

**TRADE MARKS ACT 1994**

**IN THE MATTER OF  
TRADE MARK APPLICATIONS Nos. 2442444, 2442447 AND 2459605  
IN THE NAME OF WAPPLE.NET LIMITED**

**AND IN THE MATTER OF  
CONSOLIDATED OPPOSITIONS Nos. 95786, 95787 AND 95890 THERETO  
BY APPLE INC**

**AND IN THE MATTER OF  
AN APPEAL TO THE APPOINTED PERSON BY THE OPPONENT  
AGAINST DECISIONS OF MR. DAVID LANDAU  
DATED 1 FEBRUARY 2012 AND 9 MARCH 2012**



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**DECISION**

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**Introduction**

1. This is an appeal against decisions of Mr. David Landau, the Hearing Officer acting for the Registrar, taken in consolidated opposition proceedings brought by Apple Inc. against applications for trade mark registration by Wapple.net Limited.
2. The Hearing Officer referred to Apple Inc. as “AI” and Wapple.net Limited as “WN” and I shall do the same.
3. The consolidated opposition proceedings concerned the following three trade mark applications filed by WN under numbers 2442444, 2442447 and 2459605 respectively:

<b>Trade mark</b>	<b>Application date</b>	<b>Class of goods/services</b>
WAPPLE	23.12.2006	9, 38, 41, 42
 	23.12.2006	9, 38, 41, 42

	27.06.2007	9
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4. The full specification lists for WN's applications are **attached** at **Annex A**.
5. WN's three applications were opposed by AI under numbers 95786, 95787 and 95890 respectively. Each application was opposed under Section 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994.
6. The earlier trade marks on which AI relied in support of each opposition under Section 5(2)(b) and 5(3) included the following registrations for the word APPLE:

Trade mark	Registration date	Class of goods/services
UK 1246443	20.11.1992	9
UK 1276764	01.11.1991	42
CTM 000000753	03.02.1999	9, 16, 38, 41, 42
CTM 002593168	07.08.2003	9, 28, 39

7. The full specification lists for AI's registrations UK 1246443, UK 1276764, CTM 000000753 and CTM 002593168 are **attached** at **Annex B**.
8. AI also relied upon the word APPLE as being a well known trade mark within the meaning of Sections 6(1)(c) and 56 of the Act. There was some dispute as to whether AI had specified the goods and services in respect of which well known status was claimed in APPLE for the purposes of reliance on the relative ground for refusal under Section 5(2)(b) of the Act.
9. AI based its opposition under Section 5(4)(a) of the Act on unregistered rights in signs comprising or containing APPLE in respect of goods and services, which included *inter alia* all the goods and services covered by AI's UK and CTM registrations listed paragraph 6 above.
10. In a Decision issued on 1 February 2012, BL O/036/12, the Hearing Officer accepted AI's opposition **in full** against WN's application number 2442447 for WAPPLE.NET figurative (trade mark 2 shown at para. 3 above). However, he dismissed **entirely** AI's oppositions against WN's applications numbers 2442444 and 2459605 for

WAPPLE and WAPPLE CANVAS figurative respectively (trade marks 1 and 3 shown at para. 3 above). The Hearing Officer considered that WN was entitled to an award of costs outwith the scale, which he assessed in a Supplementary Decision issued on 9 March 2012, BL O/108/12.

11. On 11 April 2012, AI filed Notice of appeal to the Appointed Person under Section 76 of the Act against the refusal by the Hearing Officer of Opposition numbers 95786 and 95890 (v. WAPPLE and WAPPLE CANVAS figurative) in BL O/036/12, and against the Hearing Officer's award of costs in BL O/108/12.
12. At the appeal hearing, AI was represented by Mr. Mark Engelman of Counsel instructed by Edwards Wildman. WN was represented by Mr. Andrew Norris instructed by Gateley. These were the same Counsel who appeared before the Hearing Officer and I am grateful to them for guiding me through the extensive evidence (on AI's part) and the arguments that were put before the Hearing Officer.

### **Genuine use**

13. Mr. Engelman impressed upon me that this was a dispute concerning mobile phone technology, which I accept. He maintained that the Hearing Officer erred in failing to take account of evidence establishing AI's (1) genuine use of, and (2) reputation in APPLE in relation to AI's IPHONE product. I considered that at times Mr. Engelman tended to elide these 2 issues.
14. Backtracking for a moment, WN put AI to proof of use of certain of the goods and services covered by AI's earlier registrations that were more than 5 years old and for which AI had stated use (Section 6A of the Act). The Hearing Officer remarked in relation to this request (para. 203), which was not challenged on appeal:

*“The request for proof of use by WN was clearly focussed on what its business was and seeking to find if there was clear, blue water between what it was doing and what AI established in relation to use. The request for proof of use in relation to software can hardly be considered perverse taking into account the findings in Galileo International Technology LLC v European Union (formerly European Community) [a decision of Floyd J [2011] EWHC 35 (Ch) at para. 39 referred to by the Hearing Officer earlier in at para. 115]”.*
15. It was agreed that the respective 5-year periods for proof of use of AI's earlier trade marks were:
  - (a) in relation to applications numbers 2442444 and 2442447 (WN's trade marks 1 and 2), 15 September 2002 – 14 September 2007
  - (b) in relation to application number 2456905 (WN's trade mark 3), 27 October 2002 to 26 October 2007.
16. By contrast the time for establishing the claimed reputation in AI's earlier trade marks (and well known status) was the respective dates of the applications, 23 December 2006 (2442444 and 2442447) and 27 June 2007 (2456905).

17. Of the challenged goods and services the Hearing Officer's findings with regard to proof of use were as follows:

**Class 9**

Computer programs and computer software, telephone based information retrieval systems, software and firmware, data recordings, computer and electronic games, multimedia products comprising or for use with any class 9 goods; interactive products comprising or for use with any class 9 goods.

**Genuine use established for *computer programs (including computer firmware) and computer software* and for devices for the recordal and reproduction of music.**

**Class 38**

Communications by computer, computer intercommunications; telecommunications services; electronic transmission of data and documents via computer, delivery of data and messages by electronic transmission, receipt and delivery of digital music, video and other content by telecommunication and electronic transmission, providing wireless telecommunications via electronic communications networks<sup>1</sup>.

**Genuine use substantiated only for receipt and delivery of digital music by telecommunication and electronic transmission.**

**Class 41**

Instruction and entertainment in the field of computers, multimedia products, interactive products and online services.

