

# O-040-17

IN THE MATTER OF THE TRADE MARKS ACT 1994

AND IN THE MATTER OF TRADE MARK APPLICATION NO. 3096716  
IN THE NAME OF WORLD OF FASHION (MCR) LTD

AND IN THE MATTER OF OPPOSITION (NO. 404512) BY  
eBAY INC

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF  
MR OLIVER MORRIS DATED 29 JULY 2016

## DECISION

1. This is an appeal from a decision of Mr Oliver Morris, the Hearing Officer for the Registrar, in which he rejected an opposition by eBay Inc to the application by World of Fashion (MCR) Limited, trading as giftobay.com, ("the Applicant") to register the stylised mark shown below ("the Mark"). eBay Inc ("the Opponent") appeals that decision.

### **Background**

2. On 27 February 2015, the Applicant applied to register the Mark:

The logo for Giftobay.com features the word "Giftobay.com" in a serif font. The "i" in "Gift" has a small decorative flourish above it. The letters "obay" and the period are in a bright green color, while "Gift" and ".com" are in black.

The letters "obay" and the full stop are in a bright green colour, which contrasts with the black colour used for the remaining words and small logo. The precise shade of green is not specified in the application.

3. The specification for the Mark covers a range of services in Class 35, including "Advertising services provided via the Internet" and "retail services connected with the sale of" a very wide variety of goods, including household items, fashion items, health and beauty products, professional salon or spa equipment, dietary and nutritional products, mobile phones, sporting goods, home security systems, plumbing items, and garden and outdoor products. The full specification is at Appendix A to this judgment.

4. The Opponent opposed the registration of the Mark under sub-sections 5(2)(b), 5(3) and 5(4)(a) of the 1994 Act. It relied upon five earlier trade marks and goodwill in the eBay name. Details of the five registered marks are set out in Appendix B to this judgment; in brief, there are UK and EU registrations for the word EBAY, and UK and EU registrations for a stylised form of the same word, in which the letters are each of a different colour, red, blue, yellow and green, in this form:



The fifth mark is for the word “bay” in which the letters are presented in the same blue, yellow and green colouring as the other stylised marks. Whilst the registrations identify the use of those colours, they do not specify the shades of each colour.

5. Both sides filed evidence. A hearing took place at which both sides were professionally represented (Mr Roughton for the Opponent and Ms Razzaq for the Applicant).
6. The Hearing Officer found, in brief, that
- i. the application included advertising services which were identical to the advertising services in the specifications of the earlier marks,
  - ii. the retail services in the Applicant's specification were not limited to services provided online;
  - iii. there was a medium degree of similarity between the services of the earlier marks and the Applicant's online retail services, and a low degree of similarity in respect of the Applicant's retail services when provided by physical means,
  - iv. some of the earlier marks were registered for goods which were the subject of the Applicant's retail services, those services were complementary to such goods and this led to a medium degree of similarity between such goods and services,
  - v. the marks were conceptually different
  - vi. the marks had a low degree of aural similarity and a lower degree of visual similarity,
  - vii. the earlier marks (save for the fifth mark, BAY) were inherently distinctive
  - viii. the use made of the eBay marks, both plain and stylised, was compelling, and had become highly distinctive in relation to the Opponent's marketing services,

- ix. the high distinctiveness of the earlier eBay marks was outweighed by the low level of similarity of the marks and medium level of similarity of the services, such that there was no likelihood of confusion for s 5(2)(b),
  - x. the Opponent had the necessary goodwill for the s 5(4)(a) objection but there was no misrepresentation,
  - xi. the earlier eBay marks had the requisite reputation for the s 5(3) objection in respect of online marketing services and a link to them would be made by use of the Mark,
  - xii. however, the Applicant would gain no tangible benefit from use of the Mark amounting to an unfair advantage, and there was no likelihood of any detriment or dilution by tarnishment.
7. The Opponent filed an appeal pursuant to section 76 of the 1994 Act. In its Grounds of Appeal, it challenged the Hearing Officer's findings under sub-sections 5(2)(b) and (3), on the basis (in summary) that
- i. The Hearing Officer erred in his assessment of the similarity of its services of operating an online marketplace to the Applicant's retail services,
  - ii. The Hearing Officer failed to carry out a proper comparison of the parties' marks. He should have found the marks to be conceptually similar to a high degree.
  - iii. As a result, he wrongly failed to find a likelihood of confusion;
  - iv. Those same errors, together with a failure to give proper effect to the evidence of the Opponent as to the "beneficial characteristics" of its marks' reputation, led the Hearing Officer wrongly to reject the allegation of unfair advantage and dilution/detriment.
8. The Applicant also filed a Respondent's Notice. However, the contents of the document do not comply with Rule 71(5), which states that such a Notice shall "specify any grounds on which the respondent considers the original decision should be maintained *where these differ from or are additional to* the grounds given by the registrar in the original decision." I have italicised the relevant element of the sub-rule: the Respondent must identify different or additional grounds on which it will invite the Appointed Person to uphold the original decision. This Respondent's Notice (as, regrettably, is often the case) identified no such grounds, but instead set out a number of reasons why the Applicant considered that the grounds given by

the Hearing Officer were correct. In the circumstances, I do not need to deal further with the Respondent's Notice.

9. The parties asked me to dispense with an oral hearing of the appeal. Despite the potential benefits of an oral hearing (as discussed by Mr Mitcheson QC in *Medi-Matt* BL O/007/17), in the light of both sides' request that I should deal with the matter on paper I gave directions for sequential written submissions from both sides. I am grateful for these, albeit both parties concentrated in their submissions on comparing their existing commercial activities, rather than comparing their respective specifications. That was particularly true for the Applicant, most of whose submissions related to the nature of its existing business, rather than (as required) the wider specification of services for which it had applied to register the Mark. The Hearing Officer, however, rightly concentrated upon the latter comparison. This decision is based upon a careful review of the evidence, the statements of case and submissions made below, the decision and the written submissions of the parties.

