

O/628/20

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3387304

BY

EZDRM.INC

TO REGISTER THE FOLLOWING TRADE MARK IN CLASS 42 AND 45



AND OPPOSITION THERETO (NO. 417550)

BY

TOONTRACK MUSIC AB

Background and Pleadings

1. On 27 March 2019 EZDRM. Inc (“the Applicant”) applied to register in the UK the trade mark no. 3387304 as set out on the front cover page, for services in classes 42 and 45. It was accepted and published on 31 May 2019. Following the commencement of these opposition proceedings, the Applicant amended its specification and therefore, it proceeds with its application on the basis of those services as listed below.

Class 42: Software as a service featuring software for digital rights management; providing use of non-downloadable digital rights management software.¹

Class 45: Digital rights management services, namely, providing content rights holder intellectual property licenses for secure content playback on a variety of consumer platforms, namely, mobile devices, connected devices, smart TVs, and desktop applications and browsers; Digital rights management services to protect digital content, namely, providing electronic verification of digital content access and control and generating electronic access permissions for said digital content.

2. Toontrack Music AB (“the Opponent”) partially opposes the application under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) relying on a number of its earlier European Union Trade Marks (EUTM) as set out below:

EZDRUMMER
EUTM no. 13944905
Filed: 13 April 2015
Registered: 10 August 2015

Class 9: Computer software; music composition software; computer software for creating and editing music and sounds; computer software

¹ Originally the application included the broad term *software as a service*, but by way of TM21B filed on 5 December 2019 this term was deleted and replaced by the current specification.

for music production including hosting sound libraries; computer software to control and improve audio equipment sound quality; computer software in the form of sound libraries; computer software for processing digital music files; musical sound recordings; sound recording featuring sound libraries; series of musical sound recordings; computer games.

Class 15: Musical instruments.

Class 42: Design and development of computer software; design and development of computer software for music production; design and development of computer software in the form of sound libraries; cloud computing.

EZMIX

EUTM no. 13945423

Filed: 13 April 2015

Registered: 31 October 2019

Class 42: Cloud computing

EZPLAYER

EUTM no. 015240179

Filed: 18 March 2016

Registered: 18 April 2017

Class 42: Cloud services

EZX

EUTM No. 13945092

Filed: 13 April 2015

Registered: 23 April 2017

Class 9: Computer software; music composition software; computer software for creating and editing music and sounds; computer software for music production including hosting sound libraries; computer

software in the form of sound libraries; computer software for processing digital music files; musical sound recordings; sound recording featuring sound libraries; series of musical sound recordings; computer games.

Class 15: Musical instruments

Class 42: Design and development of computer software; design and development of computer software for music production; design and development of computer software in the form of sound libraries; cloud computing.

3. The Opponent opposes the application submitting in its original pleadings that the respective marks are phonetically and visually similar to a high degree by virtue of them all containing the element EZ at the beginning of the marks and that the EZDRUMMER mark is particularly similar to the Applicant's; the first four letters being identical and that the element DRM in the application could be seen as an abbreviation for the word DRUMMER. In addition, the contested services in class 42 are identical/highly similar to the Opponent's *design development of computer software; cloud computing* in class 42 and *computer software; computer software in the form of sound libraries* in class 9 leading to a likelihood of confusion.

4. The Applicant filed a defence and counterstatement denying the claims made, submitting that the Opponent is attempting to monopolise the right to the letters EZ which are widely regarded as an abbreviation for "easy" and furthermore that the EUIPO regarded them as being devoid of distinctive character. Conceptually, the Applicant argues that the marks are different. Although the Applicant accepts similarity between the contested services and the Opponent's *computer software* in class 9 this is "merely because it has been broadly claimed". In relation to the Opponent's services in class 42 namely *cloud services* and *cloud computing* the Applicant argues that these are technical services relating to IT infrastructure and are sold to different users, for different purposes, through separate trade channels and therefore are dissimilar to the specific software as a service for which the applicant seeks registration.

5. Both parties are professionally represented; the Applicant by Filemot Technology Law Ltd; the Opponent by Boulton Wade Tennant LLP. Neither party filed evidence or submissions during the evidence rounds however the Applicant requested a hearing which took place before me via video conference on 21 September 2020. At the hearing Miss Barbara Cookson from Filemot Technology Law Ltd appeared for the Applicant, whereas counsel Miss Georgina Messenger appeared on behalf of the Opponent instructed by Boulton Wade Tenant LLP. Neither party filed additional submissions however both filed skeleton arguments prior to the hearing. This decision is taken following a careful perusal of all the papers and after consideration of the oral arguments submitted during the hearing.

