

O-372-19

TRADE MARKS ACT 1994
IN THE MATTER OF
TRADE MARK APPLICATION NO 3243622
BY DOGAPP LTD
TO REGISTER



AS A TRADE MARK
IN CLASSES 9, 35 & 38
AND OPPOSITION THERETO (UNDER NO. 410678)
BY
DOGBOOK APP LIMITED

Background & Pleadings

1. Dogapp Ltd ('the applicant') applied to register the trade mark set out on the title page of this decision on 14 July 2017. The mark was accepted and published on 4 August 2017 in the Trade Marks Journal in class 9, 35 and 38. The goods and services are set out later in this decision.

2. DogBook App Limited ('the opponent') opposes the mark under section 5(2)(b) of the Trade Marks Act 1994 ('the Act') on the basis of its earlier UK trade mark set out below. The goods and services are set out later in this decision.



3. The opponent claims under section 5(2)(b) that the applied for mark is similar to its earlier mark and has similar goods and services to the earlier mark and there exists a likelihood of confusion.

4. The opponent's trade mark is an earlier mark, in accordance with section 6 of the Act but, as it has not been registered for five years or more at the publication date of the applicant's mark, it is not subject to the proof of use requirements, as per section 6A of the Act.

5. The applicant filed a counterstatement in which it denied the ground of opposition.

6. In these proceedings the applicant represents itself and the opponent is represented by Trade Mark Wizards Limited.

7. Only the applicant filed evidence and neither party requested a hearing. I now make this decision from a consideration of the material before me.

Applicant's Evidence

8. The applicant provided a witness statement in the name of its director, Filippo Buccicchio, and appended 11 exhibits. These exhibits comprise undated screenshots of the mobile phone application (hereafter 'the app'), a document on the marketing strategy for the app, as well as Twitter and Facebook screenshots.

Section 5(2)(b)

9. Section 5(2)(b) of the Act is as follows:

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

(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.

10. The leading authorities which guide me are from the Court of Justice of the European Union ('CJEU'): *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 great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

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

(k) if the association between the marks creates a risk that the public 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 goods and services

11. In the judgment of the Court of Justice of the European Union (CJEU) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

12. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

13. I am further guided by the General Court guidance in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, in which they stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut fur Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

14. The goods and services are:

Opponent's goods & services	Applicant's goods & services
Class 9: Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming,	Class 9: Information technology and audio-visual, multimedia and photographic devices; Navigation, guidance, tracking, targeting and map making devices; Information technology and audiovisual equipment.

accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus; computer hardware; computer software; computer software used to enhance the capabilities and features of other software and non-downloadable online software; downloadable software in the nature of a mobile application; software for accessing information on a global computer network; telecommunications software; telecommunications equipment; software to enable uploading, posting, showing, displaying, tagging, blogging, sharing or otherwise providing electronic media or information relating to pets over the Internet or other communications network; application software for social networking services via internet for pet owners; software and software applications to enable transmission, access, organization, and management of text messaging, instant messaging, online blog journals, text, web links, and images via the Internet and other

<p>communications networks for pet owners; downloadable software in the field of animal social networking; downloadable software via the internet and wireless devices; downloadable software to facilitate online advertising, business promotion, connecting pet owners; database of pets and pets; online database of personal information relating to pets</p>	
<p>Class 35: Advertising; Business management; Business administration; Office functions; Providing an online directory information service featuring information regarding, and in the nature of pet life, classifieds, virtual community and social networking.</p>	<p>Class 35: Advertising of the goods of other vendors, enabling customers to conveniently view and compare the goods of those vendors; Advertising of the services of other vendors, enabling customers to conveniently view and compare the services of those vendors.</p>
<p>Class 38: Telecommunications; providing online chat rooms for registered users for transmission of messages concerning pets, classifieds, virtual community and social networking; providing online community forums for users to post, search, watch, share, critique, rate, and comment on, messages, news, comments, multimedia content, videos, movies, films, photos, audio content, animation, pictures, images, text, information, and content featuring pets; broadcasting services via a global computer network and other computer and communications networks, including</p>	<p>Class 38: Telecommunication services provided via Internet platforms and portals; Telecommunication services provided via platforms and portals on the Internet and other media.</p>

