

BL O/486/20

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION 3397526

BY

AGATE SYSTEMS LIMITED

TO REGISTER THE FOLLOWING TRADE MARK:

AXATE

AND

OPPOSITION THERETO (NO. 417005)

BY

AXA

Background and pleadings

1. Agate Systems Limited (hereafter “the applicant”) applied to register the trade mark:

AXATE

in the UK on 7 May 2019. It was accepted and published in the Trade Marks Journal on 17 May 2019, in respect of goods and services in classes 09, 35, 36, 38 and 42.

2. During the procedural rounds of the opposition matter before me, the applicant amended its specifications and the application now stands for the following goods and services:

Class 09: Computer hardware and software for facilitating and administering payment, electronic funds transfer and electronic payments; computer hardware and software for facilitating payment transactions by electronic means over wireless networks, global computer networks, mobile telecommunications devices, electronic devices and tablet computers; financial software and accessories for mobile devices and other point of sale systems; all of the aforesaid in connection with the provision of content in digital format, and none being insurance, investment and asset management.

Class 35: Facilitating the exchange of financial and business information between and among customers and businesses related to e-commerce transactions, namely sending invoices, goods manifests and payment / shipping receipts from businesses to their customers; computerised database management relating to electronic payments; computerised data capture, processing and verification including financial transactions; marketing and advertising services, market research and business analysis services; publicity services; rental of advertising space; dissemination of advertising for others via an on-line electronic communications network; promoting the goods and services of others; direct marketing services; customer loyalty services and customer club services for promotional and advertising purposes; information, consultancy and advisory services related thereto; all of the aforesaid in connection with the provision of content in digital format and none being for insurance, investment and asset management.

Class 36: Providing electronic processing of electronic funds transfer, credit card, debit card, electronic payments, cash, and other forms of payment; credit card and debit card transaction processing services relating to the purchase of goods and services via an electronic communications network; financial services, namely the provision of analytical tools to facilitate payment processing; services for reconciling, namely processing payment transactions based on electronic payments, gift cards, and other forms of payment; all of the aforesaid in connection with the provision of content in digital format and none being for insurance, investment and asset management.

Class 38: Providing electronic transmission of electronic payment, gift card, and other payment transaction data and related information, merchant-customer communications; providing electronic transmission of financial and business information between and among customers and businesses; electronic transmission of e-commerce transaction data and information; Providing access to, and making available of, online platforms on the Internet for purchasing, bringing together, viewing and looking inside books, periodicals, newspapers, magazines, press releases, leaflets, brochures and other publications and electronic publications, including online; Consultancy and information regarding the aforesaid services; The aforesaid services also provided via electronic networks, such as the Internet; all of the aforesaid in connection with the provision of content in digital format and none being for insurance, investment and asset management.

Class 42: Design, development, updating, implementing and maintenance of computer systems, software, websites, web applications and mobile applications; software as a service; development of software solutions for internet providers and internet users; the provision of analytic tools related to electronic payments, gift card, cash, and in kind payment processing and tracking, namely provision of computer applications to enable the analysis of data relating to electronic payments, gift card, cash, and in kind payment processing and tracking; all of the aforesaid in connection with the provision of content in digital format and none being for insurance, investment and asset management.

3. AXA (hereafter “the opponent”) opposes all of the goods and services of the contested trade mark, on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”).
4. The opposition is based on the following earlier International Registration designating the European Union (EU) 1359076:



5. The earlier mark designated the EU on 7 April 2017 and was granted protection on 12 January 2018.
6. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

(a) a registered trade mark, international trade mark (UK) a European Union trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

7. The trade mark upon which the opponent relies qualifies as an earlier trade mark under the above provisions. As this earlier trade mark had not been registered for more than five years at the date the application was filed, it is not subject to the proof of use provisions contained in section 6A of the Act. The opponent is, as a

consequence, entitled to rely upon it in relation to all of the goods and services indicated without having to prove that genuine use has been made of it.

8. Initially the opponent relied on a second earlier mark and also raised opposition based on Section 5(4)(a) of the Act, however this ground and the second earlier mark were both withdrawn by the opponent during the procedural stages.
9. The earlier mark covers goods and services in classes 9, 35, 36, 37, 38, 39 and 42, however the opponent does not rely upon any of its services in classes 37 or 39 and only on part of its services in class 36. The opponent relies upon the following goods and services:

Class 09: Apparatus for recording, transmission, reproduction or processing of sound or images; magnetic recording media, sound recording disks, data processing equipment, computers, software (recorded programs), computer programs (recorded).

Class 35: Advertising, business assistance for industrial and commercial companies, business management, business administration; business advice, information and inquiries.

Class 36: Insurance underwriting and financial services; banking, debt collection, personal insurance; reinsurance services; brokerage; provident funds; monetary affairs; fund investments; financial appraisals and expertise, consulting services relating to financial investments, financial analyses; management of portfolios, financial investments; financing services; raising capital and capital investment; financial transactions; debt collection services.

