BL O/0500/23

TRADE MARKS ACT 1994

IN THE MATTER OF
TRADE MARK APPLICATION NO. 3691326
BY PROF. DR. THOMAS SCHULTHESS
TO REGISTER THE TRADE MARK:

Fenix

IN CLASSES 9, 37, 42 AND 45

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 431193
BY FENICS SOFTWARE, INC.

Background and pleadings

1. On 7 February 2020[1], Prof. Dr. Thomas Schulthess ("the applicant") applied to register the trade mark **FENIX** in the UK, under number 3691326 ("the contested mark"). The contested mark was published in the Trade Marks Journal for opposition purposes on 19 November 2021. Registration is sought for the following goods and services:

> Class 9: Virtual server software; Cluster computer system hardware; Computer software for the setup, configuration and management of cluster computer systems, supercomputer systems, operating system software and multiple computers in a networked environment; Cluster computer system software; Supercomputer systems; Computer networks consisting of a number of computers; Computer software in the field of operating and enhancing high performance and high availability computer hardware and computer networks.
>
> Class 37: Installation and maintenance of hardware for cluster networks and grid architectures.
>
> Class 42: Services for the design of interactive computer software; Services relating to interactive computer networks; Technological services relating to interactive computers; Services for the design of scalable computer software; Services relating to scalable computer networks; Technological services relating to scalable computers; Providing of virtual computer systems by means of cloud computing; Electronic data storage; Online data storage; Computer services concerning electronic data storage; Cloud computing; Consultancy relating to the use of high-performance computers; Design of high performance and high availability computer systems, cluster computer systems, supercomputer systems, multiple computer systems and computer networks;

[1] On 1 January 2021, the UK left the EU after the expiry of the transition period. Under Article 59 of the Withdrawal Agreement between the UK and EU, applications for EUTMs made before the end of the transition period that had received a filing date can form the basis of a UK application with the same filing date as the corresponding EUTM, provided they were filed within 9 months of the end of the transition period. The applicant's EUTM number 18192962 was filed at the EUIPO on 7 February 2020, whereas its UK application was filed on 7 September 2021. Accordingly, the UK application was given the same filing date as its EUTM.

Research relating to data processing; Research in the field of information technology; Research in the field of data processing technology.

Class 45: Generation, acquisition, disposal and evaluation of industrial property rights, in particular patents; Licensing of industrial property rights, Industrial property licensing consultancy; Technology licensing.

2. On 21 February 2022, Fenics Software, Inc. ("the opponent") filed a notice of opposition. The opposition is brought under section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and is directed against all the goods and services in the application. To support its claim, the opponent relies upon the following marks:

FENICS

UK trade mark number 908671133[2]

Filing date: 21 October 2009

Registration date: 10 November 2011

("the first earlier mark")

Fenics

UK trade mark number 801503423[3]

Filing date: 16 October 2019

Priority date: 16 April 2019[4]

Registration date: 22 June 2020

("the second earlier mark")

[2] On 1 January 2021, the UK left the EU. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing EUTM/IREU. As a result of the opponent's EUTM 8671133 being registered as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark is now recorded on the UK trade mark register, has the same legal status as if it had been applied for and registered under UK law, and the original EUTM filing date remains.

[3] Under Article 54 of the Withdrawal Agreement, as set out above, a comparable UK trade mark was created for all right holders of with an existing EUTM/IREU. As a result of the opponent's IREU 1503423 being protected as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark now recorded on the UK trade mark register, has the same legal status as if it had been applied for and registered under UK law, and the international registration date is treated as the filing date.

[4] Priority is claimed from U.S Trademark Nos. 88387889, 88387917, 88387924 and 88387933.

FENICS GO

UK trade mark number 801523623[5]

Filing date: 24 October 2019

Priority date: 26 April 2019[6]

Registration date: 19 August 2020

("the third earlier mark")

3. For the purposes of the opposition under section 5(2)(b), the opponent relies upon the goods and services listed in the Annex to this decision.

4. Given the respective filing dates, the opponent's marks are earlier marks, in accordance with section 6 of the Act. As the first earlier mark had been registered for more than five years at the filing date of the application, it is subject to the proof of use requirements specified within section 6A of the Act. However, the second and third earlier marks were not registered for five years or more at the time of filing the application, therefore they are not subject to the same proof of use requirements.

5. The opponent essentially argues that the competing marks are highly similar, and the parties' goods and services are either identical or similar. On this basis, the opponent contends that there is a likelihood of confusion, including the likelihood of association. In its notice of opposition, the opponent made a statement of use in respect of each of the marks and all the goods and services they rely upon.[7]

6. The applicant filed a counterstatement denying the ground of opposition. Within its counterstatement, the applicant denied that the marks are similar and reserved the right to comment on the similarity of the goods and services until evidence is filed. It disputes that there is a likelihood of confusion. Moreover, the applicant requested that the opponent demonstrates proof of use in respect of the first earlier mark.[8]

[5] Under Article 54 of the Withdrawal Agreement, as set out above, a comparable UK trade mark was created for all right holders of with an existing EUTM/IREU. As a result of the opponent's IREU 1523623 being protected as at the end of the Implementation Period, a comparable UK trade mark was automatically created.
[6] Priority is claimed from U.S Trademark Nos. 88404018 and 88404036.
[7] Notice of Opposition, paragraphs 4, 5 & 9.
[8] Counterstatement, paragraphs 3-6.