**A fair specification in view of the use shown was *instruction in the field of computers, multimedia products, interactive products and online services; online audio entertainment services.***

**Class 42**

Consultancy, design, testing research and advisory services, all relating to computing, data processing and computer programming; computer aided design and engineering services; computer programming; computer systems and analysis, research and development of computer hardware and of software technological services relating to computers; computer consultation, design, testing, research and advisory services; research and development of computer hardware and software; computer services relating to multimedia and/or interactive products; provision of computer databases.

**Genuine use established for advisory services in relation to computers and software and computer services in relation to the supply of music over the Internet.**

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<sup>1</sup> The Hearing Officer noted that the words "*receipt and delivery of digital music, video and other content by telecommunication and electronic transmission, providing wireless telecommunications via electronic communications networks*" did not appear in AI's specifications in question.

18. Mr. Engelman furnished the Hearing Officer with a schedule in relation to the use that AI had shown, which the Hearing Officer reproduced in his decision with an extra column recording the Hearing Officer's comments (para. 116). Mr. Norris on WN's part conceded that AI had shown use for computers and closely related software, such as operating software for computers; computers used for storing and playing music.
19. AI's evidence of use was largely contained in 2 witness statements of Thomas R. La Perle, a Director managing AI's Trademark, Copyright and Enforcement Group, dated 24 August 2009 and 3 February 2011. The Hearing Officer's general criticisms of this evidence were that at times it lacked jurisdictional particularisation, related indiscriminately to a number of AI trade marks and fell outside the material dates.
20. As mentioned, AI's main complaint on appeal concerned AI's IPHONE mobile phone device. The Hearing Officer found that the APPLE IPHONE product was launched in the UK on 9 November 2007, i.e., after the material dates, which finding went unchallenged.
21. The grounds of appeal contended that the Hearing Officer ignored in the evidence: (1) AI's preparations for launch; and (2) the success of the IPHONE after launch. That led him to exclude comparison of certain of AI's goods and services (as above) to WN's goods and services applied for, especially "*telephone based information retrieval systems*" and "*computer programs and computer software*" as they related to mobile phone telecommunications devices (AI's Skeleton Argument on Appeal, paras. 10 and 14).
22. Regarding pre-launch preparations, AI relied on the Judgment of the CJEU in Case C-40/01, *Ansul BV v. Ajax Brandbeveiliging BV* [2003] ECR I-2439 at paragraph 37<sup>2</sup>:

*"37. It follows that genuine use of the mark entails use of the mark on the market for the goods or services protected by that mark and not just internal use by the undertaking concerned. The protection the mark confers and the consequences of registering it in terms of enforceability vis-à-vis third parties cannot continue to operate if the mark loses its commercial raison d'être, which is to create or preserve an outlet for the goods or services that bear the sign of which it is composed, as distinct from the goods or services of other undertakings. Use of the mark must therefore relate to goods or services already marketed or about to be marketed and for which preparations by the undertaking to secure customers are under way, particularly in the form of advertising campaigns. Such use may be either by the trade mark proprietor or, as envisaged in Article 10(3) of the Directive, by a third party with authority to use the mark."* [Mr. Engelman drew my attention to the words underlined.]
23. As to the relevance of use after the relevant periods, I was directed to the Order of the CJEU in Case C-259/02, *La Mer Technology Inc v. Laboratoires Goemar SA* [2004] ECR I-1159, at paragraph 31:

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<sup>2</sup> Cited by the Hearing Officer at para. 111 of his Decision.

“31. Nevertheless, the Directive does not expressly preclude in assessing the genuineness of use during the relevant period, account being taken, where appropriate, of any circumstances subsequent to that filing. Such circumstances may make it possible to confirm or better assess the extent to which the trade mark was used during the relevant period and the real intentions of the proprietor during that time. [Mr. Norris highlighted the last sentence.]”

24. AI’s skeleton argument referred specifically to certain passages in the Witness Statements of Mr. La Perle and material contained in Exhibits TLP 33 and 44, which AI acknowledged were discussed by the Hearing Officer in his Decision. Mr. Engelman also announced at the hearing his intention to take me through numerous other references to alleged use in AI’s evidence.
25. I asked Mr. Engelman whether, if successful, this ground of appeal would make any difference to the outcome of the Decision. The Hearing Officer held that all the goods and services applied for were identical (Class 9), highly similar (Classes 9, 38 and 41) or reasonably similar (Class 42) to AI’s goods and services (for which use had been shown where required/demanded). Further, reputation in APPLE at the application dates extended to anything involving computers and the Internet. Yet, even in the case of identical goods the Hearing Officer held that the grounds of objection in Section 5(2)(b), 5(3) and 5(4)(a) were not made out in respect of applications numbers 2442444 and 2459605 (WN’s trade marks 1 and 3) because of the distances between the trade marks.
26. Mr. Engelman’s overall position was that the mistakes he alleged were indicative of wider error on the part of the Hearing Officer.
27. Given that position, I agreed to hold over writing my decision to allow: (1) AI to supply me with a written list of references in the evidence on which AI sought to rely in support of use of APPLE in relation to mobile phones (copy to the other side and the Registrar); and (2) WN to supply me with written comments thereon (again copy to the other side and the Registrar). In the event, AI provided me with an extensive list of references<sup>3</sup> and WN a full list of comments.
28. I have carefully considered all the items that were referred to me in AI’s list. I have also reviewed the Hearing Officer’s treatment of the evidence in the Decision. In my judgment the Hearing Officer was right to conclude that AI had failed to establish genuine use in the UK or the EU (as appropriate) during the relevant periods of APPLE in respect of mobile phones.
29. As the above quotations from *Ansul* and *La Mer* make clear, qualifying use (including pre-launch preparations) must be of the mark in suit, for the goods and services in question, by the proprietor or with his consent and in the case of subsequent events in order to confirm or better assess use taking place at the relevant time.
30. Many of the items I was referred to were outside of the relevant dates and related to circumstances/events taking place in the USA. Further many consisted of editorials

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<sup>3</sup> Difficult to follow up because of the lack of pagination in the evidence.

and news articles written by journalists speculating whether Apple (the company) would introduce an IPHONE and what features it would contain. The BBC, Telegraph and Guardian reported on the announcement of the IPHONE by Steve Jobs in a speech in San Francisco in January 2007 and the subsequent launch of the IPHONE device in the USA in June 2007. An M.Metrics<sup>4</sup> press release dated 15 June 2007 reported on awareness and intention to buy an IPHONE when launched, in the UK and US.