uploading, downloading, posting, showing, displaying, tagging, sharing and electronically transmitting messages, comments, news items, multimedia content, videos, movies, films, photos, audio content, animation, pictures, images, text, information, and user-generated content relating to pets; enabling individuals to send and receive messages including via email, instant messaging, texts, the internet and via internet websites, and including messages in the fields of pets, animals, pets, canines; providing on-line chat rooms and electronic bulletin boards for transmission of messages among users, including in the field of pets, animals, pets, canines; electronic mail services; messaging and instant messaging services, web messaging services and text messaging services; webcasting services; transmission of messages, data and content via global computer network and other computer and communications networks; transmission of updated messages, comments, information, and multimedia content by electronic mail, messaging, instant messaging and text messaging; providing access to computer databases in the fields of entertainment and education relating to pets; providing access to computer databases in the

<p>field of social networking for pet owners; providing telecommunication facilities that enable the sharing of blogs, photos, videos, podcasts, and other audio-visual materials of pets; providing telecommunication facilities that enable the creation and updating of personal electronic web pages featuring user-provided content relating to pets; providing websites on the Internet for the purposes of social networking for pet owners.</p>	
<p>Class 41: Education; Providing of training; Entertainment; Sporting and cultural activities; animal shows; pet shows; animal dressage; animal training; pet exhibitions; tuition for animal beauticians in animal grooming; services for animal training; tuition in animal training; providing animal exercise services; obedience training for animals; training animals for others; hire of animals for recreational purposes; publication of printed matter relating to pet animals; obedience school training for animals.</p>	
<p>Class 42: Scientific and technological services and research and design relating thereto; Industrial analysis and research services; Design and development of computer hardware and software; Application service provider (ASP) featuring software to enable</p>	

uploading, posting, showing, displaying, tagging, blogging, sharing or otherwise providing electronic media or information over the Internet or other communications network relating to pets; designing, maintenance, testing and analysis of computer software for a social network for pets; graphic art design and development of multimedia software applications; hosting an interactive website and online non-downloadable software for uploading, downloading, posting, showing, displaying, tagging, sharing and transmitting messages, comments, multimedia content, videos, movies, films, photos, audio content, animation, pictures, images, text, information, and other user-generated content relating to pets; updating of computer software, rental of computers and computer equipment; recovery of computer data; monitoring of computer systems and computer networks of others, integration of computer database systems; providing online non-downloadable software tools; hosting an online website community for registered pet owners; design of web sites and software applications on global computer networks and local and internal social networks; scientific and technological services and research and

design relating thereto; hosting a website featuring messages, comments, multimedia content, videos, movies, films, photos, audio content, animation, pictures, images, text, information, and other user-generated content online relating to pets; computer services, namely, providing temporary use of a non-downloadable computer interface in order to create personalized information of pets; designing, updating, testing and analysis of computer software and computer programs relating to pets; hosting of digital content of pets online; hosting multimedia content for pets; designing, testing and analysis of computer systems, computer hardware; hosting computer software applications of others; maintaining and creating web sites for pet owners, hosting computer sites; design of web sites and software applications on global computer networks and local and internal computer networks; application provider services (ASP); graphic art design and development of multimedia software applications; hosting an interactive website and online non-downloadable software that enable users to post, search, watch, share, critique, rate, and comment on, messages, comments, multimedia content, videos, movies, films, photos, audio content, animation,