Class 38: Telecommunications; communications by computer terminals; electronic messaging; transmission of information by telematic means; communication (transmission) on all multimedia carriers and all networks including the Internet.

Class 42: Computer programming; consultancy in the design and development of computers; development of computer hardware and software; installation, maintenance and repair of software; information relating to design and development of computer hardware and software; administration of user rights in computer

networks; design and development of home pages and websites; consultancy services relating to the creation and design of websites for e-commerce; electronic data storage; recovery of computer data; off-site data backup; conversion of computer program data or information other than physical conversion; cloud computing; computer virus protection services; digitization of documents [scanning]; hosting of platforms on the Internet; programming of software for Internet platforms.

10. In its statement of grounds, the opponent states that the marks are similar as the earlier mark 'AXA' is wholly contained within the contested mark AXATE and forms the first part of that mark. It states that both marks are phonetically similar with the '-TE' ending of the contested mark being weak when spoken, so that it is the 'AXA' sound that is prominent and memorable. The opponent also claims that neither word element has a meaning so there can be no conceptual distinction. Overall the opponent states that the marks share a high level of similarity. It adds that the goods and services at issue are identical. The opponent also claims that the invented word 'AXA' enjoys a higher than normal level of distinctiveness and states that the relevant public is likely to make a link between the signs and, if not directly confused, will believe that they come from the same undertaking or an economically linked undertaking.

11. In its counter statement, the applicant denied that the goods or services of the applicant are identical to those of the opponent's earlier mark. It claimed that whilst they may overlap in the sense that they fall within the same classes, the opponent's area of interest is in insurance services whilst the applicant is in the business of providing a digital wallet for online content providers. The applicant submitted that the marks are distinctly different words with different logos, and that the contested mark is five letters long as opposed to the earlier mark which contains only three letters. It added that the contested mark is therefore 66% longer than the earlier mark. The applicant stated that, as they are both relatively short words, it is easier for the ordinary person to distinguish between them. The applicant also stated that visually the marks share three letters but differ in two and that aurally they share the sound 'AX', however the contested mark would be pronounced as 'AXaayT', which is a completely different sound to that made by the earlier mark. The applicant claimed that there is no conceptual similarity as both marks are coined terms with no

common meaning and added that, as the goods and services are dissimilar, the differences outweigh the similarities and the marks are dissimilar overall.

12. To support its argument regarding the differences aurally between the marks, the applicant uses the words Aga and Agate, and Aba and Abate, as examples of three letter words and five letter words, where the first three letters of the five letter word comprise the three letter word, as is the case at hand with 'AXA' and 'AXATE'. In these examples, the applicant claims that it is commonly accepted by English speakers that e.g. Aga and Agate will be enunciated differently and that the second vowel will make a different sound, 'AY' or 'AA' in the longer word but 'AH' in the three-letter word. The applicant noted that the earlier mark ends with a vowel whilst the contested mark ends in 'TE' which it denied is a weak aspect of the mark, as has been suggested by the opponent. Finally, the applicant stated that there are numerous other registered trade marks that start with the letters 'AXA' in the same classes as those at issue.

13. Both sides filed written submissions and the applicant filed evidence. I do not intend to summarise that information here but will refer to it as and where appropriate throughout my decision.

14. The applicant requested a hearing, which took place on 27 July 2020. At the hearing the applicant was represented by Charlotte Blythe of counsel, instructed by Lewis Silkin LLP. The opponent was represented by Benet Brandreth QC of counsel, instructed by Keltie LLP.

Hearing

15. At the hearing both parties spent a considerable amount of time dealing with a point raised by the applicant as to the scope and validity of the opponent's earlier goods and services. The issue of the distinctiveness of the opponent's earlier mark was also an important part of the discussions. I will deal with these two issues as preliminary points in this decision.

16. In her skeleton arguments, Ms Blythe claimed that the goods and services relied upon by the opponent include terms that are so broad that they "do not satisfy the

requirement of clarity and precision required by trade mark specifications and can therefore play no part in the assessment of relative grounds objections”.

17. In support of this argument Ms Blythe referred me to the decision of Henry Carr J in *Gap (ITM) Inc v Gap 360 Ltd* [2019] ETMR 41 at [39]-[41] and to the interpretation of specifications summarised by Arnold LJ in *Sky Plc v Skykick UK Ltd* [2020] EWHC 990 (Ch) at [56] where he sets out the applicable principles of interpretation in four ways, as follows:

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

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

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

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

18. Ms Blythe submitted that many of the terms covered by the opponent’s earlier mark fell foul of those principles of interpretation.

19. In response, Mr Brandreth submitted that the matter at hand was not a challenge to the validity of his client’s earlier mark. The earlier mark is not subject to proof of use and the applicant has made no challenge to the earlier registration on bad faith grounds.

20. Mr Brandreth is, of course, correct that the validity of the earlier mark is not in question here and accordingly I must afford the opponent’s earlier mark protection for all of the goods and services registered. I do not consider the terms with which Ms Blythe took issue to be incapable of interpretation such that they should be disregarded. However, I will keep in mind that where the terms are very broad, they should be understood in accordance with their literal meanings.

