TRADE MARKS ACT 1994 **BLO O/654/21**

IN THE MATTER OF TRADE MARK APPLICATION NO. 3387304
BY EZDRM INC

AND IN THE MATTER OF OPPOSITION NO. 417550
BY TOONTRACK MUSIC AB

AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON
FROM THE DECISION OF MS LEISA DAVIES
DATED 14 DECEMBER 2020

DECISION

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1. This is an appeal from a decision of Ms Leisa Davies, on behalf of the Registrar, BL O/628/20, by which she rejected the opposition of Toontrack Music AB ("the Opponent") to a trade mark application filed by EXDRM Inc. The Opponent appeals.

Background

2. On 27 March 2019, EXDRM ("the Applicant") applied to register this stylised mark:

The amended specification of the mark covered services in Classes 42 and 45. The Opponent filed an opposition to the Applicant's Class 42 services which are:

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

3. The opposition was based upon sub-section 5(2)(b) of the Act and upon 4 earlier EUTMs all prefixed by the letters EZ: EZDRUMMER, EZMIX, EZPLAYER and EZX. The Hearing Officer considered the impact of each of the earlier marks in her decision, but the appeal is based solely upon the EZDRUMMER mark.

4. EUTM No. 13944905 for EZDRUMMER was filed on 13 April 2015 and registered on 10 August 2015. It is registered for:

> "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 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.
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> 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."

5. Neither party filed evidence. A video hearing took place at which Ms Barbara Cookson of Filemot Technology Law Ltd appeared for the Applicant and Miss Georgina Messenger of counsel, appeared for the Opponent, instructed by Boult Wade Tenant LLP. Both parties were represented by the same advocates at the hearing of the appeal.

6. The Hearing Officer found, in summary, that

   a. The contested services were similar to a medium to high degree to the Opponent's *computer software* in Class 9, and to *cloud computing* in Class 42, and to a medium degree to *design and development of computer software; design and development of computer software for music production* in Class 42.

b. The Opponent's consumers would be the general music buying/subscribing public, whilst the Applicant's services are partly intended for the general public and partly for professionals, musicians etc, and in either case a higher than average level of attention would be given to the purchase of the Applicant's services.

c. The distinctive character of the earlier mark lay in the combination of EZ with the word DRUMMER, giving it a low to medium degree of inherent distinctive character.

d. The marks were visually and aurally similar to a low to medium degree; to those understanding the meaning of DRM there would be a conceptual difference between the marks, to those not understanding it, there would be conceptual neutrality.

e. It was conceded that the marks would not simply be mistaken one for the other, and she found that there was no likelihood of indirect confusion, in part due to the weak distinctive character of the common element of the marks, EZ.

Grounds of appeal

7. The Grounds of Appeal complained that the Hearing Officer had erred in a number of ways:

    a. In her analysis of the impact of the letters "EZ" and their pronunciation, which led her to attribute too low a level of distinctive character to the earlier mark, and meant that she did not find, as she should have done, that EZ was the dominant element of the earlier mark.

    b. In her analysis of the visual and conceptual similarities of the marks, which she should have found to be highly similar with a conceptual overlap.

    c. In failing to find that there was an overlap (and thus identity) between the Opponent's cloud computing services and the Applicant's Class 42 services.

    These were identified by Ms Messenger as the key errors in the decision. In addition, the Grounds of Appeal suggested that the Hearing Officer had erred in her analysis of the parties' respective purchasing public.

8. The Opponent submitted that had those errors not been made, the Hearing Officer would have found that there was a likelihood of indirect confusion, and invited me to make such a finding.

Standard of the appeal

9. It was common ground that this appeal is by way of review of the Hearing Officer's decision. Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference in this sort of appeal. Before that is warranted, it would be necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer was wrong. The relevant principles were set out in *TT Education Ltd v Pie Corbett Consultancy* [2017] RPC 17 by Daniel Alexander QC sitting as the Appointed Person at [14]-[52], and his conclusions were approved by Arnold J in *Apple Inc v Arcadia Trading Limited* [2017] EWHC 440 (Ch), [2017] FSR 40. Mr Alexander QC said in particular that:

> "… In the case of a multifactorial assessment or evaluation, the Appointed Person should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions. In particular, where an Appointed Person has doubts as to whether the Registrar was right, he or she should consider with particular care whether the decision really was wrong or whether it is just not one which the appellate court would have made in a situation where reasonable people may differ as to the outcome of such a multifactorial evaluation (*REEF, BUD, Fine & Country* and others)."