<p>pictures, images, text, information of their pets via a global computer network and other computer and communications networks; design research and development in the field of telecommunication and broadcasting for pets; monitoring of computer systems and computer networks of pet owners, integration of computer database systems containing information relating to pets; provision of pet services relating to design and development of computer hardware and software.</p>	
<p>Class 45: Legal services; Security services for the protection of property and individuals; pet services provided through social networking; internet-based social networking services for pet owners; on-line social networking services for pet owners; online social networking services accessible by means of downloadable mobile application; social networking services; providing information, advice and assistance about pets, animals, pets, canines, pet grooming via wireless mobile devices, satellite, cable and global computer networks; adoption agency services; personal introduction services; chaperoning services; rental and hire of clothing, footwear and headgear for pets, and of fashion and clothing accessories; pet home care</p>	

<p>services; pet babysitting services; vetting services; information relating to all the aforesaid; including (but not limited to) all the aforesaid services provided online, and/or provided for use with and/or by way of the Internet, the world wide web and/or via communications, telephone, mobile telephone and/or wireless communication networks; none of the aforesaid services for creating awards or commendations relating to the following: product design, the design of advertising campaigns or the design of communication campaigns relating to pets.</p>	
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15. In terms of *information technology devices and information technology equipment* in the applicant's class 9 specification, I regard 'information technology' to mean computer hardware and software systems which store, analyse, manipulate and communicate information or data. As such I find these goods to be identical to *data processing equipment and computers; computer hardware; computer software; computer software used to enhance the capabilities and features of other software and non-downloadable online software; downloadable software in the nature of a mobile application; software for accessing information on a global computer network; telecommunications software; telecommunications equipment* in the opponent's class 9 specification on the *Meric* principle.

16. Further I find that *audio-visual, multimedia and photographic devices and audiovisual equipment* in the applicant's class 9 specification to be identical to *photographic, cinematographic apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; computer hardware; telecommunications equipment* in the opponent's class 9 specification on the *Meric* principle.

17. Finally, I find that *Navigation, guidance, tracking, targeting and map making devices* in the applicant's class 9 specification to be identical to *nautical and surveying apparatus and instruments* in the opponent's class 9 specification on the *Meric* principle.

18. Regarding class 35, the applicant's services are considered identical to the opponent's services as they fall within the scope of the opponent's *Advertising* at large on the *Meric* principle outlined above

19. Turning to class 38, the applicant's services are considered identical to the opponent's services as they fall within the scope of the opponent's *Telecommunication* at large on the *Meric* principle outlined above

20. In conclusion, I have found all of the applicant's goods and services to be identical to those of the opponent.

The average consumer and the purchasing process

21. I now consider who the average consumer is for the contested goods and services and how they are purchased. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

22. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied

objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

23. The average consumer for the contested goods and services is a member of the general public. Using my own experience as a consumer, I would say that many mobile phone apps are free of charge or if they are purchased then the cost is usually inexpensive. On that basis I would categorise the level of attention paid by a consumer when downloading a free app is average with perhaps a slightly higher level of attention paid if the app has a purchasing fee. Mobile phone apps are usually browsed visually from a range in the phone provider’s app store or platform although I do not discount an aural aspect if say an app is recommended by word of mouth.

Distinctiveness of the earlier mark

24. The distinctive character of the earlier mark must be considered. The more distinctive it is, either inherently or through use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically

widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

25. No evidence has been filed by the opponent in these proceedings, so I have only the inherent distinctiveness of the earlier mark to consider.

26. For a large number of the goods and services, I find that the word element **The Dog App** is low in distinctiveness. There are a few goods for which the words have a somewhat higher level of distinctiveness such as *automatic vending machines and mechanisms for coin-operated apparatus; cash registers; fire extinguishing apparatus*. However it is apparent that the opponent’s interests lie in dog related goods and services and I have made an assessment on that basis. With regard to the definite article, I find that use of ‘the’ to confer pre-eminence only serves to highlight the commonplace and descriptive nature of the words which follow it. The opponent conceded in its Notice of Opposition that the definite article “would be considered to be of no trade mark significance by the relevant public”. In my view it is the device element which adds some distinctiveness to this mark. However, even taking this into account I find that for goods and services relating to dogs then the mark has a lower than average distinctiveness as a whole.