21. That being the case, I note Annex A¹ submitted by Ms Blythe and set out below in the Annex to this decision, in which Ms Blythe states that if I am not with her on the matter of scope of the earlier goods and services, and I am not, then many of the contested goods and services are conceded to be identical or similar, either directly in comparison, or by virtue of the principles established in *Meric*.² I will deal more closely with this point when I address the comparison of the goods and services later in my decision.
22. Turning now to the second issue that I feel it is appropriate to deal with at this stage: the question of the level of distinctiveness afforded to the earlier mark.
23. In its statement of grounds, the opponent claimed that the earlier mark enjoyed an enhanced level of distinctiveness and that it would support that claim with evidence. It also claimed that, as an invented word it had a higher than normal level of distinctiveness. No evidence was filed by the opponent to show that the earlier mark could be said to have an enhanced level of distinctiveness.
24. Mr Brandreth, in his skeleton arguments and during submissions at the hearing, claimed that the word 'AXA' benefits from a reputation for insurance and investment services, something which the applicant appeared to have conceded in written submissions; and that it enjoyed acquired distinctiveness, which I take to mean an enhanced distinctiveness.
25. Mr Brandreth referred me to an earlier decision of the Company Names Tribunal in which it was concluded, based on an assessment of evidence provided to the Tribunal in that matter, that the opponent company had a significant reputation. Mr Brandreth stated:

"Mr Sansom, the chief marketing officer, gave evidence of AXA's reputation for financial services, mainly insurance:

"It has been used globally since 1985, including in the UK, employs 10,000 people in the UK and has ten million customers in the UK. It is one of the

¹ Annex A is attached to the skeleton arguments of Ms Blythe, counsel for the applicant. Submitted by email on 23/07/2020

² *Gérard Meric v Office for Harmonisation in the Internal Market ('Meric')*, Case T-133/05

biggest insurers in the UK, providing personal and commercial insurance and controlling nearly 2.5 billion in premiums. An article published in the Sunday Times on 21st May 2017 described AXA as 'an insurance giant'.

In 2016 Interbrand, a brand strategy and design consultancy ranked AXA first amongst global insurance brands for the eighth year running, as well as being one of the top three financial services brands. In support of the Applicant's claim that AXA has a substantial reputation in the UK Mr Sansom points out that all the hits on the first ten pages of the results of a search for AXA conducted on Google in July 2017 related to the Applicant."

26. Ms Blythe countered this submission by telling me that the opponent had failed to submit any evidence whatsoever that provided proof of its position in the UK market; the use made of the earlier mark; the length of time that the mark had been in use; or where it had been used territorially. No sales figures or figures relating to marketing and promotional activity were submitted either.

27. The Company Names Tribunal decision to which Mr Brandreth referred me has no bearing on the matter to hand. I am not aware of the issues in that case. It may be that the mark at issue in that case is not the same mark relied upon here. In any event, it is clear from the case law that what is required for an applicant to establish goodwill (or a reputation) in a case before the Company Names Tribunal differs to what is required for an opponent to establish enhanced distinctiveness for the purposes of an opposition under section 5(2)(b). Certainly, it is true that the evidence relied upon in that earlier case was not carried across to this case and I, nor the applicant, have had an opportunity to consider the details of that evidence. As Ms Blythe stated at the hearing, the applicant would have had the opportunity to reply to or challenge the evidence if any had been submitted by the opponent. Therefore, regarding the claim of enhanced distinctiveness of the earlier mark, I dismiss the opponent's claim as unfounded. The assessment of the distinctiveness of the earlier mark must rest entirely on its inherent distinctiveness only.

28. I will not summarise the other areas of discussion from the hearing at this point but will refer to specific comments made by the parties where appropriate or necessary throughout this decision.

Decision

Section 5(2)(b) of the Act

29. Section 5(2)(b) of the Act states:

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

(a) ...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

30. The following principles are gleaned from the decisions of the Court of Justice of the European Union (“the CJEU”) 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

31. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

32. 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.

33. In *Boston Scientific*³, the General Court (“GC”) described goods/services as “complementary” in circumstances where “... *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*

³ *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

the same undertaking’. I also take note that in *Kurt Hesse v OHIM*⁴, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods.

34. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the 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 für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

35. In her skeleton arguments, Ms Blythe conceded that, were I not with her on the issue of the scope of the opponent’s earlier goods and services, some of her client’s goods and services were identical or similar to some of the opponent’s earlier goods and services. These areas of identity or similarity were set out in Annex A provided by Ms Blythe along with her skeleton arguments. This information can be found in the Annex at the end of this decision.

36. The applicant’s goods and services that have been conceded by Ms Blythe to be identical or similar to the opponent’s goods or services are:

Class 09: Computer hardware and software for facilitating and administering payment, electronic funds transfer and electronic payments; computer hardware and software for facilitating payment transactions by electronic means over wireless networks, global computer networks, mobile telecommunications devices, electronic devices and tablet computers; financial software and accessories for mobile devices and other point of sale systems; all of the aforesaid in connection with the provision of content in digital format, and none being insurance, investment and asset management.

