

## CANCELLATION No C 69 119 (INVALIDITY)

**Flow Science Inc.**, 683 Harkle Rd., NM 87505 Santa Fe, United States of America (applicant), represented by **IpcO Law B.V.**, Fascinatio Boulevard 216- 220, 3065 WB Rotterdam, Netherlands (professional representative)

a g a i n s t

**Flexcompute Inc.**, 182 Main St, MA 02472 Watertown, United States of America (EUTM proprietor), represented by **Daniel Dimov**, Rue Vanderkindere 171/14, 1180 Brussels, Belgium (professional representative).

On 05/02/2026, the Cancellation Division takes the following

### DECISION

1. The application for a declaration of invalidity is upheld.
2. European Union trade mark No 18 962 264 is declared invalid in its entirety.
3. The EUTM proprietor bears the costs, fixed at EUR 1 080.

### REASONS

On 20/11/2024, the applicant filed a request for a declaration of invalidity against European

Union trade mark No 18 962 264  (figurative mark) (the EUTM). The request is directed against all the services covered by the EUTM. The application is based on, inter alia, European Union trade mark registration No 18 056 256 'FLOW-3D' (word mark). The applicant invoked Article 60(1)(a) EUTMR in conjunction with Article 8(1)(b) EUTMR.

### SUMMARY OF THE PARTIES' ARGUMENTS

The applicant argues, inter alia, that:

- *Given the substantial overlap in purpose, relevant public, and trade channels, the services of the Contested Mark and the Earlier marks are identical, highly similar, or complementary, reinforcing the risk of confusion.*
- *It is essential to emphasize that the underlying software for both the goods in class 9 and the services in class 42 pertains, amongst others, CFD software. The distinction between "software" and "software as a service (SaaS)" is fundamentally one of delivery method, not the inherent functionality or purpose of the software itself. SaaS merely provides a modernized method of accessing software remotely over the Internet, but the core product—software— remains the same, whether installed locally or accessed via a cloud-based platform. When comparing CFD software*

*versus SAAS for CFD, both products aim to facilitate computational fluid dynamics analysis, targeting the same professional audience with overlapping technical needs. This functional equivalence underscores that the goods and services at issue are not only closely related but, in substance, identical in their purpose and application, thereby reinforcing the likelihood of confusion.*

- *Both marks are dominated by the term "FLOW," which inherently conveys the idea of movement, fluidity, and continuity. Both "3D" and "360" convey concepts that are spatial, dynamic, and linked to dimensions or perspectives. "3D" suggests a three-dimensional perspective, often associated with depth, realism, or technology. "360" often referring to a complete circle or global view. Both evoke themes of dynamic processes, motion, coverage, or spatial relationships, making the marks conceptually related and complementary, especially in certain industries like technology, design, or engineering.*
- *Taking into account the major visual, aural, and conceptual coincidences discussed above, we submit that, overall, the signs under comparison must be regarded as being similar to a high degree.*
- *The contested services are highly similar to the goods and services of the Earlier marks. Whereas the Earlier marks have protection for software and IT services including specific protection for Computational Fluid Dynamics software, the Contested mark is protected for Software as a service (still software based) in relation to Computer Fluid Dynamic. This alignment in the nature of goods and services further strengthens the argument for a likelihood of confusion.*
- *Applicant Flow Science is a renowned US software company and worldwide leading provider of computational fluid software. [...] Flow Science has distributors and technical support services for its FLOW-3D products in nations throughout the Americas, Europe, Asia, the Middle East, and Australasia. Flow Science's flagship software is called FLOW-3D®, a pioneer (CFD) software and solver that enables highly accurate simulations of free-surface flow problems with human-centric support. The mark is also used for several related IT and consultancy services. The FLOW-3D®- brand includes multiple sub-brands like FLOW-3D AM, FLOW-3D CAST, FLOW-3D HYDRO, FLOW-3D WELD, FLOW-3D POST, FLOW-3D (X) and FLOW-3D DEM. These sub-brands showcase the adaptability and extensive application range of FLOW-3D in various industries, further reinforcing its market presence.*
- *We note that Applicants Earlier Mark has a high degree of distinctiveness by virtue of intensive use and reputation. Applicant has won multiple awards and recognitions for FLOW-3D. For an extensive lists of awards and recognitions over the years, we refer to: <https://www.flow3d.com/press-releases/>. In any case, if a high distinctiveness is not (yet) accepted, the degree of distinctiveness should at least be seen as normal.*
- *Trade mark owners commonly employ families of trade marks featuring identical prefixes or suffixes, such as "FLOW", to create a cohesive brand identity across different but related product lines. This practice is particularly relevant to the marks FLOW-3D and FLOW360, which both share the distinctive prefix "FLOW." Given that both marks are associated with Computational Fluid Dynamics (CFD) solutions, the shared prefix strongly suggests that they belong to a family of trade marks used to represent related offerings. This can lead consumers to assume that the goods or services offered under FLOW-3D and FLOW360 originate from the same source or are part of a unified product line, thereby increasing the likelihood of confusion.*