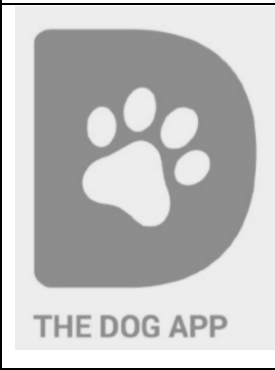

Comparison of the marks

27. 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 Court of Justice of the European Union 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.”

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

29. The marks to be compared are:

Opponent's mark	Applicant's mark
	

30. The opponent's mark consists of a composite arrangement of a device and words. The device resembles a capital letter D with a pawprint contained therein and is presented above the words **THE DOG APP**, and the whole is rendered in greyscale. The device element is considerably larger in scale than the words and makes a substantial visual impact. As previously stated above, where the opponent's goods and services are related to dogs then I consider the words **THE DOG APP** to be descriptive. As such it is a much weaker element within the mark as the D and pawprint device, in my view, are the dominant and distinctive elements. It follows then that for goods and services which do not relate to dogs, the words **THE DOG APP** take on a somewhat stronger significance within the mark and both the

device and the words play a more or less equal role in the overall impression of the mark.

31. The applicant's mark also consists of a composite arrangement being a cartoon style device of a dog's head presented above the words **Dog App**, which itself sits above the words **share the love for your dog**. The words are rendered in green and are in a stylised font. As stated above I consider the words **Dog App** to be descriptive of goods and services related to dogs provided by means of an app and whilst the additional words **share the love for your dog** are not directly descriptive of mobile phone apps, the words lack distinctive character for goods and services relating to the sharing information via an app. Whilst the dog's head device reinforces the canine nature of the app, I find its size, position and cartoon like stylisation to be the dominant and more distinctive element of this mark. It similarly follows then that for goods and services which do not relate to dogs, the words **THE DOG APP** take on a somewhat stronger significance within the mark and both elements will make a fairly equal contribution to the mark as a whole.

32. In a visual comparison, the points of similarity are the words **Dog App** which appear in both marks. The only other word element in the opponent's mark is the definite article which, as the opponent has conceded, an average consumer is unlikely to attach any particular significance to, whereas as the applicant's mark has the other additional wording **share the love for your dog**. The devices in each mark are entirely different. Given that I have already found the words **Dog App** to be descriptive and the weakest element of both marks, I find there is only a low degree of visual similarity.

33. In an aural comparison, again the points of similarity are the words **Dog App** which will be vocalised identically in both cases. The addition of the definite article in the opponent's mark will be vocalised but an average consumer will not attach any significance to it. The additional words **share the love for your dog** in the applicant's mark may be vocalised but the devices obviously play no part in the aural comparison. Taking all these factors in to account, I find that the marks are aurally identical if the additional words in the applicant's mark are not vocalised and at least highly similar if they are.

34. In a conceptual comparison, the message brought to mind by the shared word element **Dog App** will be identical, namely a software application or 'app' relating to dogs. The additional words **share the love for your dog** in the applicant's mark further reinforce the canine concept. The devices of a paw print and a dog's head are also likely to reinforce the canine concept and support the words. Conceptually as the marks share the same words in **Dog App** and have dog related images, I find they are highly similar.

Likelihood of confusion

35. I now draw together my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors and those outlined in paragraph 10:

- a) The interdependency principle, whereby a lesser degree of similarity between the goods may be offset by a greater similarity between the marks, and vice versa (*Canon*).
- b) The principle that the more distinctive the earlier mark is, the greater the likelihood of confusion (*Sabel BV v Puma AG*).
- c) Imperfect recollection i.e. that consumers rarely have the opportunity to compare marks side by side but must rather rely on the imperfect picture that they have kept in their mind (*Lloyd Schuhfabrik Meyer*).