31. However, despite the hype none of this was use, or preparations for use, by the proprietor or with his consent in order to create and maintain a market in the IPHONE mobile phone device in the UK/EU (*BEST BUY Trade Mark*, BL O/461/12, see discussion at paras. 44 – 53).
32. I was directed to no evidence of any pre-launch advertising campaign(s) by AI in the UK/EU<sup>5</sup> in the relevant periods. Moreover, there was scant evidence showing use of APPLE (as a trade mark rather than a reference to AI) in connection with mobile phone devices. By contrast, there was plenty of mention of IPHONE in the materials and also a reference to the ROKR mobile phone, which was apparently a joint venture in around 2005 between Motorola and AI.
33. The most compelling piece of evidence to my mind was a press release dated 18 September 2007 by O2 that it would be the exclusive carrier for the IPHONE device in the UK (TLP 33). However, again the press release speaks of the IPHONE and AI but not APPLE the trade mark as such in relation to mobile phone devices and there is no indication of to whom it was released. The O2 press release along with several of the other items in the evidence I was referred to, confirm that the IPHONE was not introduced in the UK until 9 November 2007. Mr. La Perle in his second Witness Statement dated 3 February 2011 cited media reports of an overwhelming number of pre-launch orders (the suggestion is for the UK) but there was no supporting evidence of any such orders.
34. I concluded therefore that the Hearing Officer did not err in rejecting AI's claim to have made genuine use of APPLE for mobile phone telecommunications devices in the UK/EU within the relevant periods. Nor in my judgment did the Hearing Officer err in holding that at the dates of the applications (23 December 2006 and 27 June 2007):

*“171) In relation to the computer programs and computer software and goods and services directly collateral to them, computer games and advisory services in relation to computers and software, the reputation of APPLE at the dates of application was enormous. It was a famous trade mark, one of the most famous trade marks. In relation to the other goods and services of AI which have been found to identical or similar, there was no similar reputation eg in relation to mobile telephones. [Emphasis mine]”*

35. The second ground of appeal under this head was that the Hearing Officer considered use of the earlier trade marks in respect of the receipt and delivery of digital music by

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<sup>4</sup> US mobile phone market research company with a London office.

<sup>5</sup> Or indeed anywhere else, except the speech by Steve Jobs at Macworld, San Francisco in January 2007.

telecommunication and electronic transmission. These were named as specific services for which WN called upon AI to provide proof of use. AI's complaint was that these services did not appear in the specifications for the earlier trademarks. I must say that I saw no point in this argument even in the context of AI's wider picture on appeal.

36. The Hearing Officer rightly recorded that these specific services were not expressed as such in AI's specifications (paras. 12 and 118). He also considered the case law on partial use within wide terms in a specification and the need arrive at a fair description of goods and services in the light of such use (paras. 113 – 115). When describing AI's evidence, the Hearing Officer noted that WN had conceded use in relation to the APPLE IPOD music device and recorded use in the relevant periods in the UK in relation to the APPLE online ITUNES music store.
37. As far as I understood it, AI was not challenging the Hearing Officer's finding that AI had used the earlier trade marks in the UK in the relevant periods in relation to the receipt and delivery of digital music by telecommunication and electronic transmission.
38. Mr. Engelman said that the Hearing Officer concluded that on the one hand AI failed to show use in relation to the *supply* of music over the Internet but on the other hand AI succeeded in establishing use in relation to *the delivery of digital music by telecommunication and electronic transmission* (Mr. Engelman's emphasis). It seemed to me that this was based on a misreading of the Decision. The Hearing Officer said:

*"121) ... The best that can be said of the evidence in relation to class 42 is that it establishes use in relation to advisory services in relation to computers and software and computer services in relation to the supply of music over the Internet and that it does establish use in relation to delivery of digital music by telecommunication and electronic transmission (a service specifically queried by WN). The music service being provided by iTunes."*

[...]

*124) The scope of what has been shown in relation to the class 38 services under challenge is limited. The evidence only substantiates use for receipt and delivery of digital music by telecommunication and electronic transmission."*

To my mind, there was nothing contradictory in this.

39. If, as appeared to be the case, Mr. Engelman was contending that AI's earlier trade marks did not cover the receipt and delivery of digital music by telecommunication and electronic transmission, Mr. Norris was content to concede the point.
40. It seems to me that the Hearing Officer was considering the receipt and delivery of digital music by telecommunication and electronic transmission as a subset or category of service within AI's specifications as he was obliged and entitled to do. However, since in my view this point can have no effect in AI's favour on the



outcome of the appeal, I decline to decide whether the receipt and delivery of digital music by telecommunication and electronic is, or is not, within the specifications of AI's earlier trade marks.

**Sections 6(1)(c) and 56**

41. I turn next to AI's ground of appeal that the Hearing Officer wrongly refused AI's claim to APPLE as a well known trade mark for a basis of opposition.

42. Section 6(1)(c) of the Act states that:

*“ 6. – (1) In this Act an “earlier trade mark” means –*

*(c) a trade mark which, at the date of the application for registration of the trade mark in question or (where appropriate) of the priority claimed in respect of the application, was entitled to protection under the Paris convention or the WTO agreement as a well known trade mark.”*

43. Section 56(1) of the Act defines a well known trade mark as follows:

*“56. – (1) References in this Act to a trade mark which is entitled to protection under the Paris Convention or the WTO agreement as a well known trade mark are to a mark which is well known in the United Kingdom as being the mark of a person who –*

*(a) is a national of a Convention country, or*

*(b) is domiciled in, or has real and effective industrial or commercial establishment in, a Convention country,*

*whether or not that person carries on business, or has any goodwill, in the United Kingdom.”*

44. AI contended first, that the Hearing Officer was wrong to state that AI was in no better position relying on APPLE as well known earlier trade mark within Section 6(1)(c) of the Act than it was in relying on its earlier registered trade marks within Section 6(1)(a). This was because the use conditions in Section 6A of the Act applied to the latter but not the former, which is true. However, AI would still have needed to show that APPLE was well known in the UK for mobile phone telecommunications devices at the dates of the applications (23 December 2006 and 27 June 2007), which the Hearing Officer found (albeit in the context of AI's earlier registered trade marks) was not the case, a finding that I have refused to overturn.

45. Second, AI contended that the Hearing Officer was wrong to state that AI had not specified the goods and services for which APPLE was claimed to be well known for the purposes of Section 5(2)(b) of the Act. Mr. Engelman referred me to paragraph 1 of Appendix A to the statements of grounds of opposition which he said qualified all AI's grounds including the claim to APPLE as a well known trade mark in paragraph 4 as follows:

“1. *The Opponent is a world-renowned computer and consumer electronics company producing personal computers and a wide variety of associated hardware, computer software, digital music and other consumer electronic devices. In addition, the Opponent provides a broad range of computer and telecommunication services.*

[...]