Preliminary issue

6. Whilst initially not opposing the Applicant's class 45 specification, the Opponent revised its position during the hearing on the basis that the term *providing use of non-downloadable digital rights management software* appeared in both classes 42 and 45 of the application. It therefore wished to oppose class 45 in so far as it related to this term. Following the hearing Miss Cookson confirmed that the term had been inadvertently included in class 45 and filed a revised specification removing this term from its application in so far as it was included within class 45. Upon this clarification, by way of letter dated 20 September 2020 the term *providing use of non-downloadable digital rights management software* was removed from class 45 and the Opponent confirmed it no longer sought to oppose any of the Applicant's services within this class. The opposition therefore proceeds only based on the Applicant's services in class 42.

Decision

7. Section 5(2)(b) of the Act states as follows:

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

(a)

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

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

8. In these proceedings the Opponent is relying on its EUTM registrations as shown above which qualify as earlier marks under section 6 of the Act, because they were applied for at an earlier date than the Applicant's contested mark. Since the Opponent's trade marks have been registered for no more than five years at the date the application was filed they are not subject to the proof of use provisions contained in section 6A of the Act. Consequently, the Opponent may rely on all the goods and services of its registrations without having to demonstrate that genuine use has been made of them.

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

The principles:

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to

make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a greater 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 to mind the earlier mark, is not sufficient;

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

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

Comparison of the goods and services

10. When conducting a goods and services comparison, all relevant factors should be considered as per the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon Kabushiki Kaisha v Metro Goldwyn Mayer Inc* Case C-39/97, where 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”.

11. I am also guided by the relevant factors for assessing similarity identified by Jacob J in *Treat*, [1996] R.P.C. 281 namely:

- (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.

12. In addition, I take note of the decision in *Les Editions Albert René v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-336/03*, in which the General Court (“GC”) stated:

“69. Next, the Court must reject the applicant’s argument that all the goods and services covered by the Community trade mark application are linked, in one way or another, to ‘computers’ and ‘computer programs’ (Class 9) covered by the earlier trade mark. As the defendant rightly points out, in today’s high-tech society, almost no electronic or digital equipment functions without the use of computers in one form or another. To acknowledge similarity in all cases in which the earlier right covers computers and where the goods or services covered by the mark applied for may use computers clearly exceeds the scope of the protection granted by the legislature to the proprietor of a trade mark. Such a position would lead to a situation in which the registration of computer hardware or software would in practice exclude subsequent registration of any type of electronic or digital process or service exploiting that hardware or software.”

13. Given the acceptance by the parties of the revised terms, for the purposes of this opposition the contested goods and services are as follows:

Applicant’s services	Opponent’s goods and services
Class 42: Software as a service featuring software for digital rights management; providing use of non-downloadable digital rights management software.	13944905 - EZDRUMMER Class 9: Computer software; music composition software; computer software for creating and editing music and sounds; computer software for

	<p>music production including hosting sound libraries; computer software to control and improve audio equipment sound quality; computer software in the form of sound libraries; computer software for processing digital music files; musical sound recordings; sound recording featuring sound libraries; series of musical sound recordings; computer games.</p> <p>Class 15: Musical instruments.</p> <p>Class 42: Design and development of computer software; design and development of computer software for music production; design and development of computer software in the form of sound libraries; cloud computing.</p>
	<p>13945423 - EZMIX Class 42: Cloud computing</p>
	<p>015240179 - EZPLAYER Class 42: Cloud services</p>
	<p>13945092 – EZX Class 9: Computer software; music composition software; computer software for creating and editing music and sounds; computer software for</p>

