

BL O/0417/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003673160

BY JOSEPH DYER

TO REGISTER THE TRADE MARK:



CLEVER CUBE

IN CLASSES 7, 9, 16, 25, 28, 35 AND 41

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 430628

BY GROUPE CANAL+

BACKGROUND AND PLEADINGS

1. On 26 July 2021, Joseph Dyer (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on the 29 October 2021 and registration is sought for the goods and services set out in the Annex to this decision.

2. The application was partially opposed by GROUPE CANAL+ (“the opponent”) on 28 January 2022. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), and is directed against the following goods and services of the application:

Class 9 Audio-visual apparatus; handheld computers; media content; information technology and audio-visual, multimedia and photographic devices; multimedia devices; cinematographic films; films, namely animated films, downloadable films and/or video films; video films; apparatus and instruments for the recording, transmission or reproduction of data, sound or images; computers; computer hardware and firmware; computer peripherals; USB hardware; USB flash drives; electronic communication apparatus; televisions; personal digital assistants and software related thereto; optical apparatus and instruments; electronic diaries, notepads, organisers; apparatus for television games; recorded content; prerecorded discs; pre-recorded videos and films; computer discs; CDs; DVDs; pre-recorded CD-ROMs; pre-recorded DVD-ROMs; tapes and cassettes; audio tapes; compact discs featuring music, video game sounds and dialogues; audio-visual teaching apparatus; teaching instruments; encoded cards; encoded discs; encoded gift cards; portable multimedia players; speakers; headphones; stereo systems; headsets; wireless headsets; parts, fixtures and fittings for all the aforesaid goods.

Class 35 Retail services, wholesale services, electronic shopping retail services, retail services provided online, retail services provided by mail order, all connected with CDs, DVDs, electronic communication apparatus,

portable digital electronic devices, computers, handheld computers, home entertainment products

Class 41 Production of television programs; production of audio-visual recordings; audio-visual display presentation services for educational or entertainment purposes; entertainment services; audio, film, video, television recording services; audio, video and multimedia production; editing of television programmes, features, films, audio recordings; interactive entertainment; providing non-downloadable on-line computer graphics, videos and images; production of animated cartoons; film and animation production services; film production; film entertainment; music production; television and radio entertainment; production of television programmes; production of television films; providing on-line music, not downloadable; provision of automated video recording services; digital, video, audio, multimedia and/or entertainment publishing services; publication of multimedia material online; rental and hire of pre-recorded media, DVDs, video and audio cassettes and tapes.

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



Comparable UK trade mark (EU) registration no. UK00908699291

Filing date 19 November 2009; Registration date 27 May 2010.

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

Class 9 Decoders; Remote controls; antennas satellite dishes.

Class 35 Retailing and wholesaling of set-top boxes; Retail sale of aerials; Arranging subscriptions to audiovisual programmes; Arranging subscriptions to a television channel.

Class 38 Television communication; Transmission of images and videos; Television broadcasting; Broadcasting of programmes via satellite, via cable, via computer networks (in particular via the internet), and via radio waves; Audiovisual and cinematographic broadcasting, whether or not for interactive purposes; Rental of aerials and satellite dishes; Transmission of programmes and selection of television channels.

Class 41 Rental of decoders.

Class 42 Online downloading of films and other audiovisual programmes.

4. As shown above, the opposition is based upon the opponent's comparable UK trade mark (EU),¹ claiming that there is a likelihood of confusion because the goods and services are either identical or similar, and the marks are similar, with the dominant and distinctive element of both marks being the word "CUBE".

5. The applicant filed a counterstatement denying the claims made and putting the opponent to proof of use.

6. The opponent is represented by D Young & Co LLP and the applicant is represented by HGF Limited. A hearing was neither requested nor considered necessary, however, both parties filed evidence in chief and submissions in lieu of a hearing. I make this decision having taken full account of all the papers, referring to them as necessary.

EVIDENCE

7. The opponent's evidence in chief consists of the first witness statement of Clément Hellich Praquin dated 28 July 2022. Mr Praquin is the Corporate General Counsel of the opponent, a position which he has held since 2016. Mr Praquin's statement was accompanied by 20 exhibits (CHP1-CHP20).

¹ Following the end of the transition period of the UK's withdrawal from the EU, all EU trade marks ("EUTM") registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A 'comparable trade mark (EU)' retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

8. The opponent's evidence in chief also consists of the second witness statement of Mr Richard Burton dated 6 September 2022. Mr Burton is a Trade Mark Attorney Partner at D Young & Co, who are the representatives for the applicant. Mr Burton's statement was accompanied by Annex 1.

9. Annex 1 contains the witness statement of Emma Borxholme, dated 21 June 2022, who is a translator from Priority Translations LTD, a position which she has held since January 2018. The witness statement confirms that she has conducted all of the accurate translations within Mr Praquin's witness statement.

