

O-489-14

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2656157
IN THE NAME OF ALBERT GRAHAM
OF THE TRADE MARK**

iFoneYou

IN CLASS 38

**AND
THE OPPOSITION THERETO
UNDER NO 400612
BY
APPLE INC.**

Background and the pleadings

1. Apple Inc. (“Apple”) opposes the application by Albert Graham to register, under number 2656157, the trade mark iFoneYou in class 38 for *communications services provided online from a global computer network or the internet*. The application was filed on 14 March 2013 and was published for opposition purposes in the *Trade Marks Journal* on 26 April 2013.

2. Apple opposes on the basis that registration of the mark would be contrary to sections 5(2)(b), 5(3), 5(4)(a) and section 56 of the Trade Marks Act 1994 (“the Act”).

3. To support its grounds under sections 5(2)(b) and 5(3) of the Act, Apple relies upon two earlier trade mark registrations. I have set out the full details of the earlier marks in Annex 1 to this decision. Apple relies upon all of its goods and services under section 5(2)(b). I have reproduced in Annex 2 the lengthy list of goods and services relied upon for sections 5(3) and 5(4)(a). A summary of the registrations relied upon is as follows:

Mark	Number	Registration date ¹	Classes
IPHONE	UK registration 2460664	22 July 2011	9, 16, 25, 35, 38, 39 & 41
IPHONE	International registration designating the EU 01071173	17 February 2012	35 & 38

4. Apple claims that there is a likelihood of confusion under section 5(2)(b) of the Act because of the similarities between the parties’ marks and the identity or similarity of the goods and services. Apple also relies upon the enhanced distinctive character of its marks as an additional factor pointing towards a likelihood of confusion.

5. Under section 5(3) of the Act, Apple claims that Mr Graham will benefit from Apple’s investment in its marks and its reputation for cutting edge technology, leading to advantage, without any investment, for Mr Graham in using his mark. Apple claims that the application will benefit from the “extraordinary level of fame and consumer recognition” of the earlier marks. Apple claims that use, over time, of the application will dilute the distinctiveness of the earlier marks which are only associated with Apple. Further, Apple claims that it has a reputation for producing very high quality products and if the services of the application were inferior, this would reduce the degree of value vested in Apple’s products.

6. For its section 5(4)(a) ground, Apple relies upon the use which it has made of its sign IPHONE in the UK since 9 January 2007. Use of iFoneYou would therefore be a misrepresentation to the public and result in damage to the goodwill which Apple owns in IPHONE.

¹ The date of completion of the registration procedure.

7. Apple also claims that its earlier marks are entitled to protection as well-known trade marks under the provisions of section 56 of the Act.

8. Mr Graham filed a counterstatement in which he states:

- iFoneYou is an imaginative play on communications between two people using any existing telephones.
- iFoneYou is suggestive, conveying the meaning 'I will telephone you'.
- Fone is fanciful, being slang for telephone. The incorrect spelling will be immediately recognised.
- Apple cannot claim exclusivity in the prefix 'i'. If it is removed, the marks are PHONE vs. FoneYou, which are clearly different.
- The specialised services offered by iFoneYou are unique. They are not in competition with Apple's goods because consumers are required already to have an existing telephone as a method of using iFoneYou services, "which may indeed include the opponent's "goods" and in that sense the iFoneYou "services" are complementary."

9. Apple is represented by a firm of trade mark attorneys, whilst Mr Graham is self-represented. Both sides filed evidence. Apple filed very lengthy written submissions during the evidence rounds which amounted to forty-five pages. On page 11 of the written submissions was a submission that Mr Graham's mark is descriptive and should be refused under section 3(1)(c) of the Act. There was no request to amend pleadings. The matter came to be heard before me on 21 October 2014 at a hearing held by video conference at which Apple was represented by Mr Paolo Cerroni, of Edwards Wildman Palmer LLP, Apple's trade mark attorneys. Mr Graham chose not to attend the hearing, but filed written submissions in lieu of attendance. When I raised the issue of Apple's section 3(1)(c) submission at the hearing, Mr Cerroni did not press for the ground to be added. It is unsatisfactory to raise such an issue as a submission, especially buried within a lengthy document when the other party is unrepresented.

Apple's reputation in IPHONE

10. The fame and recognition attached to Apple's iPhone, as a mobile telephone, is enormous. I take that to be a notorious fact. Apple has filed evidence in these proceedings to support its grounds, including a reputation in an extremely lengthy list of goods and services. Included in the evidence is content relating to Apple. It is important to bear in mind that I am looking at evidence relating to IPHONE, not to the fame of Apple in all of its business areas. Consequently, I will give a flavour of the evidence and pick out particular aspects which are relevant to the issues which I have to decide. Use of iPhone is covered by the registrations in block capitals of IPHONE because word marks protect the words registered, irrespective of format, as per the comments of Mr Iain Purvis QC, sitting as the Appointed Person in *Groupeement Des Cartes Bancaires v China Construction Bank Corporation*, case BL O/281/14:

“It is well established that a ‘word mark’ protects the word itself, not simply the word presented in the particular font or capitalization which appears in the Register of Trade Marks. See for example Present-Service Ullrich GmbH & Co. KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-66/11 at [57]. A word may therefore be presented in a different way (for example a different font, capitals as opposed to small letters, or hand-writing as opposed to print) from that which appears in the Register whilst remaining ‘identical’ to the registered mark.”

11. Apple’s evidence comes from Thomas R La Perle, a director in Apple’s legal department, by way of a witness statement dated 20 Dec 2013, and twenty-seven exhibits.

- At 14 September 2012, Apple had a market value of over \$651 billion and the iPhone represented about half of Apple’s total net sales. A “significant number of these sales were made to consumers in the UK”.
- The first iPhone device was announced on 9 January 2007, released in the US on 29 June 2007, one million had been sold by 9 September 2007 and it was released in the UK on 9 November 2007. The back of the first iPhone, and all subsequent ‘generations’ of the iPhone, includes the mark iPhone.
- In 2008, the iPhone 3G device was launched, available in the UK. This generation included software for the newly introduced App Store. This phone was highly anticipated and demand was huge. Within three days, one million iPhone 3GS mobile phones had been sold.
- In 2010, the iPhone 4 was launched, including in the UK, and had sold 1.4 million within three days (worldwide).
- In 2011, the iPhone 4S, available in the UK, had sold 4 million units within three days of launch.
- In 2012, two million iPhone 5 devices were sold within 24 hours of launch, more than double the amount sold in the first 24 hours of the iPhone 4 launch. This device was available in the UK.
- In 2013, the iPhone 5S and 5C were launched, including in the UK, topping sales of 9 million within three days.
- In 2011, Apple became the world’s biggest smartphone vendor, with a 23.8% share of the worldwide market (unit sales equivalent of 35.5 million iPhone devices).
- European sales of the iPhone 5 in the first quarter of 2013 represent about a quarter of Apple’s total net sales 2013.

- A selection of press articles in Exhibit TLP-14 discuss the huge success and recognition of the iPhone device, e.g.

From ITN on 24 September 2012, “Technology giant Apple is expected to unveil the iPhone 5 on Wednesday night. The company is hosting a “special event” which usually involves Apple executives unveiling new products to a specially invited audience at their California base. Invites including the line “it’s almost here” have been sent out to UK journalists to watch the launch by videolink live at a central London occasion.”

