

O-902-22

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NUMBER 3677519

BY LILAN HUANG

TO REGISTER THE FOLLOWING TRADE MARK:

Fiture

IN CLASSES 9, 20, 28 AND 41

AND

AN OPPOSITION THERETO UNDER NUMBER 428257

BY FITURE (HONG KONG) LIMITED

BACKGROUND AND PLEADINGS

1. On 05 August 2021, Lilan Huang (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK (“the contested mark”). The application was published for opposition purposes on 17 September 2021 and registration is sought for goods in classes 9, 20 and 28 and services in class 41.¹

2. On 17 November 2021, Fiture (Hong Kong) Limited (“the opponent”) opposed the application in full based upon sections 5(1), 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon four UK trade marks, the details of which are as follows:

UK trade mark number 3676033 (“the 033 mark”)

FITURE

Filed on 02 August 2021 and registered on 21 January 2022.

Relying on goods in classes 9, 25, 27 and 28 and services in class 41.

UK trade mark number 3676045 (“the 045 mark”)

F FITURE

Filed on 02 August 2021 and registered on 31 December 2021.

Relying on goods in classes 9, 25, 27 and 28 and services in class 41.

UK trade mark number 3676040 (“the 040 mark”)

FITURE SLIM

Filed on 02 August 2021 and registered on 21 January 2022.

Relying on goods in classes 9, 25, 27 and 28 and services in class 41.

UK trade mark number 3676046 (“the 046 mark”)

¹ These will be listed in the goods and services comparison.

FITURE Mirror

Filed on 02 August 2021 and registered on 21 January 2022.

Relying on goods in classes 9, 25, 27 and 28 and services in class 41.²

3. Under section 5(1), the opponent claims that the contested mark is identical to its 033 and 045 marks and is to be registered for identical goods and services.

4. Under section 5(2)(a), the opponent claims that the contested mark is identical to its 033 and 045 marks and is to be registered for similar goods and services.

5. Under section 5(2)(b), the opponent claims that the contested mark is similar to all of its earlier marks and is to be registered for similar goods and services.

6. The earlier marks had been registered less than five years at the filing date of the contested application. Therefore, they are not subject to proof of use pursuant to section 6A of the Act.

7. The applicant filed a defence and counterstatement admitting similarity between its mark and the opponent's 033 mark only but denying similarity or identity between any of the goods and services, therefore denying a likelihood of confusion.

8. Neither party filed evidence or submissions in these proceedings. Neither party requested a hearing, nor did they file submissions in lieu. The applicant is represented by Akos Suele, LL.M. and the opponent is represented by Appleyard Lees IP LLP.³

DECISION

Relevance of EU law

² The specifications for all four earlier marks are identical and will be listed in the goods and services comparison.

³ A Form TM33P (appointment or change of representative) was filed on behalf of the opponent on 30 March 2022, replacing Murgitroyd & Company with Appleyard Lees IP LLP.

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

My approach

10. I will begin by considering the opposition under the 5(1) and 5(2)(a) grounds in relation to the 033 and 045 marks, which I will assess together since they both require identity between the marks. It will only be necessary to consider the 5(2)(b) ground if the 5(1) or 5(2)(a) fail.

Sections 5(1) and 5(2)(a)

11. Sections 5(1) and 5(2)(a) of the Act state that:

“(1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.

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

(a) it is identical with an earlier trade mark and is to be registered for goods or services 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.”

Comparison of marks

12. The opponent claims that its 033 and 045 marks are identical to the contested mark. Since the 033 mark is the only mark for which the applicant has admitted similarity with its mark, I will begin by comparing these marks.

13. Therefore, the trade marks to be compared are as follows:

Earlier 033 mark	Contested mark
FITURE	Fiture

14. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, the Court of Justice of the European Union (“CJEU”) held that:

“54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

15. The contested mark is a plain word mark. I must take into consideration the fact that the registration of a plain word mark covers use of that mark in any normal font⁴ and in lower or upper case,⁵ and so the contested mark could be used as **FITURE**.