#### **Standard of review**

10. This appeal is by way of review. The basis of such an appeal has for many years been said to have been set out in the decision of the Court of Appeal in *Reef* [2003] RPC 5, and to require an appellant to show that the hearing officer made a distinct and material error of principle in making his decision or that it was clearly wrong, that is to say it was a decision which no reasonable hearing officer could have reached. However, some doubts have arisen as to whether more recent decisions of the Supreme Court (in particular *In Re B (A Minor) (Adoption: Natural Parent)* [2001] UKHL 70, [2002] 1 WLR 258) have materially altered the approach to be adopted in trade mark appeals. The position has recently been considered at length by Mr Daniel Alexander QC sitting as the Appointed Person in BL O/017/17, *Talk for Writing*. I do not propose to set out all of his reasoning, but would gratefully adopt it. I set out his summary of the position:

#### **"Summary**

51. In the light of the above, in my judgment, *Re:B* has not made any substantive difference to the approach that the Appointed Person should take in considering appeals from the Registrar. Rather, it has drawn on and refined in a particular context points repeatedly made in earlier cases. I reach that conclusion partly because I take the view that the earlier case law had not set such a strict threshold that appellate interference would only be warranted (or in fact undertaken) where the error was of

a particular kind. Rather, the case law drew attention to the fact that decision under appeal clearly had to be wrong and not merely one which the appellate tribunal would not have taken on a topic where reasonable people could differ. Because of that, appellate tribunals, including the Appointed Person, have, in practice, reversed decisions of the Registrar when a genuine error was identified but have declined to do so merely where they would have decided the case differently. That accords with the approach required by *Re:B* as well as the body of case law, of which I have referred to the most important extracts above.

**Principles so far as relevant to the present case**

52. Drawing these threads together, so far as relevant for the present case, the principles can therefore be summarized as follows.

(i) Appeals to the Appointed Person are limited to a review of the decision of [the] Registrar (CPR 52.11). The Appointed Person will overturn a decision of the Registrar if, but only if, it is wrong (Patents Act 1977, CPR 52.11).

(ii) The approach required depends on the nature of decision in question (*REEF*). There is spectrum of appropriate respect for the Registrar's determination depending on the nature of the decision. At one end of the spectrum are decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum are multi-factorial decisions often dependent on inferences and an analysis of documentary material (*REEF, DuPont*).

(iii) In the case of conclusions on primary facts it is only in a rare case, such as where that conclusion was one for which there was no evidence in support, which was based on a misunderstanding of the evidence, or which no reasonable judge could have reached, that the Appointed Person should interfere with it (*Re: B* and others).

(iv) In the case of a multifactorial assessment or evaluation, the Appointed Person should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions. In particular, where an Appointed Person has doubts as to whether the Registrar was right, he or she should consider with particular care whether the decision really was wrong or whether it is just not one which the appellate court would have made in a situation where reasonable people may differ as to the outcome of such a multifactorial evaluation (*REEF, BUD, Fine & Country* and others).

(v) Situations where the Registrar's decision will be treated as wrong encompass those in which a decision is (a) unsupportable, (b) simply wrong (c) where the view expressed by the Registrar is one about which the Appointed Person is doubtful but, on balance, concludes was wrong. It is not necessary for the degree of error to be "clearly" or "plainly" wrong to warrant appellate interference but mere doubt about the decision will not suffice. However, in the case of a doubtful decision, if and only if, after anxious consideration, the Appointed Person adheres to his or her view that the Registrar's decision was wrong, should the appeal be allowed (*Re: B*).

(vi) The Appointed Person should not treat a decision as containing an error of principle simply because of a belief that the decision could have been better expressed. Appellate courts should not rush to find misdirections warranting reversal simply because they might have reached a different conclusion on the facts or expressed themselves differently. Moreover, in evaluating the evidence the Appointed Person is entitled to assume, absent good reason to the contrary, that the Registrar has taken all of the evidence into account. (*REEF, Henderson* and others).

Bearing in mind the repeated reminders that different points are likely to be particularly relevant in other cases, this is not intended to be a summary of universal application for other cases where particular aspects of the approach may require different emphasis."

11. I have borne these principles in mind on this appeal, and I note that the decision which I am asked to overturn involved a multi-factorial evaluative assessment by the hearing officer, but not findings of fact made with the benefit of oral evidence.

### **Merits of the appeal**

#### **(a) Similarity of the services**

12. The relevant parts of the Decision are paragraphs 23-25:

"23. I will begin with the competing class 35 specifications. The applicant seeks registration for advertising services provided over the Internet. All of the earlier marks include the term advertising or advertising services. Consequently, these services are identical.

24. I next consider the applicant's retail services, which are connected with a large and varied range of specified goods. The opponent does not provide a retail service itself. It

instead facilities trade via its website between buyers and sellers of various goods. However, I must consider the specifications of the earlier marks on a notional basis, not on the basis of the actual use the opponent has made. Irrespective of this, the class 35 specifications of most of the opponent's earlier marks are limited to the type of service it provides. The relevant parts of the specifications of four of the earlier marks are worded as follows:

Registration 2185144 - Providing online, interactive bulletin board for the posting, promotion, sale and resale of items via a global computer network.

Registration 2642722 - On-line trading services, namely, operating on-line marketplaces for sellers and buyers of goods and services; online trading services in which sellers post products or services to be offered for sale and purchasing or bidding is done via the Internet in order to facilitate the sale of goods and services by others via a computer network ....<sup>1</sup>

25. Despite Mr Roughton submitting that the above specifications could be interpreted as covering retail services, I do not agree. Bearing in mind the case-law about how to interpret terms, the essence of what is covered is no more than what the opponent actually does provide. That, though, does not mean that the services are not similar. The applicant's retail services could be provided through an e-commerce website, as are the services of the earlier marks. The purpose of the competing services is, at their heart, to enable someone to buy something, although there is a difference in that one is the service of a particular retailer whereas the other facilitates selling and buying between users. The selling and buying could, though, relate to the same type of goods as the retail service. The services are not really in competition (despite the similarity in purpose) but there is a degree of complementarity because an online retailer could make use of the marketplace service to sell its wares, although I do not regard this as the strongest form of complementarity. I consider that there is medium degree of similarity between the services of the earlier marks and those of the applicant in so far as online retail services are concerned. There is only a low degree of similarity with retail services provided by physical means."

13. The Opponent submits that the Hearing Officer erred in failing to take into account three aspects of its evidence: (a) online retailers do in fact make use of a marketplace service such

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<sup>1</sup> The Hearing Officer set out the whole of the specification.

as that offered by the Opponent to sell their wares, (b) features of the Opponent's website replicate features of online retailers and (c) consumers use the services interchangeably.