From the *Coventry Telegraph*, on 22 September 2012, “Eager shoppers in Coventry and Warwickshire queued up yesterday to get their hands on the new iPhone 5. Mobile phone stores in Coventry city centre sold out of the smartphone which went on sale across Europe, America, Asia and Australia...One sales assistant said ‘We had an even bigger reaction from people with this phone than when the iPhone 4 came out.’”

From *The Telegraph*, on 22 September 2012, “Oh look, shiny, shiny! The new iPhone 5 has just been launched and it’s like Tracey Island hysteria all over again, except that this must-have toy is for grown-up kids. There were two million pre-orders, some people were paid by friends to queue for four days outside the Apple shop in central London to get hold of the phones, which were rationed to two per customer.”

From *MailOnline*, on 21 September 2012, “From London to Sydney, they had waited patiently for hours – with many camping out for days decking specially made outfits. But at 8am in each of their countries, the vigil was finally over for Apple fans today as the iPhone 5 went on sale around the world...One research firm claimed the iPhone5 queue to be the biggest in Apple’s history – with 1,297 people queuing outside the gadget maker’s flagship Regent Street store...The hundreds of die-hard Apple fans had swollen into huge queues of hundreds by the early hours of Friday morning, as excitement reached fever pitch hours before the release of the updated handset....Harry Newton, 18, who is sixth from the front of the queue outside the Apple store in Regent Street, will spend £600 on Friday morning on the 32GB iPhone 5. He said: “There’s a great community spirit here. I know several of the people here from previous Apple launches.”

From the *i (Independent)*, on 20 September 2012, “It is becoming an annual event. Queues were already beginning to form outside one of the world’s biggest Apple stores in London’s Covent Garden yesterday, ahead of tomorrow’s new iPhone 5 launch.”

- An article in *The Guardian* on 13 September 2013 refers to updated software in the iPhone 5 which “uses cloud computing so that viewing paused on one device can be resumed at the same point on another”.

- An article in *The Independent*, on 2 September 2013, says that the iPhone 5 was the first 4G mobile to go on sale in the UK. The same article describes the voice recognition program called Siri which responds to questions asking it to find e.g. restaurants and shops in the UK. An Apple press release from 2011 describes Siri like this:

“Siri understands context allowing you to speak naturally when you ask it questions, for example, if you ask “Will I need an umbrella this weekend?” it understands you are looking for a weather forecast...Siri helps you make calls, send text messages or email, schedule meetings and reminders, make notes, search the internet, find local businesses, get directions and more”.

- An article in the *Western Mail*, dated 31 July 2009, says “Smartphones, in particular the iPhone, are being marketed around an ability to record video, take pictures, surf the web and do computer-like things. The iPhone design appears to have cast a spell over the British mobile phone-buying public”.
- Press information from Apple, dating from 2010, refers to an iPhone function called FaceTime, which is a way of video calling over Wi-Fi. “Using FaceTime is as easy as making a regular voice call, with no set up required...”.
- Press information from Apple, dating from 2011, refers to the iCloud: “a breakthrough set of free cloud services, including iTunes in the Cloud, Photo Stream and Documents in the Cloud, that work seamlessly with your iPhone, iPad, iPod touch, Mac or PC to automatically and wirelessly store your content in iCloud and push it to all your devices.”
- Exhibit TLP-23 contains a number of prints from various ‘brand rankings’. The iPhone brand was number two in Cool Brands (Aston Martin was top) in 2008/09. It was top by the following year (Aston Martin was in second place). This appears to be a UK publication as it includes rankings for BBC iPlayer, Channel 4 and the Tate Modern, and *The Sun* reported the findings on 28 September 2009.
- An article in *Music Week* from October 2009 reports that O2 had more than 1 million iPhone customers in the UK at that time.

Mr Graham’s evidence

12. Mr Graham has provided a witness statement dated 22 April 2014. He refers to the ‘fair use of the letter i’ and refutes the idea that the prefix i is associated with Apple. To support his argument, Mr Graham exhibits a decision dated 23 February 2010 by the Australian Trade Marks Office in which it rejected an opposition by Apple, based on its various IPOD-based marks, to an application for the mark



13. Mr Graham quotes from the Australian decision:

“However, given the obvious differences between the parties’ marks when considered as wholes, the fact that it is common for traders in relevant goods

to feature the letter “i” in their trade marks and the lack of evidence of actual confusion, I am not satisfied use of the Trade Mark for any of the Goods would be likely to deceive, or cause confusion, amongst, a significant number of consumers.”

14. Mr Graham says if the i is removed from his mark and IPHONE, what remains is PHONE vs. FoneYou and that the differences are significant. He provides an exhibit entitled ‘Fone’ in which he states that PHONE is not exclusive to Apple, but is part of many generic words, such as telephone, headphone, megaphone and smartphone. PHONE cannot be afforded protection because it is a generic word and is descriptive of the goods supplied by Apple under IPHONE. Contrastingly, Mr Graham states that FONE is not a generic word, but is made-up and not descriptive of his services. He states that Apple’s claim that FONE sounds like PHONE and implying infringement of its non-existent prior rights (in PHONE) is abuse of generic words.

15. Mr Graham’s final exhibit is “to demonstrate the distinctiveness and relevance” of the word You in his mark. He says iFoneYou is imaginative play and is suggestive of the meaning “I Will Telephone You”. Mr Graham registered his mark as a domain name along with YouFoneMe, as he was undecided which one to use as a trade mark. The point he makes is that conceptually his mark consists of two ‘parties’ (first person and second person). The ‘You’ part is an essential element of his mark. This is a reference to Apple’s submission that You does not add distinctiveness.

Section 5(2)(b) of the Act

16. Section 5(2) (b) states:

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

(a) ...

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

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

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

The principles

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

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

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

18. Apple relies upon all of the goods and services of its registrations under section 5(2)(b), reproduced in Annex 1 to this decision. Apple does not have to prove use of the goods and services covered by its earlier marks as they had been registered for less than five years on the date on which Mr Graham's application was published. This means that Apple can rely on all its registered goods and services.

19. Mr Graham's services are:

Class 38: Communications services provided online from a global computer network or the internet.

Amongst the list of goods and services covered by Apple's registrations, are these services, included in the class 38 specifications:

International Registration (EU) 1071173:

Communication by computer; provision of telecommunications connections to computer databases and the Internet.

UK 2460664:

Communication and telecommunication services; communications by computer; communication between computers; electronic sending of data and documentation via the Internet or other databases; providing access to web sites on the Internet; communication by computer, computer intercommunication; provision of telecommunications access and links to computer databases and the Internet; provision of telecommunications connections to electronic communication networks, for transmission or reception of audio, video or multimedia content; provision of telecommunications connections to the Internet or computer databases.

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

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

All of Apple's registered services listed above cover, or are covered by, Mr Graham's services. They are therefore identical.

21. I will also make a comparison between certain Class 9 goods covered by Apple's registrations and Mr Graham's services. These are:

Apple	Mr Graham
(UK 2460664) <i>Handheld and mobile digital electronic devices for the sending and receiving of telephone calls, faxes, electronic mail, video, instant messaging, music, audiovisual and other multimedia works, and other digital data; computer</i>	<i>Communication by computer; provision of telecommunications connections to computer databases and the Internet.</i>

<i>programs for accessing, browsing and searching online databases; computer hardware and software for providing integrated telephone communication with computerized global information networks.</i>	
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22. In comparing the respective specifications, all relevant factors should be considered, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* 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.”

23. 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.

24. ‘Complementary’ was defined by the General Court (“GC”) in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-325/06:

“82 It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking...”