10. The applicant's evidence in chief consist of the witness statement of Mr Joseph Dyer dated 27 September 2022. Mr Dyer's statement was accompanied by 9 exhibits (JD1-JD9).

11. I have taken all of the evidence and submissions into account in reaching this decision.

RELEVANCE OF EU LAW

12. 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.

DECISION

Section 5(2)(b)

13. 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.”

14. The opponent’s mark qualifies as an earlier mark in accordance with section 6(1)(a) and 6(1)(ab) as its filing date is an earlier date than the filing date of the applicant’s mark. As the opponent’s mark has completed its registration process more than five years before the filing date of the mark in issue, it is subject to proof of use pursuant to section 6A of the Act.

Proof of use

15. I will begin by assessing whether there has been genuine use of the earlier marks. The relevant statutory provisions are as follows:

16. Section 6A of the Act states:

“(1) This section applies where

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a),
(aa) or (ba) in relation to which the conditions set out in section 5(1),
(2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes –

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the

purposes of this section as if it were registered only in respect of those goods or services.”

17. As the earlier mark is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

“7.— (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the relevant period referred to in section 6A(3)(a) (the "five-year period") has expired before IP completion day—

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day —

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM ; and

(b) the references in section 6A to the United Kingdom include the European Union”.

18. Pursuant to section 6A of the Act, the relevant period of assessing whether there has been genuine use of the earlier mark is the five years ending on the filing date of the applicant’s mark, i.e. 27 July 2016 to 26 July 2021. As the opponent’s mark is a comparable mark, and the relevant period ended on 26 July 2021 i.e. before IP Completion Day (21 December 2022), the relevant territory to assess use is the EU.

19. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J (as he then was) summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods

come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use

of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no de minimis rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

20. Proven use of a mark which fails to establish that “the commercial exploitation of the mark is real” because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark” is, therefore, not genuine use. I note the following from the opponent’s evidence:

21. Firstly, all of the exhibits to Mr Praquin’s statement are written in French (apart from **exhibit CHP7**). I have been provided with partial translations by Ms Borxholme, which adhere to the requirements set out in *Pollini* (BL O/146/02). The text which is translated has been highlighted in a yellow box within the exhibits. Anything that has not been translated cannot be taken into consideration, and will not be referred to within this decision. Furthermore, I note that the evidence which falls before the relevant period cannot be taken into consideration and will also not be referred to.

22. Mr Praquin states that the opponent is a “leader in the EU and UK of the provision of premium content and themed networks, including television stations and film and television services as well as the bundling and distribution of pay TV-offerings”. In November 2008, the opponent launched the use of LE CUBE which “permits consumers of film and television stations to access services via a set-top box, which works as a decoder alongside a remote control and satellite dish”.

23. **Exhibit CHP2**, contains dated screenshots of its LE CUBE decoders being advertised and sold through its 5 different websites (www.lesoffrescanal.fr, www.canalplus-caraibes.com, www.pluslecube.fr, [11](https://boutique.canal.fr/recevoir-</p></div><div data-bbox=)

canal/ and <https://boutique.canalplus.com/recevoir-canal/>). I will only consider the following printouts from boutique.canal.fr which fall within the relevant period:

- Screenshots dated 30 September 2017 and 10 October 2017 listing the opponent's +The Satellite Cube, The Cube S (which gives users internet connection to receive their programmes) and the +The TNT cube (to receive channels through the DTT antenna). Under +The Satellite Cube, it states that “+The Cube guarantees exceptional image quality throughout France thanks to its satellite reception, 100% of your channels are available in HD. By connecting your decoder to the internet, you will have access to an even richer experience with CANAL à laDemand and many other services”.
- Screenshots dated 19 January 2018, 16 April 2018 and 14 July 2019 showing the +Le Cube TNT “to receive your channels through your DTT antenna”.
- Screenshots dated 14 July 2019 and 9 December 2019 showing the +The TNT Cube which is “+The Cube in its TNT version”. It states that “all you have to do is connect to you DTT antenna to enjoy exceptional image quality. By connecting it to the internet, you can enrich your experience and enjoy additional channels. You will also be able to see or review your favourite programmes with CANAL on Demand”.

24. **Exhibit CHP3** contains independent web traffic statistics of the website ‘www.pluslecube.fr’ from 28 August 2015 and 21 April 2018, however, only a partial translation is provided. I note that both reports state that the ‘pluslecube’ website attracted 4,169 views per month.