14. As to (a), it seems to me that the evidence shows that eBay operates an "on-line marketplace for sellers and buyers of goods" within the terms of its trade mark specifications; it is a central aspect of its operation that it is used by retailers to sell their wares, regardless of whether any such retailer has its own on-line presence. That factor was plainly accepted as a possibility by the Hearing Officer in paragraph 25. In my judgment, the evidence upon which the Opponent relies would not have caused him to alter his view that the respective services are complementary to each other, and his failure to refer expressly to this evidence does not suggest that he wrongly failed to take it into account.
15. The specific factors relied upon by the Opponent's in support of its point (b) (such as similarities between the way in which the Opponent and retailers lay out their websites, and Amazon's offer of both its own online retail services and online marketplace services) in my judgment are irrelevant to the assessment of the similarity of the services. The Hearing Officer rightly compared the retail services in the specification of the Mark with the marketplace services of the Opponent's specifications. The fact that the Opponent or other parties may provide further services in addition to or in conjunction with services falling within the specification seems to me to be irrelevant. I do not consider that the Hearing Officer erred in failing to take this evidence into account.
16. The Opponent understandably pointed to the following statement which has at all times, it seems, appeared on the Applicant's website:

"Despite the abundance of various e-commerce websites, few of those sites have what it takes to become truly successful. With a single exception of E-bay, it would be difficult to come up with a more or less decent example of an online platform offering affordable prices and high quality customer service to a wide range of international shoppers. Yet, with the launch of Giftobay.com it seems like the situation might finally change for the better."

The Opponent submitted that this was the clearest evidence of the similarity between the respective services. I do not accept that submission, again because that statement is not related to the services within either party's trade mark specifications.

17. As to point (c), similarly in my view the fact that buyers may use one service in preference to the other does not resolve the question of whether, on a proper comparison of the parties' specifications, the services are directly in competition with each other. In my view, the Hearing Officer was right to consider the services as similar because they are complementary. His view as to the *level* of such similarity is part of a value judgment or multifactorial assessment of the kind identified above, with which an appeal tribunal should be slow to interfere in the absence of error. In this case, it does not seem to me that the Opponent has identified any error in the assessment of the level of similarity arising from such complementarity to justify interference on this appeal.

**(b) Similarity of the marks**

18. In the Grounds of Appeal, the Opponent criticised the Hearing Officer's findings as to the similarities between the marks (set out at paragraphs 37 to 44 of his decision) saying that he had paid only lip service to the established case-law as to the approach to be taken in assessing such similarity. The Hearing Officer set out in the law in uncontroversial terms, which are not criticised by the Opponent, and then said:

“38. 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. I should also say that I accept Ms Razzaq's submission that the reputation of the earlier marks should not be taken into account when assessing the similarity of the marks, although it must be taken into account when considering whether there exists a likelihood of confusion.

...

40. In terms of the overall impressions of the earlier marks, the word EBAY constitutes the only component of the opponent's word marks, so that comprises their overall impressions. In terms of the stylised marks, the words ebay and bay are both stylised. The respective word plays the greater relative role in the overall impression, although the stylisation, with its alternate colouring, is quite striking and, so, this also plays a reasonable role in the overall impression.

41. In terms of the overall impression of the applicant's mark, this comprises the word GIFTOBAY, the device of a bow above the letter “I” and the domain indicator “.com”. Given the relative sizes and distinctiveness, the bow and .com play fairly minor roles, although they are not negligible and thus will not be ignored from the comparison. The

element GIFTOBAY has greatest relative weight. Due to the contrasting colouring of GIFT and OBAY, it will be apparent to the average consumer the word as a whole is based upon those two elements, although, I still consider that the word reads though as a whole. I do not agree with the opponent that this means that OBAY will become the focal point.

42. Conceptually, Mr Roughton referred to the various meanings (such as a body of water) of the word BAY. The BAY earlier mark will clearly be conceptualised on the basis of such a word, regardless of which specific meaning is settled upon. I think the same applies to the earlier EBAY marks. In the context of an e-commerce website, the average consumer is likely to associate the initial letter E with the abbreviation for electronic and, therefore, will break the marks down to E-BAY, with BAY then taking on the meaning of that word. In contrast, the context of the applied for mark is of the element GIFT and OBAY, forming an invented word GIFTOBAY. I see no reason why the average consumer would split the mark down further to GIFT, the letter O and the word BAY. The word GIFTOBAY will be seen as an invented whole, with the only evocation, as Ms Razzaq submitted, being predicated upon the word GIFT. The marks are conceptually different.

43. Aurally, the earlier marks will be articulated as EE-BAY and BAY, respectively. The applied for mark will be articulated as either GIFT-OH-BAY-DOT.COM (if the domain name is articulated) or GIFT-OH-BAY (if it is not). Considering the latter articulation first, in comparison to the earlier marks, it is clear that they have the same final syllable. That final syllable is preceded in the applied for mark and the earlier EBAY marks with a short vowel sound EE/OH, although those sounds themselves are not particularly similar. The applied for mark is noticeably longer containing the extra syllable GIFT. There may be slightly more similarity with the earlier EBAY mark than there is with the BAY earlier mark, but not to any material extent. I consider that both marks are similar to the applied for mark but to only a low degree. If the domain name is articulated in the applied for mark then the degree of aural similarity is even lower

44. Visually, all of the marks contain the word/letters BAY, but the applied for mark is longer on account of the additional word GIFT. The extra/different letter O is another difference. There are also further visual differences on account of the bow and the domain name, although, bearing in mind the assessment I made with regard to the applied for mark's overall impression, I do not place significant weight on this difference. The stylisation of the marks must also be borne in mind, this is something Ms Razzaq strongly highlighted. Three of the earlier marks have the alternate coloured letters as described earlier. This creates a further and quite noticeable visual difference with the

applied for mark which does not share such stylisation and, indeed, has its own contrasting colour scheme. I consider that any visual similarity with the opponent's stylised marks is extremely low. I note, though, that two of the earlier marks are plain words so the difference created by the opponent's stylisation is not in play. In respect of the colouring of the applied for mark, this should not be taken into account in the comparison to the opponent's plain word mark (because the plain word could notionally be used in any colour). Overall, I consider the degree of visual similarity between the applied for mark and the plain EBAY marks to be slightly higher, but it is still only a very low degree."