⁴ Case C-50/15 P

37. All of the contested class 09 goods are conceded as being either identical to the earlier class 09 goods 'computer software', or similar to the earlier 'computer hardware'.

Class 35: Facilitating the exchange of financial and business information between and among customers and businesses related to e-commerce transactions, namely sending invoices, goods manifests and payment / shipping receipts from businesses to their customers; information, consultancy and advisory services related thereto; all of the aforesaid in connection with the provision of content in digital format and none being for insurance, investment and asset management.

38. These services are conceded to be similar to the opponent's 'financial services'.

Class 35: Marketing and advertising services, market research and business analysis services; publicity services; rental of advertising space; dissemination of advertising for others via an on-line electronic communications network; promoting the goods and services of others; direct marketing services; customer loyalty services and customer club services for promotional and advertising purposes; information, consultancy and advisory services related thereto; all of the aforesaid in connection with the provision of content in digital format and none being for insurance, investment and asset management.

39. These services are conceded to be identical or similar to the earlier 'advertising services'.

Class 36: Providing electronic processing of electronic funds transfer, credit card, debit card, electronic payments, cash, and other forms of payment; credit card and debit card transaction processing services relating to the purchase of goods and services via an electronic communications network; financial services, namely the provision of analytical tools to facilitate payment processing; services for reconciling, namely processing payment transactions based on electronic payments, gift cards, and other forms of payment; all of the aforesaid in connection with the provision of content in digital format and none being for insurance, investment and asset management.

40. All of the contested class 36 services are conceded to be identical to the earlier class 36 services, pursuant to the principle in *Meric*.

Class 38: Providing electronic transmission of electronic payment, gift card, and other payment transaction data and related information, merchant-customer communications; providing electronic transmission of financial and business information between and among customers and businesses; electronic transmission of e-commerce transaction data and information; Consultancy and information regarding the aforesaid services; The aforesaid services also provided via electronic networks, such as the Internet; all of the aforesaid in connection with the provision of content in digital format and none being for insurance, investment and asset management.

41. The applicant accepts that these contested class 38 services are identical, to the opponent's earlier services, pursuant to the principle in *Meric*.

Class 42: Design, development, updating, implementing and maintenance of computer systems, software, websites, web applications and mobile applications; development of software solutions for internet providers and internet users; all of the aforesaid in connection with the provision of content in digital format and none being for insurance, investment and asset management.

42. The applicant accepts that these contested class 42 services are identical to the opponent's earlier services pursuant to the principle in *Meric*.

43. For the purposes of this matter, I need now only assess the remaining contested services that Ms Blythe claims are neither identical nor similar, to determine whether there is any similarity between them and the opponent's earlier goods and services.

44. The remaining services of the applicant that have not been conceded as being identical or similar to the opponent's earlier goods and services are:

Class 35: Computerised database management relating to electronic payments; computerised data capture, processing and verification including financial transactions; information, consultancy and advisory services related thereto; all of

the aforesaid in connection with the provision of content in digital format and none being for insurance, investment and asset management.

45. These contested services essentially comprise computerised database management and computerised data capture in class 35 and related services. The earlier services in class 35 include 'business assistance for industrial and commercial companies, business management, business administration; business advice and information'. The earlier business assistance, management and administration can encompass the database management and data capture services of the applicant, being broad, overarching business services. Applying the *Meric* principle, I find these services to be identical. The related 'information, consultancy and advisory services related thereto' will overlap in user and trade channels with the earlier services and will be similar to a medium degree.

Class 38: Providing access to, and making available of, online platforms on the Internet for purchasing, bringing together, viewing and looking inside books, periodicals, newspapers, magazines, press releases, leaflets, brochures and other publications and electronic publications, including online; Consultancy and information regarding the aforesaid services; The aforesaid services also provided via electronic networks, such as the Internet; all of the aforesaid in connection with the provision of content in digital format and none being for insurance, investment and asset management.

46. The earlier class 38 services 'telecommunications; communications by computer terminals; electronic messaging; transmission of information by telematic means; communication (transmission) on all multimedia carriers and all networks including the Internet', provide the consumer with the ability to access a variety of media including the internet and for a multitude of purposes. The contested class 38 services provide access to online platforms on the internet for the purpose of giving consumers the ability to purchase a variety of goods. Both provide access to the internet and therefore share nature, purpose, channels of trade and end-user. These services are therefore considered to be highly similar.

Class 42: Software as a service; the provision of analytic tools related to electronic payments, gift card, cash, and in kind payment processing and tracking, namely

provision of computer applications to enable the analysis of data relating to electronic payments, gift card, cash, and in kind payment processing and tracking; all of the aforesaid in connection with the provision of content in digital format and none being for insurance, investment and asset management.