16. There is some stylisation to the letters F, T, R and E in the 033 mark. One of the two horizontal bars in the letter F, the one horizontal bar in the letter T and one of the three horizontal bars in the letter E have a slanted edge as opposed to a straight one. The bowl in the letter R does not quite meet the stem of the letter and so it does not create an enclosed curved space as it would in the standard upper case letter R. These differences, however, are so insignificant that they are likely to go unnoticed by the average consumer. As a result, I am of the view that these marks are identical.

⁴ See the decision of the General Court in *Migros-Genossenschafts-Bund v EUIPO*, Case T-189/16

⁵ See Professor Ruth Annand’s comments in *Bentley Motors Limited v Bentley 1962 Limited* BL O/158/17

17. Since I have found identity between the contested mark and the 033 mark, it is not necessary to consider the 045 mark, which, in any case, I would not have found identical to the contested mark, in accordance with the case law, given the additional figurative element.

Comparison of goods and services

18. For the purposes of my assessment under section 5(1), the matter will only proceed if I find identity between the parties' goods and services. For any goods and services that are not identical, the opposition based on section 5(1) must fail but may, however, proceed under section 5(2)(a).

19. In comparing the respective specifications, all relevant factors should be considered, as per *Canon*, where the CJEU stated at paragraph 23 of its judgment:

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

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

21. Further, in *Kurt Hesse v OHIM*,⁶ the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods/services. In *Boston Scientific Ltd v OHIM*,⁷ the General Court (“GC”) stated that “complementary” means:

⁶ Case C-50/15 P

⁷ Case T-325/06

“...there is 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.”

22. In *Gérard Meric v OHIM*, the GC confirmed that even if goods/services are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):⁸

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

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

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49].

Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is

⁸ Case T-133/05

equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

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

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

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

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

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

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

25. I bear in mind that it is permissible to group goods/services together for the purposes of assessment: *Separode Trade Mark*:⁹

"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."

26. The competing goods and services are shown below:

⁹ BL O/399/10

The earlier 033 mark

Class 9 *Interactive touch screen terminals; Downloadable software applications for mobile phones; Electronic publications, downloadable; Downloadable music files; Downloadable image files; Scales with body mass analysers; Bathroom scales; Protective helmets for sports; Cases for mobile phones; Headphones.*

Class 25 *Sports clothing; Sports shoes; Sports singlets; Sports vests; Sports caps and hats; Sweat suits; Athletic tights; Sweat-absorbent stockings; Headbands against sweating; Gloves.*

Class 27 *Yoga mats; Gymnasium mats; Gymnastic mats; Wrestling mats; Carpets; Door mats; Mats; Bath mats.*

Class 28 *Yoga blocks; Yoga straps; Body-training apparatus; Machines for physical exercises; Dumb-bells; Bar-bells; Skipping ropes; Exercise pulleys; Weight lifting machines for exercise; Body-building apparatus.*

Class 41 *Personal trainer services [fitness training]; Conducting fitness classes; Physical education; Organization of competitions [education or entertainment]; Organization of sports competitions; Movie studio services; Recording studio services; Production of radio and television programmes; Providing sports facilities; Health club services [health and fitness training].*

The contested mark

Class 9 *Communications computers; Communications servers [computer hardware]; Computer database servers; Computer hardware; Computer hardware for games and gaming; Computer hardware for remotely accessing and transmitting data; Computer hardware for routing audio, video, and digital signals; Computer hardware for signal processing of audio and video; Computer hardware for the compilation of positioning data; Computer hardware for the control of lighting; Computer hardware for the dissemination of positioning data; Computer hardware for the processing of positioning data; Computer hardware for the transmission of positioning data; Computer hardware for the collection of positioning data; Computer hardware for use*

in computer-assisted software engineering; Computer mainframes; Computer servers; Computer systems; Computers; Computers for autonomous-driving vehicles; Computers for use in data management; Covers for computer keyboards; Convertible laptops; Covers for tablet computers; Internet servers; Servers for web hosting; Sleeves for laptops; Stands for computer equipment; Wearable computers; Wristband computer devices; Adapters for wireless network access; Apparatus for the transmission of data; Data communications apparatus; Devices for streaming media content over local wireless networks; Aerial converters; Aerial sockets; Television antennas; Satellite dishes for satellite transmissions; Anti-dust plugs for earphone jacks; Audio amplifiers; Audio apparatus; Audio cassette recorders; Audio digitisers; Audio interfaces; 360° video cameras; 3D television receivers; Advertising display apparatus [mechanical or luminous]; Advertising signboards [luminous]; Anti-glare filters for televisions and computer monitors.