10. Subsequently, the Supreme Court in *Actavis Group PTC v. ICOS Corporation* [2019] UKSC 1671, [2019] RPC 9 dealt with the role of the appellate court at [78] to [81]. Lord Hodge said:

> "78. … Where inferences from findings of primary fact involve an evaluation of numerous factors, the appropriateness of an intervention by an appellate court will depend on variables including the nature of the evaluation, the standing and experience of the fact-finding judge or tribunal, and the extent to which the judge

or tribunal had to assess oral evidence*: South Cone Inc v Bessant , In re Reef Trade Mark* [2002] EWCA Civ 763; [2003] RPC 5, paras 25-28 per Robert Walker LJ.

…

80. What is a question of principle in this context? An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. What is the nature of such an evaluative error? In this case we are not concerned with any challenge to the trial judge's conclusions of primary fact but with the correctness of the judge's evaluation of the facts which he has found, in which he weighs a number of different factors against each other. This evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge's conclusion is outside the bounds within which reasonable disagreement is possible. …

81. Thus, in the absence of a legal error by the trial judge, which might be asking the wrong question, failing to take account of relevant matters, or taking into account irrelevant matters, the Court of Appeal would be justified in differing from a trial judge's assessment of obviousness if the appellate court were to reach the view that the judge's conclusion was outside the bounds within which reasonable disagreement is possible. It must be satisfied that the trial judge was wrong …"

11. I note the additional guidance from Mr Iain Purvis QC sitting as the Appointed Person in *Rochester* BL O/049/17 at [33]:

"… the reluctance of the Appointed Person to interfere with a decision of a Hearing Officer on likelihood of confusion is quite high for at least the following reasons:

(i) The decision involves the consideration of a large number of factors, whose relative weight is not laid down by law but is a matter of judgment for the tribunal on the particular facts of each case

(ii) The legal test 'likely to cause confusion amongst the average consumer' is inherently imprecise, not least because the average consumer is not a real person.

(iii) The Hearing Officer is an experienced and well-trained tribunal, who deals with far more cases on a day-to-day basis than the Appellate tribunal.

(iv) The legal test involves a prediction as to how the public might react to the presence of two trade marks in ordinary use in trade. Any wise person who has practised in this field will have come to recognize that it is often very difficult to make such a prediction with confidence. … Any sensible Appellate tribunal will therefore apply a healthy degree of self-doubt to its own opinion on the result of the legal test in any particular case."

12. I have kept these principles in mind on this appeal.

The merits of the appeal

13. The Opponent submitted that the Hearing Officer's findings about the distinctiveness of the "EZ" element of the marks were central to her conclusions on the likelihood of confusion, but were flawed in several ways. It submitted that she should have found that the EZ component was dominant and distinctive, and, in particular, that as "EZ" is not a recognisable word it would be more distinctive than "DRUMMER," especially for goods and services unrelated to music.

14. The Hearing Officer had said, in considering the distinctiveness of the earlier marks:

"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 [*software and software as a service*] 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.

…

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 ... 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."

15. When carrying out her comparison of the marks, she went on to say:

"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.

…

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.

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. … 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."

16. The Grounds of Appeal stated that the Hearing Officer's finding at paragraph 50 that the greater proportion of the public would see EZ as an abbreviation of 'easy' was inconsistent with her findings at paragraph 49 as to the pronunciation of the letters EZ. It also submitted that her findings in paragraph 37 were inconsistent with the analysis at paragraphs 49-50 of how consumers would see the EZ element of the marks. Having correctly found that UK consumers would pronounce EZ as "EEE"-ZED," it submitted that there was no basis for the conclusion that they would understand EZ as a colloquial abbreviation of the word "easy."

17. Taking that last point first, I do not accept the submission that there is an error in the decision in this regard. In paragraph 49 the Hearing Officer identified two ways in which 'EZ' might be pronounced and considered the impact of both of them in terms of the *aural* comparison of the marks, but it seems to me that she was nonetheless entitled to find in paragraph 50 that from a *conceptual* point of view the majority of consumers would see 'EZ' as a colloquial abbreviation of the word "easy." There is no inconsistency, in my view, between the two paragraphs. That being so, it does not

seem to me that the Opponent has identified an error in the findings in the last two sentences of paragraph 37, as they are consistent with paragraph 50.

18. At the hearing of the appeal, there was some discussion of the Hearing Officer's finding that DRUMMER was a recognisable word with a clear meaning, and had only low to medium distinctiveness. She did not expressly link that view to the goods and services in issue. However, her findings reflected the Opponent's submissions below, and no doubt as a result no point was taken about that finding in the Grounds of Appeal. Indeed, Ms Messenger submitted that the finding was correct, as part of her submissions on the appeal that whether or not the DRUMMER element of the mark was descriptive or allusive, "EZ" was the distinctive part of the EZDRUMMER mark, contrary to the Hearing Officer's conclusions at paragraph 39. In the circumstances, I need not consider this finding further.