47. Ms Blythe has claimed that there is no similarity between these services as the contested services all comprise software as a service which relates specifically to the analysis and tracking of electronic payments in the digital content sphere. Ms Blythe claimed that these services are different in nature, intended purpose and end user, with the contested services only provided to providers of chargeable digital content. As such, she stated that the applicant's services differ from the opponent's designing software, hardware or websites services.

48. I do not accept Ms Blythe's submission on this matter. The provision of software as a service may well have a link or connection with the opponent's earlier designing, developing, creating and programming software. It is quite possible that an undertaking responsible for the design or development of software may then go on to provide that software as a service in much the same way that it would provide a hard copy for sale in the more traditional sense. Therefore, I find these services may share channels of trade or manufacturer/provider and end-user. These services are similar to at least a medium degree.

49. I find also, that the earlier class 09 goods must be considered alongside the contested class 42 services. The earlier class 09 goods include 'computer software' and 'computer programs'. The contested class 42 services are 'software as a service' and 'analytic tools... namely provision of computer applications to enable the analysis of data...', which in the context of class 42 must be considered to be a piece of software or a program designed to complete a certain task. These goods and services may share purpose, channels of trade and end-user and can be said to be similar to at least a medium degree.

50. In conclusion, all of the contested goods and services have been conceded or found to be either identical, similar to a high degree or similar to at least a medium degree.

Average consumer and the purchasing act

51. 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*.

52. 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.”

53. Both parties made submissions regarding the nature of the average consumer and the purchase process.

54. Ms Blythe suggested that, with the exception of some of the class 42 services at issue, the goods and services concerned would be directed at a business consumer and that this had the consequence that that average consumer would be likely to pay a high degree of attention when making their selection or purchase.

55. Mr Brandreth disagreed with Ms Blythe's assessment, stating that she had assumed only one type of use of the goods and services at issue, that being one of a professional or business nature. He added that notional and fair use of the goods and services should allow for an average consumer that would be likely to display an ordinary level of care and attention in the selection of the goods at issue. He stated that goods such as computer hardware and software were not fast-moving consumer goods that would be simply snatched off a shelf, but nor were they the kind of goods

to which greater care should be taken when purchasing as they may cause harm or danger, e.g. pharmaceuticals.

56. In my opinion both parties' submissions have merit. Due to the nature of many of the services at issue, the average consumer may be said to be both the general public and a professional consumer. In respect of e.g. financial services, it can be argued that even a general public consumer may pay a slightly higher than normal degree of attention, as it is essential to ensure that an insurance policy, for example, provides the precise cover required by that consumer. I find the same to be true in respect of the average consumer of many of the goods at issue, however I do not accept that generally, the average consumer of e.g. computer software, can be said to be paying a high degree of attention when making a selection. Therefore, I find that the average consumer of the goods and services at issue will differ and encompasses both the general public and the professional consumer. I also find that the level of attention paid when selecting the goods and services at issue will vary between a medium degree and a slightly higher degree of attention but will not be the very highest level of attention.

57. The selection of the goods and services at issue will be largely a visual process, however, I do not dismiss the aural components of the marks and I do not ignore the potential for the marks to be spoken, for example, by sales assistants in a retail establishment, or when making a purchase over the telephone.

Comparison of marks

58. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components.


59. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by

means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

60. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

61. The respective trade marks are shown below:

Earlier mark	Contested trade mark
	<p style="text-align: center;">AXATE</p>

62. The opponent’s earlier mark is comprised of the word ‘AXA’ presented in a standard typeface, combined with a parallelogram device element which is described by the opponent as a ‘slash’ device. The word element ‘AXA’ is presented on the left hand side of the mark and can be said to be the smaller element in the mark. In terms of dominance, the figurative element plays an important role in the mark due to its size, however it is also reasonable to conclude that as that figurative element is quite a basic shape, neither element in the mark can be said to be more eye-catching than the other. The overall impression of the mark therefore lies in its totality.

63. The applicant’s mark is comprised of the single word ‘AXATE’ presented in a standard typeface. The overall impression of the mark therefore lies in that word.

Visual similarity

64. Visually, the marks are similar inasmuch as they share the letters ‘AXA’ which are presented in the same order in both marks. The marks differ visually in the letters ‘TE’ of the contested mark and in the figurative ‘slash’ device of the earlier mark, neither of which has a counterpart in the other mark. This difference in the textual

elements, combined with the relatively large figurative element of the earlier mark, serve to set them apart visually. These marks can be said to be visually similar to a medium degree.

Aural similarity

65. The earlier mark 'AXA' will be pronounced in two syllables as *AX/AH*, whilst the contested sign, also comprised of two syllables, will be pronounced as *AX/ATE*. In her submissions Ms Blythe claimed that the earlier mark does not appear in the contested sign and, from the phonetic standpoint, I agree with her. The sound made when enunciating the word 'AXA' is not recreated when enunciating the word 'AXATE'. It is the case however, that both marks share the initial syllable 'AX'. The second syllable of the earlier mark is comprised of the soft sounding 'AH' whilst the 'ATE' suffix in the contested mark is a stronger ending which will, in my opinion, be clearly enunciated. I find therefore that the marks at issue are aurally similar to a medium degree.