Class 20 Bathroom mirrors; Decorative mirrors; Hand-held mirrors [toilet mirrors]; Locker mirrors; Make-up mirrors for purses; Make-up mirrors for the home; Mirror frames; Mirror tiles; Mirrors enhanced by electric lights; Personal compact mirrors; Silvered glass [mirrors]; Tiles (Mirror -) for fixing to walls; Basin cabinets; Bath seats for babies; Bathroom cupboards; Bathroom furniture; Bathroom vanity units incorporating basins; Shaving mirrors; Toilet cabinets; Towel stands [furniture]; Adjustable seat carriers; Arbours [furniture]; Armrests; Assembled display units [furniture]; Audio racks [furniture] for use with audio equipment; Babies' bouncing chairs; Babies' chairs; Bamboo furniture; Bases for tables; Beach beds; Bed chairs; Bedroom furniture; Bedside cabinets; Benches [furniture]; Boards in the nature of furniture; Bookcases; Bottle racks; Cabinets for storing articles; Cabinets for tea services; Cane furniture; Chair pads; Chairs adapted for use by those with mobility difficulties; Chairs being office furniture; Clothes racks [furniture]; Coat racks; Costume stands; Non-metallic coat hooks; Adjustable beds; Air bed lounge; Babies' baskets; Bean bag beds; Bean bag cushions.

Class 28 Abdomen protectors for Taekwondo; Abdomen protectors for athletic use; Aerobic step machines; Alpine skis; American footballs; Ankle and wrist weights for exercise; Appliances for gymnastics; Arm guards for sports use; Artificial climbing walls; Badminton equipment; Badminton nets; Badminton racquets; Ball pitching

machines; Bandy balls; Barrels for darts; Baseball and softball rubbing mud; Baseball balls; Basketballs; Beach balls; Billiard ball racks; Billiard balls; Billiard cues; Bob-sleighs; Bocce balls; Body training apparatus [exercise]; Bodysurfing boards; Bodyboards; Cases adapted for sporting articles; Exercise balls; Exercise bars; Épées for fencing; Field hockey balls; Field hockey sticks; Waist trimmer exercise belts; Exercise hand grippers; Chest developers; Kettle bells; Hang gliders; Rackets; Arm floats for swimming; Flippers for swimming; Floating recreational pads; Swimming belts; Swimming jackets; Swimming rings; Webbed gloves for swimming; Angling bank stick supports; Angling nets; Artificial fish bait; Artificial flies for use in angling; Boomerangs; Fish hook removers being fishing tackle; Electronic bite indicators for use in angling.

Class 41 Aerobics competitions; Aerobics training services; Arrangement of professional golf tournaments; Booking of sports facilities; Arranging of athletics competitions; Arranging parties for archery; Coaching; Coaching [training]; Coaching services for sporting activities; Educational services relating to sports; Entertainment in the nature of tennis tournaments; Entertainment in the nature of roller derbys; Entertainment in the nature of golf tournaments; Entertainment in the nature of gymnastic performances; Entertainment services relating to sport; Exercise [fitness] advisory services; Exercise [fitness] training services; Exercise classes; Exercise instruction; Fishing instruction; Fitness club services; Gym activity classes; Gymnasium club services; Gymnasium services relating to body building; Gymnasium services relating to weight training; Gymnastics instruction; Health and fitness training; Horse jumping events (Organising of -); Instruction on formal wearing of kimono; Instruction in weight training; Instruction services relating to sports; Instructional services for bob-sledding; Instructional services for horse-riding; Judo instruction; Instructional services for skiing; Keep fit instruction services; Keep-fit instruction; Operation of sports facilities; Organisation of cycling events; Arranging and conducting e-sports competitions; Computer and video game amusement services; Electronic game services and competitions provided by means of the internet; Electronic game services provided by means of the internet; Electronic games services provided by means of a global communication network; Electronic games services provided from a computer database or by means of the internet; Electronic games services provided via a global computer network; Internet games (non-downloadable); Gaming services

for entertainment purposes; Games services provided via computer networks and global communication networks; Game services provided online from a computer network.