4. *Further and in the alternative, the APPLE marks are well known within the meaning of Article 6 bis of the Paris Convention. Because of the similarity of the Sign to the Opponent’s APPLE marks, the use of the Sign is liable to cause confusion on the part of the relevant public. Therefore, the APPLE marks are well known marks in accordance with Section 56 and Article 6 bis of the Paris Convention and, accordingly, are earlier trade marks within the meaning of Section 6 and therefore registration of the Sign should be refused pursuant to Section 5(2)(b).”*

46. However, as the Hearing Officer observed in another context (Section 5(3)), paragraph 1 of Appendix A was a statement about the company not primarily about the goods and services in respect of which the trade mark APPLE was claimed to be well known in the UK at the dates of the applications.
47. Insofar as Mr. Engelman’s skeleton argument on appeal suggested that Section 56 of the Act provides a freestanding ground of relative opposition in the Registry that was wrong.
48. The ground of appeal based on Sections 6(1)(c) and 56 of the Act fails.

**Section 5(2)(b)**

Comparison of marks

49. AI contested the Hearing Officer’s comparison of the marks.
50. AI’s “*short point*” was that having found that WN’s WAPPLE.NET figurative trade mark (WN’s trade mark 2 in application 2442447) was to a high degree phonetically and conceptually, and to a reasonable degree visually, similar to APPLE, the Hearing Officer should have applied the same findings to WAPPLE and WAPPLE CANVAS figurative (WN’s trade marks 1 and 3 in applications 2442444 and 2459605 respectively).
51. It is trite law that trade marks must be considered separately<sup>6</sup> (*The Infamous Nut Co Ltd’s Trade Marks* [2003] RPC 126, paras. 35 – 37, *ENER-CAP Trade Mark* [1999] RPC 362).

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<sup>6</sup> Although where a “family” of earlier trade marks can be established, the presence of a common element in the same position may increase the likelihood of confusion (Case C-234/06 P, *Il Ponte Finanziaria SpA v. OHIM* [2007] ECR I-7333). This was not relevant in the present case.

52. In comparing the WAPPLE.NET figurative series of 2 trade marks, the Hearing Officer observed:

*“157) The format of the main word element of the trade marks brings into play different considerations to those applied to the non-stylised word WAPPLE. The word apple is clearly discernible in the trade marks. The element before apple is not obviously the letter W, it could be seen as a three pronged device. Taking into account that apple is a commonly used word, the average consumer is likely to perceive the word apple. This perception will bring phonetic and conceptual identity in respect of this element. .... (Even if the three pronged device were seen as a W, the manner of the presentation is such that the APPLE element stands out.)”*

Those findings were not appealed.

53. By contrast, the Hearing Officer held that since neither APPLE nor WAPPLE would be divided into separate elements but would be perceived by the consumer in their entirety, there was a low degree of phonetic similarity, a reasonable degree of visual similarity and conceptual dissimilarity between the trade marks. WAPPLE CANVAS figurative was even further away. Those findings as such have also not been appealed.
54. I therefore reject the contention that the Hearing Officer should have applied the same reasoning as he did in the comparison of APPLE with WAPPLE.NET figurative, also to the comparison with WAPPLE and WAPPLE CANVAS figurative.

Whose perceptions?

55. Next AI argued that the Hearing Officer wrongly ignored the evidence of John Harris, a member of the Department of Phonetics and Linguistics, UCL, London in his Witness Statement, dated 28 January 2011, to the effect that the initial letter “W” in WAPPLE would not be emphasised by French, Spanish and Italian speakers in the UK when pronounced aurally.

56. On a general note, the Hearing Officer said of this evidence:

*“107) Mr Harris makes statements that are contradicted by the limited empirical evidence of the survey ie the propensity for the manner of pronunciation and the conceptual association of the word WAPPLE. The survey may be fatally flawed as a statistical exercise but it does contain empirical data. Most of his statement is unsupported by empirical evidence. In relation to the significance of WAP, his statement does not take into account the goods and services of the application. Mr Harris’s statement is not of assistance in this decision.”*

57. Specifically, on the use of “W” in other European languages (Harris, paras. 29 – 30) the Hearing Officer observed that this was irrelevant to the issues in the present case which related to the United Kingdom consumer. On the law as it stands at present, he

was correct<sup>7</sup>. The marks in question had to be compared for the purposes of Section 5 through the perceptions of the average English speaking consumer (*JESSICA Trade Mark*, BL O/092/11, paras. 25 – 27, referring to *inter alia* Case C-421/04, *Matratzen Concord AG v. Hukla Germany SA* [2006] ECR I-2303). This criticism is also rejected.

### Medion

58. Mr. Engelman sought to persuade me that APPLE played an independent distinctive role in the WAPPLE and WAPPLE CANVAS marks applied for as contemplated by Case C-120/04, *Medion AG v. Thomson multimedia Sales Germany & Austria GmbH* [2005] ECR I-8551.
59. As I have already indicated, the Hearing Officer held that the WAPPLE element (in both the word only and WAPPLE CANVAS figurative marks) would be viewed as a whole and would not be broken down, as contended for by Mr. Engelman, into 2 separate components, i.e., “W” and “APPLE”. In other words, “APPLE” did not have an independent distinctive role within WAPPLE and WAPPLE CANVAS figurative and therefore the *Medion* principle was inapplicable. This was a finding the Hearing Officer was entitled to make and I am not persuaded he did so in error<sup>8</sup>.

### Conceptual dissimilarity

60. The Hearing Officer compared the marks on the basis of AI’s best case that WAPPLE would be pronounced with a short “a”. His findings were (emphasis mine):
- (1) In relation to APPLE v. WAPPLE (paras. 152 – 154):
- (a) Aurally – “*Owing to the w at the beginning of WN’s trade mark, there is a low degree of phonetic similarity between the respective trade marks*”.
- (b) Visually – “*WN’s trade mark shares the final five letters with APPLE. The average consumer will not ignore the W; especially as it creates an invented word. There is a medium degree of visual similarity between the respective trade marks*”.
- (c) Conceptually – “*For the average consumer WAPPLE is an invented word with no meaning; owing to the nature of many of the goods and services the consumer may see a reference to WAP technology. APPLE is a well-known word. The respective trade marks are conceptually dissimilar; as WAPPLE has no meaning, this dissimilarity is not at the level of conceptual dissonance*”.

<sup>7</sup> This rule may change in the future: see *Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (Recast)*, COM(2013) 162 final.