	<p>music production including hosting sound libraries; computer software in the form of sound libraries; computer software for processing digital music files; musical sound recordings; sound recording featuring sound libraries; series of musical sound recordings; computer games.</p> <p>Class 15: Musical instruments</p> <p>Class 42: Design and development of computer software; design and development of computer software for music production; design and development of computer software in the form of sound libraries; cloud computing.</p>
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14. Whilst the Opponent is relying on the entire list of goods and services for which its marks are registered, at the hearing Miss Messenger submitted that the Opponent's EZDRUMMER and EZX marks are registered for similar (although not entirely identical) goods and services to each other in classes 9, 15 and 42 and that its EZMIX and EZPLAYER marks are registered for a single service each, namely *cloud computing* and *cloud services*, respectively, in class 42. On this basis she argued that it was not necessary or proportionate to consider each and every goods and services relied upon by the Opponent on the basis that a number of the terms were regarded as subsets of a broader term. Miss Messenger accepted that if the Opponent succeeded in the broader category it would also succeed in the sub category and vice versa. In this regard the Opponent focussed its attentions on the following goods and services; *computer software* and *computer software for creating and editing music and sounds* in class 9 and *cloud computing*, *cloud services*, *design and development of computer software*, *design and development of computer software for music production* in class 42. I propose to adopt the same approach when assessing the

similarity or identity of the goods and services at issue only returning to the Opponent's remaining goods and services should it become necessary to my decision. I must keep in mind that the terms are to be assessed from the perspective of the ordinary meaning attributed to them by the average consumer.

15. The parties were in agreement that certain goods and services would be regarded as similar however differed regarding the extent and degree of similarity; Miss Cookson arguing that the contested services were not identical to the Opponent's goods and services and that in particular *cloud computing* and *cloud services* in class 42 were distinct from *software as a service featuring digital rights management*. Miss Messenger on the other hand contended that there was a high degree of similarity between the Opponent's goods in class 9 and the contested services in class 42 and that the Opponent's *cloud computing* and *cloud services* were identical.

16. The term 'software' is a broad term encompassing a number of uses/applications. Almost every business and commercial undertaking relies upon some form of information technology and software to some degree to function.

17. In relation to understanding what terms used in specifications mean or cover, the case-law directs us to construe words used in a specification, with reference to how the products are regarded for the purposes of the trade² and that words should be given their natural meaning within the context in which they are used and not given an unnaturally narrow meaning.³ Mr Justice Floyd stated in *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), that:

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

² *British Sugar PLC v James Robertson* 1996 R.P.C. 281

³ *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267

Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”

18. Miss Cookson relied on the decision in *Skykick*⁴ where in so far as the applicable principles of interpreting terms, Justice Arnold stated:

“56. (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.”

19. Taking into account the decision in *Skykick* Miss Cookson contended that terms should not be interpreted too widely arguing that the term *cloud computing* is too broad a term and is not the same as *software as a service* on the basis that terms that were once considered as the same ten years ago are no longer regarded as such. Miss Cookson differentiates the terms as follows:

“the essence of "cloud computing" is the on demand what we expect when we rent on-demand remotely some computer resources that we don't have on our desktop. So we want processors and memory. Essentially, it is on-demand rental of hardware, storage and processor power.”

⁴ *Sky Plc & Ors v Skykick UK Ltd & Anor* C-371/18 and [2020] EWHC 990

20. Miss Messenger submitted that:

“Software is, obviously, essential to the provision of software as a service. They are complementary within the specific meaning of complementarity for the purposes of an opposition. Furthermore, they are likely to be sold through the same channels, to the same consumers and by the same entities. For example, an entity which provides computer software as a product may also provide related services, such as software as a service, and that the same consumers may access both of the goods and the services. Indeed, in that respect, it may be that they are competitive in that regard. The same entity is often responsible for both software as a product and software as a service.”

21. I agree with Miss Cookson that the general populous’ understanding of computer terms have developed in recent years and for a proportion of the public who have an expertise in IT they may have a greater in-depth understanding of how the terms cloud computing/cloud services and software as a service are differentiated. However, the caselaw directs us to consider the terms based on their core meanings and how they are perceived by the average consumer; in this case both professionals and members of the general public.

22. The Applicant’s application is for software as a service and providing use of non-downloadable software both in relation to digital rights management. The providers for such services would be those offering copyright protection for digital media, accessible online via subscription rather than purchased, downloaded and installed on a personal hard drive or individual computer. Those accessing the services would include professionals for example record companies and artists, songwriters, performers and the like wishing to manage their copyrighted material. *Software as a service featuring software for digital rights management and providing use of non-downloadable digital rights management software* is a software delivery/licencing method that limits the ability to copy, modify or distribute copyrighted material.