19. That leaves the submission that the Hearing Officer was wrong not to find that EZ is properly the distinctive and dominant element of the earlier mark. In my judgment, given the Hearing Officer's findings about both elements of the earlier mark in paragraph 37, there is no scope for the Opponent to criticise her conclusions on that point at paragraph 39. In my view the Hearing Officer carried out a proper analysis of the dominant and distinctive components of the marks. The weight to be given to each of the various elements of the marks was a matter for the Hearing Officer, and it cannot be said that she erred in principle, or reached a conclusion that was not open to her.

20. In its written submissions below, the Applicant had argued that EZ would be taken to be an abbreviation for EASY, and relied upon two European decisions to that effect including Case T-771/16, *Toontrack Music AB v EUIPO* relating to the Opponent's EUTM EZMIX, which had been refused save for cloud computing. An appeal was dismissed in C-48/18P.

21. I consider it well within the scope of reasonable decisions for the Hearing Officer to find that EZ would be seen by the majority of consumers as an abbreviation for EASY.

This was not a point on which the Hearing Officer required evidence, but she was entitled to apply her own knowledge of current English usage. As a result, she was also entitled to find that the distinctive character of the earlier mark lay in the juxtaposition of its two elements.

22. I therefore dismiss the first limb of the appeal.

23. Paragraphs 7 to 12 of the Grounds of Appeal set out a series of alleged errors in the Hearing Officer's analysis of the visual and conceptual similarities of the marks. As to visual similarity she said:

> "48. All the marks coincide visually to the extent that each include the letters EZ at their beginning. … 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."

24. The Opponent submitted that the Hearing Officer had erred in not taking into account the fact that the first 4 letters of the two marks were the same, and that a consumer would be likely to break both marks down into their comprehensible constituent parts, with the result that they were visually highly similar.

25. It is right that the Hearing Officer did not specifically mention the fact that the first 4 letters of the two marks were the same, but she relied on the first two letters being the same, as well as on the overlap of the letters "D", "R" and "M," to conclude that the EZDRUMMER mark had more visual similarity to the Applicant's mark than did the

Opponent's other earlier marks. In the circumstances, I am not persuaded that she made the rather elementary error alleged by the Opponent, especially as the Opponent had relied below on the impact of the first part of each of the marks. Nor do I consider that it is clear on any basis that she should have found the marks have a high level of visual similarity. Her conclusions do not seem to me to arise from any appealable error.

26. Next, the Opponent submitted that the Hearing Officer erred in her comparison of the conceptual similarity of the marks in paragraph 50 of her decision (set out above). the phrases I have placed in square brackets as set out above relate to the additional marks relied upon by the Opponent below, which do not form part of the appeal. She found that EZ would be read in the same way in both marks and found that EZDRUMMER had a clear conceptual meaning - that the goods and services relate to music and are easy to use or straightforward. That part of paragraph 50 was not said to be wrong. Nor did the Opponent criticise her next point, which was that 'DRM' in the Applicant's mark would (in relation to its services) be understood by a number of consumers as an abbreviation of 'digital rights management.'

27. Instead, the Opponent said that the Hearing Officer should have found that there was a clear conceptual overlap between goods and services relating to music and sound production, and services relating to digital rights management. It is not at all clear to me that the point was made in those terms to the Hearing Officer, as in its written submissions the Opponent said "DRM is non-distinctive and/or descriptive and therefore has limited or no impact on the conceptual meaning of the Contested Sign. As EZ has no meaning to the relevant public there is no conceptual aspect to the Contested Sign."

28. Even if the point now raised was made at the hearing below, it seems to me that the Opponent is concentrating upon the similarity of the goods/services, rather than upon the meaning (the concept) of the two marks. To those understanding the term DRM, the Applicant's mark would raise the concept of easy digital rights management, whilst the earlier mark would raise the concept of easy drumming (or music, as the Hearing

Officer more generously found). It seems to me that the Hearing Officer was entitled to find that these are different concepts and the similarity which is now alleged by the Opponent is extremely tenuous. It does not seem to me that any distinct error has been identified by the Opponent. I reject this ground of appeal.

29. Thirdly, the Opponent criticised the Hearing Officer's findings on the identity or similarity of the goods and services. At paragraph 58, the Hearing Officer identified as a factor against a finding of a likelihood of confusion her finding that the Opponent's goods and services relied upon by the Opponent were only similar to a medium to high degree to the Applicant's services. The Opponent submitted that she had been wrong to make that finding, as "cloud computing" in the specification of the EZDRUMMER mark is identical to the Applicant's services.