7. The opponent is professionally represented by Bristows LLP, whereas the applicant is professionally represented by Withers & Rogers LLP. Evidence has been filed by the opponent in these proceedings. Both parties were given the option of an oral hearing, though neither asked to be heard on this matter. However, both parties filed written submissions in lieu of an oral hearing. Whilst I do not intend to summarise these, I have taken them into consideration and will refer to them as and where appropriate during this decision. This decision is taken following a careful perusal of the papers.

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

Evidence and submissions

9. The opponent's evidence comprises a witness statement of Mark Rinaldo dated 27 July 2022, together with Exhibits MR1 to MR9. Mark Rinaldo confirms that they are the Chief Operating Officer of the Fenics businesses, including Fenics Software Inc. (the opponent company), and Fenics Software Limited (an affiliate of the opponent company), a position they have held since 3 January 2017. The purpose of the statement is to give evidence as to the history of the opponent, as well as its use of the first earlier mark. I have reviewed the evidence and will return to it to the extent I consider necessary during the course of this decision.

My approach

10. Even if the opponent is able to demonstrate use of the first earlier mark, this would not put it in a better position than the second and third earlier marks, as its goods and services appear to be narrower (or, in the case of class 9, not materially any broader given the limitation contained within the specification). Therefore, I will first consider

the opponent's reliance on the second and third earlier marks, returning to consider the first earlier mark should it become necessary to do so.

Decision

Section 5(2)(b)

11. Sections 5(2)(b) and 5A of the Act read as follows:

> "5(2) A trade mark shall not be registered if because-
>
> […]
>
> (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".

> "5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

Case law

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

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

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

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

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

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

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

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

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

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

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

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

Comparison of goods and services

13. In *Canon*, Case C-39/97, the Court of Justice of the European Union ("CJEU") stated at paragraph 23 of its judgment that:

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

14. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

15. In *Gérard Meric v Office for Harmonisation in the Internal Market ('Meric'),*[9] the General Court (GC) stated that:

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

16. Regarding the interpretation of terms in specifications, in *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

"[…] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR) [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural

[9] Case T-133/05

> 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".

17. Moreover, in *Avnet Incorporated v Isoact Limited,* [1998] F.S.R. 16, Jacob J. (as he then was) warned against construing specifications for services too widely, stating 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".

18. For the purposes of considering the issue of similarity of goods or services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

19. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC stated that 'complementary' means:

> "[...] there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking".

20. In *Sanco SA v OHIM*, Case T-249/11, the GC 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. (as he then was), sitting as the Appointed Person, noted 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".

21. The goods and services to be compared are those outlined in paragraph 1 and (in relation to the second and third earlier marks) in the annex to this decision.

Class 9

Virtual server software; Computer software for the setup, configuration and management of cluster computer systems, supercomputer systems, operating system software and multiple computers in a networked environment; Cluster computer system software; Computer software in the field of operating and enhancing high performance and high availability computer hardware and computer networks.

22. The applicant's above terms are all types of software for use with servers, networks, cluster computer systems and for enhancing the performance of hardware. I have considered whether these would be similar to the opponent's software terms in class 9, under the second and third earlier marks, however, as they all relate to software for the financial and investment field, they would have different intended purposes and methods of use. The trade channels would differ, as given the

specialisms, it is unlikely that they would be sold by the same companies. Users would only overlap to a general degree for those in the financial sector. Further the goods would not be complementary, as one is not required for the other to function. Therefore, the class 9 goods would be dissimilar. Instead, I have compared the opponent's terms in class 42 under the second earlier mark, "Research, design and development of computer software; installation and maintenance of computer software". Although the goods and services fundamentally differ in nature, method of use and intended purpose, they are complementary in nature as software is essential to the research, design, development, installation and maintenance of it and vice versa. Further, consumers may assume that the same company that designs and develops software products would also sell them. There is also an overlap in trade channels and users would be the same. There is a degree of competition as users could purchase a readymade software program or have a bespoke software package designed instead. Overall, I find that there is a medium level of similarity between the goods.