The EUTM proprietor argues that the signs are not identical, thus creating a different commercial, visual and phonetic impression for consumers. Also, the EUTM proprietor claims that the services are not similar and that it has been using the contested trade mark since at least the year 2018.

In reply, the applicant reiterates its main arguments.

In its last submissions, the EUTM proprietor argues that conceptually, the marks refer to different ideas: “FLOW360” conveys a sense of continuous motion, completeness, and a comprehensive 360-degree perspective. It also alludes to the full calendar year (365 days), symbolising ongoing innovation and delivery. “FLOW360” underscores the trade mark’s hallmark: the rapid, high-volume production of simulations (over 360 generated daily) highlighting both scale and speed. “FLOW-3D”, on the other hand, evokes three-dimensional modelling or visualisation. These conceptual differences significantly reduce the risk of consumer confusion.

Also, the EUTM proprietor claims that the shared term ‘FLOW’ is widely recognised and commonly used in the fields of software, engineering, and simulation, particularly in reference to computational fluid dynamics (CFD). Therefore, ‘flow’ has limited distinctiveness and cannot dominate the comparison of the marks. Instead, the differentiating elements “360” and “3D” provide the dominant, source-identifying features, reducing any risk of confusion. Moreover, the EUTM proprietor claims that to its knowledge the trade marks in dispute have coexisted in the marketplace without any documented instances of actual confusion among relevant consumers. This coexistence further suggests that the average consumer, who is reasonably well-informed and observant, is capable of distinguishing between the two trade marks. Furthermore, the cancellation applicant has not submitted any objections regarding the contested trade mark during the opposition period, thus demonstrating no intention to object the registration of the contested trade mark.

#### **LIKELIHOOD OF CONFUSION — ARTICLE 60(1)(a) EUTMR IN CONJUNCTION WITH ARTICLE 8(1)(b) EUTMR**

Pursuant to Article 8(1)(b) EUTMR, a likelihood of confusion exists if there is a risk that the public might believe that the goods or services in question, under the assumption that they bear the marks in question, come from the same undertaking or, as the case may be, from economically linked undertakings. Whether a likelihood of confusion exists depends on the appreciation in a global assessment of several factors, which are interdependent. These factors include the similarity of the signs, the similarity of the goods and services, the distinctiveness of the earlier mark, the distinctive and dominant elements of the conflicting signs and the relevant public.

The application is based on more than one earlier trade mark. The Cancellation Division finds it appropriate to first examine the application in relation to the applicant’s European Union trade mark registration No 18 056 256.

##### **a) The services**

The relevant factors relating to the comparison of the goods or services include, inter alia, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary (‘the Canon criteria’). It is also necessary to take into account, besides the Canon criteria, other factors, namely distribution channels, the relevant public and the usual origin of the goods or services (02/06/2021, T-177/20, Hispano Suiza / Hispano Suiza, EU:T:2021:312, § 21-22).

The services on which the application is based are, inter alia, the following:

*Class 42: IT consultancy, advisory and information services; Software consultancy services; Consultancy and advice on computer software and hardware; Consultancy and information services relating to computer software design; Technical support services relating to computer software and applications; Computer software integration; Software development, programming and implementation; Computer hardware and software design; Design and development of operating system software.*

The contested services are the following:

*Class 42: Software as a service (SAAS) services featuring software for Computational Fluid Dynamic.*

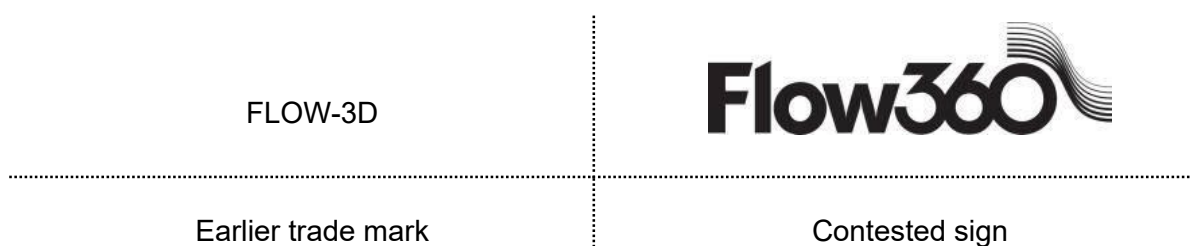
The contested *software as a service (SAAS) services featuring software for Computational Fluid Dynamic* are at least similar to a high degree to the opponent's *IT consultancy, advisory and information services* because they at least coincide in their distribution channels, relevant public and provider. Also, they are complementary.