19. The case law of the Court of Justice cited by the Hearing Officer requires that marks should be assessed as a whole, but the overall impression conveyed to the public may nevertheless be dominated by one or more of a mark's components. The Hearing Officer undertook an analysis of the dominant features of both parties' marks in paragraphs 40 and 41 and held (subject to the point made at paragraph 23 below) that the dominant part of the Mark was the whole invented word GIFTOBAY. The Opponent criticises those paragraphs.
20. The Opponent complains that the Hearing Officer should have found that GIFT and ".com" are not dominant features of the Mark, because they are descriptive elements, meaning that OBAY is the dominant feature of the Mark. It relied upon the highlighting of OBAY by the colour contrast in the Mark and submitted that no reasonable tribunal could have failed to find that the focus of the Mark was OBAY. The Opponent also claimed (somewhat inconsistently) in the Grounds of Appeal that "The marks coincide in their distinctive element, BAY," a point which was not pursued as such in its written submissions on the appeal.
21. I do not agree that the Hearing Officer was wrong to find that GIFT as part of GIFTOBAY could not be distinctive because it is a descriptive word. It may not be a word of high inherent distinctiveness, but GIFT is not descriptive of the advertising or retail services in the specification of the Mark.
22. The Hearing Officer decided at paragraph 41 that the average consumer would distinguish the recognisable word GIFT from the invented element OBAY, but would still read them together as two elements of the longer invented word GIFTOBAY, rather than reading them as two distinct words (one real, one invented). I have considered with care whether the Hearing

Officer gave sufficient weight to the fact that the Mark is applied for with the letters OBAY picked out in bright green, which arguably creates a distinction between the GIFT and OBAY elements of the Mark. I note that he expressly considered the impact of that “highlighting” in paragraph 41 and concluded that it would be apparent to the average consumer that “the word [i.e. GIFTOBAY] as a whole is based upon those two elements.” As he concluded that the word GIFTOBAY would be read as a whole, he expressly rejected the Opponent’s submission that OBAY was the focal point of the Mark.

23. The assessment of the dominant features of a mark is part of a multifactorial, value judgment, with which I should not interfere unless, after anxious consideration, I consider that the Hearing Officer’s conclusions were wrong. It seems to me that the Hearing Officer did take into account the impact of the highlighting of the letters OBAY, and was entitled to find that GIFTOBAY would be read as a whole. On that basis, he was also entitled to find that OBAY was not the sole focal point of the Mark, as the Opponent had contended. Nevertheless, in the light of his acceptance that it would be apparent to the average consumer that GIFTOBAY is based upon two elements, one of which is OBAY, that must be a more nuanced finding than first meets the eye. Indeed, that appears from the Hearing Officer's reasoning in paragraph 42 of the decision, where he refers to "the context" of the Mark being "of the element GIFT and OBAY, forming an invented word GIFTOBAY."
24. The Opponent referred me to another UKIPO decision, BL O/494/16, in which it successfully opposed the registration of the trade mark SOCIALBAY. That application was for services in Class 35 identical to services in the Opponent’s cited earlier marks. In that decision, the Hearing Officer referred to Case T-189/05, *Usinor SA v OHIM*, where the General Court stated that although a mark will normally be perceived as a whole, it may be broken down by consumers into verbal elements which suggest a concrete meaning to them. That comment was especially pertinent in that case, because the mark applied for consisted of the combination of the recognisable words SOCIAL and BAY. It is of doubtful relevance to this case, even if OBAY stands out to the average consumer as one element of GIFTOBAY, because the consumer would not recognise OBAY as a word in its own right, it is meaningless/invented.
25. The question then arises as to what the Hearing Officer considered to be the dominant feature of the Mark. The Opponent suggested that the Hearing Officer made no reference to the dominant and distinctive elements of the Mark, despite his comment in paragraph 41 that

“The element GIFTOBAY has greatest relative weight.” In the circumstances, this seems to have been a finding (even if not expressed quite in these terms) that GIFTOBAY is the dominant element of the Mark. I do not consider that the Hearing Officer can be said to have been wrong in reaching that conclusion, rather than finding that the dominant element was just the invented word OBAY. It seems to me that he was entitled to conclude that the dominant element was GIFTOBAY and in the circumstances, I cannot accept the Opponent’s submission that this conclusion was manifestly incorrect.

26. The Opponent next criticised the Hearing Officer’s assessment of the conceptual similarity of the marks, arguing that no reasonable tribunal could have reached the conclusion that they were conceptually different. The basis upon which this claim is made was, it seemed to me, somewhat confused. In the Grounds of Appeal the Opponent stated first that the Hearing Officer should have concentrated upon OBAY as the focal point of the Mark, and secondly that both marks would be seen with the prefix severed from BAY so that they coincided in “their distinctive element, BAY.” The latter point arose, it seems, from the Hearing Officer’s comment that the ‘e’ of EBAY would be recognised as an abbreviation for electronic. The Opponent suggested that the ‘o’ of OBAY would be treated in the same way, but I see no reason to criticise the Hearing Officer’s view that the consumer would not break down OBAY in that way.
27. The criticism of the assessment of conceptual similarity was based broadly upon the contention that the dominant part of the Mark is OBAY, and it was submitted that comparing “EBAY” to OBAY would have led to a finding of conceptual neutrality. The Hearing Officer considered the conceptual similarity of the marks in paragraph 42. He considered whether the average consumer would (as the Opponent argued) split the Mark into three parts (GIFT, O and BAY), and concluded that the Mark would be seen as a single invented word. He also explained in paragraph 42 that the “e” prefix to the eBay marks would be seen as descriptive of services provided electronically, whilst the word BAY could be given one of a number of dictionary meanings. By contrast, the Hearing Officer considered that for the purposes of assessing conceptual similarity, the only meaningful element of the Mark is the word GIFT, which is not present in the earlier marks. This followed logically, in my judgment, from the Hearing Officer’s findings as to the dominant element of the Mark and his recognition that the average consumer would see the invented word GIFTOBAY as comprising the word GIFT and the invented word OBAY.

28. However, the Hearing Officer did not consider, in paragraph 42, whether any conceptual similarity would arise from his own view that the average consumer would see the invented word GIFTOBAY as comprising the two elements GIFT and OBAY. It seems to me that consistently with his own findings, he should have taken that additional step. The Opponent argued for a finding of conceptual similarity only on the basis that both EBAY and OBAY would be considered shorn of their prefixes, and submitted that had the comparison been made between OBAY and EBAY the conceptual comparison would have been neutral, which I take to mean that there would have been a finding that there was no conceptual similarity between the marks. Hence, even if I am right in thinking that the Hearing Officer should have given more weight to his own view that the OBAY element of GIFTOBAY would be noticed by the average consumer, that would, on the Opponent's case, lead only to conceptual neutrality, not conceptual similarity.
29. Subject to the last point, in my judgment, the Hearing Officer's approach to the assessment of the level of similarity of the marks was not flawed in the ways identified by the Opponent in the Grounds of Appeal.