Cluster computer system hardware; Supercomputer systems; Computer networks consisting of a number of computers

23. The applicant's terms are systems and networks that involve a mix of hardware and software. When compared to the opponent's class 42 terms "design and development of computer hardware and software" under the third earlier mark, I acknowledge that the applicant's goods are the end result of its design and development. The relationship between these goods and its design and development is therefore complementary, with the average consumer believing one undertaking is responsible for providing them both. Furthermore, the applicant's products would not exist without the design and development services to create it. Nevertheless, I accept that goods and services are fundamentally different in nature, and that the method of use and intended purpose will also differ as the services require the user to consult providers to agree on a product to be created, whereas the goods allow users to interact with them for the purpose of processing, accessing, and storing data. However, the trade channels will overlap, as companies that design and develop software and hardware may also provide the applicant's goods in class 9. Users will

also be the same. As a result, overall, I consider the goods and services to be similar to a medium degree.

Class 37

Installation and maintenance of hardware for cluster networks and grid architectures.

24. The services are complementary to the opponent's services under its third earlier mark in class 42 "design and development of computer hardware and software" as design and development of hardware would include hardware for cluster networks and grid architectures. This hardware needs to exist through its design and development services in order to be installed and maintained, therefore its design and development services are essential to services for the installation and maintenance of hardware such as the applicant's. Further, consumers would reasonably expect the same company that designed and developed hardware to install and maintain it. The trade channels would overlap as would the users. However, the services are not in competition as they have distinct roles. I also acknowledge that the nature, method of use and intended purpose are not the same as the opponent's services concern the design and development of hardware, whilst the applicant's services involve the installation and maintenance of a particular type of hardware. Taking all the factors into consideration I consider there to be between a low and medium level of similarity between the services.

Class 42

Providing of virtual computer systems by means of cloud computing

25. The applicant's term is identical to the opponent's term "providing virtual computer systems […] through cloud computing" (under its second earlier mark) which is simply another way of expressing the applicant's term.

Cloud computing

26. The applicant's above term broadly relates to all cloud computing services, therefore, in my view, it would encompass the opponent's term "cloud computing services, namely, cloud hosting in the nature of a scalable computer software for

providing access to an electronic financial exchange" under class 42 of the second earlier mark, which is a type of cloud computing service for access to an electronic financial exchange. Consequently, these services are *Meric* identical.

Services for the design of interactive computer software; Services for the design of scalable computer software; Design of high performance and high availability computer systems, cluster computer systems, supercomputer systems, multiple computer systems and computer networks; Consultancy relating to the use of high-performance computers; Research relating to data processing; Research in the field of information technology; Research in the field of data processing technology.

27. The applicant's above services involve those related to the research and design of computer hardware and software, or computer software consultancy. As such they are *Meric* identical to the opponent's broad terms "Scientific and technological research, design and development of computer hardware and software; computer software consulting" found in class 42 of the third earlier mark.

Technological services relating to interactive computers; Technological services relating to scalable computers

28. These are technological services for various types of computers, in my view, technological services are broad enough to encompass the opponent's services "design and development of computer hardware and software". Consequently, I find that these services are *Meric* identical.

Services relating to interactive computer networks; Services relating to scalable computer networks

29. These are services involved with different types of computer networks and would include services relating to the design of those networks. Therefore, they would encompass the opponent's term "computer network design for others" under the second earlier mark. As a result, these services are *Meric* identical.

Electronic data storage; Online data storage; Computer services concerning electronic data storage;

30. The opponent has not specifically identified which of its registered terms it considers similar to the applicant's above terms. It simply claims that the applicant's class 42 terms are all identical/highly similar to its class 42 services covered by the earlier registrations as well as its class 9 goods. Having considered the opponent's class 42 and class 9 goods across both the second and third earlier marks, I have found none to be similar to the applicant's above services.

31. I pause here, as upon receipt and review of the applicant's written submissions, it was observed that the applicant had included a fall-back specification, i.e. the addition of a limitation should the opposition be successful. To ensure fairness for each of the parties, the Tribunal wrote to the opponent on 28 April 2023, giving it 14 days to comment on the applicant's proposed fall-back specification. Accordingly, the opponent responded on 12 May 2023. The applicant's fall-back specification is for services in class 42,[10] for which the following limitation is proposed:

> "all of the aforesaid relating to cluster networks and grid architectures."

32. I have considered this limitation in respect of the contested class 42 services which I have found to be identical to the opponent's. However, in my view, this limitation does not overcome these findings. This is because the registered services are all sufficiently broad to include the applicant's services even accounting for the limitation. The exception to this is the applicant's broader term "cloud computing" against the registered term "cloud computing services, namely, cloud hosting in the nature of a scalable computer software for providing access to an electronic financial exchange". However, even if the applicant's proposed limitation was applied, there remains a degree of similarity with the registered term. Despite a lack of specific guidance on these competing terms, I understand that the nature and intended purpose of both cloud computing services through either scalable computer software or cluster networks and grid architectures are to provide IT services, such as software, networks or databases, through the internet in a manner that is designed to enhance

[10] Applicant's written submissions, paragraph 47

performance. Further, whilst I acknowledge that the registered term is limited to providing access to the electronic financial exchange, the applicant's term can still be used for these purposes, although, I accept that the method of use may differ. The trade channels could overlap as the same undertakings would typically offer both services. Furthermore, the services may be competitive in nature as high performing cloud computing could be achieved through scalable computer software, or through cluster networks and grid architecture. Users may also overlap. Overall, I consider these services to have, at least, a medium degree of similarity when considering the proposed limitation under the fall-back specification.