#### **b) Relevant public — degree of attention**

The average consumer of the category of products concerned is deemed to be reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's degree of attention is likely to vary according to the category of goods or services in question (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26).

In the present case, the services found to be at least similar to a high degree target the public at large and also business customers with specific professional knowledge or expertise. The degree of attention is considered to be average.

#### **c) The signs**



The relevant territory is the European Union.

The global appreciation of the visual, aural or conceptual similarity of the marks in question must be based on the overall impression, bearing in mind their distinctive and dominant components (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23).

The earlier mark is a word mark, namely 'FLOW-3D'. The contested sign is figurative and it consists of the verbal and numerical elements 'Flow360' depicted in black characters together with a figurative element placed at the right of the mark. This element consists of a series of curved, flowing lines.

As pointed out by the EUTM proprietor itself, it can be expected that the element 'FLOW' will be recognised in both marks as a rather basic English term that the public will associate to

the concept of something which inherently conveys the idea of movement, fluidity, and continuity. To this extent this element is weak in relation to all the services, since it will be recognized in both signs.

As regards the elements '-3D' of the earlier mark, firstly it must be noted that the hyphen is a basic punctuation mark commonly used to combine two words or elements in both text and trade marks. Therefore, this element is devoid of any distinctive character as such. '3D' is the abbreviation of three-dimensional, which means representing objects or images that have length, width, and depth. It will be understood by the public throughout the entire territory of the European Union (12/10/2017, R 56/2015-2, CINEMA 3D (fig.) / CINEMA 4D et al., § 62). In the context of the relevant services, this element is weak, since it alludes to the idea of visualization, emphasising the three-dimensional nature of the dynamics represented.

The contested sign's remaining component '360' will be perceived as such (as the numeral '360'). Since this is a common reference to '360 degrees', which in turn alludes to the completeness of the given services (namely to the notions of 'full range' or 'fully encompassing'), it is weak.

Also, for what concerns the figurative element of the contested sign, the lines are arranged in a wave-like or flow pattern which in a certain manner represent movement, waves, or dynamic motion, a circumstance that reinforces the concept of 'flow' suggested by the verbal element. In this sense the figurative element is also weak.

The contested mark has no element that could be considered more dominant (visually eye-catching) than other elements.

**Visually**, the signs coincide in the verbal element 'FLOW' and in the number '3'. However, they differ in the remaining elements of the signs, namely the hyphen and the letter 'D' of the earlier mark and the two numbers '60' and the figurative element of the contested sign.

For what concerns the contested sign, account must be taken of the fact that when signs consist of both verbal and figurative components, in principle, the verbal component of the sign usually has a stronger impact on the consumer than the figurative component. This is because the public does not tend to analyse signs and will more easily refer to the signs in question by their verbal element than by describing their figurative elements (14/07/2005, T-312/03, SELENIUM-ACE / SELENIUM SPEZIAL A-C-E (fig.), EU:T:2005:289, § 37; 19/12/2011, R 233/2011-4 Best Tone (fig.) / BETSTONE, § 24; 13/12/2011, R 53/2011-5, Jumbo (fig.) / DEVICE OF AN ELEPHANT (fig.), § 59).

Taking into account what has been explained above in relation to the distinctiveness of the elements which form the marks in dispute, the Cancellation Division considers that the marks are visually similar to an average degree.

**Aurally** and **conceptually**, the signs coincide in the word element 'FLOW', present in both of them. As regards the concept that is endowed in the figurative element, it is also an element of conceptual convergence between the signs, since it reinforces the idea of 'flow'. The signs differ in the elements '-3D' of the earlier mark and in the number '360' of the contested sign, which will be pronounced in their entirety, and in a different manner notwithstanding the presence of the same number '3'.

In the light of the distinctiveness of the elements which form the marks in dispute explained above, the Cancellation Division considers that the marks are aurally and conceptually similar, at least, to an average degree.

**d) Distinctiveness of the earlier mark**

The distinctiveness of the earlier mark is one of the factors to be taken into account in the global assessment of likelihood of confusion.

The applicant claimed that the earlier trade mark enjoys enhanced distinctiveness but did not file any evidence to prove this claim.