The applicant's class 9 goods

Covers for computer keyboards; Covers for tablet computers; Sleeves for laptops

27. The opponent's specification includes *cases for mobile phones*. All of these items are designed to protect electronic devices meaning they have an overlap in purpose, though because they are not the same devices being covered, there is only a superficial overlap. The physical nature of the goods will also differ. However, they are likely to be sold in the same aisles of retail stores (and their online equivalents) and their trade channels may overlap. The users may also overlap but I do not consider the goods to be complementary or in competition. Overall, I find a low to medium degree of similarity between these goods.

Anti-dust plugs for earphone jacks

28. I understand these goods to be small items made of rubber or a similar material which are inserted into the auxiliary inputs on devices such as laptops and mobile phones; they are used when there are no earphones or headphones plugged into the devices in order to stop dust getting into the port. Whilst these have a different nature, method of use and purpose to the opponent's *cases for mobile phones and headphones*, I consider the users may overlap whereby the consumer purchases a case and anti-dust plugs for their mobile phone for protection or whereby the consumer purchases both headphones and anti-dust plugs for when the headphones are not in use. The items are also likely to be found on the same shelves or in the same aisles in retail stores or their online equivalents. Overall, I find a low degree of similarity between these goods.

Anti-glare filters for televisions and computer monitors; Stands for computer equipment

29. I do not find any meaningful similarity between these goods and any of the opponent's goods and services. The fact that these goods may be sold in the same area in retail stores as the opponent's *cases for mobile phones* and *headphones* is, by itself, not sufficient for a finding of similarity.

Computers.

30. An *interactive touch screen terminal* is essentially a computer within a touch-screen monitor, the two being combined to create one system with no additional equipment required. Accordingly, this term in the opponent's specification falls within the above-listed term and the goods are identical in accordance with *Meric*. The fact that the applicant's term is broader and could encompass other goods dissimilar to the opponent's *interactive touch screen terminals* is irrelevant since *Meric* allows for identity regardless of which specification includes the more general category.

Communications computers

31. I consider these goods to encompass any computer which is able to send communications to another computer. Interactive touch screen terminals are likely to involve consumers inputting data, such as inputting details at a doctor's surgery to inform staff you have arrived for an appointment or inputting menu options at a fast-food restaurant which will be communicated to the kitchen staff to prepare your order, for example. As such, and without any submissions on the point from the parties, I find the opponent's *interactive touch screen terminals* to be encompassed by the applicant's *communications computers* and therefore identical in accordance with *Meric*.

Computer hardware

32. This term is likely to cover the internal components of computers or the peripheral devices such as keyboards and mice, for example. I do not consider this term to cover the opponent's *interactive touch screen terminals* to find identity, but I do find similarity on the basis that these goods overlap in users and trade channels. There is also an element of complementary given that hardware components are important to the

operation of *interactive touch screen terminals*. I find these goods similar to a medium degree.

Computer systems

33. Similar to my reasoning in the previous paragraph I find similarity between these goods and the opponent's *interactive touch screen terminals* in that the users and trade channels may overlap and there is a complementary nature on the basis that the touch screen terminal will require a computer system in order to function.

34. Absent any evidence or submissions from the parties, I find no similarity between the remainder of the applicant's class 9 specification and any of the opponent's goods or services. The opponent's interactive touch screen terminals, whilst being encompassed by the broad term *computers*, must not be interpreted too liberally. Interactive touch screen terminals are specific goods and simply because they can be considered a type of computer does not render them similar to any computer-related goods. The computer-related goods applied for have specific purposes, none of which I find sufficiently similar to interactive touch screen terminals, nor to any other terms in the opponent's specification, and the same applies to the remainder of the applicant's class 9 goods.