25. **Exhibit CHP4** contains the following undated examples of the LE CUBE decoder packaging:



26. Ms Borxholm also provides a translation for the back of the following packaging:



Translation

+LE CUBE

WITH THE +LE CUBE DECODER, I HAVE ACCESS TO CANAL SERVICES VIA DTTV

HD* guarantee for channels received via DTTV

Additional channels by connecting your Cube to the internet

More than 10,000 items of content accessible on demand*

Your programmes on any device with the myCANAL site and application*

ENJOY YOUR PROGRAMMES ANYWHERE, ANY TIME WITH myCANAL*

Thanks to the myCANAL* experience, included in your subscription, you can find all of your programmes live or on catch-up* on all your devices! Watch your favourite programmes, follow the greatest sporting moments live*, discover our personalized recommendations, or your favourite films and series. On PC/Mac, tablet, smartphone, Apple TV or Android TV, XBOX, your programmes will be with you anywhere, even offline!*

myCANAL

Download from the App Store

AVAILABLE ON Google Play

Available on Windows Store

Accessible on XBOX

Available on you PC/Mac

TO TAKE ADVANTAGE OF CURRENT OFFERS, FIND OUT MORE IN STORE

TOTAL COST OF SECURITY DEPOSIT OF +LE CUBE DECODER: 75 € (1)

(you will pay part of the security deposit at checkout)

27. **Exhibit CHP5** contains 2 installation manuals for the products and services offered under the LE CUBE mark from 2014 to 2018. I note the following partial translations have been provided by Ms Borxholm:

- Install your +LE CUBE SATELLITE DECODER.
- +Le Cube satellite.
- Discover the new CANAL experience with the +LE CUBE SATELLITE decoder.
Thanks to the quality of the satellite, you enjoy a perfect HD image and Dolby Digital sound.
- Programming December 2016 to February 2017.

28. I note that in his witness statement, Mr Praquin states that **exhibit CHP6** contains purchase orders of the above manuals. However, on inspection of the evidence these appear in **exhibit CHP5**. There are 2 invoices from “havas factory” which is located in France. The first invoice is dated 13 November 2018 and amounts to €5,355.00. Ms Borxholm has partially translated the document which says; “G5 Decoder Installation Booklet – Nov 18 [...] Please prepare your purchase order and send it to gestion.hf@havas.com”. The second invoice is dated 30 November 2018 and

amounts to €6,615.00. The only parts translated is the header which says, “G 5 T MANUAL BOOKET – 2018 [...]” and “Please prepare your purchase order and send it to gestion.hf@havas.com”.

29. **Exhibit CHP9** contains printouts from www.lesoffrescanal.fr regarding its +LE CUBE goods. I note that the only screenshot which falls within the relevant period is dated 9 December 2019 showing “+ Le Cube DTTV”, “to receive your channels thanks to your DTTV antenna”.

30. In the witness statement of Mr Praquin, he states that **exhibit CHP14** contains screenshots showing the awards won by the LE CUBE set-top box. I note that the LE CUBE set-top box is specifically referred to as “LE CUBE S”. The LE CUBE S has won the Red Dot Product Design Award 2016, the International Design Awards Gold 2016 and the SPARK Awards Gold 2016.

31. **Exhibit CHP16** contains partial translations from third party articles and press reviews, both within and outside of France, regarding the opponent’s LE CUBE goods. Firstly, I note that there are multiple printouts and articles dated between 2013 to early 2016 contained within this exhibit. These fall before the relevant period and therefore do not assist the opponent. Consequently, I note the following relevant information from this exhibit:

- A translated TNT SAT article dated 19 December 2017, which says “enjoy Canal plans with +LECUBE, benefit from the only plan with 100% HD channels”. “With the +LECUBE decoder you can access the channels from the CANAL plans via satellite. Specifically, you’ll find all the DTTV channels for free”, “you simply need to install your +LECUBE decoder to receive all your channels”. “+LECUBE will give you access to on-demand programmes, recording, control of live TV and also Eureka, which will offer you suggestions for programmes you’re sure to love”.
- A translated article from “La Correspondence de la Presse” dated 10 February 2017 which notes that the video on demand service is fully moving to HD and that this was already made available through its “le Cube DDTV” decoder.

- The next 5 screenshots within this exhibit contains articles from the year 2017 which address technical problems with the Cube. The first article states that “this update is obviously going rather badly... indeed, many subscribers encounter problems following its instillation, loss of recordings present on the hard disk, no more images on channels of the bouquet, blocking of the decoder, problems related to the HDMI connection, significant delays, size of subtitles too large..”. The second article is regarding an update which causes the CUBE to be blocked. The third article is regarding a transaction (paying its private copying levy) which ended “disputes in progress relating to the royalties to be paid on its decoders”. The fourth article refers to another update to the satellite decoder (Cube) which caused multiple issues for its subscribers including a black screen zapping, slow to wake up and 408 errors.
- An article from clubic.com dated 1 June 2018 stating that the opponent is launching “Le cube” a “new top-of-the-range decoder sold for 51 euros per month” with the subscription to the opponent included. This set-top box allows the users to view content in preview, but also in catch-up and video on demand.
- An article from telesatellite.com dated 6 October 2020 noting that the opponent has announced a new +LE CUBE TNT and +LE CUBE SATELLITE decoders making it now possible to watch programmes in streaming “thanks to an update allowing the decoder to choose the quality of the video stream ON DEMAND according to the speed of the home”.
- An article from telesatellite.com dated 9 July 2019 stating that the opponent is updating the Cube which allows subscribers to benefit from, a new welcome portal, a new on demand portal, a new menu on 2 levels and a simplified guide.

