

O/922/21

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION NO. 3466030
BY TUUKKA'S TRACKS KY**

TO REGISTER:

Level

AS A TRADE MARK IN CLASS 42

AND

**IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 420150 BY
RADAR SCOPE LTD**

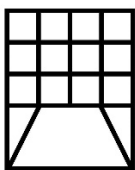
BACKGROUND AND PLEADINGS

1. Tuukka's Tracks KY ("the applicant") applied to register **Level** as a trade mark in the United Kingdom on 12 February 2020. The application was accepted and published on 28 February 2020 in respect of the following services:

Class 42

Computer services, namely, providing an online platform to enable music professionals to exploit and commercialise, distribute and promote recorded music, audio sound recordings, songs, and music videos to Retail Digital Service Providers (DSPs); all the aforesaid services utilizing exclusively, digital files of the following formats: mp3, wav, aiff, ogg, flac, lossless files and aac file format, all with a minimum sample rate of 44.1 kHz in 16 bit format, irrespective of the file format, and a maximum sample rate of 48 kHz in 24 bit format, irrespective of the file format, and all with bit rates, (irrespective of the noted digital file format containing the sound recording) of: 64kbps, 128kbps, 192kbps, 256kbps, 320kbps, 1411 kbps with a max rate of 36,864 kbps, all of the aforesaid services being commercialized retail subscription based services by means of download sale and/or subscription, by the DSP to the retail end user, none of the aforesaid services being for promotional means.

2. On 22 April 2020, the application was opposed by Radar Scope Ltd ("the opponent"). The opposition is based on section 3(6) of the Trade Marks Act 1994 ("the Act") and concerns all the services in the application.



LEVEL

with an application date of 8 May 2019, a priority date of 14 December 2018, and registration date of 16 August 2019. That mark is registered for the following services:

Class 35

Promoting the music of others through the distribution of recorded music to online streaming services via an online platform; business and sales monitoring and tracking services relating to online streaming music services.

Class 42

Computer services, namely, providing an online platform to allow music professionals to distribute and promote recorded music to online streaming services.

4. The opponent says that it is an affiliate of Warner Music Group (“WMG”) which has used the earlier rights since 2018 for an online music platform aimed at meeting the needs of independent artists. It states that the applicant was a subscriber to this service from at least as early as April 2018 as both an artist and a representative of other artists. The opponent claims that the applicant was therefore aware that the opponent owned the earlier rights. It further claims that the applicant has attempted to register various versions of the opponent’s earlier rights, including its domain name (www.levelmusic.com).

5. According to the opponent, the applicant has been in dispute with WMG over the issue of royalties due to him. The opponent claims that the applicant did not have a *bona fide* intention to use the contested mark in relation to the services in the application. It further claims that the applicant’s sole intention was to try to prevent or disrupt the opponent, or any third party under the control of WMG, from using the LEVEL and/or LEVEL Music brands or to gain an advantage in his dispute with WMG.

6. The opponent requests that the application be refused under section 3(6) and that an award of costs be made above the standard scale and on a full indemnity basis, “in view of the Applicant’s behaviour and clear dishonest intent”.

7. The applicant filed a defence and counterstatement denying the claims made. It claims to have evidence of actual use of the contested mark and submits that the marks cover different services, with digital service providers not being the same as online streaming services. It quotes the definition of “digital service provider” in EU Directive 2015/1535: “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”¹ and submits that these require a subscription or registration process, which are not required by “online streaming services”. The applicant notes that there is no clear definition of this latter term and submits that therefore the opponent’s mark is “overly broad and incomprehensible” and should be revoked. It also asserted that the opponent had no legal standing to apply for UKTM No. 3397794 as it was a dormant company, and that this was another reason why that mark should be revoked. Further, the applicant submits that the marks cover different services, as its mark does not cover “online streaming services”, and so the opponent’s claim should be dismissed.

8. In these proceedings, the opponent is represented by Joshi-IP.Law and the applicant is a litigant in person.

Evidence

9. The opponent’s evidence comes in the form of a witness statement from Mr Manish Joshi, the opponent’s representative, dated 22 February 2021. He states that he is authorised by WMG to make the statement on behalf of the opponent and that the facts contained within it are based on his own knowledge, online research, information obtained “as a result of being involved in these or related proceedings”, and information obtained by him from employees and records of WMG.