36. In the matters of direct or indirect confusion I am guided by the comments of Mr Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, where he 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 recognized that the later mark is different from the earlier mark. It therefore requires a mental

process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

37. Whereas in *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., also sitting as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

38. In considering the impact of the distinctive character or lack thereof, I keep in mind *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, where Mr Iain Purvis Q.C. again 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.”

39. In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask ‘in what does the distinctive

character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

40. So far, I have found that the contested goods and services are identical and that the average consumer will pay only an average degree of attention during a primarily visual purchasing process. In addition, I have found that there is a low degree of visual similarity, save for the evident similarity of the shared two word element **Dog App** and an identical or at least high degree of aural similarity. Furthermore I found the marks were conceptually highly similar. Lastly, I found that the earlier mark has a lower than average level of inherent distinctiveness for those goods and services which relate to dogs provided by means of an app.

41. Taking the guidance given in *Kurt Geiger* into account I have found that the word element of the earlier mark is not distinctive for goods and services relating to dogs provided by an app. The distinctiveness of the earlier mark for these goods and services lies in its device and presentation which is different from the contested mark. As the average consumer is likely to see **Dog App** as a description of an app related to dogs, they will be inclined to see the shared words as a coincidental use of descriptive language rather than as the provision of goods and services coming from the same undertaking. As a result, consumers will have to rely on those other elements of the respective marks to determine the trade origin of the goods and services.

42. Bearing in mind that I have already found the other elements of the respective marks, namely the devices and the additional wording **share the love for your dog** in the applicant’s mark, to be different then I do not find that there is direct confusion between the marks. Having only found a low degree of visual similarity, in a primarily visual purchasing process, I do not think that the average consumer would mistake one mark for another. In my view there are too many visual differences between the applicant’s mark and opponent’s marks for a consumer to be directly confused.

43. When turning to the question of indirect confusion, I must consider the distinctive strength of the shared word element, **Dog App**, and I have already found that this word has lower than average distinctiveness. The device elements, the paw print

within a letter D, give opponent's earlier mark a somewhat stronger distinctiveness but have no similarity to the applicant's mark. Again, based on the guidance given in *Kurt Geiger*, it follows that there is less probability of indirect confusion. I am reassured in my conclusion that the *Duebros* guidance is also applicable here, namely that although the average consumer may see the shared element, **Dog App**, and bring another mark to mind, this is merely association of the coincidental use of descriptive language and not indirect confusion.

44. Clearly in terms of the decision given above I have focussed on those contested goods and services aimed at dog owners provided by means of an app. Although the terms given in the applicant's specifications are broader in scope and not limited, it is clear from the evidence supplied that the applicants goods and services do relate to dog ownership. For those goods not related to dog ownership in the opponent's specification, for example goods such as *automatic vending machines and mechanisms for coin-operated apparatus; cash registers; fire extinguishing apparatus* then I've found the mark to be somewhat higher in distinctive character and may cross over the line in terms of likelihood of confusion. However, in any case such goods are not relevant as they are not similar to any goods in the applied for mark. So the fact that the earlier mark may be higher in distinctiveness for such goods does not matter. Therefore, I do not feel it is necessary to consider if there is a likelihood of confusion for the broader goods and services.

Conclusion

45. The opposition is dismissed in its entirety. The application can proceed to registration, subject to any appeal.

Costs

46. The applicant has been successful and is therefore, in principle, entitled to a contribution towards its costs. As the applicant is unrepresented, at the conclusion of the evidence rounds the Tribunal invited it, in the official letter dated 26 February 2019, to indicate whether it wished to make a request for an award of costs, and if so, to complete a pro-forma including a breakdown of its actual costs, including

providing accurate estimates of the number of hours spent on a range of given activities relating to the defence of the opposition; it was made clear to the applicant that if the pro-forma was not completed then no costs will be awarded. The applicant did not respond to that invitation. Consequently, I make no order as to costs.

Dated 3 July 2019

**June Ralph
For the Registrar
The Comptroller-General**