23. The Opponent’s *computer software* in class 9 is a broad term which effectively provides a computer with a set of instructions in which to work; the term is generally

considered to include all kinds of software applications and includes software for digital rights management and software for creating and editing music and sounds. Those providing the services of software as a service therefore still require the computer software in order to work. As such, consumers would regard those providing the services to also provide the software thus the contested services and goods overlap in producer and trade channels. However, the end users may differ in so far as the Opponent's consumers would be those from the general music buying/subscribing public whereas the Applicant's would be, for example, song writers and right holders wishing to protect their rights. Whilst the nature of the goods and services would be different, there may be complementarity in that the service cannot be provided without the software itself and in competition where the purchaser may purchase the software or access it via a subscription service. I consider that the contested services are similar to a medium to high degree to the Opponent's *computer software* in class 9. In addition, those consumers would consider that the undertaking providing the software as a service would also be designing and developing the software. They overlap in provider and channels of trade. The contested services are therefore similar to a medium degree to *design and development of computer software; design and development of computer software for music production* in class 42.

24. Miss Messenger argues that in relation to the Opponent's *cloud computing* and *cloud services* these are identical to the contested services because generally *software as a service* is a sub-category of *cloud computing/services* and *providing use of non-downloadable digital rights management software* is also a service that provides software which can be accessed on-line, most commonly via the cloud.

25. To my mind software as a service is effectively any fully formed software application that is held or located remotely where access is granted via the internet by way of a subscription or rental agreement. It avoids the consumer having to manage its own software internally relying on the provider's infrastructure instead. *Cloud computing/cloud services* is the practice of using a network of remote servers which allows consumers to store and access data and programs virtually rather than on a local server or a personal computer. The provider for such services can offer the consumer the hardware or software or both, providing both the infrastructure and the services. Similar to software as a service, consumers would regard cloud computing

as involving the hosting of servers for others from a global computer network accessible to lease, rent or subscribe. Since the Opponent's *cloud computing/services* would include those relating to digital rights management whilst differing in nature they would be similar to a medium to high degree to the contested services coinciding in producer, relevant public and distribution channels and be in competition.

Average consumer

26. When considering the opposing marks, the average consumer is deemed reasonably informed and reasonably observant and circumspect.

27. 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 word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

28. Miss Cookson argued that for “the Applicant’s services the relevant public would be a business manager in the publishing industry where their attention is likely to be quite high. The Opponent’s average consumer in so far as its specific goods is a musician, a player or a specialist consumer however for the broader computer goods the average consumer could be both the business consumer and the average consumer. There are therefore two distinct classes of consumer.”

29. Miss Messenger on the other hand argues that the average consumers must be assessed by reference to the full range of the Opponent’s registered goods and services not only those that it actually uses in the market place submitting that the

respective goods and services have a wider scope and would include both professionals and members of the general public.

30. Whilst part of the Opponent's goods and services are directed specifically towards music related software, the terms as registered are however broader and also cover software at large. To my mind the goods and services at issue are partly intended for the general public and are partly specialised directed towards professionals, musicians and those with an interest in gadgetry or IT.

31. The purchasing process for the goods and services are likely to be primarily visual with consumers purchasing the goods from retail premises or their online equivalent and selecting the services through websites and internet search engines in order to locate the providers. I do not ignore the fact that an aural process may factor through recommendations or as a result of requests made to sales assistants.

32. Given the nature of the respective goods and services, considerations such as reviews of the application/software, price, quality, ease of use, suitability of the product and the reputation of the provider would be taken into account before purchasing the goods or accessing the services. Taking these matters into account I consider that for either the general public or the professional business user a higher than average level of attention would be undertaken.

Distinctiveness of the earlier marks

33. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU provided guidance on assessing a mark's distinctive character, stating 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).”

34. Registered trademarks possess varying degrees of inherent distinctive character; descriptive words tend to have a low level of inherent distinctiveness, whereas invented words are regarded as possessing a high level of distinctive character. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark the greater the likelihood of confusion. The distinctiveness of a mark can be enhanced by virtue of the use made of it.

35. No evidence was filed by the Opponent contending a family of marks argument nor did it plead that the distinctive character of its mark has been enhanced through use, I only therefore have the inherent position to consider.

36. The Opponent submits that the element EZ in each of its marks is the dominant and distinctive element because the remaining elements are descriptive or allusive of the goods and services. The Applicant refutes this argument however on the basis that the element EZ is not distinctive and is simply laudatory.