Class 45

Generation, acquisition, disposal and evaluation of industrial property rights, in particular patents; Licensing of industrial property rights, Industrial property licensing consultancy; Technology licensing.

33. The opponent argues within its written submissions that "There is similarity in class 45 and the Earlier Trade Marks. By way of an example, "Technology licensing" could be considered similar to "Scientific and technological research, design and development of computer hardware and software".[11] I disagree. The services identified are different in nature, method of use and intended purpose. The applied for services relate to intellectual property rights, whilst the opponent's services relate to I.T and technology services. The trade channels differ, as do the users. The services are not complementary as although there may be some connection between technological research and technology licensing the relationship is not sufficiently proximate, and consumers are unlikely to assume that the originate from the same undertakings. Further, I have considered the other goods and services relied upon and there does not appear to be any obvious similarity between them. Consequently, I find the applicant's goods dissimilar to the goods and services registered under the opponent's second and third earlier marks.

[11] Opponent's written submissions, paragraph 51

34. As some degree of similarity between the goods and services is necessary to engage the test for likelihood of confusion, my findings above mean that the opposition must fail against services of the application that I have found to be dissimilar, namely:[12]

Class 42: Electronic data storage; Online data storage; Computer services concerning electronic data storage;

Class 45: Generation, acquisition, disposal and evaluation of industrial property rights, in particular patents; Licensing of industrial property rights, Industrial property licensing consultancy; Technology licensing.

Average consumer and the nature of the purchasing act

35. 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.

36. 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."

[12] *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA, paragraph 49.

37. Due to the specialist nature of the goods and services at issue, I find that the relevant consumer is likely to be business or professional users, including those in the financial and investment industry.

38. In respect of the goods and services, for business and professional users the cost and frequency at which they are purchased is likely to vary, depending on their nature and type, but overall, they are likely to be purchased relatively frequently to meet ongoing business needs and at an average outlay. The selection of the goods and services would be relatively important for business and professional consumers as they will wish to ensure that the products meet their professional requirements, i.e. on a large scale with high demands, and they would be alert to the potentially negative impacts of choosing the wrong product. Further, business and professional users are likely to assess the service provider's technical knowledge, as well as the efficiency and reliability of their offerings. In light of the above, I find that the level of attention of business and professional users would be higher than average. The goods and services are likely to be available at tradeshows or business events and purchased directly from the provider after viewing information in specialist magazines, brochures or on the internet. In these circumstances, visual considerations would dominate, however, I do not discount aural considerations entirely as it is possible that the purchasing of these kinds of goods and services would involve discussions with sales representatives or word of mouth recommendations.

Distinctive character of the earlier mark

39. The distinctive character of a trade mark can be measured only, first, by reference to the goods or services in respect of which registration is sought and, second, by reference to the way it is perceived by the relevant public. 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)."

40. Registered trade marks possess varying degrees of inherent distinctive character, ranging from very low, because they are suggestive or allusive of a characteristic of the goods and services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. Dictionary words which do not allude to the goods or services will be somewhere in between. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark, the greater the likelihood of confusion.

41. Further, the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it. Although evidence has been filed, I will proceed without considering whether the distinctiveness of these marks has been enhanced through use, returning to consider it, should it become necessary to do so.

42. The second earlier mark is a figurative mark and comprises the word, "FENICS" in stylised font. I acknowledge that the opponent claims the word "FENICS" has no

meaning in the English language,[13] with which the applicant appears to agree,[14] as do I. As such, it will be perceived by consumers as an invented word, and consequently, the second earlier mark possesses a high level of inherent distinctive character, which predominately lies in the word "FENICS" with the stylisation providing a contribution. The third earlier mark is a word-only mark consisting of the words "FENICS GO". As discussed, the word "FENICS" has no meaning in the English language. However, the word "GO" is an easily recognisable dictionary word, meaning to move,[15] which is not directly related to the goods and services. Overall, the third earlier mark has between a medium and high level of inherent distinctive character, which resides mainly in the word "FENICS" with the word go playing a lesser role.

Comparison of the marks

43. It is clear from *Sabel BV v. Puma AG*[16] that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM,* Case C-591/12P, that:

> "34. […] 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."

44. It would therefore be wrong to artificially dissect the trade marks, although it is necessary to take into account their distinctive and dominant components and to give

[13] Opponents written submissions, paragraph 32
[14] Applicant's written submissions, paragraph 39
[15] https://dictionary.cambridge.org/dictionary/english/go
[16] Case C-251/95, paragraph 23

due weight to any other features which are not negligible and therefore contribute to the overall impressions they create.

45. The respective trade marks are shown below:

Second earlier mark	Contested mark
	FENIX
Third earlier mark	
FENICS GO	

Overall impressions

46. The second earlier mark is a figurative mark that comprises the word “FENICS” in stylised font. The overall impression lies in the word “FENICS” with the stylisation playing a lesser role.