**(c) Likelihood of confusion**

30. The Opponent submitted that the errors which it alleged the Hearing Officer had made in assessing the elements relevant to the assessment of a likelihood of confusion led him wrongly to reject the opposition based upon sub-section 5(2)(b). It also submitted that the Hearing Officer had not given sufficient weight to the very high degree of distinctiveness of the earlier marks.
31. The Hearing Officer held in paragraph 47 of the decision that
- "The use made of EBAY (both plain and stylised) is compelling. These marks are to be regarded as highly distinctive in relation to services such as its marketplace services. This, though, does not apply to the goods of the earlier Mark which will be advertising services. ... In relation to the BAY earlier mark, whilst I accept that BAY is a recognisable part of the word EBAY, it does not play an independent role and, therefore, I find that BAY alone should not be taken as highly distinctive."

When considering the likelihood of confusion, the Hearing Officer held at paragraph 50:

" ... In terms of direct confusion, notwithstanding the high degree of distinctiveness of the earlier EBAY marks, and whilst I bear in mind the concept of imperfect recollection, I'm satisfied that the differences that exist between the marks are more than sufficient to avoid likelihood of them being mistaken for one another. If there is to be a positive finding under section 5(2)(b) an indirect confusion is the more arguable candidate."

The Hearing Officer cited the decision of Iain Purvis QC sitting as the Appointed Person in BL O/375/10, *L A Sugar*, and went on at paragraph 52:

"Mr Roughton argued that the average consumer would see the applied for mark as, effectively, an extension of EBAY, albeit an arm of the business that focused on gifts, due to the descriptive nature of the word GIFT and the common presence of the word BAY. While I understand the point, this is a case where it is asking too much to assume that the average consumer will come to such a conclusion. Notwithstanding the high degree of distinctiveness of the earlier marks and the concept of imperfect recollection, these factors are outweighed by the low/no levels of oral, visual and conceptual similarity, combined with the fact that the competing services are similar only to a medium level."

32. In the circumstances, it appears that the Hearing Officer took into account the high degree of distinctiveness of the earlier marks. He referred to that point in both paragraphs 50 and 52 as one of the factors to be taken into account in the global appreciation of the likelihood of confusion. Moreover, even if the point which I have discussed at paragraph 28 above had been taken into account, it would not have led to a likelihood of confusion, because the Hearing Officer had factored in low/no levels of conceptual similarity, rather than any conceptual dissimilarity.
33. In my view, there is no error in the assessment of the likelihood of confusion which would entitle me to interfere with it on this appeal.

### **Section 5(3)**

34. The Hearing Officer's findings in relation to the objection under s 5(3) were as follows:

"60. ... I accept that the earlier EBAY marks (both plain word and stylised) have the requisite reputation in respect of, essentially, online marketplace services. It is a particularly strong reputation. ...

...

64. I come to the view that despite the fairly low level of similarity between the marks overall, I consider that the closeness of the respective services, together with the strong

reputation of the earlier mark, will result in the relevant public bringing the EBAY mark(s) to mind when the applicant's mark is encountered. A link will be made."

35. He then went on to consider the claim that the link would lead to the Mark taking unfair advantage of the earlier eBay marks, and set out the law as to the kinds of damage relevant to s 5(3). He referred in particular to paragraphs [80]-[83] of the judgment of Arnold J in *Jack Wills Ltd v House of Fraser (Stores) Ltd* [2014] EWHC 11(Ch), although there appears to be a mistake in the citation which omits the end of paragraph [80] of the judgment. It is particularly helpful to bear in mind the full passage in paragraph [80] of *Jack Wills*, so I set it out in full:

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

36. It is also helpful to consider the more recent comments of Arnold J in *Enterprise Holdings, Inc v Europcar Group UK Ltd* [2015] EWHC 17 (Ch), [2015] F.S.R. 22:

"125 *Unfair advantage*. The Court of Justice described taking unfair advantage of the distinctive character or repute of a trade mark in *L'Oréal SA v Bellure NV* (C-487/07) [2009] E.C.R. I-5185; [2009] E.T.M.R. 55; [2010] R.P.C. 1 at [41] as follows:

"As regards the concept of 'taking unfair advantage of the distinctive character or the repute of the trade mark', also referred to as 'parasitism' or 'free-riding', that concept relates not to the detriment caused to the mark but to the advantage taken by the third party as a result of the use of the identical or similar sign. It covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation."

126 The Court of Justice explained the correct approach to determining whether unfair advantage has been taken of the distinctive character or repute of the trade mark in that case as follows:

“44. In order to determine whether the use of a sign takes unfair advantage of the distinctive character or the repute of the mark, it is necessary to undertake a global assessment, taking into account all factors relevant to the circumstances of the case, which include the strength of the mark’s reputation and the degree of distinctive character of the mark, the degree of similarity between the marks at issue and the nature and degree of proximity of the goods or services concerned. As regards the strength of the reputation and the degree of distinctive character of the mark, the Court has already held that, the stronger that mark’s distinctive character and reputation are, the easier it will be to accept that detriment has been caused to it. It is also clear from the case law that, the more immediately and strongly the mark is brought to mind by the sign, the greater the likelihood that the current or future use of the sign is taking, or will take, unfair advantage of the distinctive character or the repute of the mark or is, or will be, detrimental to them (see, to that effect, *Intel Corporation* at [67]–[69]).

45. In addition, it must be stated that any such global assessment may also take into account, where necessary, the fact that there is a likelihood of dilution or tarnishment of the mark.

...

49. In that regard, where a third party attempts, through the use of a sign similar to a mark with a reputation, to ride on the coat-tails of that mark in order to benefit from its power of attraction, its reputation and its prestige, and to exploit, without paying any financial compensation and without being required to make efforts of his own in that regard, the marketing effort expended by the proprietor of that mark in order to create and maintain the image of that mark, the advantage resulting from such use must be considered to be an advantage that has been unfairly taken of the distinctive character or the repute of that mark.”

127 It is clear both from the wording of art.5(2) of the Directive and art.9(1)(c) of the Regulation and from the case law of the Court of Justice interpreting these provisions that this aspect of the legislation is directed at a particular form of unfair competition. It is also clear from the case law both of the Court of Justice and of the Court of Appeal in this country that the defendant’s conduct is most likely to be regarded as unfair where he intends to take advantage of the reputation and goodwill of the trade mark. Nevertheless, in *Jack Wills Ltd v House of Fraser (Stores) Ltd* [2014] EWHC 110 (Ch); [2014] F.S.R. 39 at [80] I held that there is nothing in the case law to preclude the court from

concluding in an appropriate case that the use of a sign the objective effect of which is to enable the defendant to benefit from the reputation and goodwill of the trade mark amounts to unfair advantage even if it is not proved that the defendant subjectively intended to exploit that reputation and goodwill.”