37. I consider that the words DRUMMER, PLAYER and MIX in the Opponent’s EZDRUMMER, EZPLAYER and EZMIX trade marks are not directly descriptive or allusive of those goods and services as relied upon and outlined in paragraph 20

however they are recognisable words with a clear meaning. These suffixes therefore when regarded individually will be considered as possessing a low to medium degree of distinctive character. This does not mean however as argued by Miss Messenger that the letters EZ alone provide the Opponent's marks with their distinctiveness. The letters EZ in isolation will be seen as an acronym or as a colloquial term for 'easy', the commonality of which when taken individually will not be considered as greatly distinctive and give rise to a relatively low degree of inherent distinctive character.

38. In relation to its EZX mark the Opponent accepts that the element EZ would not be separated from the letter X and that the three letters will be seen in combination. I agree. In this mark I do not consider that the letters EZ dominate or would be separated from the remaining letter X. The mark is the three letters in totality and will be perceived as an acronym.

39. I consider that the distinctive character of each of the Opponent's marks is in the juxtaposition of the element EZ in combination with the words DRUMMER, PLAYER and MIX and in its EZX trade mark resides in the three letters in their entirety. The lower distinctive character of the individual components, in my view, is offset to a degree by the elements in combination. Overall taking into account the marks in their entirety, I consider that they possess between a low and medium degree of inherent distinctive character.

Comparison of the trade marks

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

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

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

41. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to consider 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.

42. The respective trade marks are shown below:

Applicant's trade mark	Opponent's trade marks
	<p>EUTM no. 13944905 EZDRUMMER</p> <p>EUTM no. 015240179 EZPLAYER</p> <p>EUTM no. 13945423 EZMIX</p> <p>EUTM no. 13945092 EZX</p>

43. At the hearing Miss Messenger submitted that the element EZ in the respective marks has no recognisable meaning in the English language for the goods and services at issue and therefore is distinctive. In particular she submitted that:

“The average consumer is likely to split the contested mark into the verbal and visual elements EZ and DRM as a result of the figurative component surrounding the EZ component highlighted with the use of the bold text.

The relevant public will understand the expression DRM as an acronym for digital rights management and therefore will recognise it and separate it for the EZ component. The dominant and distinctive element is the EZ element because greater emphasis is given to the beginning of marks and because DRM will be recognised as an acronym.

Although the contested mark and my client's earlier rights differ in their end components, in respect of the EZDRM and EZDRUMMER comparison, there is visual and aural similarity conferred by the fact that the first four letters of those marks are identical and also the fact that the entirety of the contested mark, being a five-letter word, is included within the beginning of the EZDRUMMER mark ...there is a very high degree of visual similarity between the marks and in relation to the remaining marks an average to high degree of similarity due to the overlap in letters and length.”

44. Miss Cookson on the other hand submitted that:

“Visually the similarity is slight. The Applicant's mark is a figurative mark whereas the Opponent's mark is a long string of undivided letters in standard characters....Conceptually there is no similarity... Aurally if the marks were pronounced as individual letters then there is some similarity. It has to be noted that in the UK Z is ZED so the possibility of the EZ element being considered the dominant and distinctive component is low.”

Overall Impression of the respective marks

45. The Opponent's EZX trade mark consists of three letters presented in an unremarkable font. There are no other elements to contribute to the trade mark and therefore the overall impression resides in the combination of these letters.

46. The remaining earlier marks consist of the letters EZ accompanied by a different word neither element dominating the other. Whilst consumers are naturally drawn to words they recognise, the words DRUMMER, PLAYER and MIX and the element EZ are not greatly distinctive for the reasons I have already outlined. The overall impression for each of the Opponent's marks lies in the totality of the word and the two elements in combination.

47. The Applicant's mark consists of the letters EZ and DRM where the letters EZ are presented in a slightly stylised emboldened font encased within a rounded rectangle which naturally draws the eye as it acts to separate the two sets of letters. The right hand side of the rectangle is merged with the letter D. Whilst the emboldened font and the rectangular device play a role, I consider these aspects to be given lesser importance; the combination of the letters EZ and DRM have the greatest relative weight in the overall impression of the mark as a whole.