Conceptual similarity

66. Both parties have submitted that the words 'AXA' and 'AXATE' are coined or invented terms which have no dictionary meaning and therefore carry no conceptual message. I agree with this assessment of the verbal elements. I also find that the figurative element in the earlier mark is a fairly basic shape that conveys no conceptual message. Therefore, I conclude that the marks are conceptually neutral.

67. In conclusion, the marks have been found to be visually and aurally similar to a medium degree and conceptually neutral.

Distinctive character of the earlier trade mark

68. 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).”

69. In its statement of grounds, the opponent claimed that the earlier mark is inherently highly distinctive due to the word ‘AXA’ being an invented word. It also claimed an enhanced level of distinctiveness because of the use made of the mark and the reputation that the opponent company AXA has, particularly in the field of insurance services.

70. As I have established previously in paragraphs 24-29 of this decision, the claim of enhanced distinctiveness in the earlier mark has not been established by the opponent through evidence. Therefore, I have dismissed the opponent’s claim in this regard.

71. Turning then, to the consideration of inherent distinctiveness, I find the word ‘AXA’ to be a coined expression with no dictionary meaning. It can therefore be said to be inherently distinctive to a higher than medium degree. The addition of the figurative element merely reinforces a finding that the earlier mark can be said to be inherently highly distinctive.

Likelihood of Confusion

72. The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

73. I have taken note of the evidence provided by the applicant in this matter. I find, however, that nothing much rests on the evidence or witness statements supplied by Anne Victoria Silberbauer who is the Chief Operating Officer of Agate Systems Limited.

74. Particularly I note that the state of the register evidence, which is set out in exhibit SAVS2, provides details of 23 registered marks that contain words beginning with the combination AXA, and the evidence in exhibit SAVS1 of trade mark opposition cases from Darts IP, providing information on cases involving three letter and five letter marks, where the first three letters are identical, is of limited value.

75. In *Henkel KGaA v Deutsches Patent- und Markenamt*, Case C-218/01, the Court of Justice of the European Union found that:

“65... The fact that an identical trade mark has been registered in one Member State as a mark for identical goods or services may be taken into consideration by the competent authority of another Member State among all the circumstances which that authority must take into account in assessing the distinctive character of a trade mark, but it is not decisive regarding the latter's decision to grant or refuse registration of a trade mark.

On the other hand, the fact that a trade mark has been registered in one Member State for certain goods or services can have no bearing on the examination by the competent trade mark registration authority of another Member State of the distinctive character of a similar trade mark for goods or services similar to those for which the first trade mark was registered.”

76. In *Zero Industry Srl v OHIM*, Case T-400/06, the General Court stated that:

“73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word ‘zero’, it should be pointed out that the Opposition Division found, in that regard, that ‘... there are no indications as to how many of such trade marks are effectively used in the market’. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word ‘zero’ is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 GfK v OHIM – BUS(Online Bus) [2005] ECR II-4865, paragraph 68, and Case T-29/04 Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH) [2005] ECR II-5309, paragraph 71).”

77. Taking account of this case law, I find that the evidence provided relating to state of the register and the evidence of previous opposition cases cannot be said to be compelling where each case must be considered on its own merits, taking into account all of the specifics of particular marks and circumstances.

78. Confusion can be direct (which effectively occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods/services down to the responsible undertakings being the same or related).

79. I have already found that:

- the goods and services at issue are identical, similar to a high degree or similar to at least a medium degree;
- the marks are visually and aurally similar to a medium degree and conceptually neutral;
- the average consumer will be both a member of the general public and a professional;

- the consumer will pay a medium level of attention when selecting the goods and services at issue, but will likely pay a higher level of attention when selecting some of the services (e.g. insurance services) and a professional consumer is likely to pay a higher level of attention during the purchasing process;
- the purchasing process will be largely visual however I do not ignore the role that an aural assessment may play in the purchasing process;
- the earlier mark has a high degree of inherent distinctiveness.

80. In her submissions Ms Blythe stated that as 'AXA' and 'AXATE' are both relatively short words, it is easier for the ordinary person to distinguish between them. I agree entirely with this argument and taking all of the aforesaid into account, I find that direct confusion will not occur.

81. The average consumer will immediately notice the differences between the contested word mark 'AXATE' and the verbal element 'AXA' of the earlier mark and will not mistake one mark for the other. The figurative element in the earlier mark has also been found to play a role in the overall impression of that mark and, due to its size, cannot be overlooked. That additional element also serves to support a conclusion that direct confusion will not occur.

82. Having found no likelihood of direct confusion, I now go on to consider the matter in respect of indirect confusion.

83. Mr Iain Purvis QC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10 noted that:

"16. ...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).”

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

85. In my opinion, the contested mark ‘AXATE’ will be perceived as a single word. The average consumer will make no attempt to dissect this word but will accept it as an invented term. Both parties have submitted that the terms ‘AXA’ and ‘AXATE’ are coined words with no meanings. I have agreed with this position previously.