<sup>8</sup> Indeed, the Hearing Officer remarked that the flawed survey contradicted the unsupported opinion of Mr. Harris that the public would effectively perceive APPLE in WAPPLE (para. 103).

(2) In relation to APPLE v. WAPPLE CANVAS figurative:

*“155) The wapple element in the above trade mark can be considered on the same basis as WAPPLE on its own; nothing turns upon wapple being in lower case. The canvas element of the trade mark is neither descriptive nor allusive to the goods and services of the application. Owing to the positioning and size of the two word elements, each is a distinctive and dominant component of the trade mark. The contrasting colours and the positioning of the words makes the device element more noticeable. Visually and phonetically the trade mark needs must be less similar to the trade mark of AI than WAPPLE on its own. As well as the conceptual dissimilarity in relation to wapple/APPLE, there is the conceptual dissonance in relation to canvas”.*

61. Insofar as the grounds of appeal suggested (para. 6) that the Hearing Officer considered that WAPPLE and WAPPLE CANVAS figurative shared a high degree of phonetic and conceptual similarity and a reasonable degree of visual similarity with APPLE, this was a misrepresentation of the Hearing Officer’s decision and wrong.
62. AI’s arguments in relation to the conceptual aspects were, as I understood them, threefold.
63. First, AI said that the Hearing Officer was wrong to follow Case T-292/01, *Philips-Van Heusen Corp v. OHIM* [2003] ECR 4335 because the facts were incomparable; BASS and PASH (*Philips*) shared only 2 letters in common in the same order, whereas WAPPLE and APPLE shared 5 letters in common in the same order.
64. Likewise, the Hearing Officer was wrong to rely on Case T-460/07, *Nokia Oyj v. OHIM* [2010] ECR II-0089; LIFE BLOG and LIFE shared only 4 letters in common in the same order, although Mr. Engelman opined that *Nokia* (where in contrast to *Philips* the marks were found to be conceptually similar) was nearer the present facts.
65. However, as Mr. Norris commented, all this missed the point. The Hearing Officer cited *Philips* and *Nokia* in his consideration of likelihood of confusion as authorities for the proposition that conceptual differences may sometimes (depending on various elements in the overall assessment of likelihood of confusion) counteract aural and visual similarities in the marks. That principle was affirmed by the Court of Justice of the EU in Case C-361/04 P, *Claude Ruiz-Picasso and others v. OHIM* [2006] ECR I-0643, paragraphs 18 – 25 and was not challenged as such by AI on appeal.
66. It is convenient here to dismiss a linked argument made by AI that the Hearing Officer should have followed Case T-209/09, *Alder Capital Limited v. OHIM* [2011] ECR II-0099, in which the General Court upheld a finding of likelihood of confusion between HALDER and ALDER CAPITAL (CAPITAL being ancillary for financial services). Mr. Engelman highlighted the 5 letters in common in the same order differing in the letter “H” in HALDER as being comparable to the present facts. However, in *Alder* a conceptual comparison was impossible unlike in the present case.
67. Second, AI contended that the Hearing Officer wrongly took into account distinctiveness in his assessment of the degree of similarity between the trade marks. Again, I agree with WN that this is based on a misreading of the decision. The

Hearing Officer dealt with the distinctive character and reputation of APPLE as one of the various interdependent factors (including the degree of similarity between the trade marks) which went into the global assessment of likelihood of confusion. He had earlier compared the marks aurally, visually and conceptually (his conclusions are recorded at para. 60 above). In making that earlier comparison, he expressly instructed himself that the reputation of APPLE must be ignored by reference to *inter alia* Case T-243/08, *Ravensburger AG v. OHIM* [2010] ECR II-0095, paragraph 27.

68. Third, AI argued that WAPPLE was “*freighted with conceptual meaning*” because of WN’s use of what Mr. Engelman characterised as “*the Apple Tree device*”. This was linked to Mr. Engelman’s further argument that use of the Apple Tree device constituted notional and fair use of WAPPLE (*OPEN COUNTRY Trade Mark* [2000] RPC 477).
69. The Hearing Officer described the evidence on this at paragraph 81:

*“At exhibit 3 is a printout of an archived page from WN’s website dated 15 June 2004 and a leaflet advertising a 2006 conference on Mobile Content Management and Distribution. The webpage is headed “Underneath The Wapple Tree”. WN was an associate sponsor of the conference. In a brief introduction to WN Wapple.net appears in the same stylised form as shown in application no 2442447. Instead of the device of the sun, a device of a stylised tree appears above the first letter p. Mr Olsen describes the stylised tree device as being that of an apple tree.”*

70. As this paragraph makes clear, first, the so called Apple Tree device was an adaptation of the WAPPLE.NET figurative trade mark (WN’s trade mark 2) which was not the subject of this appeal. Second, contrary to Mr. Engelman’s suggestion, the Hearing Officer did not conclude that WN had used WAPPLE with an apple tree device. He was merely stating how the witness, John Olsen, described the mark.
71. In my judgment, there are 2 short answers to this point. First, the marks under consideration on this appeal are the word mark WAPPLE and the figurative mark WAPPLE CANVAS (WN’s trade marks 1 and 3). As I have said previously this appeal is not concerned with the WAPPLE.NET figurative series (WN’s trade mark 2) or any adaptation thereof. Second, use of the so called Apple Tree device did not and could not constitute notional and fair use of the word mark WAPPLE (Case T-344/09, *Hearst Communications, Inc. v. OHIM*, 27 June 2012, para. 63).

*Living dangerously*

72. This ground of appeal follows on from the above. AI claims that the Hearing Officer failed to draw the correct inferences from the facts regarding WN’s use of the so called Apple Tree device. Those inferences were that WN intended to take advantage of the APPLE marks and/or that WN was living dangerously. AI claims that if those inferences had been drawn, they would have led the Hearing Officer to conclude that AI’s objections to WAPPLE and WAPPLE CANVAS figurative under Section 5(2)(b) were made out.