47. As for the third earlier mark, it is a word-only mark containing the words “FENICS GO”, the overall impression is dominated by the word “FENICS” which is longer than

the word “GO” and appears at the beginning of the mark. The word “GO” also provides a contribution but plays a lesser role.

48. The contested mark is a word-only mark comprising the word “FENIX”. As there are no other components to the mark, the overall impression lies in the word “FENIX”.

Visual comparison

49. The second earlier mark and the contested mark are similar as they both contain words that begin with the letters “FENI”, a position which is generally considered to have more of an impact on UK consumers.[17] However, the marks differ in their respective endings as the contested mark ends with the letter “X” whilst the second earlier mark ends in the letters “CS”. Further, the second earlier mark is presented in stylised font whereas the contested mark is a word only mark. Taking into account the overall impressions, I find that the competing marks are visually similar to between a medium and high degree.

50. With respect to the third earlier mark, it contains the same first word as the second earlier mark, i.e. “FENICS”. This word will have the same similarities and differences when compared to the contested mark. However, the third earlier mark, like the contested mark, is a word-only mark. The third earlier mark also contains the word “GO” which is not replicated in the contested mark. Overall, I consider the competing marks to be visually similar to a medium degree.

Aural comparison

51. The second earlier mark and the contested mark both encompass two syllables “FEN-ICS/FEN-IX”. These syllables will be pronounced in the same way. Accordingly, these marks are aurally identical.

52. The third earlier mark consists of the same first two syllables as found in the second earlier mark. However, it has an extra syllable in the word “GO”, which creates

[17] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

a point of aural difference between it and the contested mark. Consequently, I find that there is a high degree of aural similarity between these marks.

Conceptual comparison

53. The opponent claims "FENICS is a made-up word and has no meaning in the English language. A conceptual similarity is therefore not able to be made."[18] However, the opponent has not commented on the meaning of the contested mark, "FENIX". Similarly, the applicant states, "None of the respective marks has [sic] a meaning which means it is not possible to conduct a conceptual comparison."[19] I am prepared to accept that the words "FENICS" and "FENIX" have no meaning within the English language and as such will be seen as invented words. It follows that the second earlier mark and the contested mark are conceptually neutral.

54. The third contested mark will be seen as conceptually neutral insofar as it contains the same word as the second earlier mark. However, the additional word "GO" in the third earlier mark will be understood in accordance with its dictionary definition as discussed above, and creates a conceptual difference as it is not replicated in the contested mark. Consequently, insofar as the competing marks convey any conceptual meanings, they are dissimilar.

Likelihood of confusion

55. Whether there is a likelihood of confusion must be assessed globally, taking into account a number of factors. One such factor is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services, and vice versa. It is also necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be aware of the fact that the average consumer rarely has the opportunity to make direct comparisons between

[18] Opponent's submissions, paragraph 40
[19] Applicant's submissions, paragraph 39

trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

56. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods down to the responsible undertakings being the same or related.

57. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C. (as he then was), as the Appointed Person, explained that:

> "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)."

58. These examples are not exhaustive but provide helpful focus.

59. I bear in mind that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion.[20]

60. Furthermore, in *Liverpool Gin*,[21] Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

The second earlier mark and the contested mark

61. I have found that the applicant's goods and services are either identical or similar to between a low and medium degree to the goods and services of the second earlier mark. I have found that the average consumer of the goods and services will be business and professional users, including those in the financial and investment sector, who will pay a higher than average level of attention. I have found that the

[20] *Duebros Limited v Heirler Cenovis GmbH,* BL O/547/17
[21] *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207

purchasing process will be largely visual, however, I have not discounted aural considerations. The overall impression of the second earlier mark is dominated by the word “FENICS”, while the stylisation plays a lesser role. The overall impression of the contested mark lies in the word, “FENIX”. I have found that the second earlier mark and the contested mark are visually similar to between a medium and high degree, aurally identical, and conceptually neutral. I have also found that the second earlier mark possesses a high degree of inherent distinctive character.

62. The competing marks have different respective endings. The second earlier mark ends in the letters “CS” whilst the contested mark ends in the letter “X”. In addition, the second earlier mark appears in a stylised font. However, the marks coincide in highly similar words “FENICS/FENIX”, which have the same first four letters, a position where consumer’s attention is usually drawn. These highly similar words dominate the overall impression and distinctiveness of the respective marks. In my opinion, taking into account the overall levels of similarity between the marks, the differences are likely to be insufficient to distinguish between the competing marks, especially as the difference appears at the end of the respective marks. Furthermore, the stylisation in the second earlier mark, although contributing to the overall impression of the mark, may also be misremembered by consumers. Further, the words “FENICS/FENIX” are not only aurally identical but lack a conceptual hook to differentiate between the competing marks. In my judgement it is highly likely that consumers, even paying a higher than average level of attention during the purchasing process, would misremember the marks for one another and fail to recall the difference in stylisation and different endings, particularly given the high level of distinctive character possessed by the second earlier mark. Consequently, in my view there is a likelihood of direct confusion.