86. The invented word ‘AXATE’ cannot be said to be a logical extension of the ‘AXA’ brand. The addition of the suffix ‘-TE’ to the invented term ‘AXA’ is not an obvious or logical construction, but merely creates a further, distinct, invented term with no obvious association to the word ‘AXA’.

87. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection,

he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

88. Even if the opponent's mark was brought to mind by the applicant's mark (which I find unlikely), I still do not consider it likely that indirect confusion will occur. Overall, I find no likelihood of indirect conclusion.

Conclusion

89. As I have found that there is no likelihood of confusion, direct or indirect, the opposition fails and, subject to appeal, the application may proceed to registration for all of the applied for goods and services.

Costs

90. The applicant has been successful and is entitled to a contribution towards its costs. At the hearing Ms Blythe suggested that, in the event of success, her client should receive on-scale costs at the higher end of the scale. She stated that this should be as a reflection of the attempt made by her client to remove conflict between the marks at issue through a limitation to the original goods and services applied for. She added that her client had attempted to settle this matter early, but the opponent had shown no willingness to find common ground. Mr Brandreth argued that the reasons given by Ms Blythe were not sufficient to conclude that an award for higher than normal costs was appropriate. I agree with Mr Brandreth and find that there is nothing in this matter which would suggest that a contribution towards costs over and above the normal scale set out in Tribunal Practice Notice 2/2016 should be the case.

91. I therefore award costs to the applicant as follows:

Considering the statement of grounds and preparing the counterstatement	£200
Preparing skeleton arguments and Considering the opponent's skeleton	£300

Preparing for and attending a hearing	£700
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<u>Total</u>	<u>£1200</u>
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92. I therefore order AXA to pay Agate Systems Limited the sum of £1200. This sum is to be paid within 21 days of the expiry of 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 1st day of October 2020

Andrew Feldon

For the Registrar

The Comptroller-General

ANNEX A: The list of goods and services which the applicant has conceded are identical or similar to the earlier goods and services of the opponent.⁵

Annex A: Goods and Services Comparison Table

NB: All of the Contested Goods and Services are qualified by the statement “*all of the aforesaid in connection with the provision of content in digital format, and none being insurance, investment and asset management*”.

	Contested Goods/Services	Average consumer / purchasing process	Comparison with goods/services covered by the Earlier Mark
Class 9			
1	Computer hardware and software for facilitating and administering payment, electronic funds transfer and electronic payments; computer hardware and software for facilitating payment transactions by electronic means over wireless networks, global computer networks, mobile telecommunications devices, electronic devices and tablet computers; financial software and accessories for mobile devices and other point of sale systems	Business consumers only at a high level of attention to detail.	The Opponent alleges that the Contested Goods in this row are identical or similar to the terms “ <i>software (recorded programs), computer programs (recorded)</i> ” in Class 9. The Applicant submits that these terms are insufficiently clear such that they should be disregarded. If the Hearing Officer disagrees, the Applicant accepts that the Contested Goods in this row are identical pursuant to the principle in <i>Gérard Meric v OHIM</i> (Case T-133/05) at [29] insofar as they comprise software and similar insofar as they comprise hardware.
Class 35			
2	Facilitating the exchange of financial and business information between and among customers and businesses related to e-commerce transactions, namely sending invoices, goods manifests and payment / shipping receipts from businesses to their customers; information, consultancy and advisory services related thereto	Business consumers only at a high level of attention to detail.	The Opponent alleges that the Contested Services in this row are identical to the term “ <i>business administration</i> ” in Class 35 and similar to the term “ <i>financial transaction</i> ” in Class 36. The Applicant submits that both of those terms are insufficiently clear such that they should be disregarded. If the Hearing Officer disagrees, the Applicant accepts that the Contested Services in this row are similar to “ <i>financial transaction</i> ” services but denies any identity or similarity with “ <i>business administration</i> ” services. The latter, being a general term and a service, should be interpreted as covering only the services clearly covered by its literal meaning and should not be interpreted too

⁵ Annex A was submitted with the skeleton arguments of Ms Blythe, counsel for the applicant, by email on 23/07/2020.

