrutinising services as per *Avnet*. I find nothing which is obviously similar between the opponent’s various services and the applicant’s “*Telecommunication; data communications; aforementioned services also via electronic webs, like Internet, and via mobile means of communication*” and I therefore consider the applicant’s services to be dissimilar to any of the services being relied upon by the opponent.

rental and other forms of providing data communication equipment in particular for financial transactions; aforementioned services also via electronic webs, like Internet, and via mobile means of communication.

48. I note the applicant's use of "*in particular*" following the broad term "*rental and other forms of providing data communication equipment*". In *Häfele GmbH & Co. KG v OHIM*, Case T-336/09, the GC stated that the words "in particular" used in a description are merely indicative of an example, rather than limiting those goods or services to those listed following the term. With the absence of evidence to the contrary, I find nothing obviously similar between the applicant's "*rental and other forms of providing data communication equipment in particular for financial transactions; aforementioned services also via electronic webs, like Internet, and via mobile means of communication*" and the opponent's earlier services.

Class 41

ticket reservation and booking services for entertainment events.

49. The opponent submits that the applicant's "*ticket reservation and booking services for entertainment events*" is closely similar to, inter alia, its "*Entertainment services, namely, arranging for ticket reservations for entertainment, educational, sporting and cultural events, performances, and parties*". To my mind, the applicant's services are clearly encompassed within the opponent's "*Entertainment services, namely, arranging for ticket reservations for entertainment, educational, sporting and cultural events, performances, and parties*", rendering the respective services identical, as per *Meric*.

Provision of entertainment information by electronic means.

50. The opponent submits that the applicant's "*Provision of entertainment information by electronic means*" is closely similar to, inter alia, its "*Providing an internet website portal in the fields of entertainment, fundraising, event planning, traveling, and temporary accommodations*" (Class 42). In my view, there is an overlap in the users of the respective services, which I find to be similar in nature and purpose, and both services could reasonably be expected to be provided by the same or economically linked undertakings. To my mind, the competing services are similar to a high degree.

Class 42

providing software, computer software applications and mobile applications on global computer networks; all the aforementioned services also via electronic webs, like Internet, and via mobile means of communication.

51. Given the likely overlap in users and channels of trade, in my view there is at least a low degree of similarity between the applicant's "*providing software, computer software applications and mobile applications on global computer networks; all the aforementioned services also via electronic webs, like Internet, and via mobile means of communication*" and the opponent's "*Providing an internet website portal in the fields of entertainment, fundraising, event planning, traveling, and temporary accommodations*".

Scientific and technological services and research and design relating thereto; designs and development of computers, peripheral devices for computers, computer systems, software, software applications, web applications and mobile applications;

52. As the opponent has provided no supporting evidence in relation to the similarity between the earlier services and the applicant's Class 42 services listed above, and as I see nothing within the opposing specifications which immediately strikes me as being self-evidently similar, I find the competing services to be dissimilar.

53. A degree of similarity between the goods and/or services is essential for there to be a finding of likelihood of confusion. In *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated that:

"49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity."

54. In relation to the goods and services which I have found to be dissimilar, as there can be no likelihood of confusion under section 5(2)(b), I will take no further account of such goods or services, with the opposition failing to that extent.

The average consumer and the nature of the purchasing act

55. 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 was then) described the average consumer in these terms:

“The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median”.¹⁰

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

57. In its written submissions, the opponent submits that both parties goods and services are directed at event and other professionals, event and other business users, and/or members of the general public. Meanwhile in its written submissions, the applicant submits that its own goods and services are directed to the general public, who will pay a high degree of attention to the relatively high price items such as the booking of flights, hotels and museum tickets, and the transfer of monies.

58. In my view, the average consumer for the competing goods, being tickets and vouchers, and the various ticket related management, reservation and booking

¹⁰ Paragraph 60

services, will most likely be both the general public and businesses, including those who act in the capacity of a broker.

59. The ticket-related goods and services are sold through a range of channels including through visiting physical premises such as ticket offices, as well as through telesales and via the internet, with the selection process being a combination of visual and aural, which may result from exposure to visual and audio advertising campaigns. Some consumers would seek further information from written reviews and recommendations, particularly on the internet, whereas other consumers would receive verbal advice and recommendations from sales representatives, particularly in the case of telesales. The goods and services are likely to be accessed relatively frequently and the level of attention of the general public will be commensurate with the price tag and importance of the occasion, but will range from what I would expect to be relatively low to a comparatively high degree, being higher for businesses who will want to ensure that the goods and services are appropriate to their own specific business needs.