32. **Exhibit CHP19** contains partial translations of 6 subscription agreements between the opponent and its customers between 2015 and 2020. I note that only 3 fall within the relevant period (dated 31 March 2017, 28 February 2019 and 31 January 2020). Mr Praquin acknowledges that there isn’t any reference to “LE CUBE” within these agreements, but confirms “that these are notably related to the LE CUBE decoders”.

33. In his witness statement, Mr Praquin confirms that in 2015 the opponent has 11.2 million individual subscribers which increased to a total of 20.3 million by 2020. “On

average 4.8 million subscribers were equipped with Canal+ and LE CUBE decoders were distributed to at least 2.5 million of these households". He also states that "the G5 + LE CUBE SAT received over 1 million [subscribers] in 2020, G5T + LE CUBE TNT has received over 300,000 [subscribers] in 2020 and G6T LE CUBE S has received over 140,000 [subscribers] in 2020".

34. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the Court of Justice of the European Union ("CJEU") found that (my emphasis):

"31. It is true that the 'use' through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas 'genuine use', within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, 'use' within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish 'use' within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestle*, the 'use' of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition of a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35. Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1)". (emphasis added)

35. In *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, Phillip Johnson, sitting as the Appointed Person, considered the correct approach to the test under s. 46(2). He said:

"13. [...] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences) (see for instance, T-598/18 *Grupo Textil Brownie v EU*IPO*, EU:T:2020:22, [63 and 64]).

14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.

15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hypen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative

elements are usually less likely to change the distinctive character than those related to the word elements.

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

17. It is also worth highlighting the recent case of T-615/20 *Mood Media v EUIPO*, EU:T:2022:109 where the General Court was considering whether the use of various marks amounted to the use of the registered mark MOOD MEDIA. It took the view that the omission of the word “MEDIA” would affect the distinctive character of the mark (see [61 and 62]) because MOOD and MEDIA were in combination weakly distinctive, and the word MOOD alone was less distinctive still”.

36. Where the opponent’s mark has been used as registered this will, clearly, be use upon which the opponent can rely. However, and as highlighted above, I note that the mark has been used in the following variants:

1) + LE CUBE / + Le Cube

2) Le Cube S / **LE CUBE** 

37. Variant 1 is the word only variant of the opponent’s mark which is used throughout the evidence. While the opponent’s mark has additional presentational elements, the distinctive character of the mark is the same and it is an acceptable variant use.

38. I also note that the opponent has used variant 2 within its evidence. Variant 2 consists of the words “Le Cube S”. It therefore lacks the + element at the start of the original mark, and has the addition of the letter S at the end of it. Consequently, I consider that this changes the distinctive character of the mark. Variant 2 is not acceptable use of the mark.

39. In regard to the opponent’s above evidence, there are clearly some issues with some of the exhibits. Firstly, the evidence provided is mainly in French, with Ms Borxholme only providing partial translations. Consequently, some of the exhibits are particularly unhelpful because they do not make any sense as a whole. For example, in a few exhibits (such as **CHP6** and **CHP9**) only the wording “+ LE CUBE” (the mark) has been translated on the page. I am therefore unable to determine the context in which the mark is being referenced. Secondly, and as noted by the applicant, I have found that a lot of the evidence falls before the relevant period.

40. However, taking all of the evidence as a whole above, I am satisfied that the earlier mark has been put to genuine use in relation to decoders during the relevant period in France. Although there are no revenue figures provided for the opponent’s +LE CUBE decoders, I note that the user/subscriber numbers provided demonstrate a significant number of customers.

41. The case law above is clear that use of a mark in an area of the European Union constituting one-member state may be sufficient to demonstrate genuine use in the European Union as a whole. I consider that to be the case here. I am satisfied that the opponent has demonstrated use of its mark in the EU during the relevant period.

42. I must now consider whether, or the extent to which, the evidence shows use of the goods and services relied upon. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there

has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

43. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows:

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria’s Secret UK Ltd* [2014] EWHC 2631 (Ch) (“Thomas Pink”) at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 (“Asos”) at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46.”

44. The goods and services for which the earlier mark is registered and upon which the opponent relies is its class 9, 35, 38, 41 and 42 technical goods and services.

45. Clearly, the opponent will be able to rely upon the terms “decoders” in class 9 and “rental of decoders” in class 41, for which it has shown use.

46. However, for the remainder of its goods and services, I note that the opponent does provide these, however, not under the +LE CUBE mark. The evidence only clearly shows that the mark has been used in relation to its set-top box decoders. I note that whilst these decoders allow the users to access their subscriptions and TV channels, these services have clearly been sold under different marks (such as CANAL+). Consequently, I consider a fair specification of the earlier mark to be:

Class 9 Decoders.

Class 41 Rental of decoders.