30. The Hearing Officer dealt with the similarity of the goods/services as follows:

> "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.
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> 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."

31. There was no evidence before the Hearing Officer as to the meaning or scope of 'cloud computing,' but both sides made written submissions on the point below. The Opponent's position was that

"a. Digital rights management is the use of technology and systems to restrict the use of copyrighted digital materials;

b. Cloud computing is the on-demand availability of computer system resources without direct active management by the user;

c. Software as a service is a software distribution model whereby a provider hosts and/or makes software applications available to consumers over the internet. It is a type of cloud computing;

d. Non-downloadable software is software that a consumer accesses online via a third party platform, generally it is cloud-based software. "

The Applicant's written submissions simply dismissed cloud computing as adding nothing to the Opponent's computer software in Class 9.

32. The Hearing Officer's findings at paragraph 25 are unfortunately not altogether clear. The Opponent submitted that on her own findings as to the scope of cloud computing, she should have found the Applicant's services to be a sub-set of cloud computing services at large, and hence identical to them.

33. In my view, when the Hearing Officer said "The provider for such services can offer the consumer the hardware or software or both, providing both the infrastructure and the services" she accepted that the term cloud computing covered both infrastructure and software as a service. I agree with the Opponent that it is hard to reconcile that view with the next sentence, in which she said that consumers would regard cloud computing as involving the *hosting* of servers for others from a global computer network. This suggest that she was concentrating on infrastructure and excluding software as a service, and it seems that it was as a result of the latter point that she found cloud computing services only to be similar to the Applicant's services.

34. If, as I think she did, the Hearing Officer had accepted that the broad term 'cloud computing' covered software as a service as well as infrastructure as a service and platform as a service, it seems to me that she ought to have held that the Applicant's services ('software as a service featuring software for digital rights management; providing use of non-downloadable digital rights management software') were a sub-set of and so identical to cloud computing. This was an error, and those services should have been found to be identical.

35. The Opponent also criticised the Hearing Officer for finding a medium to high degree of similarity between computer software in Class 9 and the contested services, saying that she made an error about the identity of the average consumer for the goods and services, and should have found the goods/services to be highly similar. However, Ms Messenger said that she would need to rely on this point only if I rejected the argument about cloud computing. In the circumstances, and as it seems to me that the difference between a finding of medium to high similarity and one of high similarity would have no substantive impact on the assessment of the likelihood of confusion, I will not consider this point further.

36. The Opponent submitted that the various errors made by the Hearing Officer necessarily affected her assessment of the likelihood of indirect confusion. In particular, the Opponent relied upon the importance of the visual similarity of the marks given the primarily visual selection process for the relevant goods and services The force of that point is greatly reduced in light of my findings above, but the question arises whether finding that the Applicant's services are identical to the Opponent's cloud computing means that a likelihood of confusion should have been found.

37. The Hearing Officer's reasoning on the likelihood of confusion was first to reject any likelihood of direct confusion. That conclusion was not appealed but I set it out for completeness:

"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. … Consequently, taking all these matters into account I do not consider that there will be a likelihood of direct confusion.

38. The Hearing Officer then turned to consider the likelihood of indirect confusion. After setting out the usual passage from Mr Purvis QC's decision in *LA Sugar* she said:

"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. [Here the Hearing Officer referee to BL O/547/17, *Duebros.*] 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."

39. In my judgment, the Hearing Officer's reasoning in paragraph 58 is sound. Her emphasis was upon the weakness/lack of distinctiveness of the EZ common element and the conceptual differences between the marks, findings which I have upheld. Taking those factors into account, it does not seem to me that the conclusion she reached as to a lack of a likelihood of confusion would have been different had she found the parties' respective services to eb identical, nor is it my own view that, in all the circumstances, there is a likelihood of indirect confusion. In my judgment, the Hearing Officer was right to think that at most the Applicant's mark might bring the earlier mark to mind, but that would not lead them to assume an economic connection between them.

40. For all these reasons, the appeal fails.

41. The Applicant is entitled to a contribution to its costs of the appeal, which I assess at £800, and shall be paid by the Opponent together with the £1200 costs awarded by the Hearing Officer by 5 pm on 23 September 2021.

Amanda Michaels
The Appointed Person
1 September 2021

Ms Barbara Cookson of **Filemot Technology Law Ltd** appeared for the Applicant/Respondent.
Miss Georgina Messenger of counsel, instructed by **Boult Wade Tenant LLP**, appeared for the Opponent/Appellant.