In *Sanco SA v OHIM*, Case T-249/11, the General Court indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted, sitting as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited*, BL O/255/13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.”

Whilst on the other hand:

“.....it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.

25. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J said:

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

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

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

27. *Apple's handheld and mobile digital electronic devices for the sending and receiving of telephone calls, faxes, electronic mail, video, instant messaging, music, audiovisual and other multimedia works, and other digital data* includes smartphones. Smartphones are much more than simply devices for making phone calls – they are mini-computers. As Apple's evidence shows, the iPhone has functionality (which it calls FaceTime) which enables users to make video calls over wireless networks. This function is covered by Apple's *computer hardware and software for providing integrated telephone communication with computerized global information networks*. These goods are highly complementary to Mr Graham's services, which he states use telephones. Mr Graham states in his counterstatement that phones and his services are complementary. Although the nature and method of use of the goods and services differ, they are complementary. They may also share channels of trade; e.g. the communications service being accessed from the same trade source as the application software enabling the communication itself (such as FaceTime). The relevant public are liable to believe that responsibility for the goods and services lies with the same undertaking or with economically connected undertakings. There is a good deal of similarity between Mr Graham's services and Apple's class 9 goods which I have listed in the table.

Average consumer

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

29. 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.”

30. In *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06, the CJEU stated at paragraph 66 of its judgment that when assessing the likelihood of confusion under Section 5(2) it is necessary to consider all the circumstances in which the mark applied for might be used if it were registered. This means that because both parties' specifications cover wide terms, the average consumer may be both the general public and a more professional public. Services of both ordinary and higher cost are included notionally in the specifications and there will be a commensurate degree of attention paid depending upon the cost and complexity of the goods or services purchased by the average consumer. The purchasing process is likely to be visual (e.g. by way of a website or a high street telecommunications shop), but I do not discount the potential for oral use and aural perception of the marks during purchase.

Comparison of the marks

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

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

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.

32. The parties' marks are:

Apple	Mr Graham
IPHONE	iFoneYou

33. Apple's single word mark consists of two syllables, one of which is clearly recognisable as the word PHONE. Visually, there is a low degree of similarity: the first letter is I in each mark, but the only other similar element is the letters ONE, which are subsumed within the middle of Mr Graham's mark. Aurally, there is a good degree of similarity: IPHONE and iFone are aurally identical and the different aural element, You, comes at the end of the application, so is heard last.

34. Apple's mark has the potential to signify a phone codified by an I which means interactive or internet. However, it also could mean the first person singular making a phone call: "I phone...". In this scenario, the marks have a good degree of conceptual similarity: both convey the meaning of the first person singular making a phone call. The additional meaning that 'I' phone 'you' in Mr Graham's mark does not detract from the fact that both marks signify the making of a phone call by the first person. Mr Graham submits that FONE is invented; he also says it is slang. It is a common way deliberately to misspell PHONE, as in text speak or informal language. It would be clearly perceived as meaning PHONE.

35. The relative weight of the components of the marks is affected by the conceptual meaning: the three components of Mr Graham's mark are equally weighted because the mark, although conjoined, forms a sentence, which is the overall impression created by his mark. In IPHONE, the sentence structure is incomplete and the more dominant, recognisable part of the mark is the word PHONE. That said, whilst the overall impression of IPHONE is of a single word, there will also be recognition of the letter I as an addition to the word PHONE.

Distinctive character of IPHONE

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

"22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined

Cases 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).”

37. I asked Mr Cerroni about where he considered the reputation in IPHONE to lie. He replied:

“...obviously the phone device would fall in class 9 itself, but additionally class 38 contains telecommunication services, which is the whole reason why anyone would ever buy an iPhone, and it has a number of communication services not only calling people, but also sending messages, using the internet to send e-mails, more or less any form of communication, especially electronic or digital, any modern day communication. The reason the reputation claimed for iPhone is so big is because the whole point and the way the product has been designed and marketed is that it is trying to do more or less everything. What made the iPhone significant was the use of apps. It was one of the first phones to start using apps, which essentially made it a platform to allow it to do almost anything. We have reference in the witness statement to collaboration with Nike. Then this enabled the iPhone device to become a tool to assist exercising, health and fitness. There are obviously lots of social media apps. You can use your iPhone as a fundamental part of social networking. There are applications both used by Apple and also third parties that makes the iPhone device a huge platform for advertising, so services in class 35. What we tried to do in the witness statement is cover the key services and the goods where the iPhone is used and known. It is quite vast. We have collaboration with the leading motor vehicle manufacturers, the leading airlines, as I mentioned, sports companies, advertising. Perhaps if there is anything fundamental to this case that we might not have covered, we can go and look at that particular part of the declaration or the evidence. The reputation is vast because the iPhone is essentially trying to be one device in some ways that a consumer can use for everything.”

38. The clear picture from the evidence is that the fame of the iPhone has grown to iconic proportions. It is a household name in respect of smartphones, and a very desirable brand. There is a tremendous amount of hype surrounding the release of each new generation of iPhone and some members of the public who buy iPhones appear to be so loyal to them that they are prepared to endure lengthy queues to be amongst the first to procure a new iPhone. It has become a fashion icon; iPhone owners appear to feel that they must upgrade to each new generation. Its vast use and enormous fame as a trade mark has made the IPHONE (iPhone) one of the most famous/distinctive marks in the world.

39. I also think that the peculiar and unique nature of the iPhone phenomenon is that the reputation which iPhone has includes recognition of the iPhone as a game-

changer in relation to developing 'smartphone' technology. It has an aura of modernity.

Likelihood of confusion

40. Deciding whether there is a likelihood of confusion is not scientific; it is a matter of considering all the factors, weighing them and looking at their combined effect, in accordance with the principles from the EU courts, listed above in paragraph 17.

41. One of those principles states that a lesser degree of similarity between the goods and services may be offset by a greater degree of similarity between the trade marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*). I have found that the goods and services range from being identical to having a good deal of similarity.

41. A further principle states that there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it (*Sabel BV v Puma AG*). There is no question that IPHONE is highly distinctive of mobile/smart phone devices because of the use which has been made of it. It has achieved recognition at all levels of society; it is iconic. As a brand, it is unique. Through its functionality, e.g. FaceTime, it provides the mechanism for communications, even though IPHONE is not used as a mark to provide conventional calling credit in the same way as more obvious mobile phone telecommunication providers such as Vodafone and O2. The evidence shows that there was, in fact, a close link between the iPhone and the new 4G network in that, at first, consumers had to purchase the iPhone from O2 to be able to use 4G telecommunications. In the converging telecommunications market, whereby devices such as the iPhone perform all manner of functions (such as video calling (FaceTime), the Siri Assistant function, data streaming, TV etc), the particular reputation for cutting-edge telecommunications technology which Apple has in the IPHONE/iPhone device spills over to a degree into mobile telecommunications. Primarily, though, the huge reputation lies in the smartphone, the iPhone.