73. Mr. Engelman expressed concern that the Hearing Officer should have realised from WN's replies to AI's requests for information<sup>9</sup> that WN was hiding documents relating to adoption of the stylised tree device.
74. The Hearing Officer dealt with AI's living dangerously argument at some length (paras. 126 – 132). He concluded:
- (1) WN's responses to AI's requests did not add to the evidence of Anne Thomas, WN's CEO that WAPPLE "was a quirky name which came up with out of the word "WAP"". WN had adopted the name in 2003 "because we developed technology which uses WAP to enable content such as games to be delivered to mobile phones". (Witness Statement of Anne Thomas, dated 9 June 2010, para. 5).
  - (2) It was of little significance that a business starting out from scratch did not have records of how its name was derived. It would be more surprising if there were such documents.
  - (3) AI chose not to cross examine Ms. Thomas.
  - (4) The intention of the applicant was not a relevant factor under Section 5(2)(b).
  - (5) Whilst an applicant's intention could be relevant to objections under Section 5(3) and 5(4)(a):  
  

*"132) AI has not established that WI had an intention to take advantage of the reputation of APPLE nor that it was living dangerously. (The evidence from the deeply flawed survey would suggest that if that had been the intention of WN, it had failed.)"*
75. AI did not demonstrate that these inferences were wrong, or based on a distortion of the facts. In any event, as I have said already, this appeal concerns WAPPLE and WAPPLE CANVAS figurative (WN's marks 1 and 3), not WAPPLE.NET figurative (WN's mark 2) or a version of WAPPLE.NET figurative with a stylised tree replacing the sun device. To my mind, AI's real complaint is that the Hearing Officer did not find under Section 5(2)(b) in AI's favour in respect of the WAPPLE and WAPPLE CANVAS figurative marks. The living dangerously ground of appeal fails.
76. Finally, AI argued that the Hearing Officer made inconsistent findings on the recognition of APPLE on the market. I reject that contention. Although using slightly different terminology, the Hearing Officer was consistent in his view that the reputation of APPLE was enormous in relation to computer and Internet technology.

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<sup>9</sup> Purportedly made by AI according to Mr. Engelman under Part 18 CPR.

**Section 5(3) and 5(4)(a)**

77. The grounds of appeal under Section 5(3) and 5(4)(a) were dependent on the previous grounds particularly in relation to the comparison of the marks where Mr. Engelman's position was that the "W" in WAPPLE should be ignored, and the living dangerously argument.
78. Generally in relation to Section 5(3) (i.e., across all 3 of WN's marks) the Hearing Officer held that AI had failed to establish 2 of the requisite heads of damage for Section 5(3), namely: (a) unfair advantage taken of the distinctive character or the repute of APPLE; and (b) detriment to the repute of APPLE (tarnishment) (Case C-252/07, *Intel Corporation Inc. v. CPM United Kingdom Ltd* [2008] ECR I-8823, para. 27). Regarding: (a) the Hearing Officer held that there was no unfairness (an intention by WN to trade off the reputation of AI was not established by evidence or inference, paras. 186 – 187); and (b) the goods and services of WN had no inherent characteristic or quality that would have a negative impact or image (para. 190).
79. Turning to the specific marks in suit, first the WAPPLE.NET figurative series (WN's trade mark 2 shown at para. 3 above):

*"192) In relation to the trade marks the subject of application no 2442447, it has been found that there is a high degree of phonetic and conceptual similarity between the trade marks and the trade mark of AI and that there is a reasonable degree of visual similarity between the trade marks. These similarities will bring to mind the trade mark of AI and so create the necessary link. The goods and services of the application are linked to computer technology. Taking into account, the reputation and uniqueness of the APPLE mark and the nature of the respective goods and services for which AI has a reputation, the similarity of the trade marks and the nature of the similarity; it is considered that the use of WN's trade mark would have an effect on the economic behaviour of AI's customers and would dilute the distinctive character of AI's trade mark.*

***193) Registration of application no 2442447 would be contrary to section 5(3) of the Act."***

Nothing in the decision relating to the WAPPLE.NET figurative series of 2 trade marks (application no. 2442447) has been appealed.

80. Second, WAPPLE and WAPPLE CANVAS figurative (WN's trade marks 1 and 3 shown at para. 3 above):

*"194) In relation to the other two trade marks, all of the factors in the global appreciation of a likelihood of confusion were in favour of AI, save similarity. There are similarities between the trade marks but the sequitur of the finding in relation to the likelihood of confusion is that the trade marks are not similar; otherwise the finding of likelihood of confusion would have had to have gone the other way, taking into account the factors in favour of AI. That trade marks have similarities does not make them similar; it would be unusual*



*for a party to launch proceedings where there are no similarities. It is a requisite under section 5(3) of the Act that the trade marks are similar...*

***195) As the trade marks the subject of application nos 2442444 and 2459605 are not similar to APPLE, the grounds of opposition under section 5(3) of the Act are dismissed.”***

81. The Hearing Officer cited Case C-254/09 P, *Calvin Klein Trademark Trust v. OHIM* [2010] ECR I-7989, paras. 46 – 68, in support of his finding that because the marks were dissimilar as a result of his consideration of Section 5(2)(b), the first condition of Section 5(3) (for identical/similar marks) was not satisfied. He also referred to a number of General Court decisions where a similar strategy was employed (e.g., Case T-434/04, *Gateway, Inc. v. OHIM* [2007] ECR II-0163, paras. 58 – 61) and to Case C-5552/09 P, *Ferrero SpA v. OHIM* [2011] ECR I-2063, which confirmed that the similarity of marks is to be assessed in the same way for Section 5(2)(b) and Section 5(3) (para. 54).
82. The Hearing Officer might alternatively have gone through the steps of globally assessing the requisite link and detriment to distinctive character. However, given his prior findings as to the low degree of phonetic similarity, medium degree of visual similarity but conceptual dissimilarity between APPLE on the one hand and WAPPLE and WAPPLE CANVAS figurative on the other hand, I am satisfied that the outcome would have been the same.
83. Mr. Engelman phrased AI’s ground of appeal under Section 5(3) in terms of unfair advantage taken of the distinctive character of the APPLE earlier trade marks. Whichever way the ground is viewed, and bearing in mind the Hearing Officer’s rejection of the living dangerously argument, which I upheld, in my judgment this ground of appeal fails.
84. The Section 5(4)(a) ground of appeal stood or fell with Section 5(2)(b) and is likewise dismissed.

**Supplementary Decision, BL O/108/12**

85. AI contested the Hearing Officer’s Supplementary Decision as to costs, as I understood it, in 2 respects.
86. First, it was said that the Hearing Officer failed to give AI an opportunity to be heard before making his decision on costs, which was contrary to Rule 63(1) of the Trade Marks Rules 2008 and Article 6 of the Convention on Human Rights.
87. AI’s skeleton argument below claimed costs on an off-scale basis in relation to its costs of proving reputation for the purposes of Sections 5(2)(b), 5(3), 5(4)(a) and 56. The parties confirmed that the question of costs (including off-scale costs) was raised and argued before the Hearing Officer in the normal way, as was also apparent from paragraphs 203 – 205 of the Hearing Officer’s substantive Decision (BL O/036/12). Mr. Norris informed me that, although not included in his skeleton argument below, he made a request at the hearing for WN to be awarded costs outwith the scale in respect of having to deal with AI’s evidence (agreed by Mr. Engelman).