60. For the access to and provision of general entertainment services, the average consumer will be the general public who are likely to access the services frequently, paying varying degrees of attention to the selection process, dependent on individual priorities, although I would not expect this to be to the very highest degree.

Comparison of marks

61. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM* Case C-591/12P, 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.”¹¹

62. 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.

63. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
FEVO	FEEV

64. The opponent submits that overall, the competing marks are highly similar. It submits that visually, the only points of difference are the “O” in its earlier mark and the “E” in the later mark, and that aurally, the marks are “substantially identical in sound”, with the consumer focussing on the first syllable of each of the signs, with the contested mark wholly subsumed into FEVO when pronounced.

65. The applicant submits that the marks are different in structure, and that visually and phonetically, the marks are completely different. It submits that the marks are very short, and that it is well-established law that minor differences in short marks result in consumers being able to distinguish competing marks from one another.¹²

Overall impression

¹¹ Paragraph 34

¹² See paragraph 13 of the applicant's written submissions dated 12 July 2022.

66. The opponent's mark is a word mark consisting of the single word "FEVO", presented in capital letters in a standard typeface. As the mark contains no other elements, the overall impression therefore rests in the word itself.

67. The applicant's mark is a word mark consisting of the single word "FEEV", presented in capital letters in a standard typeface. As the mark contains no other elements, the overall impression therefore rests in the word itself.

Visual comparison

68. The competing marks each consist of four letters, and both marks present the letters "F E" in the same position at the beginning of the mark, and both marks also contain the letter "V", although placed in different positions within each respective word. The opponent's mark also contains the letter "O", positioned at the end of the word, while the applicant's mark contains an additional letter "E", positioned after the first two letters "F E", and before the final letter "V". I agree with the applicant that the respective marks are both short in length, and I note the applicant's references to earlier decisions made by the Registry in relation to short marks, however, the circumstances in the case before me are somewhat different. In *Robert Bosch GmbH v Bosco Brands UK Limited*, Case BL O/301/20, James Mellor QC (as he then was), sitting as the Appointed Person, summarised that:

"a. There is no special test which applies to the comparison of 'short' marks. Their visual, aural and conceptual similarities must be assessed in the normal way – see SABEL, paragraph 23. The Hearing Officer directed herself entirely appropriately by reference to SABEL and Bimbo v OHIM.

..."¹³

In *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the GC noted that the beginning of words tend to have more visual and aural impact than the ends, although I accept that this is not always the case. Even considering that three out of four of the

¹³ At [44].

letters in the opposing marks are identical, the differing positions of the letter V in the respective marks, together with the non-identical letters, create a notable visual difference. Overall, I consider the marks to be visually similar to a medium degree.

Aural comparison

69. The opponent's mark would be pronounced as two syllables, FEE-VO (fi:vəʊ), while the contested mark would be pronounced as one syllable, FEEV (fi:v). Consequently, I consider the competing marks to be aurally similar to at least a medium degree.

Conceptual comparison

70. For a conceptual message to be relevant, it must be capable of immediate grasp by the average consumer - *Case C-361/04 P Ruiz-Picasso and others v OHIM* [2006]¹⁴.

71. Neither mark has a defined meaning in British English, and they are likely to be perceived by a significant proportion of the average consumer as invented words with no clear and recognisable semantic content, therefore a conceptual comparison cannot be made.

Distinctive character of the earlier mark

72. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91.

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

¹⁴ Paragraph 56.

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

74. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are allusive or suggestive of a characteristic of the goods and services, ranging up to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it.

75. Earlier in my decision, I found that the opponent’s mark would be perceived as an invented word by a significant proportion of the relevant consumer. I do not consider it to be allusive of the services for which it is registered. Consequently, I find the earlier mark to be inherently distinctive to a high degree.

76. The opponent has filed evidence in support of the earlier mark relied upon. The territory relevant to the assessment of enhanced distinctiveness is the United Kingdom. I must now assess if that evidence demonstrates whether, at the date of

filing the contested application, the earlier mark enjoyed an enhanced degree of distinctive character by virtue of the use made of it in relation to the UK market.

77. I note that in the witness statement of Mr Daie, he states that the mark was initially used in the United States since its launch in August 2016, but “quickly expanded such use internationally, including in the United Kingdom”. However, the date the mark was first used in the UK has not been given. Mr Daie goes on to say that “the FEVO trade mark in the United Kingdom has obtained a reputation with consumers at least for its social commerce platform revolutionizing the live event, ticketing, and group purchasing industry”, and he states that it serves a wide array of clients, including sports teams, universities, festivals and producers of other similar or special events.