37. The Hearing Officer’s analysis of unfair advantage was as follows:

“67. There was a discussion at the hearing as to the pertinence of the applicant’s earlier trade mark application (now withdrawn). It looked like this:



68. Mr Roughton submitted that it was appropriate to consider this earlier application in deciding what the applicant’s intentions were with regard to the new application. I accept that it is not inappropriate to bear this earlier application in mind. I also accept that there is a striking degree of visual similarity with the opponent’s stylised EBAY marks, similarity which, in my view, can be no co-incidence.

69. The applicant’s position is that the earlier mark was filed without taking legal advice and that every step has been taken to avoid conflict. However, the applicant does not say why it chose its first mark with a striking degree of similarity to EBAY’s stylised marks. It is therefore not unreasonable to assume that the applicant must have seen some benefit in using a mark so close to that of EBAY’s stylised marks. Further, it is not unreasonable to assume that it may also have seen some benefit in continuing to use GIFTOBAY as part of the re-design, even though the potential for confusion may have been mitigated. However, it does not automatically follow that this equates to an unfair advantage being gained.

70. I asked Mr Roughton about the required image transfer. Most of his answers were based upon the existence of a trust factor. At the start of the hearing Mr Roughton took me to a number of exhibits in the opponent’s evidence. There is evidence that EBAY has a number of fraud prevention mechanisms such as escrow payments and user feedback ratings. I accept that EBAY have been proactive in terms of putting such mechanisms in place. However, the necessity of having such mechanisms is symptomatic of the business model that EBAY operate. It facilitates trade between users of its ecommerce website and, thus, is a type of business model, with the huge number of registered users that it has, which is inherently susceptible to fraudulent activity. Whilst fraud is something that could occur in many fields, the operation of a retail service does not engender such an inherent level of risk. I also asked Mr Roughton if the trust he was referring to was trust

with the users (via the use of the feedback system) or trust in EBAY. He argued that EBAY had a certain standard of conduct in its business dealings and had policy systems in place and that it was this image which may transfer to the applicant. I reject the claim on this basis because I consider it highly improbable that a member of the relevant public, when encountering the applied for mark in relation to the applied for services would i) project an image of trustworthiness upon the applicant because of the slight similarity between the marks and, ii) be more likely to purchase from the applicant's retail services because of that projected image.

71. Reference was made to the applicant being able to benefit from the investment the opponent had made in relation to its mark and that EBAY is a powerful ecommerce website. Clearly EBAY is a powerful site in terms of its success and popularity, something which would have come to fruition on account of the promotional investments it has made. However, this, in and of itself, does not present any tangible characteristic that would transfer to the applied for mark. I note from the pleading that reference is made to prestige, but there is no real evidence showing that the opponent is known, despite it[s] success, as being prestigious. In short, I struggle to see what aspect of EBAY's reputation will transfer to the applicant and, consequently, why the applicant would gain any form of advantage. The best that one can say is that the relevant public, when encountering the applied for mark and then bringing EBAY to mind, may assume that GIFTOBAY is an ecommerce website, as is EBAY; that may have been the full extent of what the applicant was intending, particularly with its second application. However, any real tangible benefit in this is innocuous. It is not even as if there is any evidence showing that GIFTOBAY would appear prominently in web searches for EBAY from which it could have been argued that members of the relevant public would then click upon GIFTOBAY to see what they were offering. In short, the bringing to mind results in nothing other than an intangible association which does not provide the applicant with an unfair advantage."

38. It is clear that the Hearing Officer turned his mind to the question of whether the Applicant intended to benefit from the reputation and goodwill of the earlier marks. The very striking resemblance of the Applicant's original Giftobay mark to eBay's earlier marks led him to conclude that the Applicant had seen some benefit in using that original mark. Indeed, I do not think that any reasonable person would have been likely to come to any other conclusion, especially when taking into account the Opponent's stylised eBay trade marks (as well as some

additional eBay marks, not cited in this opposition, which feature closely similar staggered letters) and the narrative on the Applicant's website which I have set out at paragraph 17 above. Bearing in mind the guidance (such as at paragraph 48 of Case C- 487/07, *L'Oréal v Bellure*) that conduct is most likely to be regarded as unfair where the applicant intends to benefit from the reputation of the earlier mark, it seems to me that if the application to register the original Giftobay mark had been pursued, it would, on opposition, have been refused as liable to take unfair advantage of the Opponent's earlier marks.

39. The Applicant submitted that it had no intention to take unfair advantage by use of the Mark; it had chosen the original mark without the benefit of legal advice, and had made a change with a view to finding an acceptable alternative, which showed it had no intention to take an unfair advantage. It seems that the Hearing Officer did not accept that submission, as he held that it was not unreasonable to assume that the Applicant may also have seen some *similar* benefit in its choice of the *current* Giftobay mark. He pointed out, however, that such an intention does not automatically lead to an unfair advantage being gained.
40. I accept that it would be wrong to hold that a subjective intention to take advantage will automatically lead to an unfair advantage. However, it seems to me that the Hearing Officer's analysis of unfair advantage did not give any weight to the assumption which the Hearing Officer had made about the Applicant's intentions in terms of its hope of obtaining a similar benefit to using its first choice of mark, nor (apparently) to the statement on the Applicant's website which continues to draw an analogy between its on-line retail services and eBay's services. Instead, he suggested that the Applicant may only have wished to suggest (by its reference to eBay) that it too was an e-commerce website. If that is right, it seems to me that it has the consequences discussed in paragraph 48 below. However, I consider that suggestion to be inconsistent with the Hearing Officer's finding that the Applicant maintained an intention similar to that which lay behind its original choice of mark. That intention would not, in my judgment, explain why the Applicant needed to use a mark similar to the eBay marks, or maintain the colour contrast between GIFT and OBAY discussed above. In the light of *L'Oréal v Bellure*, that failure to give weight to the relevant intention on the part of the Applicant was, in my view, an error on his part.
41. The Opponent submitted that the Hearing Officer also erred in his analysis of the benefit to the Applicant of the transfer of image and should have taken into account a wider range of positive characteristics attaching to the reputation of the earlier marks, such as eBay's

reputation as a source of a huge range of goods of every kind and quality at competitive prices, and as a user-friendly, simple and efficient place to purchase goods, offering excellent customer support services of various kinds. Those characteristics, it said, emerged from the unchallenged evidence filed on behalf of Opponent, but also from the Applicant's own identification on its website of eBay as an exceptional example of "an online platform offering affordable prices and high quality customer service."