63. In the event I am wrong about direct confusion, I will now go on to consider indirect confusion in respect of the second earlier mark.

64. Where consumers recognise the difference in stylisation between the competing marks, as discussed above they will most likely misremember or imperfectly recollect the highly similar words i.e “FENICS/FENIX” for one another. In these circumstances it is my view that the difference created by the stylisation will be seen as a brand

variation. Therefore, I am satisfied that consumers, paying even a higher than average degree of attention, would assume a commercial association between the parties, or sponsorship on the part of the opponent. Consequently, I consider there to be a likelihood of indirect confusion.

The third earlier mark and the contested mark

65. In relation to the third earlier mark, I have found that the applicant's goods and services are either identical or similar to between a low and medium degree to the goods and services of the third earlier mark. I have found that the average consumer of the goods and services will be business and professional users, including those in the financial and investment sector, who will pay a higher than average level of attention. I have found that the purchasing process will be largely visual, however, I have not discounted aural considerations. The overall impression of the third earlier mark is dominated by the word "FENICS", while the word "GO" provides a smaller contribution. Whereas the overall impression of the contested mark lies in the word, "FENIX". I have found that the third earlier mark and the contested mark are visually similar to a medium degree, aurally similar to a high degree, and conceptually dissimilar. I have also found that the third earlier mark possesses between a medium and high degree of inherent distinctive character.

66. The first word in the third earlier mark and the contested mark have different respective endings. The third earlier mark ends in the letters "CS" whilst the contested mark ends in the letter "X". Furthermore, the third earlier mark contains an additional word i.e. "GO" which is not replicated in the contested mark. The marks coincide in highly similar words "FENICS/FENIX", which dominate the overall impressions and distinctiveness of the respective marks. The competing marks are similar in the first four letters of the mark "FENI" which, as discussed above, is especially important as it is a position where consumer's attention is usually directed. The marks are also aurally identical in the overlapping words "FENICS/FENIX". Further, despite having found that the marks are conceptually dissimilar overall, this is the result of the common dictionary word "GO" appearing at the end of the mark, which plays a lesser role. In my opinion, taking into account the overall levels of visual and aural similarity between the marks, and the level of distinctiveness of the third earlier mark, the

differences are likely to be insufficient to distinguish between the competing marks. This is likely to result in consumers, even paying a higher than average level of attention, misremembering the marks for one another, and failing to recall the different endings of the respective first words and the additional two-letter word. Therefore, in my opinion, there is a likelihood of direct confusion.

67. In the event I am wrong about direct confusion, I will now go on to consider indirect confusion in relation to the third earlier mark.

68. If consumers recognise that there are differences between the competing marks, they will also recognise the highly similar words “FENICS/FENIX” which dominate the respective overall impressions, and which is the most distinctive element of the third earlier mark. They both consist of a similar word which have the identical first four letters. Therefore, they are likely to be misremembered or imperfectly recalled as one another. Whether consciously or unconsciously, this will lead the average consumer through the mental process described in *L.A. Sugar*. In my view the misremembered word FENICS/FENIX is strikingly distinctive and, therefore, consumers may believe that only the opponent would be using the word within its marks. In addition, or in the alternative, the addition/removal of the word “GO” readily lends itself to a logical brand extension, i.e. the third earlier mark would be seen as a variant brand which includes the word “GO”, which would be perceived as a faster version of the software or more immediate technological services with the applicant’s mark perceived as the original. Taking all this into account, I am satisfied that consumers, paying even a higher than average degree of attention, would assume a commercial association between the parties, or sponsorship on the part of the opponent, due to the highly similar elements “FENICS/FENIX”. Consequently, I consider there to be a likelihood of indirect confusion.

69. I have found a likelihood of confusion based upon the second and third earlier marks in relation to all the applied-for goods and services, except for those in class 45 and the terms “Electronic data storage; Online data storage; Computer services concerning electronic data storage” within class 42. However, I have considered the goods and services under the first earlier mark and irrespective of whether the evidence demonstrates use, none of the goods and services are similar to the

applicant's services that I have found dissimilar. Therefore, it is not necessary to go on to consider the opponent's first earlier mark which requires a proof of use assessment. In the circumstances, consideration of the first earlier mark does not take the opponent's claim any further.