The applicant's class 20 goods

35. The closest term in the opponent's specification to the applicant's class 20 goods is *bath mats*. Whilst there may be an overlap in users whereby consumers buy all the goods for use in their home and can be bought in the same homeware stores, I consider this too superficial for a finding of similarity between the goods, which have a different nature, method of use and purpose and are neither complementary nor in competition. Absent any submissions from the parties, I find no similarity between the applicant's class 20 goods and any of the opponent's goods and services. The opposition must fail in relation to these goods, which may proceed to registration.

The applicant's class 28 goods

Body training apparatus [exercise]

36. These are identical to the opponent's *body-training apparatus*.

Aerobic step machines

37. These fall within the opponent's *machines for physical exercises* and are therefore identical.

Abdomen protectors for athletic use; Ankle and wrist weights for exercise; Exercise balls; Exercise bars; Waist trimmer exercise belts; Exercise hand grippers; Chest developers; Kettle bells.

38. I consider 'apparatus' to comprise the equipment, tools or machinery used for a particular purpose.¹⁰ As such, the opponent's *body-training apparatus* would include any equipment, tools or machinery used when training the body. Accordingly, I find the above-listed goods to be encompassed by and therefore identical to the opponent's *body-training apparatus*.

Abdomen protectors for Taekwondo; Alpine skis; American footballs; Appliances for gymnastics; Arm guards for sports use; Artificial climbing walls; Badminton equipment; Badminton nets; Badminton racquets; Ball pitching machines; Baseball balls; Basketballs; Bob- sleighs; Bodysurfing boards; Bodyboards; Épées for fencing; Field hockey balls; Field hockey sticks; Hang gliders; Rackets; Arm floats for swimming; Flippers for swimming; Swimming belts; Swimming jackets; Webbed gloves for swimming.

39. Although 'body training' is a broad term that is likely to be perceived differently by different consumers, I consider that participating in certain sports is a way of training the body. Therefore, the above-listed goods – which comprise equipment, tools or machinery for particular sports – have an overlap in purpose to the opponent's *body-training apparatus*. The physical nature of the goods varies, as does the method of

¹⁰ Cambridge English Dictionary.

use, but the users may overlap and consumers are likely to expect to find all of these goods in the same area in physical stores or their online equivalents. Overall, I find these goods similar to between a low and medium degree.

Angling bank stick supports; Angling nets; Fish hook removers being fishing tackle; Electronic bite indicators for use in angling; Bandy balls; Barrels for darts; Beach balls; Billiard balls; Billiard cues; Bocce balls; Boomerangs; Floating recreational pads; Swimming rings.

40. There is a difference between more physically demanding sports and 'recreational' sports, which consumers might not consider to fall within 'body training'. As such, although the above-listed goods could be considered apparatus for sports and warrant a similar assessment to the goods listed in the previous paragraph, they are less likely to involve a body training element, resulting in no overlap in purpose. Accordingly, I find these goods similar to a very low degree to the opponent's *body-training apparatus*.

Artificial fish bait; Artificial flies for use in angling; Baseball and softball rubbing mud; Billiard ball racks; Cases adapted for sporting articles.

41. These goods would not be considered apparatus, i.e. equipment, tools or machinery, required to carry out the relevant sports but rather accessories for the sports. As such, they are a step removed from the aforementioned goods and I find no meaningful similarity with any of the opponent's goods. These goods will proceed to registration.

The applicant's class 41 services

Coaching; Coaching [training]; Coaching services for sporting activities; Exercise [fitness] advisory services; Exercise [fitness] training services; Health and fitness training; Instruction in weight training; Instruction services relating to sports; Exercise [fitness] training services; Exercise classes; Exercise instruction; Gym activity classes; Keep fit instruction services; Keep-fit instruction; Educational services relating to sports; Entertainment in the nature of tennis tournaments; Entertainment in the nature

of roller derbys; Entertainment in the nature of golf tournaments; Entertainment in the nature of gymnastic performances; Entertainment services relating to sport; Electronic game services and competitions provided by means of the internet; Aerobics competitions; Arrangement of professional golf tournaments; Arranging of athletics competitions; Horse jumping events (Organising of -); ; Arranging and conducting e-sports competitions; Booking of sports facilities; Operation of sports facilities; Organisation of cycling events; Aerobics training services; Fitness club services; Gymnasium club services; Gymnasium services relating to body building; Gymnasium services relating to weight training.