Section 5(2)(b) - case law

47. In making this decision, I bear in mind the following principles 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

48. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the GC stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut 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.”

49. I note that at least some of the goods and services covered by the parties' respective specifications are identical. For example, “decoders” in the opponent's specification falls within the broader category of “audio-visual apparatus” in the applicant's specification. They are identical on the principle outlined in *Meric*. For this reason, I will not undertake a full comparison of the goods and services above. I will

assess the opposition on the basis that the contested goods and services are identical to those covered by the opponent's mark. If the opposition fails, even where the goods and services are identical, it follows that the opposition will also fail where the goods and services are only similar.

The average consumer and the nature of the purchasing act

50. 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.”

51. The average consumer for the goods and services will be members of the general public and business consumers. I consider that the cost of purchase is likely to vary, and it is unlikely to be a particularly frequent purchase. Even where the cost of purchase is lower, various factors will be taken into consideration such as the 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.

52. The goods are likely to be purchased from electrical retailers, their online equivalent, or via the manufacturer directly using their website or telephone sales. The services are likely to be purchased from broadcasting, multimedia or streaming

undertakings/platforms, or their online equivalent. Alternatively, the goods and services may be purchased following perusal of advertisements. Consequently, visual considerations are likely to dominate the selection process.

53. 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

54. 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.”

55. 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.

56. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
	

57. The opponent's mark consists of the words "LE CUBE" written in a standard grey capitalised typeface. On the left hand side of these words, is a simple device composed of a white plus sign contained within a black box. I consider that the eye is naturally drawn to the element of the mark that can be read, and therefore, the device will play a lesser role in the overall impression of the mark.

58. The applicant's mark consists of the words "CLEVER CUBE", written in a stylised typeface, with both letter C's at the start of the words presented in red, and the rest of the letters presented in black. I consider that the overall impression lies in the combination of these words.

59. Visually, the marks coincide in the second word CUBE. This acts as a visual point of similarity. However, the opponent's mark begins with the simple plus device and the word "LE", and the applicant's mark begins with the word "CLEVER". I also bear in mind that the average consumer tends to pay more attention to the beginning of the marks. Therefore, these act as visual points of difference. I note that the opponent submits that the letters "LE" are contained within the word "CLEVER" and thus increases the similarities between the marks. However, these letters are in between the letters C and VER (to create the word CLEVER). I also note that the applicant's mark is presented in a stylised typeface with both letter C's presented in red. Consequently, I consider that the marks are visually similar to between a low and medium degree.

60. Aurally, I consider that the word CUBE will be given its ordinary English pronunciation, which will be the same in both marks. In the opponent's mark, I note that although the device element is capable of being articulated as the word 'PLUS', I do not consider that, when encountering the mark, the average consumer will pronounce it.

61. I note that the LE element at the beginning of the opponent's mark will be articulated how it is written. I also consider that the word CLEVER in the applicant's mark will be given its ordinary English pronunciation. Therefore, the beginning of the marks differ aurally. Nonetheless, as the marks overlap in the pronunciation of "CUBE", they are aurally similar to a medium degree. However, if the average consumer were to pronounce the "plus" device in the opponent's mark, then the marks will be aurally similar to a low degree.

62. Conceptually, to the extent that both marks refer to the geometric shape (CUBE), there will be conceptual overlap. However, given that the word CLEVER qualifies the word CUBE (which creates a unitary meaning) in the applicant's mark, they are unlikely to be conceptually similar overall to no more than a medium degree.

Distinctive character of the earlier trade mark

63. 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).”

64. 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 and services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

65. I note that in its submissions in lieu, the opponent states that “by virtue of the use that has been made of the Opponent’s trade marks in the European Union (as shown in the Witness Statement of Clement Hellich Praquin), the Opponent’s trade marks enjoy an enhanced level of distinctive character, and the Opponent respectfully requests that the Office takes account of this.”

66. However, for the purposes of assessing enhanced distinctiveness, the relevant market is the United Kingdom. However, the opponent did not provide any evidence to establish use of its mark in the UK. Consequently, I have only the inherent position to consider.

67. As established above, the opponent’s mark consists of the simple black and white “plus” device, followed by the words “LE CUBE” in a grey standard capitalised typeface. At the beginning of the mark is a visual representation of a “plus”. I consider conceptually, “plus” would normally signify that something that is ‘upgraded’ or ‘advanced’. However, in this instance, due to the placement of the plus at the beginning of the mark, this conceptual meaning wouldn’t make sense. Therefore, I consider that the average consumer will see it as a decorative device with no apparent meaning.

68. The word “LE” is the French language word for ‘THE’ and, while a significant proportion of average consumers will understand this, I consider that there will be a smaller proportion who may not. If the French word is not recognised, it will be seen as either a made up word, a foreign language word or an acronym/two letter

combination with no immediate conceptual meaning (since they may stand for any number of word combinations).