42. Apple's reputation in its mark lies in its use of a lower case letter 'i', with the first letter of the next word (P) presented in upper case. The mark, represented as iPhone, has become associated in the mind of a significant portion of the public. Mr Graham's mark takes the same format: a lower case 'i' followed by a word beginning with an upper case letter (F). This same pattern, combined with the fact that the word appearing after the lower case letter i is conceptually identical (PHONE and FONE), is a factor in assessing the likelihood of confusion. It is not about whether Apple has 'monopolised' the letter i. The Australian decision does not assist because the comparison of the marks as wholes (where the i appeared at the end of the application) revealed differences which pointed away from confusion. The enormous reputation in Apple's mark, the proximity of the parties' goods and services to one another and the similarities between the marks, which are greater at aural and particularly conceptual level, combine to create the impression that Mr Graham's services are connected with goods and services provided under the mark IPHONE. The different spelling of PHONE and FONE will not counteract such an impression, given that FONE is a common way to spell PHONE. The confusion will be of the sort sometimes called 'indirect', whereby the marks are not confused

directly with one another, but the various similarities (and the reputation of the earlier mark in this case) combine to cause the average consumer to believe that the goods and services derive from companies which are linked economically; alternatively, that the iFoneYou denotes an extension to the IPHONE (iPhone) brand, such as a particular internet communications function which is accessed through the iPhone. Direct or indirect confusion means that there is a likelihood of confusion: if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*). Indirect confusion was explained by Mr Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

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

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

43. There is a likelihood of confusion. The opposition succeeds in full under section 5(2)(b) of the Act.

Section 5(3) of the Act

44. Section 5(3) states:

“(3) A trade mark which-
(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark or international trade mark (EC), in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

45. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Addidas-Salomon*, [2004] ETMR 10 and Case C-487/07, *L’Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark’s reputation and distinctiveness; *Intel*, paragraph 42

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark’s ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious likelihood that this will happen in future; *Intel*, paragraphs 76 and 77.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure*).

46. The conditions of section 5(3) are cumulative. Firstly, Apple must satisfy me that its earlier marks have achieved a level of knowledge/reputation amongst a significant part of the public. Secondly, it must establish that the level of reputation and the alleged similarities between the marks will cause the public to make a link between IPHONE and iFoneYou, when used in respect of the parties' goods and services, in the sense of the earlier mark being brought to mind by the later mark. Thirdly, assuming that the first and second conditions have been met, section 5(3) requires that one or more of three types of damage will occur. These are, within the context of Apple's claims:

(i) that iFoneYou will erode or 'dilute' the distinctiveness of IPHONE so that the latter's capacity to act as a sign of trade origin will be diminished (detriment to the distinctive character of the earlier mark);

(ii) that Apple will lose custom because its mark will be 'tarnished', because Mr Graham's services may be of inferior quality. There will be a negative impact on the image of Apple's mark (detriment to the repute of the earlier mark);

(iii) that Mr Graham will find it easier to sell his services because of the link made with IPHONE, thereby riding on the coat tails of Apple's promotional efforts and the power, reputation and prestige of IPHONE (the later mark will take unfair advantage of the distinctive character or repute of the earlier mark.)

47. If any one of these three types of damage is proven by Apple, the section 5(3) ground of opposition will be successful unless, notwithstanding the damage, Mr

Graham shows that he has “due cause”, which is a compelling business reason to use his mark. There has been no suggestion of “due cause” in these proceedings.

48. The level of reputation necessary for a section 5(3) ground was described by the Court of Justice of the European Communities (“CJEU”) in *General Motors Corporation v Yplon SA* [1999] E.T.M.R. 950:

“23. ... In so far as Article 5(2) of the Directive, unlike Article 5(1), protects trade marks registered for non-similar products or services, its first condition implies a certain degree of knowledge of the earlier trade mark among the public. It is only where there is a sufficient degree of knowledge of that mark that the public, when confronted by the later trade mark, may possibly make an association between the two trade marks, even when used for non-similar products or services, and that the earlier trade mark may consequently be damaged.

24. The public amongst which the earlier trade mark must have acquired a reputation is that concerned by that trade mark, that is to say, depending on the product or service marketed, either the public at large or a more specialised public, for example traders in a specific sector.

25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.”

49. I have set out above my findings in relation to IPHONE: there is a vast reputation for smartphones.

50. The next consideration is whether the public will make a link between the marks. The relevant public is the public at large for both parties’ goods, and is deemed to be reasonably well informed and reasonably observant and circumspect². The CJEU said, in *Intel Corporation Inc v CPM (UK) Ltd* (C-252-07), that if the later mark would call the earlier mark to mind, this is tantamount to the existence of a link. The other factors considered by the CJEU are as follows, from the same judgment (with my underlining):

² *Intel Corporation Inc v CPM (UK) Ltd* (C-252-07), paragraphs 35 and 36.

“31 In the absence of such a link in the mind of the public, the use of the later mark is not likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier mark.

...

41 The existence of such a link must be assessed globally, taking into account all factors relevant to the circumstances of the case...

42 Those factors include:

- the degree of similarity between the conflicting marks;
- the nature of the goods or services for which the conflicting marks were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public;
- the strength of the earlier mark’s reputation;
- the degree of the earlier mark’s distinctive character, whether inherent or acquired through use;
- the existence of the likelihood of confusion on the part of the public.

44 As regards the degree of similarity between the conflicting marks, the more similar they are, the more likely it is that the later mark will bring the earlier mark with a reputation to the mind of the relevant public. That is particularly the case where those marks are identical.

45 However, the fact that the conflicting marks are identical, and even more so if they are merely similar, is not sufficient for it to be concluded that there is a link between those marks.

46 It is possible that the conflicting marks are registered for goods or services in respect of which the relevant sections of the public do not overlap.

47 The reputation of a trade mark must be assessed in relation to the relevant section of the public as regards the goods or services for which that mark was registered. That may be either the public at large or a more specialised public (see *General Motors*, paragraph 24).

48 It is therefore conceivable that the relevant section of the public as regards the goods or services for which the earlier mark was registered is completely distinct from the relevant section of the public as regards the goods or services for which the later mark was registered and that the earlier mark, although it has a reputation, is not known to the public targeted by the later mark. In such a case, the public targeted by each of the two marks may never be confronted with the other mark, so that it will not establish any link between those marks.

49 Furthermore, even if the relevant section of the public as regards the goods or services for which the conflicting marks are registered is the same or overlaps to some extent, those goods or services may be so dissimilar that the later mark is unlikely to bring the earlier mark to the mind of the relevant public.

50 Accordingly, the nature of the goods or services for which the conflicting marks are registered must be taken into consideration for the purposes of assessing whether there is a link between those marks.

51 It must also be pointed out that certain marks may have acquired such a reputation that it goes beyond the relevant public as regards the goods or services for which those marks were registered.

52 In such a case, it is possible that the relevant section of the public as regards the goods or services for which the later mark is registered will make a connection between the conflicting marks, even though that public is wholly distinct from the relevant section of the public as regards goods or services for which the earlier mark was registered.

53 For the purposes of assessing where there is a link between the conflicting marks, it may therefore be necessary to take into account the strength of the earlier mark's reputation in order to determine whether that reputation extends beyond the public targeted by that mark.

54 Likewise, the stronger the distinctive character of the earlier mark, whether inherent or acquired through the use which has been made of it, the more likely it is that, confronted with a later identical or similar mark, the relevant public will call that earlier mark to mind.

55 Accordingly, for the purposes of assessing whether there is a link between the conflicting marks, the degree of the earlier mark's distinctive character must be taken into consideration.

56 In that regard, in so far as the ability of a trade mark to identify the goods or services for which it is registered and used as coming from the proprietor of that mark and, therefore, its distinctive character are all the stronger if that mark is unique – that is to say, as regards a word mark such as INTEL, if the word of which it consists has not been used by anyone for any goods or services other than by the proprietor of the mark for the goods and services it markets – it must be ascertained whether the earlier mark is unique or essentially unique.