10. I shall not provide a detailed summary of the evidence here but will refer to it where appropriate in my decision. However, at this stage, I find it convenient to set out the timeline according to Mr Joshi’s evidence:

¹ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services. The definition quoted is the definition of “service” for the purposes of that Directive: see Article 1(1)(b).

- **30 April 2018:** Mr Kennedy registers on the Level Music platform using the email address Ecards@tuukkastracks.com;²
- **19 October 2019:** A question is posted on the justanswer.co.uk website.³ This question is asked by a Kyle Kennedy who runs a record label named Tuukka's Tracks and concerns a dispute with "Level Music, a fully owned subsidiary of Warner Music Group" over royalty payments;
- **21 October 2019:** Tuukka's Tracks applies to the UK Intellectual Property Office (IPO) to register a series of four marks (Level, Level Music, Level Distribution, www.levelmusic.com). The application is subsequently amended to one mark (Level Music);⁴
- **Around 4 November 2019:** Mr Kennedy files a petition to wind up the opponent;⁵
- **18 December 2019:** The petition to wind up the opponent is dismissed;⁶
- **12 February 2020:** The application that is the subject of these proceedings is made;
- **14 February 2020:** Tuukka's Tracks applies to register Level Music as a trade mark in Ireland;⁷
- **10 November 2020:** The High Court issues a civil restraint order against Tuukka's Tracks, having found that it had made two or more applications in the winding up proceedings that were "totally without merit".⁸

Procedural history

11. On 11 January 2021, the opponent requested that parts of the applicant's defence be struck out and summary judgment given on the opponent's claim. A week later, on 18 January 2021, the applicant requested cross-summary judgment on the basis that

² Witness statement, paragraph 26, and Exhibit WMG1.

³ Exhibit MJ20.

⁴ Witness statement, paragraphs 57-59. This mark was also opposed by Radar Scope Ltd. No defence was filed, so the parties were notified on 10 December 2020 that the application was deemed withdrawn under Rule 18(2) of the Trade Mark Rules 2008.

⁵ Witness statement, paragraph 38, and Exhibit MJ21.

⁶ Exhibit WMG2, pages 223-224.

⁷ Witness statement, paragraphs 64-68, and Exhibits MJ17-MJ19. The application was refused.

⁸ Exhibit WMG2, pages 225-228.

(in its view) the trade marks were different and “no fact based evidence can overcome our defense”.

12. The Registry issued its preliminary view to reject both parties’ requests for summary judgment on 21 January 2021 and gave the opponent a deadline of 22 February 2021 by which to file any evidence. The applicant objected to the preliminary view, and requested to be heard. In addition, it had asked for security for costs to be granted to “prevent delay” in the proceedings. This was also refused. Then, on 28 January 2021, the applicant requested that the opponent’s claim be struck out on the grounds that it was a dormant company.

13. A case management conference (“CMC”) was held on 4 February 2021 at which the applicant was represented by Kyle Kennedy, who is a partner in Tuukka’s Tracks,⁹ and the opponent by Aaron Wood, instructed by Joshi-IP.Law. The letter recording the outcome of the CMC reads as follows:

“At the CMC, Mr Kennedy argued that as per the public records, the opponent is a dormant company from its inception and that a dormant company cannot legally enter into contracts. Mr Kennedy further argued that as the opponent’s bad-faith claim was based on purported contractual relationships between the parties, the Registry should strike out the opposition.

Mr Wood submitted that the opponent is affiliated to Warner Music Group of Companies (‘WMG’). He cited references from the statement of grounds (paragraphs 9-12) to support his argument that WMG uses the earlier marks. He also submitted that it is not unusual for a dormant company to hold an intellectual property right or license its rights.

I agree with Mr Wood that merely because a company is dormant does not mean that it cannot hold a trade mark or enter into any binding agreements. Considering Mr Wood’s submission that the opponent is affiliated to WMG

⁹ Exhibit MJ6 is an extract from the Finnish Companies Registry confirming this.

and that the earlier rights are used by WMG, it appears that any such use is likely to be with the consent of the opponent. Moreover, section 3(6) is an absolute ground for refusal. There is no requirement that the party bringing a claim under section 3(6) should be the owner of or trading under the earlier marks. Having reviewed the statement of grounds, I consider that the opponent has sufficiently explained its basis of a bad faith claim which, I understand, is based upon alleged use of the earlier rights by WMG and the applicant's purported relationship with WMG. It does not appear that the opponent's claim is plainly unsustainable so that I must strike out the opposition. I do not want to prejudge the matter which should be decided on its merits once all the evidence and submissions have been filed."