42. I consider that there is a good deal of force in the Opponent's submissions on this point. The Hearing Officer mainly considered whether the average consumer would project an image of trustworthiness upon the Applicant because of the similarity between the marks, and so would be more likely to purchase from the Applicant. Doubtless he concentrated on that point because (as he said) that was the primary point put forward by counsel for the Opponents at the hearing, but in my view the Opponent is justified in submitting on the appeal that its evidence showed that its reputation related to the other aspects of its business listed above. The Hearing Officer considered whether the earlier marks were "prestigious" and accepted that eBay "is a powerful site in terms of its success and popularity," yet did not consider that its image as a powerful site would be transferred to or confer any benefit upon the Applicant's business. He did not expressly consider whether the Applicant's services might benefit from the reputation of eBay for instance as a marketplace advertising a huge range of products for sale at competitive prices. I have considered whether this is just an example of infelicity of wording, and have after anxious consideration decided that this is a lacuna in the Hearing Officer's reasoning. In the circumstances, I consider that the Hearing Officer was wrong in failing to consider whether the additional aspects of its image listed above might have been transferred to the Applicant which might, as Arnold J put it at paragraph [109] of *Jack Wills*, have enhanced the attractiveness of its services.
43. Moreover, when considering the question of trustworthiness the Hearing Officer suggested that this (although an important aspect of the Opponent's business model) would not be relevant to the operation of a retail service which, he said, "does not engender such an inherent level of risk." It seems to me that upon this point the Hearing Officer erred by failing to distinguish between an online retail business and a bricks and mortar retail business. In my view, the averagely astute consumer is well aware of the risks of purchasing from an online retail business, and knows that the risks of making a purchase online are greater than from a bricks and mortar retail business, even if the risks of using an online marketplace such as eBay

might be thought to be greater still. The element of trust would seem to be especially important for any online retail business.

44. In all the circumstances, there were in my view a number of errors in the Hearing Officer's analysis of the allegation that the Mark would take unfair advantage of the earlier eBay marks, which lead me to conclude that his conclusion on this point was flawed. I must therefore consider the question afresh.
45. The Hearing Officer cited paragraphs [82]-[83] of *Jack Wills*, in which Arnold J referred to the requirement for the unfair advantage to lead to some change in the behaviour of customers as a result of the use of the allegedly infringing sign, or a serious likelihood of such a change. At [42] of Case C-383/12, *Environmental Manufacturing* EU:C:2013:741, [2012] ETMR 54 the CJEU held that this does "not require evidence to be adduced of actual detriment, but also admit[s] the serious risk of such detriment, allowing the use of logical deductions." It is therefore legitimate to draw inferences from the facts and probabilities of the situation. In the light of the findings which he had made as to a lack of transfer of image to the Mark, the Hearing Officer did not consider this point and in particular whether there were any inferences which he could have drawn as to unfair advantage.
46. I must undertake a global appreciation of the question. The relatively low level of similarity of the marks must be balanced against the very high level of distinctiveness of the earlier marks in relation to the eBay online marketplace and the repute of those marks in that context, and the similarity of the online services within the Applicant's specification. The Applicant's apparent intention to benefit from the reputation of the eBay marks, or the objective effect of its acts, is also relevant.
47. In my judgment, the impact of the link found by the Hearing Officer (which must to some extent reflect the Hearing Officer's finding that the manner in which the Mark is presented differentiates OBAY from GIFT) will differ according to the nature of the services in relation to which the Mark is used. Given the nature of the reputation attaching to the eBay marks, the impact will be significantly greater in relation to the Applicant's online retail services than to its retail services when provided by physical means, and lower still in relation to its advertising services. As to online retail services, there was no evidence of advantage being taken, because, as the Hearing Officer pointed out, the Applicant's business was on a very small scale at the relevant date. However, in my judgment, it is logical to deduce that there will be a transfer of

image effected by the use of the Mark in relation to such services and equally logical to deduce that this will confer an advantage on the Applicant. I do not consider that the same conclusion flows in relation to other retail services or advertising services.

48. I agree with the Hearing Officer that bringing eBay to mind might lead consumers to assume that Giftobay.com was also an e-commerce website, and moreover one which offered a wide range of wares, especially given the enormously varied range of goods the subject of the services in the specification of the Mark. This would in my view amount to a transfer of image, which would not be “innocuous” as the Hearing Officer suggested, but would give an advantage to the Applicant. In my judgment, the transfer to the Applicant of the image of the success and popularity of eBay would confer an advantage upon it, by making its services more attractive to consumers knowing of the Opponent’s well-established services and repute. Logically, one can deduce that the image would be transferred of the beneficial attributes described above. On the other hand, I cannot see how there would be any real risk of any such transfer of image where the Mark was used for advertising services or “physical” retail services.
49. I conclude that in all the circumstances, normal commercial use of the Mark in relation to online retail services carries a non-hypothetical risk that in the future it would take unfair advantage of the earlier marks and their reputation. This would provide the Applicant with a commercial advantage and it would “ride on the coat-tails” of eBay. It has no due cause to use the Mark, but would be benefiting from the reputation of the earlier marks without expending the money necessary to create a market for its services in the UK. It would thus be likely to take unfair advantage of the repute of the earlier marks.
50. I do not consider that the arguments based upon detriment to the repute of the eBay marks or upon dilution affect the remaining parts of the Applicant’s specification, as all of the Opponent’s submissions in this regard again relate only to its online retail services.
51. For all these reasons, I conclude that the appeal should succeed in part. The opposition succeeds in respect of the Applicant’s retail services when provided electronically or via the internet. I will consider the parties’ submissions as to the appropriate form of wording of an alternative specification. The Applicant may provide me with its proposals by 5 pm on 13 February 2017. The Opponent may reply by 5 pm on 27 February 2017.

52. The Opponent has had a fair measure of success on the appeal. I consider that the appropriate order as to costs would be for the Applicant to pay the Opponent £1000 as a contribution towards its scale costs below, together with the sum of £750 in respect of the appeal. The total of £1750 is to be paid by 5 pm on 13 February 2017.