42. Either because of their identical wording, or in accordance with the principle outlined in *Meric*, I consider the above terms identical to one or more of the following terms in the opponent's class 41 specification: *Personal trainer services [fitness training]; Conducting fitness classes; Physical education; Organization of competitions [education or entertainment]; Organization of sports competitions; Providing sports facilities; Health club services [health and fitness training]*. Even if I wrong in my finding of identity, I consider that the services attract the same users, have a shared purpose and will overlap in trade channels, resulting in a high degree of similarity.

Fishing instruction; Gymnastics instruction; Instructional services for bob-sledding; Instructional services for horse-riding; Judo instruction; Instructional services for skiing.

43. The opponent's physical education relates to the instruction of physical exercise, games or sports. As such, I find the above-listed services, which refer to the instruction in relation to specific sports, to be included within the opponent's aforementioned term. I find these services identical. In the alternative, there is a high degree of similarity between them, given their overlap in purpose, users and trade channels.

Arranging parties for archery

44. Archery parties will most likely require sports facilities. I therefore find at least a medium degree of similarity between these services and the opponent's *providing*

sports facilities. The core purpose of the services differs, however, the users will overlap and those users will expect these to be provided by the same undertaking.

Instruction on formal wearing of kimono; Computer and video game amusement services; Electronic game services provided by means of the internet; Electronic games services provided by means of a global communication network; Electronic games services provided from a computer database or by means of the internet; Electronic games services provided via a global computer network; Internet games (non-downloadable); Gaming services for entertainment purposes; Games services provided via computer networks and global communication networks; Game services provided online from a computer network.

45. I do not find any obvious similarity between the applicant's remaining class 41 services and any of the opponent's goods or services and I have not been provided with submissions on the point. Therefore, the above-listed services will proceed to registration.

The average consumer and the purchasing act

46. 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. described the average consumer in these terms:

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

47. The relevant goods and services are those for which I have found at least a degree of similarity, for which the average consumer is a member of the general public. The various goods and services will be selected with an average level of care, though some goods, such as *beach balls* and *swimming rings*, for example, may attract a slightly lower level of care. The goods and services will be selected through primarily visual means, with the goods most often being selected from the shelves of retail stores (or the online equivalents) and the services being selected upon visual inspection of signage at the premises or advertising material. There may also be an aural aspect to the purchase if consumers request assistance from sales assistants in stores or if consumers receive word of mouth recommendations for the services.

Distinctive character of the earlier mark

48. In *Lloyd Schuhfabrik Meyer* the CJEU stated that:

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

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

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

50. The 033 mark is not a dictionary defined word. I have no submissions from the parties as to the meaning of the word, but it appears to me to be invented, though some consumers may see a combination of the words FIT and FUTURE. Further, the inclusion of the word FIT within FUTURE, may, for the average consumer, indicate goods or services that are fitness-related, resulting in an allusive nature for the majority of the specification. I find the mark to have a medium degree of inherent distinctive character. I have no evidence from which to assess an enhanced distinctive character through use.

Likelihood of confusion

51. 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/services down to the responsible undertakings being the same or related. In determining whether there is a likelihood of confusion, all of the above factors need to be borne in mind. They must be considered globally from the perspective of the average consumer. In making my assessment, I must keep 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. The factors considered above have a degree of interdependency: for example, a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods/services and vice versa.

52. I have found the contested mark to be identical to the earlier 033 mark. I have found the goods and services to vary in similarity from dissimilar to identical. I have

found the earlier 033 mark to have a medium to high degree of inherent distinctive character. I have identified the average consumer to be a member of the general public who, paying no more than an average level of attention, selects the goods and services predominantly by visual means, though there will also be an aural element to the selection.

53. Given the identity between the competing marks, it is my view that the average consumer will be directly confused, even for goods and services that are similar to only a very low degree, due to the interdependency principle. There is a likelihood of direct confusion.