			widely. Thus, it should be interpreted only to cover administrative support services such as diary management, call handling, copying documents and the like
3	Computerised database management relating to electronic payments; computerised data capture, processing and verification including financial transactions; information, consultancy and advisory services related thereto	Business consumers only at a high level of attention to detail.	The Contested Services in this row are not similar to any of the goods/services covered by the Earlier Mark.
4	Marketing and advertising services, market research and business analysis services; publicity services; rental of advertising space; dissemination of advertising for others via an on-line electronic communications network; promoting the goods and services of others; direct marketing services; customer loyalty services and customer club services for promotional and advertising purposes; information, consultancy and advisory services related thereto	Business consumers only at a high level of attention to detail.	The Opponent alleges that the Contested Services in this row are identical or similar to the term "Advertising" in Class 35. The Applicant accepts that all of the Contested Services in this row are identical or similar thereto, all such services being types of advertising.
Class 36			
5	Providing electronic processing of electronic funds transfer, credit card, debit card, electronic payments, cash, and other forms of payment; credit card and debit card transaction processing services relating to the purchase of goods and services via an electronic communications network; financial services, namely the provision of analytical tools to facilitate payment processing; services for reconciling, namely processing payment transactions based on electronic payments, gift cards, and other forms of payment	Business consumers only at a high level of attention to detail.	The Opponent alleges that the Contested Services in this row are identical to the terms: "financial services", "monetary affairs", "financial transactions" and "banking services" in Class 36. The Applicant submits that the terms "monetary affairs" and "financial transactions" are insufficiently clear such that they should be disregarded. If the Hearing Officer disagrees, the Applicant accepts that the Contested Services in this row are identical thereto pursuant to the principle in <i>Gérard Meric</i> . The Applicant does not accept that the Contested Services in this row are identical to the term "banking services". That term naturally covers financial services provided by a bank such as debit cards,

		<p>transfers, savings accounts etc. The Contested Services in this row cover processing of payments but only for purchasing goods in the digital content sphere. The respective services are therefore provided via different trade channels and for different purposes and customers.</p> <p>It is emphasised that the Earlier Mark does not cover “<i>financial services</i>” simpliciter. It includes only “<i>Insurance underwriting and financial services</i>” as one composite term, wherein the term “<i>financial services</i>” is qualified by the term “<i>insurance</i>” and therefore limited to that field, such that there is no similarity.</p>
Class 38:		
<p>Providing electronic transmission of electronic payment, gift card, and other payment transaction data and related information, merchant-customer communications; providing electronic transmission of financial and business information between and among customers and businesses; electronic transmission of e-commerce transaction data and information; Consultancy and information regarding the aforesaid services; The aforesaid services also provided via electronic networks, such as the Internet</p>	<p>Business consumers only at a high level of attention to detail.</p>	<p>The Opponent alleges that the Contested Services in this row are identical to the terms “<i>telecommunications</i>”, “<i>communication on all multimedia carriers</i>” and “<i>transmission of information by telematic means</i>” in Class 38.</p> <p>The Applicant submits that the terms “<i>communication on all multimedia carriers</i>” and “<i>transmission of information by telematic means</i>” are insufficiently clear such that they should be disregarded. If the Hearing Officer disagrees, the Applicant accepts that the Contested Services in this row are identical thereto pursuant to the principle in <i>Gérard Meric</i>.</p> <p>However, the Applicant does not accept that there is any similarity between “<i>telecommunications</i>” and the Contested Services. “<i>Telecommunications</i>” properly and literally interpreted should be held to cover only the core services of telephone, broadband, wifi services and the like. It would give that term far too broad an interpretation for it to cover transmission of e-commerce data. Those services are different in their intended purpose, channels of distribution, end user etc.</p>
<p>Providing access to, and making available of, online platforms on the Internet for purchasing, bringing together, viewing and</p>	<p>Business consumers only at a high level of attention to detail.</p>	<p>The Contested Services in this row are not similar to any of the goods/services covered by the Earlier Mark.</p>

<p>looking inside books, periodicals, newspapers, magazines, press releases, leaflets, brochures and other publications and electronic publications, including online; Consultancy and information regarding the aforesaid services; The aforesaid services also provided via electronic networks, such as the Internet</p>		<p>These services are not retail services but the service of providing online access thereto.</p>
Class 42		
<p>Design, development, updating, implementing and maintenance of computer systems, software, websites, web applications and mobile applications; development of software solutions for internet providers and internet users</p>	<p>Both members of the general public à moderate level of attention to detail. And businesses à higher level of attention to detail.</p>	<p>The Opponent alleges that the Contested Services in this row are identical to the terms “<i>development of computer hardware and software; installation, maintenance and repair of software; design and development of home pages and websites; consultancy services relating to the creation and design of websites for e-commerce</i>” in Class 42.</p> <p>The Applicant accepts that all of the Contested Services in this row are identical thereto pursuant to the principle in <i>Gérard Meric</i>.</p>
<p>Software as a service; the provision of analytic tools related to electronic payments, gift card, cash, and in kind payment processing and tracking, namely provision of computer applications to enable the analysis of data relating to electronic payments, gift card, cash, and in kind payment processing and tracking</p>	<p>Business consumers only à high level of attention to detail.</p>	<p>The Opponent alleges that the Contested Services in this row are identical to the terms “<i>software</i>” in Class 9 and the services listed in the row above in Class 42.</p> <p>The Applicant submits that the term “<i>software</i>” is insufficiently clear such that it should be disregarded.</p> <p>In any event, it is not accepted that there is any relevant similarity. The Contested Services in this row all comprise software as a service which relates specifically to the analysis/tracking of electronic payments in the digital content sphere. Such services are different in nature, intended purpose and end user (the Contested Services are provided only to providers of chargeable digital content) from the service of designing software/hardware/websites.</p>