The applicant only referred in its observations to various hyperlinks such as <https://www.flow3d.com/press-releases/>.

Under Article 95(1) EUTMR, in proceedings relating to relative grounds for refusal of registration, the Office is restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought. That provision relates, inter alia, to the factual basis of decisions by the Office, that is, the facts and evidence on which those decisions may be validly based. It is not for the Office decision-taking bodies to verify or to try and clarify the information submitted by accessing the respective websites with a view to verifying the claims put forward (04/10/2018, T-820/17, Alfrisa (fig.) / Frinsa F (fig.), EU:T:2018:647, § 61-63).

The Cancellation Division can only rely on the evidence submitted by the parties, and a mere indication of a website through a hyperlink does not constitute evidence. It is clear that, by its very nature, a hyperlink to a website does not allow for the content and data to which it is meant to refer to be copied and transmitted as a document so that the other party could access that information. In addition, websites are easily updated, and most do not provide any archive of previously displayed material or display records that would enable members of the public to establish with precision when any particular piece of content was published. Therefore, the authenticity, reliability and stability of the evidence cannot be sufficiently guaranteed merely by submitting a hyperlink to a website.

Online evidence is admissible only in a limited number of cases, as provided in Article 7(3) EUTMDR, and in particular in relation to the substantiation of earlier national rights and proving the content of the national law pursuant to Article 8(4) EUTMR. In all other instances, such as in the present case, the evidence, even if available online, should be provided to the Office in the form of materials such as printouts/screenshots, recorded on a digital carrier or in another appropriate form.

Therefore, the submission of direct links to websites cannot be considered as valid evidence and cannot be taken into account.

Consequently, the assessment of the distinctiveness of the earlier mark will rest on its distinctiveness per se. Considering what has been stated above in section c) of this decision, the distinctiveness of the earlier mark must be seen as weak for all the services in question.

**e) Global assessment, other arguments and conclusion**

The appreciation of likelihood of confusion on the part of the public depends, inter alia, on the recognition of the earlier mark on the market, the association that can be made with the registered mark, and the degree of similarity between the marks and between the goods or services identified. It must be appreciated globally, taking into account all factors relevant to the circumstances of the case (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 18; 11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22).

The services in Class 42 are at least similar to a high degree. The relevant public consists of the general public and also business customers with specific professional knowledge or

expertise, whose degree of attention is average. The earlier mark has a weak degree of inherent distinctiveness in relation to the services at issue.

The signs are visually similar to an average degree and aurally and conceptually similar to an at least average degree. They coincide in the element 'FLOW', which, although weak in the context of the services, constitutes the initial part and the core of both marks. The differences are confined to the elements '-3D' in the earlier mark and the number '360' and the figurative element in the contested sign, which all have a weak distinctive character, being descriptive of or allusive to characteristics of the services. The hyphen in the earlier mark is a mere punctuation device devoid of distinctive character.

When marks share an element that is non-distinctive or has a low degree of distinctiveness, the assessment of likelihood of confusion will focus on the impact of the non-coinciding components on the overall impression of the marks. That assessment takes into account the similarities/differences and distinctiveness of the non-coinciding components. A coincidence in a non-distinctive element or an element with a low degree of distinctiveness will not normally on its own lead to a likelihood of confusion (02/10/2014, Common Communication on the Common Practice of Relative Grounds of Refusal – Likelihood of Confusion, (Impact of non-distinctive/weak components) (CP5)).

However, in the present case, the non-coinciding elements '-3D' of the earlier mark and '360' and the figurative element of the contested sign are equally weak in relation to the services at issue. As a result, they have limited capacity to distinguish the marks from each other. The relevant public, even with an average degree of attention, will focus on the common element 'FLOW', which occupies the initial position and shapes the overall impression of both marks. The structural similarity created by the shared element 'FLOW' followed by numerical/alphanumeric references creates a pattern that reinforces the similarity between the signs.

Account is taken of the fact that average consumers rarely have the chance to make a direct comparison between different marks but must trust in their imperfect recollection of them (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26). In the present case, the common element 'FLOW' will be the element most easily remembered by the relevant public, particularly given that the differentiating elements have weak distinctive character.

Also, evaluating likelihood of confusion implies some interdependence between the relevant factors and, in particular, a similarity between the marks and between the goods or services. Therefore, a lesser degree of similarity between goods and services may be offset by a greater degree of similarity between the marks and vice versa (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17). In the present case, the at least high degree of similarity between the services, combined with the at least average degree of similarity between the signs, supports a finding of likelihood of confusion, notwithstanding the weak distinctive character of the earlier mark.