CONCLUSION

54. For the goods and services I found to be identical, the opposition succeeds under section 5(1); for those with which I found similarity, it succeeds under section 5(2)(a).

55. Since I have found no similarity between these goods and services and the opponent's goods and services, the application will proceed for:

Class 9 Communications servers [computer hardware]; Computer database servers; Computer hardware for games and gaming; Computer hardware for remotely accessing and transmitting data; Computer hardware for routing audio, video, and digital signals; Computer hardware for signal processing of audio and video; Computer hardware for the compilation of positioning data; Computer hardware for the control of lighting; Computer hardware for the dissemination of positioning data; Computer hardware for the processing of positioning data; Computer hardware for the transmission of positioning data; Computer hardware for the collection of positioning data; Computer hardware for use in computer-assisted software engineering; Computer mainframes; Computer servers; Computers for autonomous-driving vehicles; Computers for use in data management; Convertible laptops; Anti-glare filters for televisions and computer monitors; Stands for computer equipment; Internet servers; Servers for web hosting; Wearable computers; Wristband computer devices; Adapters for wireless network access; Apparatus for the transmission of data; Data communications apparatus; Devices for streaming media content over local wireless

networks; Aerial converters; Aerial sockets; Television antennas; Satellite dishes for satellite transmissions; Audio amplifiers; Audio apparatus; Audio cassette recorders; Audio digitisers; Audio interfaces; 360° video cameras; 3D television receivers; Advertising display apparatus [mechanical or luminous]; Advertising signboards [luminous].

Class 20 Bathroom mirrors; Decorative mirrors; Hand-held mirrors [toilet mirrors]; Locker mirrors; Make-up mirrors for purses; Make-up mirrors for the home; Mirror frames; Mirror tiles; Mirrors enhanced by electric lights; Personal compact mirrors; Silvered glass [mirrors]; Tiles (Mirror -) for fixing to walls; Basin cabinets; Bath seats for babies; Bathroom cupboards; Bathroom furniture; Bathroom vanity units incorporating basins; Shaving mirrors; Toilet cabinets; Towel stands [furniture]; Adjustable seat carriers; Arbours [furniture]; Armrests; Assembled display units [furniture]; Audio racks [furniture] for use with audio equipment; Babies' bouncing chairs; Babies' chairs; Bamboo furniture; Bases for tables; Beach beds; Bed chairs; Bedroom furniture; Bedside cabinets; Benches [furniture]; Boards in the nature of furniture; Bookcases; Bottle racks; Cabinets for storing articles; Cabinets for tea services; Cane furniture; Chair pads; Chairs adapted for use by those with mobility difficulties; Chairs being office furniture; Clothes racks [furniture]; Coat racks; Costume stands; Non-metallic coat hooks; Adjustable beds; Air bed lounge; Babies' baskets; Bean bag beds; Bean bag cushions.

Class 28 Artificial fish bait; Artificial flies for use in angling; Baseball and softball rubbing mud; Billiard ball racks; Cases adapted for sporting articles.

Class 41 Instruction on formal wearing of kimono; Computer and video game amusement services; Electronic game services provided by means of the internet; Electronic games services provided by means of a global communication network; Electronic games services provided from a computer database or by means of the internet; Electronic games services provided via a global computer network; Internet games (non-downloadable); Gaming services for entertainment purposes; Games services provided via computer networks and global communication networks; Game services provided online from a computer network.

FINAL REMARKS

56. Since I have found the marks to be identical and the goods and services to either be identical, similar or dissimilar, it is not necessary to consider the 5(2)(b) ground. Further, comparing the specifications of the remaining earlier marks to the contested specification would not alter my findings since the four earlier marks are registered for the same goods and services.

57. Even if I am wrong on my finding under sections 5(1) and 5(2)(a) as to the identity of the marks, I consider the opposition would have succeeded under section 5(2)(b) given the high similarity between the marks.

COSTS

58. On balance, I consider that both parties have achieved a relatively equal level of success in these proceedings. In the circumstances, I do not consider it appropriate to make a costs award in favour of either party. Therefore, I order both parties to bear their own costs in these proceedings.

Dated this 18th day of October 2022

E FISHER (née VENABLES)

For the Registrar