57 Finally, a link between the conflicting marks is necessarily established when there is a likelihood of confusion, that is to say, when the relevant public believes or might believe that the goods or services marketed under the earlier mark and those marketed under the later mark come from the same undertaking or from economically-linked undertakings (see to that effect, inter alia, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 17, and Case C-533/06 *O2 Holdings and O2 (UK)* [2008] ECR I-0000, paragraph 59).

58 However, as is apparent from paragraphs 27 to 31 of the judgment in *Adidas-Salomon and Adidas Benelux*, implementation of the protection introduced by Article 4(4)(a) of the Directive does not require the existence of a likelihood of confusion.

59 The national court asks, in particular, whether the circumstances set out in points (a) to (d) of Question 1 referred for a preliminary ruling are sufficient to establish a link between the conflicting marks.

60 As regards the circumstance referred to in point (d) of that question, the fact that, for the average consumer, who is reasonably well informed and reasonably observant and circumspect, the later mark would call the earlier mark to mind is tantamount to the existence of such a link.

61 As regards the circumstances referred to in paragraphs (a) to (c) of that question, as is apparent from paragraph 41 to 58 of this judgment, they do not necessarily imply the existence of a link between the conflicting marks, but they do not exclude one either. It is for the national court to base its analysis on all the facts of the case in the main proceedings.

62 The answer to point (i) of Question 1 and to Question 2 must therefore be that Article 4(4)(a) of the Directive must be interpreted as meaning that whether there is a link, within the meaning of *Adidas-Salomon and Adidas Benelux*, between the earlier mark with a reputation and the later mark must be assessed globally, taking into account all factors relevant to the circumstances of the case.

63 The fact that for the average consumer, who is reasonably well informed and reasonably observant and circumspect, the later mark calls the earlier mark with a reputation to mind is tantamount to the existence of such a link, within the meaning of *Adidas-Salomon and Adidas Benelux*, between the conflicting marks.

64 The fact that:

- the earlier mark has a huge reputation for certain specific types of goods or services, and
- those goods or services and the goods or services for which the later mark is registered are dissimilar or dissimilar to a substantial degree, and
- the earlier mark is unique in respect of any goods or services,

does not necessarily imply that there is a link, within the meaning of *Adidas-Salomon and Adidas Benelux*, between the conflicting marks.”

51. Strength of reputation is one of the factors to be assessed in relation to the existence of a link, as is the fact that IPHONE/iPhone is unique as a mark. IPHONE/iPhone has penetrated the consciousness of all sections of the public,

whether iPHONE owners or not³. The mark is ubiquitous. I have already found that there is a likelihood of confusion. The public, on seeing Mr Graham's mark, will call Apple's mark to mind. There is no doubt in my mind that a link would be made. I will go on to look at the third condition, which is whether damage will be caused.

Unfair advantage of the distinctive character or the repute of the earlier trade mark

52. The question is whether Mr Graham will have an unfair advantage in using his mark because there will be an increased chance that the public will buy Mr Graham's services because of the link made with Apple's mark.

53. As stated earlier in this decision, Mr Graham's mark is shown on the application form with a lower case letter 'i', followed by a word, FONE, which is identical in meaning to PHONE and which begins with a capital letter. Apple's mark, in use, is also a lower case letter 'i' preceding the word PHONE which starts with a capital letter. It is use like this which has forged its exceptional level of reputation. Apple's mark has become associated in the mind of a significant portion of the public with that particular form of use. This is relevant to the global assessment of whether there is unfair advantage.

54. There is some debate as to whether the judgment of the CJEU in *L'Oreal v Bellure* means that an advantage gained by the user of a junior mark is only unfair if there is an intention to take advantage of the senior mark, or some other factor is present which makes the advantage unfair. The English Court of Appeal has considered this matter three times. Firstly, in *L'Oreal v Bellure* [2010] RPC 23 when that case returned to the national court for determination. Secondly, in *Whirlpool v Kenwood* [2010] RPC 2: see paragraph 136. Thirdly, in *Specsavers v Asda Stores Limited*¹ [2012] EWCA Civ 24: see paragraph 127. On each occasion the court appears to have interpreted *L'Oreal v Bellure* as meaning that unfair advantage requires something more than an advantage gained without due cause. However, the absence of due cause appears to be closely linked to the existence of unfair advantage. See paragraph 36 of the opinion of Advocate General Kokott in Case C-65/12 *Leidseplein Beheer and Vries v Red Bull*.

55. In *Jack Wills Limited v House of Fraser (Stores) Limited* [2014] EWHC 110 (Ch) Arnold J. considered the earlier case law and concluded that:

"80. The arguments in the present case give rise to two questions with regard to taking unfair advantage. The first concerns the relevance of the defendant's intention. It is clear both from the wording of Article 5(2) of the Directive and Article 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 that 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

³ As per the judgment of the CJEU in *You-Q BV v Apple Corps Ltd* C-294/12 P.

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.”

56. In my view, even if Mr Graham did not intend to ride on the coat tails of IPHONE’s reputation, the strength of the reputation, the uniqueness of the earlier mark, the strength of the link made, and the closely allied goods and services means that the objective effect of use of iFoneYou will confer a marketing advantage on Mr Graham’s mark. This is because it will call to mind Apple’s mark and will therefore appear instantly familiar to the public concerned, thereby making it easier for Mr Graham to establish his mark and to sell his services without the usual marketing expenditure.

57. Mr Graham has filed no evidence so there is no suggestion that he has ‘due cause’ to use the mark for which he has applied. **I find that use of Mr Graham’s trade mark would take unfair advantage of the repute of Apple’s mark.**

58. Apple only needs to establish success under one of the three types of damage to which I referred earlier; as it has also succeeded under section 5(2)(b), for the sake of procedural economy, I do not propose to look at the other two possible heads of damage under section 5(3) of the Act.

Section 5(4)(a)

59. Given the conclusions reached, I will deal briefly with the claim to passing off. Section 5(4)(a) states:

“A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b)...

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark.”

60. Halsbury’s Laws of England (4th Edition) Vol. 48 (1995 reissue) at paragraph 165 provides the following analysis of the law of passing off. The analysis is based on guidance given in the speeches in the House of Lords in *Reckitt & Colman Products Ltd v. Borden Inc.* [1990] R.P.C. 341 and *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd* [1979] AC 731. It is (with footnotes omitted) as follows:

“The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

(1) that the plaintiff's goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and

(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation."

61. The relevant date at which matters must be assessed is the date on which Mr Graham applied for his trade mark, because there is no evidence that he has used the mark before that date. It will be very clear from findings made earlier in this decision that Apple, at that date, owned a substantial reputation and goodwill in the mark IPHONE (and has done since 2007). For similar reasons to those I have set out in relation to a likelihood of confusion under section 5(2)(b) of the Act, I find that there is a misrepresentation which is likely to lead to a substantial number of the public believing that Mr Graham's services are those of Apple. This belief will cause damage to Apple: in *Ewing v Buttercup Margarine Company, Limited*, [1917] 2 Ch. 1 (COA), Warrington L.J. stated that:

"To induce the belief that my business is a branch of another man's business may do that other man damage in various ways. The quality of goods I sell, the kind of business I do, the credit or otherwise which I enjoy are all things which may injure the other man who is assumed wrongly to be associated with me."