Visual comparison

48. All the marks coincide visually to the extent that each include the letters EZ at their beginning. In relation to the Opponent's EZPLAYER and EZX marks the only similarity is with the EZ element there being no overlap in any of the remaining letters. There is an overlap in the letters "D", "R" and "M" in the Opponent's EZDRUMMER and EZMIX trade marks, albeit it as part of the words DRUMMER and MIX respectively. However, since these letters are in the middle of the Opponent's marks the similarity is not obvious. The Applicant's mark also includes a rectangular device there being no counterpart in any of the earlier marks. The marks also differ in length; the Applicant's consisting of five letters; the Opponent's consisting of nine, eight, five and three letters respectively. Weighing up the similarities and differences I consider that the

Opponent's EZDRUMMER mark and the Applicant's mark are visually similar to a low to medium degree whereas the remaining marks are visually similar only to a low degree.

Aural Comparison

49. There are two possible ways in which the letters EZ can be pronounced. The first as EEE-ZED being the English pronunciation of the letter Z and the second being EEE-ZEE the American equivalent. Irrespective of which pronunciation will be afforded to the letter Z by the average consumer, it will apply across all marks. The first element of each mark will therefore be pronounced as EEE-ZEE or EEE-ZED and be aurally identical. I consider that each letter will be pronounced in turn in the Applicant's mark such that it will be pronounced phonetically as EEE-ZED/ZEE-DEE-ARE-EM, no pronunciation being afforded to the device. There will be aural differences created by the second element of each of the earlier marks, the words DRUMMER, PLAYER and MIX will be given their ordinary dictionary pronunciations. The Opponent's EZX mark will be pronounced in its entirety, letter by letter with no overlap in pronunciation between the letter X and the letters D, R and M of the application. Given the difference in the number of syllables present in the respective marks and the shared common element only residing in the pronunciation of the letters EZ, I consider that the marks are aurally similar to a low to medium degree.

Conceptual Comparison

50. Whilst I accept that to the English speaking consumer within the UK the letter Z is pronounced as ZED I consider that a greater proportion of the public will see it in combination with the letter E as a colloquial abbreviation for the word 'easy'. This meaning will therefore apply equally across all marks. The words DRUMMER, PLAYER and MIX within the Opponent's marks will be given their ordinary dictionary meanings. The combination of the EZ element with the word DRUMMER, MIX and PLAYER will give rise to a clear concept namely that the goods and services relate to music and sound production and mixing which are easy to use or straightforward. The earlier mark EZX will not give rise to any particular meaning unless perhaps perceived

as an acronym. Whilst the Opponent in its statement of grounds submitted that the letters DRM in the Applicant's mark will be seen as an abbreviation for the word DRUMMER I do not consider this to be the case or that consumers will regard it as such. For the Applicant's consumers I consider that they will see the letters DRM within its mark as an abbreviation for digital rights management and that the services offered are uncomplicated. There may be those however that are not familiar with this term such that these three letters will not give rise to any meaning. There are clear conceptual differences therefore between the respective marks the only overlap residing in the respective goods and services being perceived as easy to use. If the letters DRM do not give rise to a meaning as with the Opponent's EZX marks I consider that they will be conceptually neutral.

Likelihood of Confusion

51. When considering whether there is a likelihood of confusion between the marks at issue I must consider whether there is direct confusion, where one mark is mistaken for the other or whether there is indirect confusion where the similarities between the marks lead the consumer to believe that the respective goods and services originate from the same or related source.

52. A number of factors must also be borne in mind when undertaking the assessment of confusion. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or services and vice versa. As I mentioned above, it is also necessary for me to keep in mind a global assessment of all relevant factors when undertaking the comparison and that the purpose of a trade mark is to distinguish the goods and services of one undertaking from another. In doing so, I must consider that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

53. I remind myself that I have found most of the respective goods and services to be similar at best to a medium to high degree. I have found the average consumer to include members of the general public or professional business users selecting the goods and services primarily by visual means but not discounting aural considerations. I have found the level of attention in the purchasing process to be higher than average taking into account the nature of the goods and services at issue. I consider the EZDRUMMER trade mark to offer the Opponent's its best case visually in so far as I found it to be visually similar to the contested trade mark to a low to medium degree (its remaining marks were only visually similar to a low degree). Aurally the respective marks were similar to a low to medium degree. I found that a greater proportion of the public would perceive the letters EZ as the word "easy", such that the Opponent's EZDRUMMER, EZPLAYER and EZMIX trade marks would give rise to different concepts and are therefore conceptually distinct to the application. Where the Applicant's DRM element did not give rise to a meaning then the trade marks were conceptually neutral. I consider that when taken as a whole the Opponent's marks are inherently distinctive to a low to medium degree, with the common element EZ individually only possessing a low degree of distinctive character.