78. Mr Daie states that FEVO’s Partnership with Sports Loft, being London’s first sports tech and media hub, introduced FEVO to the general public in the UK and has contributed significantly to the reputation of FEVO and the FEVO trade mark in the UK. Again, no information has been given regarding when this partnership was formed. Mr Daie describes Exhibit JS1 as screen shots of podcasts and webinars showing Sport Loft’s promotion of the FEVO brand in the UK:

S_L

Event Details

We were recently joined by leading investors Michael Spirito and Jay Adya and tech CEO’s Daniel Kirschner and Ari Daie, to hear how they view the investment process for high growth companies in sports and media...

We were delighted to have leading VCs Michael Spirito (Partner at Sapphire Ventures) and Jay Adya (Managing Partner at Elysian Park Ventures) who provided some great insights from an investors perspective as they evaluate hundreds of opportunities in the sports and media market. They were joined by Ari Daie (CEO at FEVO) and Daniel Kirschner (CEO at Greenify) who have first-hand experience of raising money for their companies.

Featuring



Speakers



Ari Daie
FEVO

Ari has been the CEO of FEVO since 2016, having previously worked as Head of M&A at Live Nation.



It used to be that all the most exciting marketing happened in the B2C space - those were the campaigns that won awards and got featured in industry press. The B2B marketers were solid, reliable but not that interesting. Not any longer. A world of always-on consumers has forced B2B brands to totally re-think how they talk with their consumer. The B2B tech buyer is the same person who is buying the Vans trainers and subscribing to Netflix. They want personalisation, content relevant to their interests and businesses who share their values. B2B marketers have had to up their game.

For early stage companies, this is a challenge. How do you deliver the quality of marketing and content across multiple channels with limited resource and budget? How do you build a consistent message when the product is evolving so fast? But equally, in the early days of a startups' journey, companies are focused on understanding their customer's needs and building an initial product that they can sell - do they really need a brand at that stage? As they acquire more customers and the product becomes increasingly defined, that's when the company's brand - as Jeff Bezos put it, "What other people say about you when you are not in the room" - becomes increasingly important

In the latest Sports Loft podcast we are joined by the Chief Marketing Officers of FEVO and Greenfly, Betty Tran and Tom Kuhr respectively. They discuss why a brand is important to achieve scale, how their brands are constantly evolving and how building a brand plays into fundraising conversations.

Featuring

FEVO 

Guests



Betty Tran

FEVO

Betty is the CMO and COO of FEVO with over 20 years experience in Marketing.

79. The witness statement states that pre-pandemic, FEVO's plans for 2021 included significant international expansion and describes Exhibit JS2 as a press article from Sports Loft which discusses some deals and partnerships that are directed to the UK market:

Pre-pandemic, FEVO's plans for 2021 included significant international expansion. A deal was signed with City Football Group, owners of 10 clubs around the world including Manchester City, Melbourne City and Girona, and another round of funding was raised, bringing the total so far to \$65million. Covid put a pause on getting things up and running abroad but Ari is still actively recruiting in the UK, has another big-name Premier League team partnership to announce soon, and is also working on a massive acquisition that could see FEVO expand into 50 new geographies across continental Europe and in emerging markets.

80. However, I note that the screenshots in Exhibit JS1 are undated, while the article under Exhibit JS2 is dated April 7, 2021, being only 7 days prior to the filing of the contested application on 14 April 2021. Neither is there anything to corroborate that the podcasts and article were directed towards the UK market. Further, while the witness statement and article under Exhibit JS2 mentions funding to the tune of \$65million, there is nothing to show what percentage of this relates to the UK market, while at paragraph 6 of the witness statement, the reference to further funding of \$36.5million states that this was in December 2021, and is therefore subsequent to the application date of the contested mark.

81. In paragraph 7, Mr Daie confirms in the witness statement that FEVO is actively recruiting in the UK and that currently, it has a verbal commitment from Chelsea FC and is working in close collaboration with Ticketmaster UK and Live Nation UK. However, I interpret “currently” as being at the time the witness statement was signed, being May 11, 2022, which post-dates the filing date of the applicant’s mark on 14 April 2021.

82. Mr Daie submits that the witness statement provides evidence of FEVO’s fame and significant reputation. The exhibits make mention of FEVO in a largely undefined manner - while I appreciate that the “FEVO” trade mark belongs to the company FEVO, INC., the references within the evidence to “FEVO” do not explicitly show use of the mark. The majority of the references seem to imply the actions of the company and as such do not differentiate between the company name and the trade mark. I see no specific evidence to demonstrate use of “FEVO” as a trade mark in direct relation to the services for which it is registered.