62. Mr Graham is liable to be prevented from use of his trade mark under the law of passing-off. **The opposition succeeds under section 5(4)(a) of the Act.**

Section 56

63. Apple has been successful on the basis of its trade marks registered in the UK. There is, therefore, no need to look at the section 56 claim.

Outcome

64. The opposition succeeds under sections 5(2)(b), 5(3) and 5(4)(a) of the Act. The application is refused.

Costs

65. Apple has been successful and is entitled to a contribution toward the cost of the proceedings. The registrar normally awards costs from the published scale, as set out in Tribunal Practice Notice 4/2007. I assess the cost award as follows:

Opposition fee	£200
Preparing a statement and considering the counterstatement	£300

Filing evidence	£700
Attendance at hearing	£400
Total	£1600

66. I order Albert Graham to pay Apple Inc. the sum of £1600 which, in the absence of an appeal, should be paid within seven days of the expiry of the appeal period.

Dated this 17th day of November 2014

**Judi Pike
For the Registrar,
the Comptroller-General**

Annex 1: Apple's earlier marks

(i) UK 2460664

IPHONE

Filed 6 July 2007; priority date 8 January 2007; registration procedure completed 22 July 2011

Class 9: Handheld and mobile digital electronic devices for the sending and receiving of telephone calls, faxes, electronic mail, video, instant messaging, music, audiovisual and other multimedia works, and other digital data; MP3 and other digital format audio and video players; handheld computers, personal digital assistants, electronic organizers, electronic notepads; magnetic data carriers; telephones, mobile phones, computer gaming machines, videophones, cameras; computer hardware and software; prerecorded computer programs for personal information management; database management software; electronic mail and messaging software; paging software; database synchronization software; computer programs for accessing, browsing and searching online databases; computer hardware and software for providing integrated telephone communication with computerized global information networks; parts and accessories for handheld and mobile digital electronic devices; parts and accessories for mobile telephones; mobile telephone covers; mobile telephone cases; mobile telephone cases made of leather or imitations of leather; mobile telephone covers made of cloth or textile materials; batteries; rechargeable batteries; chargers; chargers for electric batteries; headphones; stereo headphones; in-ear headphones; stereo speakers; audio speakers; audio speakers for home; personal stereo speaker apparatus; microphones; car audio apparatus; apparatus for connecting and charging portable and handheld digital electronic devices; parts and fittings for all the aforesaid goods; providing electronic publications for downloading over computer networks, namely books, pamphlets, brochures, newsletters, journals and magazines, on the subjects of computer hardware and software applications.

Class 16: Paper, cardboard and goods made from these materials, not included in other classes; printed matter; book binding 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; printed publications; periodicals; books; magazines; newsletters; brochures; booklets; pamphlets; manuals; journals; leaflets; greeting cards; advertising and promotional material; catalogues relating to computer software; computer brochures; computer handbooks; computer hardware publications; computer hardware reference manuals; computer hardware users guide; computer instruction manuals; computer manuals; publications relating to technology, digital technology and gadgets; catalogues relating to musical apparatus and instruments; music books; music instruction manuals; music magazines.

Class 25: Clothing, footwear, headwear; clothing for men, women and children, namely, shirts, t-shirts, sweatshirts, jogging suits, trousers, jeans, pants, shorts, tank tops, rainwear, skirts, blouses; dresses, sweaters, jackets, coats, raincoats, snow suits, ties, robes, hats, caps, sunvisors, belts, scarves, sleepwear, pyjamas, lingerie, underwear, boots, shoes, sneakers, sandals, booties, slipper socks; parts and accessories for all the aforesaid goods.

Class 35: Advertising; business management; business administration; office functions; advertising and marketing services; promotion services; market surveys; analysis of advertising response and market research; retail store services in the field of entertainment featuring movies, musical and audiovisual works and music related electronic products, provided via the Internet and other electronic and communications networks; retail store services in the field of computer, entertainment products and electronic products, namely, handheld and mobile digital electronic devices for the sending and receiving of telephone calls, faxes, electronic mail, video, instant messaging, music, audiovisual and other multimedia works, and other digital data, MP3 and other digital format audio and video players, personal digital assistants, electronic organizers, electronic notepads, magnetic data carriers, telephones, mobile phones, videophones, cameras, parts and accessories for handheld and mobile digital electronic devices, parts and accessories for mobile telephones, chargers, chargers for electric batteries, headphones, stereo headphones, in-ear headphones, stereo speakers, audio speakers, audio speakers for home, personal stereo speaker apparatus, microphones, car audio apparatus, apparatus for connecting and charging portable and handheld digital electronic devices, parts and fittings for all the aforesaid goods; retail store services provided via communication networks in the field of computer, entertainment products and electronic products, namely, handheld and mobile digital electronic devices for the sending and receiving of telephone calls, faxes, electronic mail, video, instant messaging, music, audiovisual and other multimedia works, and other digital data, MP3 and other digital format audio and video players, personal digital assistants, electronic organizers, electronic notepads, magnetic data carriers, telephones, mobile phones, videophones, cameras, parts and accessories for handheld and mobile digital electronic devices, parts and accessories for mobile telephones, chargers, chargers for electric batteries, headphones, stereo headphones, in-ear headphones, stereo speakers, audio speakers, audio speakers for home, personal stereo speaker apparatus, microphones, car audio apparatus, apparatus for connecting and charging portable and handheld digital electronic devices, parts and fittings for all the aforesaid goods; retail store services provided via communications networks in the field of mobile phones, handheld mobile digital electronic devices, music related electronic products and other consumer electronics, namely, handheld and mobile digital electronic devices for the sending and receiving of telephone calls, faxes, electronic mail, video, instant messaging, music, audiovisual and other multimedia works, and other digital data, MP3 and other digital format audio and video players, personal digital assistants, electronic organizers, electronic notepads, magnetic data carriers, telephones, mobile phones, videophones, cameras, parts and accessories for handheld and mobile digital electronic devices, parts and accessories for mobile telephones, batteries, rechargeable batteries, chargers, chargers for electric batteries, headphones, stereo headphones, in-ear headphones, stereo speakers, audio speakers, audio speakers for home, personal stereo speaker apparatus, microphones, car audio apparatus, apparatus for connecting and charging portable and

handheld digital electronic devices, parts and fittings for all the aforesaid goods; product demonstrations provided in-store and via communications networks; computerised data storage and retrieval services; computerised data storage and retrieval services for digital text, data, image, audio, and video works; data storage of electronic music; Internet services, namely, creating indexes of information, sites and other resources available on global computer networks for others; searching, browsing and retrieving information, sites, and other resources available on global computer networks and other communication networks for others; organizing content of information provided over a global computer network according to user preferences; information, advisory and consultancy services relating to all the aforesaid.