Amanda Michaels  
The Appointed Person  
27 January 2017

## Appendix A

### **Giftobay's specification**

#### **Class 35**

Advertising services provided via the Internet; retail services connected with the sale of household items namely kitchen appliances, cutlery, dishes, bedroom accessories namely lamps, ornaments, bathroom accessories namely towels, towel rails, toothbrush holders, soap dispensers, toilet roll holders, candle holders, blankets, sheets, decorative fruit and vegetables, tin boxes, jars, bookends, cookware, utensils, bar stools, stationery, gift wrap, cards, fashion items namely men's clothes, women's clothes, children's clothes, underwear, fashion accessories namely handbags, watches, shoes, health and beauty products namely bath and body products, make up items, hair styling products, nail care products, professional salon and spa equipment, dietary and nutritional products, mobile phones, mobile phone accessories, cameras, photo equipment computers tablets, car electronics namely GPS Systems, video and console games, sporting goods and equipment for cycling, hunting, golf, fitness and exercise, fishing, arts and collectibles namely silver utensils, antique furniture, collectible books, clocks, lamps, vases, ceramics and porcelain, pictures and frames, mirrors, figurines, mugs, trinket boxes, tools, heating systems, home security systems, plumbing items, door handles, circuit breakers and fuse boxes, garden and outdoor products namely products for pools and spas, garden and patio furniture, outdoor power equipment namely lawnmowers, chainsaws, pressure washers, fertilizers.

## Appendix B

### **eBay's specifications (to the extent relied upon in the opposition):**

#### 1) UK TM 2185144: EBAY

The mark was filed on 22 December 1998 and registered on 8 December 2000.

Class 35:

Advertising services; providing online, interactive bulletin board for the posting, promotion, sale and resale of items via a global computer network.

#### 2) EUTM 1029198: EBAY

The mark was filed on 24 December 1998 and registered on 22 June 2000.

Class 35:

Advertising services; online trading services.



#### 3) UK TM 2642722

The mark was filed on 19 November 2012 and registered on 22 February 2013.

Class 14:

Clocks; watches; jewellery.

Class 16:

Publications, namely, a series of nonfiction books, concerning hobbies, collectibles, auctions, and a wide variety of products relating to antiques, art, literature, culture, technology, travel, sports, entertainment, home furnishings, garden items, musical instruments, motor vehicles, toys and games, fashion, jewellery, electronics, photography, holiday related items, film and video; paper and stationery items, namely, greeting cards, memorandum boards, memo pads, paper postcards, stationery, pens and pencils; bumper stickers, calendars, decorative stickers and decals.

Class 25:

Clothing, namely, t-shirts, sweatshirts; caps; jackets; and visors.

Class 28:

Christmas tree ornaments; soft sculpture toys; plush toys; toy miniature cars; bean bag toys; playing cards.

Class 35:

On-line trading services, namely, operating on-line marketplaces for sellers and buyers of goods and services; online trading services in which sellers post products or services to be offered for sale and purchasing or bidding is done via the Internet in order to facilitate the sale of goods and services by others via a computer network; providing evaluative feedback and ratings of sellers' goods and services, the value and prices of sellers' goods and services, buyers' and sellers' performance, delivery, and overall trading experience in connection therewith; providing a searchable online advertising guide featuring the goods and services of online vendors; providing a searchable online evaluation database for buyers and sellers; advertising and advertisement services; business services, namely, providing a website that gives users the ability to create customized web pages featuring user-defined information in the field of intellectual property rights and intellectual property enforcement policies, in order to assist program participants with inquiries and requests regarding use of intellectual property by others in an online marketplace.



4) EUTM 11576865

The mark was filed on 15 February 2013 and registered on 20 August 2013.

Class 9:

Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment, computers; computer software; fire-extinguishing apparatus; Mouse pads; computer e-commerce software to allow users to conduct electronic business transactions in online marketplaces via a global computer network; computer database software featuring information in the field of hobbies, collectibles and a wide variety of products; computer software and software development tools for use in developing further software and software applications in the field of e-commerce.

Class 14:

Precious metals and their alloys and goods in precious metals or coated therewith, not included in other classes; jewellery, precious stones; horological and chronometric instruments; Clocks; watches; jewellery.

Class 16:

Paper, cardboard and goods made from these materials, not included in other classes; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers' type; printing blocks; Publications, namely, a series of nonfiction books concerning hobbies, collectibles, auctions, and a wide variety of products relating to antiques, art, literature, culture, technology, travel, sports, entertainment, home furnishings, garden items, musical instruments, motor vehicles, toys and games, fashion, jewelry, electronics, photography, holiday related items, film and video; paper and stationery items, namely, greeting cards, memorandum boards, memo pads, paper postcards, stationery, pens and pencils; bumper stickers, calendars, decorative stickers and decals.

Class 18:

Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas and parasols; walking sticks; whips, harness and saddlery; Duffel bags, tote bags, backpacks and briefcases.

Class 20:

Furniture, mirrors, picture frames; goods (not included in other classes) of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials, or of plastics; Plastic key chain tags; plastic novelty license plate frames.

Class 21:

Household or kitchen utensils and containers; combs and sponges; brushes (except paint brushes); brush-making materials; articles for cleaning purposes; steelwool; unworked or semi-worked glass (except glass used in building); glassware, porcelain and earthenware not included in other classes; Mugs; tumblers; water bottles sold empty; lunch boxes; dispensers for candy.

Class 25:

Clothing, footwear, headgear; Clothing, namely, t-shirts, sweatshirts; caps; jackets; and visors.

Class 28:

Games and playthings; gymnastic and sporting articles not included in other classes; Christmas tree ornaments; soft sculpture toys; plush toys; toy miniature cars; bean bag toys; playing cards.

Class 35:

Advertising; business management; business administration; office functions; On-line trading services, namely, operating on-line marketplaces for sellers and buyers of goods and services; online trading services in which sellers post products or services to be offered for sale and purchasing or bidding is done via the Internet in order to facilitate the sale of goods and services by others via a computer network; providing evaluative feedback and ratings of sellers' goods and services, the value and prices of sellers' goods and services, buyers' and sellers' performance, delivery, and overall trading experience in connection therewith; providing a searchable online advertising guide featuring the goods and services of online vendors; providing a searchable online evaluation database for buyers and sellers; advertising and advertisement services

5) EUTM 12995833 for the mark  :

The mark was filed on 13 June 2014 and registered on 30 October 2014.

Class 35:

Online trading services, namely, operating online marketplaces for sellers and buyers of goods and services; online trading services in which sellers post products or services to be offered for sale, and purchasing or bidding is done via the Internet in order to facilitate the sale of goods and services by others via a computer network; providing evaluative feedback and ratings of sellers' goods and services, the value and prices of sellers' goods and services, buyers' and sellers' performance, delivery, and overall trading experience in connection therewith; providing a searchable online advertising guide featuring the goods and services of online vendors; providing a searchable online evaluation database for buyers and sellers; advertising and advertisement services; business services in the nature of intellectual property claims management, namely, processing and administration of claims of intellectual property owners against third party sellers; identification verification services, namely, confirming authenticity of environmentally friendly products, producers and sellers for the purposes of helping consumers make informed purchasing decisions