Indeed, although the earlier mark has weak inherent distinctiveness, the overall similarity between the signs, particularly their structural similarity and shared distinctive core 'FLOW', combined with the high degree of similarity between the services targeting the same general and professional public, is sufficient to create a likelihood of confusion. The relevant public may believe that the services designated by the contested sign originate from the same undertaking as those covered by the earlier mark, or from economically linked undertakings operating in the same specialised field.

In its observations, the EUTM proprietor argues that its trade mark has coexisted in the market with the applicant's earlier marks.

According to case-law,

...the possibility cannot be entirely dismissed that, in certain cases, the coexistence of earlier marks on the market could reduce the likelihood of confusion which the [Cancellation] Division and the Board of Appeal find exists as between two conflicting marks. However, that possibility can be taken into consideration only if, at the very least, during the proceedings before the EUIPO concerning relative grounds of refusal, the [proprietor of] the European Union trade mark duly demonstrated that such coexistence was based upon the absence of any likelihood of confusion on the part of the relevant public between the earlier marks upon which it relies and the intervener's earlier mark on which the opposition is based, and provided that the earlier marks concerned and the marks at issue are identical.

(11/05/2005, T-31/03, GRUPO SADA (fig.) / Sadia (fig.), EU:T:2005:169, § 86)

Formal coexistence of certain marks in national or European Union registries is not per se particularly relevant. It also needs to be proven that the marks coexist in the market, which could indicate that consumers are used to seeing the marks without confusing them. Last but not least, the Office will in principle be restricted in its examination to the trade marks in conflict.

Only under special circumstances may the Cancellation Division consider evidence of the coexistence of other marks in the market (and possibly in a Register) on a national/European Union level as an indication of 'dilution' of the distinctive character of the applicant's mark which might be contrary to an assumption of likelihood of confusion.

This has to be assessed on a case-by-case basis and such an indicative value should be treated with caution as there may be different reasons as to why similar signs coexist, for example, different legal or factual situations in the past, or prior rights agreements between the parties involved.

Therefore, in the absence of convincing arguments and evidence thereof, this argument of the EUTM proprietor must be rejected as unfounded.

Also, the EUTM proprietor argues that it has been using the contested trade mark since at least the year 2018 and has submitted various items of evidence to substantiate this claim.

The right to an EUTM begins on the date when the EUTM is filed and not before. Therefore, when considering whether or not the EUTM falls under any of the relative grounds for refusal, events or facts related to the EUTM which happened before its filing date are irrelevant because the applicant's rights, insofar as they predate the EUTM, are prior to the EUTM proprietor's EUTM. According to the case-law, only the reputation of the earlier mark, and not that of the contested mark, must be taken into account in order to assess whether the similarity of the goods or services designated by the two marks is sufficient to give rise to a likelihood of confusion (03/09/2009, C-498/07 P, LA ESPAÑOLA / ACEITE DE OLIVA CARBONELL, EU:C:2009:503, § 84; 10/11/2021, T-353/20, ACM 1899 AC MILAN (fig.) / Milan et al., EU:T:2021:773, § 113).

## **Conclusion**

Considering all the above, there is a likelihood of confusion on the part of the public.

Therefore, the application is well founded on the basis of the applicant's European Union trade mark registration No 18 056 256. It follows that the contested trade mark must be declared invalid for all the contested services.



As the earlier European Union trade mark registration No 18 056 256 leads to the success of the application and the cancellation of the contested trade mark for all the services against which the application was directed, there is no need to examine the other earlier rights invoked by the applicant (16/09/2004, T-342/02, Moser Grupo Media, s.l. / MGM, EU:T:2004:268) nor the applicant's family of marks claim.

### **COSTS**

According to Article 109(1) EUTMR, the losing party in cancellation proceedings must bear the fees and costs incurred by the other party.

Since the EUTM proprietor is the losing party, it must bear the cancellation fee as well as the costs incurred by the applicant in the course of these proceedings.

According to Article 109(7) EUTMR and Article 18(1)(c)(ii) EUTMIR, the costs to be paid to the applicant are the cancellation fee and the representation costs, which are to be fixed on the basis of the maximum rate set therein.



### **The Cancellation Division**

Boyana NAYDENOVA

Andrea VALISA

Aldo BLASI

According to Article 67 EUTMR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 68 EUTMR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. It must be filed in the language of the proceedings in which the decision subject to appeal was taken. Furthermore, a written statement of the grounds of appeal must be filed within four months of the same date. The notice of appeal will be deemed to be filed only when the appeal fee of EUR 720 has been paid.