Class 38: Telecommunications; communication and telecommunication services; telecommunication access services; communications by computer; communication between computers; electronic sending of data and documentation via the Internet or other databases; supply of data and news by electronic transmission; providing access to web sites on the Internet; delivery of digital music by telecommunications; providing wireless telecommunications via electronic communications networks; wireless digital messaging, paging services, and electronic mail services, including services that enable a user to send and/or receive messages through a wireless data network; one-way and two-way paging services; communication by computer, computer intercommunication; telex, telegram and telephone services; broadcasting or transmission of radio and television programmes; time sharing services for communication apparatus; provision of telecommunications access and links to computer databases and the Internet; electronic transmission of streamed and downloadable audio and video files via computer and other communications networks; web casting services; delivery of messages by electronic transmission; provision of connectivity services and access to electronic communications networks, for transmission or reception of audio, video or multimedia content; provision of telecommunications connections to electronic communication networks, for transmission or reception of audio, video or multimedia content; providing access to digital music web sites on the Internet; providing access to MP3 web sites on the Internet; delivery of digital music by telecommunications; operating search engines; provision of telecommunications connections to the Internet or computer databases; providing user access to the Internet (service providers); electronic mail services; telecommunication of information (including web pages), computer programs and any other data; video broadcasting, broadcasting prerecorded videos featuring music and entertainment, television programs, motion pictures, news, sports, games, cultural events, and entertainment-related programs of all kinds, via a global computer network; streaming of video content via a global computer network; subscription audio broadcasting via a global computer network; audio broadcasting; audio broadcasting of spoken word, music, concerts, and radio programmes, broadcasting prerecorded videos featuring music and entertainment, television programmes, motion pictures, news, sports, games, cultural events, and entertainment-related programmes of all kinds, via computer and other communications networks; streaming of audio content via a global computer network; electronic transmission of audio and video files via communications networks; providing search engines for obtaining data on a global computer network; communication services, namely, matching users for the transfer of music, video and audio recordings via communication networks; providing on-line bulletin boards for the transmission of messages among computer users concerning entertainment, music, concerts, videos, radio, television, film, news, sports, games and cultural events; rental and hire of communication apparatus and electronic mail-boxes; electronic news services; electronic communications consultancy; facsimile, message collection and transmission services; transmission of data and of information by electronic means, computer, cable, radio, teleprinter, teletext, electronic mail, telecopier, television, microwave, laser beam, communications satellite or electronic communication means; transmission of data by audio-visual apparatus controlled by data processing apparatus or computers; provision of access time to web-sites featuring multimedia materials; providing users with access time to electronic communications networks with means of identifying, locating, grouping, distributing, and managing data and links to third-party computer servers, computer processors and computer users; information, advisory and consultancy services relating to all the aforesaid.

Class 39: Transport; packaging and storage of goods; travel arrangement; computerised distribution advisory services relating to transport; computerised information services for travel; information, advisory and consultancy services relating to all the aforesaid.

Class 41: Education; providing of training; entertainment; sporting and cultural activities; provision of electronic publications (not downloadable); providing on-line electronic publications; publication of electronic books and journals on-line; providing publications from a global computer network or the Internet which may be browsed; computer assisted education services; computer assisted teaching services; computer assisted training services; computer based educational services; education services relating to computer software; editing of audio-tapes; editing of cine-films; editing of video-tapes; editing of written text; film editing (photographic); videotape editing; digital imaging services; digital music (not downloadable) provided from MP3 web sites on the Internet; digital music (not downloadable) provided from the Internet; entertainment services in the nature of musical, video, audio-video, and textual materials, namely books, plays, pamphlets, brochures, newsletters, journals, and magazines, on the subjects of sporting and cultural activities and a wide range of topics of general interest distributed over computer networks; providing electronic publications for browsing over computer networks, namely books, pamphlets, brochures, newsletters, journals, and magazines, on the subjects of computer hardware and software applications; information, advisory and consultancy services relating to all the aforesaid.

Class 42: Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software; computer hardware and software consulting services; rental of computer hardware and software apparatus and equipment; multimedia and audio-visual software consulting services; computer programming; support and consultation services for developing computer systems, databases and applications; graphic design for the compilation of web pages on the Internet; information relating to computer hardware or software provided on-line from a global computer network or the Internet; creating and maintaining web-sites; hosting the web-sites of others; providing search engines for obtaining data via communications networks; providing databases and directories via communications networks for obtaining data in the fields of music, video, film, books, television, games and sports; application service provider (ASP) services featuring software for use in connection with online music subscription service, software that enables users to play and program music and entertainment-related audio, video, text and multimedia content, and software featuring musical sound recordings, entertainment-related audio, video, text and multimedia content; providing temporary use of on-line non-downloadable software to enable users to program audio, video, text and other multimedia content, including music, concerts, videos, radio, television, news, sports, games, cultural events, and entertainment-related programs; providing on-line facilities, via a global computer network, to enable users to

program the scheduling of audio, video, text and other multimedia content, including music, concerts, videos, radio, television, news, sports, games, cultural events, and entertainment-related programs as they will be aired; providing search engines for obtaining data on a global computer network; creating indexes of information, sites and other resources available on global computer networks for others; searching, browsing and retrieving information, sites, and other resources available on global computer networks for others; organizing content of information provided over a global computer network according to user preferences, namely search engine feeder services; information, advisory and consultancy services relating to all the aforesaid.

(ii) International registration designating the EU 1071173

IPHONE

Filed 15 February 2011; registration procedure completed 17 February 2012

Class 35: Retail store services and retail store services provided via communications networks all featuring handheld mobile digital electronic devices and other consumer electronics, computer software, accessories, and carrying cases for such devices; product demonstrations provided via communications networks.

Class 38: Telecommunication access services; communication by computer; transmission of data and of information by electronic means; provision of telecommunications connections to computer databases and the Internet; electronic transmission of streamed and downloadable audio and video files via computer and other communications networks; delivery of messages by electronic transmission; provision of telecommunications connections to electronic communications networks, for transmission or reception of audio, video or multimedia content.

Annex 2: goods and services relied upon for sections 5(3) and 5(4)(a)

Class 9

Handheld and mobile digital electronic devices for the sending and receiving of telephone calls, faxes, electronic mail, video, instant messaging, music, audiovisual and other multimedia works, and other digital data; MP3 and other digital format audio and video players; handheld computers, personal digital assistants, electronic organizers, electronic notepads; magnetic data carriers; telephones, mobile phones, computer gaming machines, videophones, cameras; computer hardware and software; prerecorded computer programs for personal information management; database management software; electronic mail and messaging software; paging software; database synchronization software; computer programs for accessing, browsing and searching online databases; computer hardware and software for providing integrated telephone communication with computerized global information networks; parts and accessories for handheld and mobile digital electronic devices; parts and accessories for mobile telephones; mobile telephone covers; mobile telephone cases; mobile telephone cases made of leather or imitations of leather; mobile telephone covers made of cloth or textile materials; batteries; rechargeable batteries; chargers; chargers for electric batteries; headphones; stereo headphones; in-ear headphones; stereo speakers; audio speakers; audio speakers for home; personal stereo speaker apparatus; microphones; car audio apparatus; apparatus for connecting and charging portable and handheld digital electronic devices; parts and fittings for all the aforesaid goods; providing electronic publications for downloading over computer networks, namely books, pamphlets, brochures, newsletters, journals and magazines, on the subjects of computer hardware and software applications.