69. Lastly, the word CUBE is a recognisable concept of a third-dimensional shape. I consider that the word CUBE within the opponent's mark is allusive of the shape of the goods (as highlighted by the evidence above). Therefore, taking the mark as a whole into account, I consider that it is inherently distinctive to a medium degree.

Likelihood of confusion

70. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. It is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and services and the nature of the purchasing process. 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.

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

- The simple plus device in the opponent's mark plays a lesser role in the overall impression, with the elements that can be read (which the eye is naturally drawn to) playing a greater role.
- The words "CLEVER CUBE" both play an equal role in the overall impression of the applicant's mark as they create a unitary meaning.

- I have found the marks to be visually similar to between a low and medium degree.
- I have found the marks to be aurally similar to a medium degree, or a low degree, depending on how the marks are pronounced.
- I have found the marks to be conceptually similar to no more than a medium 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 goods and 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 for the purpose of my analysis.

72. Therefore, taking all of the factors listed in paragraph 71 into account, particularly the visual, aural and conceptual differences between the marks, and even bearing in mind the principle of imperfect recollection, I am satisfied that the marks are unlikely to be mistakenly recalled or misremembered as each other. This is particularly the case given the lower visual similarity (between a low and medium degree) between the marks, and the predominantly visual purchasing process. The word "CLEVER" at the beginning of the applicant's mark, qualifies the word "CUBE", to create a unitary meaning, which creates a clear conceptual difference between the marks. I do not consider that the average consumer would overlook the word CLEVER in the applicant's mark, nor do I consider that they would overlook the plus device, and the word LE, at the beginning of the opponent's mark, especially as the beginning of the marks tend to make more of an impact than the ends. Consequently, I do not consider there to be a likelihood of direct confusion.

73. It now falls to me to consider the 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.

74. 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.

75. Having noticed that the competing trade marks are different, I see no reason why the average consumer would assume that they came from the same or economically linked undertakings.

76. I do not consider that the differences between the marks would fall within any of the categories of indirect confusion identified by Mr Purvis KC in *L.A Sugar Limited*,² nor has the opponent identified any other logical examples of how the applicant’s mark could be indirectly confused with the opponent’s. No such reasons are apparent to me. Consequently, I do not consider there to be a likelihood of indirect confusion between the opponent’s mark and the application, even on goods and services that are identical.

² Paragraphs 16 & 17 of *L.A Sugar Limited v By Black Beat Inc*, Case BL-O/375/10

CONCLUSION

77. The opposition is unsuccessful, and the application may proceed to registration.

COSTS

78. The applicant has been successful and has requested that off-scale costs be awarded.

79. The applicant's representatives submit that the opponent has filed hundreds of pages of evidence which was irrelevant because a considerable proportion of what was filed was from outside of the relevant period. "The review of these materials and the requirement to prepare submissions in relation to them has caused the applicant considerable, and unnecessary, costs that could have easily been avoided".

80. Rule 67 of the Trade Marks Rules 2008 provides:

"The registrar may, in any proceedings under the Act or these Rules, by order award to any party such costs as the registrar may consider reasonable, and direct how and what parties they are to be paid."

81. Tribunal Practice Notice ("TPN") 4/2007 indicates that the Tribunal has a wide discretion when it comes to the issue of costs, including making awards above or below the published scale where the circumstances warrant it. The TPN stipulates that costs off the scale are available "to deal proportionately with wider breaches of rules, delaying tactics or other unreasonable behaviour".

82. I acknowledge that the opponent did file a lot of evidence which fell before the relevant period. However, there is nothing to suggest that this behaviour was an abuse of process, inappropriate, nor a tactic to delay the proceedings. In my view, the applicant can be adequately compensated for time spend on evidence in these proceedings within the parameters of the normal scale. Consequently, I do not consider that off-scale costs would be appropriate in this instance.

83. The relevant scale to determine costs is contained in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicant the sum of **£1,200** as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Considering the Notice of opposition and preparing a Counterstatement	£200
Considering the opponent's evidence and filing evidence	£500
Preparing and filing submissions	£500
Total	£1,200

84. I therefore order GROUPE CANAL+ to pay Joseph Dyer the sum of £1,200. 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 4th day of May 2023

L FAYTER
For the Registrar

ANNEX

The applicant's mark

Class 7

Vending machines; automated vending machines; parts and fittings for all the aforesaid goods.