83. Given that I have no evidence to show “FEVO” being used as a trade mark, and in the absence of any turnover or advertising figures in relation to the mark being used in UK market, or any information as to how or where potential customers were able to access the services under the mark in the UK during the relevant period, I do not consider the evidence sufficient to establish that the distinctive character of the mark has been enhanced through use.

Likelihood of confusion

84. There is no simple formula for determining whether there is a likelihood of confusion. It is clear that I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa (*Canon* at [17]). I must consider the various factors from the perspective of the average consumer, bearing in mind 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 he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

85. There are two types of possible confusion: direct, where the average consumer mistakes one mark for the other, or indirect, where the average consumer recognises that the marks are different, but assumes that the goods and/or services are the responsibility of the same or connected undertakings. The distinction between these was explained by Mr Iain Purvis Q.C. (as he then was), sitting as the Appointed Person, in *L.A. Sugar Limited v Back Beat Inc*, Case BL-O/375/10. He said:

“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).”

86. The above are examples only which are intended to be illustrative of the general approach. These examples are not exhaustive but provide helpful focus.

87. Earlier in this decision, I found the contested goods and services in classes 9 and 36 to be dissimilar to the opponent’s services, however, I found identity/similarity between some of the opposing goods and services in the remaining classes 16, 35, 38, 41 and 42. I found the competing marks to be visually similar to a medium degree and aurally similar to at least a medium degree, although the marks were conceptually neutral. I considered the average consumer of the goods and services in common to be the general public as well as business users, where the level of attention paid during the selection process would range from low to high, being higher for business users, and all commensurate with the importance of the particular purchase. I considered the earlier mark to possess a high degree of inherent distinctive character.

88. I acknowledge the evidence submitted by the applicant to support its claim that the focus of the parties’ goods and services are different, with its own goods and services aimed at Business to Consumer (“B2C”), while it submits that the opponent’s services are directed towards a Business to Business model (“B2B”), and therefore the

respective parties operate in different markets which target different consumers.¹⁵ However, I must make my assessment based on how the goods and services might fairly be used now or in the future. In *Devinlec Développement Innovation Leclerc SA v OHIM*, Case C-171/06P, the CJEU stated that:

“59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks.”

89. I have weighed up each of the competing factors in my decision, not least the differences as well as the similarities between the competing marks, including the degree of aural and visual similarity between them, as identified above, both of which play a part. Given the high degree of inherent distinctive character of the earlier mark, and bearing in mind the principle of imperfect recollection, I consider the differences between the marks to be insufficient to avoid them being mistakenly recalled as each other, and particularly where a lesser degree of attention is paid during the selection process, although as mentioned previously, I acknowledge that this will vary. Consequently, I find that there is a likelihood of direct confusion between the marks for those goods and services which were considered to be identical or similar.

90. The opposition under Section 5(2)(b) succeeds in relation to all goods in Class 16 and all services in Class 41, and in relation to some services only in Classes 35, 38 and 42, as follows:

Class 16

Tickets for festivals, concerts, films, shows, sports events and other amusement including transport tickets and vouchers for camping, hotels, motels and such kind of accommodation.

¹⁵ See the joint witness statement, including screen shots, of Duco Hiensch and Patryk Skoczylas; and paragraph 9 of the applicant’s written submissions dated 12 July 2022.

Class 35

Accountancy and office functions in connection with the reservation, issuing and sales of admission tickets.

Class 38

Providing access to and dissemination of information via whether or not wireless, electronic (communications) webs, websites, portals, electronic databases and online communication capabilities; providing access to and dissemination of information related to payment transaction facilitation on an interactive online platform; aforementioned services also via electronic webs, like Internet, and via mobile means of communication.

Class 41

Provision of entertainment information by electronic means; ticket reservation and booking services for entertainment events.

Class 42

Providing software, computer software applications and mobile applications on global computer networks; all the aforementioned services also via electronic webs, like Internet, and via mobile means of communication.

91. The opposition fails in respect of all goods in Class 9, all services in Class 36, and the remaining services only in Classes 35, 38 and 42.

Section 5(3)

92. Section 5(3) and 5(3)(A) of the Act state:

“A trade mark which -

(a) is identical with or similar to an earlier trade mark, and

[...]

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

(3A) Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected.”

93. The relevant case law can be found in the following judgments of the 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 Case C-487/07, *L'Oréal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora* and Case C383/12P, *Environmental Manufacturing LLP v OHIM*. 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 and *Environmental Manufacturing LLP v OHIM*, paragraph 34.

(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'Oréal 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'Oréal v Bellure*).

94. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that the earlier mark is similar to the applicant's mark. Secondly, that the earlier mark has achieved a level of knowledge/reputation amongst a significant part of the public. Thirdly, it must be established 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 being brought to mind by the later mark. Fourthly, assuming that the first three conditions have been met, section 5(3) requires that one or more of the three types of damage claimed will occur. It is unnecessary for the purposes of section 5(3) that the goods and services 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. In this case, I found certain goods and services to be identical or highly similar, while I found other goods and services to be dissimilar.

95. The relevant date for the assessment under section 5(3) is the filing date of the contested application, namely, 14 April 2021.

96. With regard to the first condition of similarity between the marks, as considered earlier in this decision, I found the earlier mark to be visually similar to the applicant's mark to a medium degree, and aurally similar to at least a medium degree.

97. The second hurdle for the opponent to get over is the question of reputation.¹⁶ Earlier in this decision, when assessing whether the earlier mark enjoyed enhanced distinctive character resulting from the use made of it under section 5(2)(b), I found the evidence relating to use of the opponent's mark to be extremely limited and insufficient to find the mark possessed enhanced distinctiveness. Section 5(3) requires the opponent to prove that the earlier mark has a reputation. In view of my considerations of the evidence provided as outlined under paragraphs 77 - 83 of this

¹⁶ See *General Motors Corp v Yplon SA*, Case C-375/97, at [24] –[28].

decision, it is insufficient for me to find that the opponent enjoys a reputation which would cause the public to make a link between the marks.

98. I therefore consider that the opponent has not proven a reputation at the relevant date in the relevant territory, and so the opposition under 5(3) fails in respect of the earlier mark relied upon.

OUTCOME

99. The opposition under section 5(2)(b) has succeeded in part, as outlined in paragraphs 90 - 91, and has failed under section 5(3). Subject to any successful appeal, the application by Feev Holding B.V. may proceed to registration in respect of the following goods and services only:

Class 9

Data processing apparatus; computers and computer peripheral devices; computer programs recorded on strips, discs and other magnetic data media; computer software; image and sound carriers; magnetic data carriers; electronic apparatus and instruments, namely computerized machines for making reservations for sports events, cultural events, dancing events, entertainment events, business events, hotels, restaurants and flights; coin-operated mechanisms for vending machines, cash registers and calculators; apparatuses for automatically conducting of financial transactions; automatic paying machine; coded credit cards and cash cards; downloadable computer software applications; software applications for mobile communications apparatus, involving mobile telephone; computerized machines for reserving tickets, admission tickets and travel passes; computing devices and programs for booking seats and tickets for festivals, events, concerts, films, shows, sports events and other amusement, for issuing tickets and settling it.

Class 35

Commercial business consultancy, consulting and information; business management assistance, advisory, consulting and scheduling; business management analyzing; assistance and advising regarding management; commercial, business investigations, evaluations, surveys, analyses and studies, including the preparation of relevant

reports; commercial information; office functions of the collecting, storing and processes of business and financial information and data, among other things for the compilation of statistics and indices; Compilation of statistics in the business and financial field, as well as economic analysis in this context; market valuation services, research and - studies related to business and financial matters.

Class 36

Banking services; investment banking; mediation in acquisition, selling and trading in bonds, shares, stocks and other such securities; capital and fund investment; factoring invoices, financing, lending, credit and mortgages; leasing [hire-purchase finance]; insurance and mediation for business, involving financial guarantees [surety services]; financial and monetary services for investment companies and trusts investments funds; asset management; consulting and consultancy on the aforesaid services; financial consultancy and information; financial assistance, advisory and advice; financial planning and analyses; financial searches, evaluations, surveys, information and appraisals; financial studies, including the preparation of relevant reports; fiscal valuations; financial advising relating to financial issues; mediation in the purchase and sale of real estate; assessment and management of real estate; facilitating payment processing services; electronic payment services.

Class 38

Telecommunication; data communications; rental and other forms of providing data communication equipment in particular for financial transactions; aforementioned services also via electronic webs, like Internet, and via mobile means of communication.

Class 42

Scientific and technological services and research and design relating thereto; designs and development of computers, peripheral devices for computers, computer systems, software, software applications, web applications and mobile applications; all the aforementioned services also via electronic webs, like Internet, and via mobile means of communication.

COSTS

100. Both parties have enjoyed a share of success. Considering the balance of success is roughly equal, adopting a “rough and ready” approach to the matter, I have concluded that both parties should bear their own costs.

Dated this 25th day of January 2023

Suzanne Hitchings
For the Registrar,
the Comptroller-General