54. At the hearing Miss Messenger conceded that in light of the additional elements present in the respective marks it is unlikely that they will be mistaken one for the other. I agree. Whilst it is true that as a general rule a greater degree of attention is paid to the beginnings of marks I consider that there are sufficient differences between the visual characteristics of the respective marks, by the presence of the additional elements, for the average consumer to easily distinguish between them. I do not consider that the shared element EZ alone would lead consumers to directly confuse the trade marks such that they would be imperfectly recalled. Not discounting the interdependency principle, even assuming a medium to high degree of similarity between the respective goods and services this will not offset the differences that exist between the marks. Consequently, taking all these matters into account I do not consider that there will be a likelihood of direct confusion.

55. Moving on to consider the possibility of indirect confusion, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognised 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, I conclude that it is another brand of the owner of the earlier mark.”

56. Therefore for indirect confusion to apply the consumer when encountering one mark or the other would acknowledge the differences but nevertheless consider that as a result of the common element EZ, there was an economic connection between the respective marks and the respective goods and services, such that they were provided by one and the same or related undertaking, perceiving the differences as a brand extension or sub brand. A shared common element alone, however, does not necessarily lead to a likelihood of confusion, since it is important to note the aspects of the other elements within the respective marks and the part they play. I bear in mind the level of distinctiveness of the earlier marks as wholes but also the distinctiveness of the common element.

57. In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in

Sabel. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

58. It is my view that the average consumer paying a higher than average level of attention will not consider that the common element EZ as being greatly distinctive such that only the Opponent would be using it as a trade mark. A clear conceptual gap exists between the marks, introduced by the element DRUMMER, MIX and PLAYER which is not reproduced in the Applicant’s mark. Given that the goods and services relied upon by the Opponent as its best case are only similar to a medium to high degree and considering the specialised nature of the Applicant’s services coupled with predominantly a visual selection process, any connection between the trade marks will be regarded as coincidental rather than that those goods and services come from the same origin. Taking into account my assessment of the overall impression of each mark and the distinctive character of the Opponent’s marks as wholes as previously outlined, the weakness of the common element EZ (perceived as the word easy) is such that in my view consumers may consider that there is an association between the trade marks but that this will result in bringing to mind the other’s mark rather than giving rise to an economic connection between them.⁵ The element EZ is insufficiently distinctive for consumers to regard the respective goods and services as being provided by the same or related undertaking. I do not find therefore that consumers would be indirectly confused.

59. Finally for clarification having found no confusion in respect of those goods and services I assessed as being at best similar to a medium to high degree applying the same reasoning the Opponent would be in no better position for its remaining goods

⁵ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

and services which I consider (and was accepted by Miss Messenger) as being further away in terms of similarity.

60. The opposition under section 5(2)(b) of the Act fails in its entirety. Subject to any successful appeal and as no opposition was raised in relation to the Applicant's services in class 45 the application may proceed to registration for the entirety of its applied for services namely:

Class 42: Software as a service featuring software for digital rights management; providing use of non-downloadable digital rights management software.

Class 45: Digital rights management services, namely, providing content rights holder intellectual property licenses for secure content playback on a variety of consumer platforms, namely, mobile devices, connected devices, smart TVs, and desktop applications and browsers; Digital rights management services to protect digital content, namely, providing electronic verification of digital content access and control and generating electronic access permissions for said digital content.

Costs

61. As the Applicant has been successful it is entitled to a contribution towards its costs. Award of costs in proceedings are based upon the scale as set out in Tribunal Practice Note 2 of 2016. Applying that guidance, I award costs to the Applicant on the following basis:

Preparing a defence and counterstatement:	£200
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Preparing for and attending a hearing including drafting skeleton arguments:	£1000
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Total:

£1,200

62. I order Toontrack Music Ab to pay EZDRM. Inc the sum of £1200 as a contribution toward its costs. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case, if any appeal against this decision is unsuccessful.

Dated this 14th day of December 2020

Leisa Davies
For the Registrar