Class 35

Advertising; business management; business administration; office functions; advertising and marketing services; promotion services; market surveys; analysis of advertising response and market research; retail store services in the field of entertainment featuring movies, musical and audiovisual works and music related electronic products, provided via the Internet and other electronic and communications networks; retail store services in the field of computer, entertainment products and electronic products, namely, handheld and mobile digital electronic devices for the sending and receiving of telephone calls, faxes, electronic mail, video, instant messaging, music, audiovisual and other multimedia works, and other digital data, MP3 and other digital format audio and video players, personal digital assistants, electronic organizers, electronic notepads, magnetic data carriers, telephones, mobile phones, videophones, cameras, parts and accessories for handheld and mobile digital electronic devices, parts and accessories for mobile telephones, chargers, chargers for electric batteries, headphones, stereo headphones, in-ear headphones, stereo speakers, audio speakers, audio speakers for home, personal stereo speaker apparatus, microphones, car audio apparatus,

apparatus for connecting and charging portable and handheld digital electronic devices, parts and fittings for all the aforesaid goods; retail store services provided via communication networks in the field of computer, entertainment products and electronic products, namely, handheld and mobile digital electronic devices for the sending and receiving of telephone calls, faxes, electronic mail, video, instant messaging, music, audiovisual and other multimedia works, and other digital data, MP3 and other digital format audio and video players, personal digital assistants, electronic organizers, electronic notepads, magnetic data carriers, telephones, mobile phones, videophones, cameras, parts and accessories for handheld and mobile digital electronic devices, parts and accessories for mobile telephones, chargers, chargers for electric batteries, headphones, stereo headphones, in-ear headphones, stereo speakers, audio speakers, audio speakers for home, personal stereo speaker apparatus, microphones, car audio apparatus, apparatus for connecting and charging portable and handheld digital electronic devices, parts and fittings for all the aforesaid goods; retail store services provided via communications networks in the field of mobile phones, handheld mobile digital electronic devices, music related electronic products and other consumer electronics, namely, handheld and mobile digital electronic devices for the sending and receiving of telephone calls, faxes, electronic mail, video, instant messaging, music, audiovisual and other multimedia works, and other digital data, MP3 and other digital format audio and video players, personal digital assistants, electronic organizers, electronic notepads, magnetic data carriers, telephones, mobile phones, videophones, cameras, parts and accessories for handheld and mobile digital electronic devices, parts and accessories for mobile telephones, batteries, rechargeable batteries, chargers, chargers for electric batteries, headphones, stereo headphones, in-car headphones, stereo speakers, audio speakers, audio speakers for home, personal stereo speaker apparatus, microphones, car audio apparatus, apparatus for connecting and charging portable and handheld digital electronic devices, parts and fittings for all the aforesaid goods; product demonstrations provided in-store and via communications networks; computerised data storage and retrieval services; computerised data storage and retrieval services for digital text, data, image, audio, and video works; data storage of electronic music; Internet services, namely, creating indexes of information, sites and other resources available on global computer networks for others; searching, browsing and retrieving information, sites, and other resources available on global computer networks and other communication networks for others; organizing content of information provided over a global computer network according to user preferences; information, advisory and consultancy services relating to all the aforesaid.

Class 38

Telecommunications; communication and telecommunication services; telecommunication access services; communications by computer; communication between computers; electronic sending of data and documentation via the Internet or other databases; supply of data and news by electronic transmission; providing access to web sites on the Internet; delivery of digital music by telecommunications; providing wireless telecommunications via electronic communications networks; wireless digital messaging, paging services, and

electronic mail services, including services that enable a user to send and/or receive messages through a wireless data network; one-way and two-way paging services; communication by computer, computer intercommunication; telex, telegram and telephone services; broadcasting or transmission of radio and television programmes; time sharing services for communication apparatus; provision of telecommunications access and links to computer databases and the Internet; electronic transmission of streamed and downloadable audio and video files via computer and other communications networks; web casting services; delivery of messages by electronic transmission; provision of connectivity services and access to electronic communications networks, for transmission or reception of audio, video or multimedia content; provision of telecommunications connections to electronic communication networks, for transmission or reception of audio, video or multimedia content; providing access to digital music web sites on the Internet; providing access to MP3 web sites on the Internet; delivery of digital music by telecommunications; operating search engines; provision of telecommunications connections to the Internet or computer databases; providing user access to the Internet (service providers); electronic mail services; telecommunication of information (including web pages), computer programs and any other data; video broadcasting, broadcasting prerecorded videos featuring music and entertainment, television programs, motion pictures, news, sports, games, cultural events, and entertainment-related programs of all kinds, via a global computer network; streaming of video content via a global computer network; subscription audio broadcasting via a global computer network; audio broadcasting; audio broadcasting of spoken word, music, concerts, and radio programmes, broadcasting prerecorded videos featuring music and entertainment, television programmes, motion pictures, news, sports, games, cultural events, and entertainment-related programmes of all kinds, via computer and other communications networks; streaming of audio content via a global computer network; electronic transmission of audio and video files via communications networks; providing search engines for obtaining data on a global computer network; communication services, namely, matching users for the transfer of music, video and audio recordings via communication networks; providing on-line bulletin boards for the transmission of messages among computer users concerning entertainment, music, concerts, videos, radio, television, film, news, sports, games and cultural events; rental and hire of communication apparatus and electronic mail-boxes; electronic news services; electronic communications consultancy; facsimile, message collection and transmission services; transmission of data and of information by electronic means, computer, cable, radio, teleprinter, teletype, electronic mail, telecopier, television, microwave, laser beam, communications satellite or electronic communication means; transmission of data by audio-visual apparatus controlled by data processing apparatus or computers; provision of access time to web-sites featuring multimedia materials; providing users with access time to electronic communications networks with means of identifying, locating, grouping, distributing, and managing data and links to third-party computer servers, computer processors and computer users; information, advisory and consultancy services relating to all the aforesaid.

Class 41

Education; providing of training; entertainment; sporting and cultural activities; provision of electronic publications (not downloadable); providing on-line electronic publications; publication of electronic books and journals on-line; providing publications from a global computer network or the Internet which may be browsed; computer assisted education services; computer assisted teaching services; computer assisted training services; computer based educational services; education services relating to computer software; editing of audio-tapes; editing of cine-films; editing of video-tapes; editing of written text; film editing (photographic); videotape editing; digital imaging services; digital music (not downloadable) provided from MP3 web sites on the Internet; digital music (not downloadable) provided from the Internet; entertainment services in the nature of musical, video, audio-video, and textual materials, namely books, plays, pamphlets, brochures, newsletters, journals, and magazines, on the subjects of sporting and cultural activities and a wide range of topics of general interest distributed over computer networks; providing electronic publications for browsing over computer networks, namely books, pamphlets, brochures, newsletters, journals, and magazines, on the subjects of computer hardware and software applications; information, advisory and consultancy services relating to all the aforesaid.

Class 42

Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software; computer hardware and software consulting services; rental of computer hardware and software apparatus and equipment; multimedia and audio-visual software consulting services; computer programming; support and consultation services for developing computer systems, databases and applications; graphic design for the compilation of web pages on the Internet; information relating to computer hardware or software provided on-line from a global computer network or the Internet; creating and maintaining web-sites; hosting the web-sites of others; providing search engines for obtaining data via communications networks; providing databases and directories via communications networks for obtaining data in the fields of music, video, film, books, television, games and sports; application service provider (ASP) services featuring software for use in connection with online music subscription service, software that enables users to play and program music and entertainment-related audio, video, text and multimedia content, and software featuring musical sound recordings, entertainment-related audio, video, text and multimedia content; providing temporary use of on-line non-downloadable software to enable users to program audio, video, text and other multimedia content, including music, concerts, videos, radio, television, news, sports, games, cultural events, and entertainment-related programs; providing on-line facilities, via a global computer network, to enable users to program the scheduling of audio, video, text and other multimedia content, including music, concerts, videos, radio, television, news, sports, games, cultural events, and entertainment-related programs as they will be aired; providing search engines for obtaining data on a global computer network; creating indexes of information,

sites and other resources available on global computer networks for others; searching, browsing and retrieving information, sites, and other resources available on global computer networks for others; organizing content of information provided over a global computer network according to user preferences, namely search engine feeder services; information, advisory and consultancy services relating to all the aforesaid.