14. On 8 February 2021, the applicant notified the Registry that it would be applying to the High Court for a writ of mandamus to overturn the above decision. The following day, the Registry informed the applicant that an appeal against an interim decision, such as this, could only be made with the leave of the Registry. The applicant requested leave to appeal and a CMC was scheduled for 10 March 2021. This was rescheduled twice before the applicant withdrew its request on 23 March 2021 and said it would be filing an application to strike out much of the opponent's evidence. No such application was made until shortly before the rescheduled hearing. The Registry wrote to the applicant informing it that, as a consequence of the withdrawal of the request for leave to appeal, the decision made at the 4 February 2021 CMC was upheld.

15. At the CMC, the opponent's request for an extension of time to file evidence was granted. This evidence was filed on 22 February 2021 in the form of the witness statement to which I have already referred.

16. Following the admission of the opponent's evidence, the applicant had been given a deadline of 23 May 2021 by which to file its evidence. It requested an additional 30 days and was notified that it would need to file the correct form. Although the form was received on 24 May 2021, it was not accompanied by the necessary fee. The applicant stated that the cheque had been posted from Finland, where it was based, and asked to be able to pay by alternative means. On 11 June 2021, it was given a further week

in which to refile the TM9 with payment. On 28 June 2021, the applicant informed the Registry that it wished to rely on what had already been submitted, and so the evidence round was closed.

17. The applicant requested a hearing, which was held before me by Skype on 21 October 2021, having been rescheduled because on the day originally appointed Mr Kennedy had suddenly been unable to attend. As at the CMC, it was Mr Kennedy who represented the applicant at the hearing. The opponent did not take part in the hearing, but Mr Joshi attended to hear the applicant's submissions.

The hearing

18. The main points raised at the hearing were as follows:

- The applicant's request to strike out parts of the opponent's evidence, namely Exhibits MJ10, WMG1 and MJ20;
- The existence (or not) of a licensing relationship between the opponent and the applicant; and
- The applicant's request to file further evidence.

19. I shall deal with the first and third of these points here and return to the second in due course.

Request to strike out evidence

20. Exhibit MJ10 consists of court documents from proceedings in the United States District Court, Northern District of California, San Jose Division. Mr Kennedy asked that this exhibit be struck out on the grounds that its filing represented an abuse of process, was unnecessary, scandalous, frivolous or vexatious.

21. The exhibit is adduced by Mr Joshi as evidence of the connection between the applicant and Mr Kennedy and use of the following email addresses: Ecards@tuukkastracks.com and tuukkastracks@gmail.com. Later in the witness

statement, Mr Joshi submits that the evidence shows that Mr Kennedy has made complaints against the legal representatives of other parties in more than one set of proceedings.

22. The documents had been obtained via the PACER service of the US Federal Courts. A few days before the hearing, Mr Kennedy produced a different document – one commissioned as part of the US proceedings from a consultant engaged by Mr Kennedy’s business partner in the applicant company¹⁰ – which Mr Kennedy said debunked some of the claims made in the US court documents in Exhibit MJ10. When I asked him why he had not made requested strike out of parts of the evidence at an earlier point in the proceedings, he stated that there had been a delay in getting hold of the document as gaining access to the PACER service required going through “quite a rigorous process to explain why you need access to the federal court documents et cetera”.¹¹

23. The document produced by Mr Kennedy is an affidavit from a consultant in computer forensics and data recovery and presents his expert opinion that three emails and various attachments are what they purport to be. Since it was Mr Kennedy’s own business partner in Tuukka’s Tracks who engaged the consultant, I find it surprising that the applicant had to resort to the PACER system in order to obtain a copy, particularly given the difficulties that Mr Kennedy reported having experienced in gaining access to the service.

24. The Tribunal Manual states that requests to strike out evidence should be made at the earliest possible opportunity.¹² I have already noted that the applicant had stated on 23 March 2021 that it would be making a request to strike out much of the opponent’s evidence, but this was not promptly followed by such a request. In fact, it took just over six months for any request to materialise, and it did not appear to be an issue on the day originally scheduled for the hearing. In my view, it is not reasonable to leave another party in uncertainty on the status of its evidence for such a period.

¹⁰ That this individual is a business partner of Mr Kennedy in Tuukka’s Tracks is confirmed by the extract from the Finnish Companies Registry in Exhibit MJ6.