Conclusion

70. The opposition brought under section 5(2)(b) of the Act has been partially successful. Subject to any appeal against my decision, the application will be refused in respect of the following goods and services:

> Class 9: Virtual server software; Cluster computer system hardware; Computer software for the setup, configuration and management of cluster computer systems, supercomputer systems, operating system software and multiple computers in a networked environment; Cluster computer system software; Supercomputer systems; Computer networks consisting of a number of computers; Computer software in the field of operating and enhancing high performance and high availability computer hardware and computer networks.
>
> Class 37: Installation and maintenance of hardware for cluster networks and grid architectures.
>
> Class 42: Services for the design of interactive computer software; Services relating to interactive computer networks; Technological services relating to interactive computers; Services for the design of scalable computer software; Services relating to scalable computer networks; Technological services relating to scalable computers; Providing of virtual computer systems by means of cloud computing; […] Cloud computing; Consultancy relating to the use of high-performance computers; Design of high performance and high availability computer systems, cluster computer systems, supercomputer systems, multiple computer systems and computer networks; Research relating to data processing; Research in the field of information technology; Research in the field of data processing technology.

71. The application will proceed to registration in the UK in respect of the following services, against which the opposition has failed:

> Class 42: Electronic data storage; Online data storage; Computer services concerning electronic data storage.
>
> Class 45: Generation, acquisition, disposal and evaluation of industrial property rights, in particular patents; Licensing of industrial property rights, Industrial property licensing consultancy; Technology licensing.

Costs

72. As the opponent has enjoyed a larger degree of success than the applicant, it is entitled to a contribution towards its costs based upon the scale published in Annex A of Tribunal Practice Notice 2 of 2016, with an appropriate reduction to reflect the applicant's level of success. Applying this guidance, I award the opponent the sum of **£610**, which is calculated as follows:

Official fee:[22]	£100
Preparing the notice of opposition and considering the applicant's counterstatement:	£170
Filing written submissions: (including further written submissions)	£340
Total:	**£610**

73. Accordingly, I hereby order Prof. Dr. Thomas Schulthess to pay Fenics Software, Inc. the sum of **£610**. This sum is to be paid within twenty-one days of the expiry of

[22] The official fee connected with the filling of the Form TM7 is not subject to a reduction.

the appeal period, or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 31st day of May 2023

Sarah Wallace
For the Registrar

Annex

FENICS UK trade mark number 908671133 The first earlier mark	**Class 9** Computer software; computer software relating to the financial services market and the provision of financial trading information; computer software used to calculate the theoretical fair price of options on foreign exchange contracts and other financial instruments; all of the aforementioned goods only in the financial and investment field and not in the insurance field. **Class 42** Computer programming services; design and development of computer software; maintenance of computer software; computer network and support services; pre and post sale technical support services; post sale maintenance services; professional advisory and consultancy services; all of the aforesaid services relating to the financial services market and the provision of financial trading information; all of the aforementioned services only in the financial and investment field and not in the insurance field.
	**Class 9** Downloadable computer software for calculating and analyzing prices of financial instruments; downloadable computer financial software for calculating the theoretical fair price of options on foreign exchange contracts and other financial instruments; downloadable computer software for price discovery of financial instruments;

UK trade mark number 801503423 The second earlier mark	downloadable computer financial software for processing of securities transactions, managing financial data, and creating financial reports; downloadable computer software for use in connection with capital investment services, securities brokerage services, namely, transacting and trading of financial instruments; downloadable computer software for financial trade execution, trade allocation, confirmation, clearing and settlement transactions; downloadable computer software for accessing an electronic marketplace for trading of financial instruments; downloadable computer software for accessing financial information, namely, information in the fields of futures, commodities, securities, currencies, financial instruments, brokerage, trading, investments, companies and financial markets and stock pricing and financial indices; downloadable electronic publications, in the nature of electronic newsletters in the fields of business, finance and investing; downloadable computer software for electronically trading securities; customizable application programming interfaces, namely, downloadable software development tools for the creation of client interfaces; downloadable computer software that enables trading in financial instruments, provides trade execution, allocation, settlement and confirmation capabilities, and provides access to financial information and financial market information, real time and otherwise; downloadable computer software used to calculate the theoretical fair price of options on

	foreign exchange contracts and other financial instruments. **Class 36** Financial analysis, management and consulting; financial portfolio management; capital investments services; financial securities exchange services; securities brokerage services; financial services, namely, transacting and trading of financial instruments; financial services, namely, aggregation of financial data; providing an electronic marketplace for trading of financial instruments; providing financial information; providing financial information, namely, information in the fields of futures, commodities, securities, currencies, financial instruments, brokerage, trading, investments, companies, financial markets, stock pricing and financial indices; financial services, namely, providing financial market data, financial securities data, and financial pricing data in the nature of financial instrument price information; financial portfolio management services; financial services in the field of securities analytics, namely, reporting securities prices and indicative prices for use in analyzing and assessing securities portfolios; financial, securities and commodities exchange services; financial trade execution, allocation, confirmation, clearing and settlement services; investment brokerage; financial analysis and research services; analyzing and compiling data for measuring the performance of financial