88. I am therefore satisfied that AI had the opportunity to be heard on the substantive issue of costs (including off-scale costs) at the oral hearing.
89. In BL O/036/12, the Hearing Officer concluded his substantive determination of costs as follows:
- “205) Taking into account the nature of the evidence that AI provided, even if it had been successful in all three oppositions, an award of costs would have been made against it. It is considered to make an award of costs outwith the scale to WN. WN has four weeks from the date of the issue of this decision to give a breakdown of costs in relation to the consideration of the evidence of AI and solely in relation to this matter. A supplementary decision will then be made in relation to costs.”*
90. It does not appear to me from this, or from the Supplementary Decision or the file, that AI was given the opportunity, as it should have been, to submit any observations that it wished to make on the breakdown of costs WN supplied to the Hearing Officer (or that WN was afforded the opportunity to reply). I agree that the incorrect procedure was followed (see the practice adopted by this tribunal in similar situations at, e.g., BL O/315/09, *General Traders Ltd’s Application*, para. 6) and this point of appeal, to which I return below, succeeds.
91. Second, AI complained that the Hearing Officer: (1) did not take into account WN’s conduct in putting AI to proof of reputation in its APPLE marks; and (2) wrongly discounted the evidence of Mr. Harris and should not have taken that into consideration when awarding off-scale costs to WN.
92. I have already dismissed AI’s arguments as to the evidence of Mr. Harris which disposes of point (2).
93. As regards point (1), it will be recalled that after the appeal hearing, I permitted AI to supply me with a list of items in the evidence on which it sought to overturn the Hearing Officer’s findings in relation to mobile phone telecommunications devices (see para. 27 above).
94. I was uninvitedly also sent copies of open correspondence between the parties and my attention (but no further) was drawn to the existence of closed correspondence<sup>10</sup> (letter Edwards Wildman, 2 April 2013). No submissions were made by AI as to the relevance of such correspondence (beyond a general assertion as to its relevance to the determination of costs). WN in reply expressed concern that this correspondence was not relied on before the Hearing Officer (letter Gateley, 9 April 2013).
95. I have looked at the open correspondence, copies of which were already on the Registry file. I do not consider that the contents (even if missed by the Hearing Officer, which I doubt) would have affected the Hearing Officer’s substantive findings on the issue reproduced below.

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<sup>10</sup> Copies not attached.

96. Mr. Engelman additionally sought to argue that WN's request for proof of use in respect of "*the receipt and delivery of digital music*" was, as he put it, "*unfocussed*". I dismissed this argument earlier in my decision.

97. The Hearing Officer's reasoning in relation to costs outwith the scale was as follows (BL O/036/12):

*"203) Mr Engelman submitted that AI should be awarded costs outwith the scale in relation to the requirement for AI to prove its reputation, which he considered perverse. However, AI claimed a reputation for all of the goods and services of its registrations; something that was not substantiated by any means. The request for proof of use by WN was clearly focused on what its business was and seeking to find if there was clear, blue water between what it was doing and what AI established in relation to use. The request for proof of use in relation to software can hardly be considered perverse taking into account the findings in Galileo International Technology, LLC v European Union (formerly European Community). It is not considered that there is any basis for an award of costs to AI outwith the scale.*

*204) AI provided a large amount of evidence. The survey, the evidence of Mr Blackett, Mr Wood and Mr Harris were of no assistance. The evidence of Mr Zook was excessive; the sole effect of that evidence was to establish that private individuals and sole traders have websites, something that could have been established in one page. Large parts of the evidence of Mr La Perle were not directed to the issues in play in these proceedings and have the appearance of being a standard format used by AI in proceedings. AI did not comply with Tribunal Practice Notice 5/2008; it did not paginate the original evidence that it furnished and it then supplied bundles for the hearing, after the indices for the case had been sent out by the Intellectual Property Office. AI provided a large amount of evidence that was not pertinent to the proceedings or of no assistance. In the case of the evidence of Mr Blackett, AI took no notice of the judgment of the Court of Appeal in relation to the value of evidence he had supplied in esure Insurance Limited v Direct Line Insurance Plc. The furnishing of large amounts of evidence can be oppressive, even if it is not so intended; especially if the parties have unequal resources. The other party has to pay its legal representatives to consider the evidence."*

98. I agree with this reasoning and the observations regarding AI's evidence. The second ground of appeal against the Hearing Officer's Supplementary Decision in BL O/108/12 fails.

99. Returning to the first ground, which I found to have substance, on reflection I do not consider it proportionate to remit the case to the Registry.

100. I have reviewed WN's itemised costs in dealing with AI's evidence (para. 2, Supplementary Decision). On the face of it, they appear to me reasonable. The Hearing Officer allowed 50% of those itemised costs, giving a total of £2,745 off-scale costs in relation to AI's evidence. Again, *prima facie* that seems to me reasonable.

101. The Hearing Officer awarded WN a further £2,400 in on-scale costs in respect of other steps in the 2 oppositions WN successfully defended (para. 3, Supplementary Decision). That award was unchallenged.
102. I will allow AI a period of 14 days from the date of this decision in which to submit any written observations it wishes to make on the list of itemised costs appearing at paragraph 2 of the Hearing Officer's Supplementary Decision, BL O/108/12 only. Such observations should be sent to me through the offices of the Treasury Solicitor and copied to WN and the Registrar. WN will then be allowed 14 days in which to reply in writing (sent and copied in the same way). In the absence of any such submissions, the Hearing Officer's off-scale costs award to WN of £2,745 stands.

**Conclusions and costs of the appeal**

103. In conclusion:
- (1) The appeal largely failed.
  - (2) It succeeded on 1 point which was that AI was not given the opportunity to be heard in relation to the breakdown of costs incurred by WN in considering AI's evidence, which WN supplied to the Hearing Officer after his substantive Decision in BL O/036/12 was handed down.
  - (3) Insofar as successful, WN is entitled to a contribution towards its costs of defending this appeal. The parties agreed that these should be on the scale. I will order AI to pay WN the sum of £900 in respect of WN's costs of this appeal, such sum to be paid to WN within 14 days of this decision.
  - (4) The Hearing Officer's on-scale award of costs in the sum of £2,400 to WN towards WN's costs of the opposition stands and is to be paid by AI to WN within 14 days of this decision.
  - (5) AI is permitted to submit to me written observations on the itemised list of WN's costs appearing at paragraph 2 of the Supplementary Decision, BL O/108/12 only, and WN to reply thereto both as directed at paragraph 102 of my decision.
  - (6) If no such observations are timeously received by me from AI, the Hearing Officer's off-scale award of costs in the sum £2,745 to WN in respect of the opposition stands and becomes payable by AI to WN immediately.