Class 9

Computer games; software; audio-visual apparatus; teaching apparatus; handheld computers; e-readers; computer software; application software; computer games software; computer games programs; computer games provided through a global computer network; computer game software for use on mobile and cellular phones; downloadable software; media content; children's educational software; computer software relating to education, recreation, sports, entertainment, leisure and/or literature; animation software; entertainment software; multimedia software; downloadable computer games; downloadable publications; publications in electronic form; downloadable multimedia files; downloadable music files; downloadable graphics, images and moving images for computers, video game machines or mobile phones; downloadable screensavers; downloadable wallpapers; animated cartoons; interactive multimedia computer programs; information technology and audio-visual, multimedia and photographic devices; multimedia devices; video games, namely video game software and video game computer programs; video game discs and cartridges; video games programmes; cinematographic films; films, namely animated films, downloadable films and/or video films; video films; apparatus and instruments for the recording, transmission or reproduction of data, sound or images; computers; computer hardware and firmware; computer peripherals; USB hardware; USB flash drives; electronic communication apparatus; cameras; camcorders; photographic apparatus and instruments; mobile phones; telephones; televisions; covers, fascias and cases for mobile phones; waterproof cases for smart phones; accessories for mobile phones, namely straps, cases, covers, docking stations and/or battery chargers; personal digital assistants and software related thereto; mp3 players; optical apparatus and instruments; E-books; audio books; electronic diaries, notepads, organisers; apparatus for television games; recorded content; prerecorded discs; pre-recorded videos and films; computer discs; CDs; DVDs; pre-recorded CD-ROMs; pre-

recorded DVD-ROMs; tapes and cassettes; audio tapes; compact discs featuring music, video game sounds and dialogues; audio-visual teaching apparatus; teaching instruments; encoded cards; encoded discs; encoded gift cards; portable multimedia players; coin-operated mechanisms for vending machines; radio alarm clocks; radios; eye glasses; spectacles; sunglasses; cases for sunglasses; binoculars; calculators; speakers; headphones; stereo systems; headsets; wireless headsets; height charts; magnetic badges; protective clothing for the prevention of injury; carrying cases adapted for audio-visual apparatus, computers, e-readers, mobile phones, headphones, sunglasses, eye glasses or binoculars; parts, fixtures and fittings for all the aforesaid goods.

Class 16

Books; publications; teaching materials; educational equipment; note books; books for children; printed matter; publications for children; educational publications; journals; magazines; pamphlets; periodicals; newsletters; postcards; posters; prints; photographs; photocards; photographic albums; albums; children's books incorporating an audio component; comics and comic books; fiction books; story books; activity books; colouring books; picture books; address books; brochures; calendars; diaries; catalogues; trading cards; souvenir programmes; tickets; greetings cards; gift cards; Christmas cards; stationery; stationery for children; pens; pencils; erasers; pencil cases; pencil sharpeners; pen holders; pen clips; crayons; writing instruments; pencil boxes; adhesive labels; stickers; sticker books; stamp pads; transfers; stamps; stencils; drawing instruments; drawing materials; drawing sets; artists' materials; scrap books; sketch books; lithographic works of art; modelling clay; paintings; geographical maps; personal organisers; protective covers for books; reference books; book markers; car bumper stickers; cheque book holders; passport holders; document holders; coasters; paper bibs; paper table cloths; paper table mats; plastic bags; disposable napkins; flags and pennants of paper; paperweights; removable tattoos (decalcomanias); binders; children's slates; bags formed primarily of paper or cardboard; boxes made of paper or cardboard; tissues formed of paper; wrapping material and packing paper; packaging materials; adhesives for household purposes; ornaments of paper or card; desk mats; embroidery, sewing and knitting patterns.

Class 25

Clothing; footwear; headgear; children's clothing; children's headgear; children's footwear; clothing for babies; hats for babies; t-shirts, shirts, sweaters, sweatshirts, jackets, pyjamas, coats, swimwear, mufflers, gloves, scarves, neck ties, socks, underwear, pants, jeans, shorts, skirts, underpants, robes; waterproof clothing; articles of outer clothing; knitwear; leisure wear; sports clothing; beachwear; slippers; belts; money belts; costumes; fancy dress outfits.

Class 28

Toys; games; playthings; Christmas decorations; toy building blocks capable of interconnection; magnetic building blocks being toys; toy building blocks; children's playthings; handheld computer games; computer games apparatus; educational toys; toys adapted for educational purposes; model toys; outdoor toys; assembly toys; mechanical toys; electronic toys and games; electronic educational game machines for children; animated toys and playthings; remote control toys and playthings; coin operated amusement machines; coin operated gaming equipment; arcade game machines; arcade redemption game machines; arcade crane game machines; slot machines [gaming machines]; puzzles; toys in the form of puzzles; manipulative logic puzzles; trading card games; playing cards; card games; board games; dolls; figurines; toy action figures; action toys; soft toys; stuffed toys; sporting articles; games apparatus; gymnastic apparatus; playground apparatus; balls for games; shin guards, elbow guards, wrist guards and knee pads; gloves for games; bags adapted for carrying sporting articles; fancy dress outfits and costumes, being children's playthings; masks and toy masks; Christmas crackers; ornaments for Christmas trees; mobiles; video game apparatus; parts and fittings for all the aforesaid goods.