	markets; providing information and links to other websites in the field of finance. **Class 38** Communication of financial information through an online global computer network; electronic transmission for others of securities and financial information via computer linking services, namely, communicating and routing trade information involving orders, entry and execution services, to others via a global computer network; consultancy and provision of information relating to communication of financial information through an online global computer network; leasing of telecommunications equipment. **Class 42** Research, design and development of computer software; installation and maintenance of computer software; computer software consulting; updating of computer software for others; customization of computer software; providing temporary use of on-line non-downloadable software for accessing a financial exchange; providing temporary use of on-line non-downloadable software for accessing financial information and trading of financial instruments; providing temporary use of on-line non-downloadable software for financial trade allocation, confirmation, clearing and settlement transactions; providing temporary use of on-line non-downloadable software for calculating and analyzing prices of financial instruments and

	accessing financial securities pricing data; providing temporary use of on-line non-downloadable computer software for accessing financial securities pricing data; providing temporary use of on-line non-downloadable computer software for managing financial data and creating financial reports; technical support services, namely, troubleshooting of computer software problems; customized software development services; application service provider featuring customizable application programming interfaces for use in building software applications; computer consulting services in connection with software for facilitating interactive communication and information sharing over a global computer network and other networks in the field of finance; computer software as a service (SAAS) featuring computer software for accessing, hosting, managing, developing, analyzing and maintaining scalable computer hardware, computer software, computer applications, websites, and databases for others accessible via private and global computer networks; platform as a service (PAAS) featuring computer software platforms for accessing, hosting, managing, developing, analyzing and maintaining scalable computer hardware, computer software, computer applications, websites, and databases for others accessible via private and global computer networks; infrastructure as a service (IAAS) featuring computer software platforms for accessing, hosting, managing, developing, analyzing and

	maintaining scalable cloud computing infrastructure services accessible via private and global computer networks; providing virtual computer systems and virtual computer environments through cloud computing; infrastructure as a service (IAAS) for financial exchange services, application service provider (ASP) and software as a service (SAAS) services featuring software matching engines for routing, allocating and processing trades on a financial exchange; matching engine as a service, namely, software for matching, routing, allocating and processing bids and offers on a financial exchange; cloud computing services, namely, cloud hosting in the nature of a scalable computer software for providing access to an electronic financial exchange; computer hardware and software design and development; design, deployment, support, management, and maintenance of cloud computing infrastructure software for others; consultation services in the fields of selection, implementation and use of computer hardware and software systems for others; computer consultation services in the field of infrastructure as a service (IAAS), software as a service (SAAS), and platform as a service (PAAS); computer network design for others; technical support services, namely, remote and on-site infrastructure management services for monitoring, administration and management of public and private cloud computing IT and application systems; technical support services, namely, technical administration of servers for

	others and troubleshooting in the nature of diagnosing computer hardware and software problems; rental of computer hardware, computer software and web servers.
FENICS GO UK trade mark number 801523623 The third earlier mark	**Class 9** Downloadable computer financial software for processing of securities transactions, managing financial data, and creating financial reports; downloadable computer software for use in connection with capital investment services, securities brokerage services, namely, transacting and trading of financial instruments; downloadable computer software for financial trade execution, confirmation, clearing and settlement transactions; downloadable computer software for accessing an electronic marketplace for trading of financial instruments; downloadable computer software for accessing financial information, namely, information in the fields of futures, commodities, securities, currencies, financial instruments, brokerage, trading, investments, companies, financial markets and stock pricing and indices; downloadable electronic publications, in the nature of electronic newsletters in the fields of business, finance and investing; downloadable computer software for electronically trading securities; customizable application programming interfaces, namely, downloadable software development tools for the creation of client interfaces; downloadable computer software that enables trading in financial instruments, provides

	trade execution, settlement and confirmation capabilities, and provides access to financial information and financial market information, real time and otherwise; downloadable computer software used to calculate the theoretical fair price of options on foreign exchange contracts and other financial instruments. **Class 35** Providing an electronic marketplace for trading of financial instruments for buyers and sellers of financial instruments through a global communications network. **Class 36** Financial analysis, management and consulting; capital investments services; securities brokerage services; financial services, namely, transacting and trading of financial instruments; providing financial information; providing financial information, namely, information in the fields of futures, commodities, securities, currencies, financial instruments, brokerage, trading, investments, companies, financial markets, stock pricing and stock indices; financial, securities and commodities exchange services; financial trade execution, confirmation, clearing and settlement services; investment brokerage; financial analysis and research services; providing information including links to other websites in the field of finance. **Class 38**

	Electronic transmission of financial information through an online global computer network; consultancy and provision of information relating to electronic transmission of financial information through an online global computer network; leasing of telecommunications equipment. **Class 42** Scientific and technological research, design and development of computer hardware and software; installation and maintenance of computer software; computer software consulting; updating of computer software for others; customization of computer software; providing on-line non-downloadable software for accessing financial information and trading of financial instruments; technical support services, namely, troubleshooting in the nature of diagnosing computer hardware and diagnosing and repairing of software problems; customized software development services; application service provider featuring customizable application programming interfaces for use in building software applications; computer consulting services in connection with software for facilitating interactive communication and information sharing over a global computer network and other networks in the field of finance.