Professor Ruth Annand, 8 July 2013

Mr. Mark Engelman of Counsel instructed by Edwards Wildman Palmer UK LLP appeared for the Appellant/Opponent

Mr. Andrew Norris of Counsel instructed by Gateley LLP appeared for the Respondent/Applicant

**ANNEX A**

**UK Trade Mark Applications Nos. 2442444 and 2442447**

Class 9

Downloadable mobile phone content including logos, ring tones, Internet and wireless application protocol (WAP) games, pictures, wallpapers, animations and applications; all of the aforesaid being downloadable via the mobile phone wireless application protocol (WAP); mobile phone accessories; software to enable the construction of internet sites designed to be viewed via mobile devices and/or software to enable access to the Internet from mobile devices; software for mobile Internet technology; software to build internet sites designed to be viewed via mobile devices using wireless application protocol; software to enable videos, games, graphics, music and/or animated images to be transmitted, viewed and/or managed; software and/or apparatus for profiling and identifying a mobile device to optimise the delivery of internet sites viewed by that mobile device; software and/or apparatus which allows users to carry out marketing and promotions via mobile devices; software to allow technology to prevent and control unauthorised peer-to-peer file sharing as a solution to digital rights management

Class 38

Wireless application protocol (WAP) search engine, portal and directory services; provision of access to an accredited developers network allowing third parties to use and/or resell mobile phone technology and services

Class 41

Non-downloadable games, pictures, chat room services; all made available via the mobile phone wireless application protocol (WAP)

Class 42

Development of wireless application protocol (WAP) software engines; wireless application protocol (WAP) web-site hosting services. Software development, licensing of software, development of software for mobile telephony services; licensing of software for mobile telephony services; consultancy services relating to technology available for marketing and/or promotional activities via mobile devices and/or technology which profiles and identifies a mobile device and/or technology which controls and prevents unauthorised peer-to-peer file sharing; hosting of internet sites designed to be viewed via mobile devices using wireless application protocol

**UK Trade Mark Application No. 2459605**

Class 9

Software to enable the construction of Internet sites designed to be viewed by mobile devices and/or software to enable access to the Internet from mobile devices; software to build Internet sites designed to be viewed via mobile devices using wireless Internet protocol (WAP); software to enable videos, games, graphics, music and/or animated gifts to be transmitted, viewed and/or managed; software and/or apparatus for profiling and identifying a mobile device to optimise the delivery of Internet sites viewed by that mobile device; software and/or apparatus which allows users to carry out marketing and promotions via mobile devices; downloadable mobile phone content including logos, ringtones, Internet and WAP games, pictures, wallpapers, animations and applications; all of the aforesaid being downloadable via the mobile phone WAP; mobile phone accessories

**ANNEX B**

**UK Trade Mark Registration No. 1246443**

Class 9

Computers; computer terminals; video display units; disc driving apparatus; computer driven printers; computer networking installations; electronic data communications apparatus and installations; electronic apparatus and instruments for recognising digital and analogue codes; control apparatus and instruments; cards, discs, tapes, wires, microchips and electronic circuits all for the recordal of data; racks, cabinets and holders, all for the aforesaid goods; parts and fittings for all the aforesaid goods; computer programs and computer software, none relating to fruit; all included in Class 9

**UK Trade Mark Registration No. 1276764**

Class 42

Consultancy, design, testing, research and advisory services, all relating to computing, data processing and computer programming; computer aided design and engineering services; lithographic printing; computer programming; computer systems analysis; computer time sharing; research and development of computer hardware and of software; technological services relating to computers; leasing of access time to a computer database; all included in Class 42; but not including any such services relating to fruit

**CTM Registration No. 000000753**

Class 9

Computers, computer terminals, keyboards, printers, display units, terminals; modems; disc drives; computer peripherals; communications equipment; facsimile machines, answering machines telephone-based information retrieval systems; adapters, adapter cards, connectors and drivers; blank computer storage media, computer programs, operating systems, computer hardware, software and firmware; computer memory devices; data recordings; cameras; fonts, typefaces, type designs and symbols; chips, discs and tapes bearing or for recording computer programs and software; random access memory, read only memory; solid state memory apparatus; electronic communication equipment and instruments; telecommunications apparatus and instruments; computer and electronic games; related computer equipment for use therewith ; multimedia products comprising or for use with any of the aforesaid goods; interactive products comprising or for use with any of the aforesaid goods; parts and fittings for all the aforesaid goods

Class 16

Printed matter in the field of computers, multimedia products, interactive products and online services; instructional and teaching materials; magazines, newsletters, periodicals and printed publications; manuals, pamphlets, brochures and catalogues; office requisites; computer disk holders; paper and stationery, desk accessories, telephone and address books, agendas, diaries, calendars, decals, and bumper stickers; parts and fittings for all the aforesaid goods

Class 38

Communication by computer, computer intercommunication; telecommunications services; telex, telegram and telephone services; rental, hire and leasing of communications apparatus and of electronic mailboxes; electronic bulletin board services; electronic transmission of data and documents via computer, delivery of data and messages by electronic transmission

Class 41

Educational services, providing of training, instruction and entertainment in the field of computers, multimedia products, interactive products and online services, and distributing course materials therewith; arranging and conducting of exhibitions, workshops, seminars and video conferences; publication of printed matter and of instructional and teaching materials

Class 42

Promoting the interests of computer user groups and computer online user services; computer consultation, design; testing, research and advisory services; research and development of computer hardware and software; leasing access and providing access to an electronic computer bulletin board; updating of computer software; computer time-sharing services; leasing and rental of computers; lithographic printing; computer-aided design and engineering services; computer systems analysis; computer programming services; computer services relating to multimedia and/or interactive products; provision of computer databases

**CTM No. 002593168**

Class 9

Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus; but not including sound records, video records or cinematographic films

Class 28

Toys, games and playthings, including electronic games; hand-held electronic games and apparatus; stand alone video output game apparatus (apparatus for electronic games other than those adapted for use with television receivers only); computer games; apparatus and instruments adapted for playing computer games; educational toys; toy computers (not working); parts and fittings relating to all the aforesaid

Class 39

Transport services; packaging and storage of goods; storage in warehouses, freighting and delivery of computers and related accessories; storage of electronically-stored data or documents; advisory and consultancy services relating to all the aforesaid