Class 35

Retail services, wholesale services, electronic shopping retail services, retail services provided online, retail services provided by mail order, all connected with computer software, computer game software, computer application software, computer games, E-books, audio books, publications in electronic form, downloadable software, CDs, DVDs, electronic communication apparatus, portable digital electronic devices, computers, handheld computers, cameras, photographic equipment, telephones, televisions, badges, mobile phones, cases for mobile phones, mp3 players, protective

clothing, alarm clocks, radios, sunglasses, binoculars, calculators, videos, home entertainment products, feeding bottles, figurines of non-precious metal, figurines of plastic, figurines of ceramic, bottle stoppers, cutlery, hot water bottle covers, colognes, perfumes, after-shaves, cosmetics, toiletries, nail art stickers, body art stickers, first aid kits, dressings, plasters, anti-bacterial preparations, anti-bacterial gel, lamp shades, trophies, watches, clocks, watch cases, jewellery, precious metals, keyrings, ornaments, figures of precious metal, ornamental pins, tie pins, books, books for children, publications for children, stationery, note books, diaries, drawing instruments, drawing materials, drawing sets, pencil cases, cards, journals, photographs, teaching materials, stationery for children, scrap books, sketch books, colouring books, personal organisers, prints, calendars, geographical maps, paintings, comics, address books, car bumper stickers, coasters, paperweights, souvenir programmes, tickets, travel guides, adhesive labels, stickers, albums, catalogues, napkins, flags, removable tattoos, office requisites, banners, magazines, bottle stoppers, bags, cases, trunks, handbags, purses, wallets, luggage, rucksacks, camping bags, holdalls, protective covers for luggage, luggage tags, business card holders, key cases, notecases, bag straps, suit carriers, umbrellas, parasols, vanity cases, bedding, mattresses, pillows, cushions, cups, mugs, bottles, flasks, lunch boxes, kitchen utensils, crockery, jugs, money boxes, piggy banks, tableware, cookware, containers, vacuum flasks, glassware, hip flasks, tankards, bottle openers, figurines, textiles, towels, blankets, bed covers, bed linen, clothing, footwear, headgear, children's clothing, children's footwear, waterproof clothing, underwear, articles of outer clothing, knitwear, leisurewear, casual wear, sports clothing, training wear, gloves, belts, costumes, fancy dress outfits, button badges, novelty badges, shoe laces, hair decorations, toys, games, puzzles, soft toys, sporting articles, playthings, computer game apparatus, action toys, board games, dolls, games apparatus, electronic toys, electronic games, toy blocks, balls for games, masks, balloons, playing cards, crisps, snack foods, confectionery, biscuits, sweets, candy bars, chewing gum, dessert puddings, chocolate, ice cream, ice lollies, coffee, tea, jams, non-alcoholic beverages, fruit juices, waters; advertising, marketing and promotional services; business assistance, management and administrative services; business organisation, planning, information and management consultancy services; negotiation of contracts; television advertising; on-line advertising; arranging and conducting exhibitions; agency services for promoting and management of literary personalities, celebrities, after dinner

speakers and motivational speakers; business administration; subscriptions to electronic journals; rental of vending machines; consultancy, information and advisory services relating to all of the aforesaid services.

Class 41

Production of television programs; production of audio-visual recordings; audio-visual display presentation services for educational or entertainment purposes; education services; educational services provided for children; entertainment services for children; cultural activities; recreational services; entertainment services; providing amusement and recreational facilities; training courses; instruction courses; teaching services; audio, film, video, television recording services; audio, video and multimedia production; providing on-line non-downloadable audio and video content; editing of television programmes, features, films, audio recordings; interactive entertainment; interactive computer game services; online games; provision of computer games via the Internet; provision of video games software via the Internet; electronic games services provided by means of the Internet or via a computer based system; computer games services provided on a global computer network; providing on-line video games and on-line computer games; providing non-downloadable on-line computer graphics, videos and images; production of animated cartoons; film and animation production services; film production; film entertainment; music production; television and radio entertainment; production of television programmes; production of television films; providing on-line music, not downloadable; theatre production; theatre entertainment; presentation of live performances; photographic services; provision of automated video recording services; writing of texts; editing of texts; screenplay writing services; script writing services; literary agency services; book club services; library services; providing information via a global computer network pertaining to books, animations, television programs, instructional activities and publishing; publication services; publication of books, stories, documents; publication of electronic books, manuals, journals, web logs, blogs, magazines on-line; publication of photographs; digital, video, audio, multimedia and/or entertainment publishing services; publication of multimedia material online; rental and hire of pre-recorded media, DVDs, video and audio cassettes and tapes; arranging and conducting of events, exhibitions, presentations, conferences, shows and/or seminars, all for educational and/or entertainment purposes; organisation, production and presentation of video and computer game

events; organisation, production and presentation of competitions, contests, games and quizzes; arranging and organising personal appearances, demonstrations and award presentations; master of ceremony services for parties and special events; recreational services relating to education or entertainment; amusement park services; theme park services; live costume show entertainments; sporting and cultural activities; organisation of sporting events; club services; fan club services; consultancy, information and advisory services relating to all of the aforesaid services.