¹¹ Transcript, page 5.

¹² Section 4.8.8.

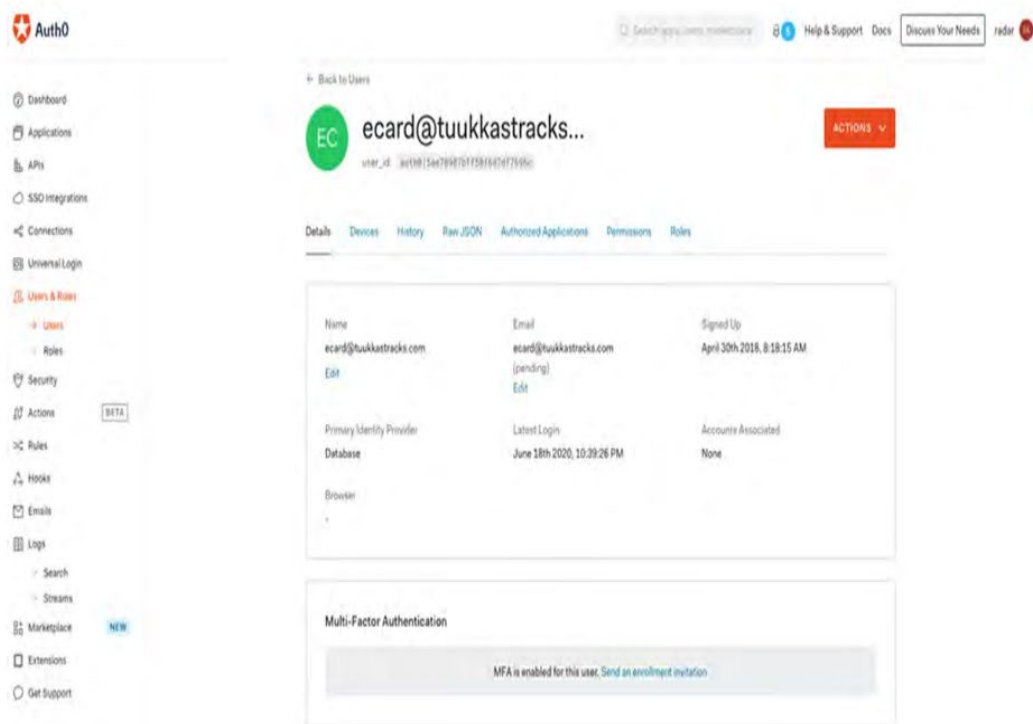
25. The court documents are a matter of public record. They appear to me to support the statements that Mr Joshi has made in connection with them, namely that Mr Kennedy is associated with Tuukka's Tracks (a fact confirmed by the Finnish Companies Registry), that he has used the Ecards@tuukkastracks.com email address, and that Mr Kennedy has threatened to complain to The State Bar of California about lawyers in those proceedings.¹³ Mr Joshi draws a parallel between this threat and comments made by the applicant during the course of these proceedings. In its counterstatement in these proceedings, the applicant (represented by Mr Kennedy) requested that the opponent's representative be sanctioned:

"The representative of the opposition, whom happens to be the opposition's application representative on IPO file whom was aware his client was a dormant limited entity and lacked legal standing to make such application but did so anyway, should be sanctioned by IPO for fraudulent behaviour as need not be repeated again but is incorporated by reference and suspended for knowingly making false opposition threats and/or claims thereby usurping the IPO's limited resources."

26. I see no reason for the exhibit to be struck out at this relatively late stage. I accept that it may contain some information that is not relevant to these particular proceedings. Where that is the case, I shall not take it into account in making my decision.

27. The next exhibit that Mr Kennedy attempted to have struck out was Exhibit WMG1, which I have reproduced below and which Mr Joshi states was provided by WMG.

¹³ Exhibit MJ10, page 89.



28. Mr Kennedy submitted that it was impossible to tell where this exhibit came from and to what it referred. I agree. While I note the appearance of the word “radar” in the top right-hand corner, there is nothing here that says what service was signed up to. That said, I see no reason to strike out the exhibit and its presence does not harm the applicant’s case.

29. I now come to Exhibit MJ20. In its statement of grounds, the opponent claimed that the applicant was in dispute with WMG over the payment of royalties and that Mr Kennedy had sought legal advice using a website, www.justanswer.co.uk. Exhibit MJ20 contains printouts from this website showing the question that was asked and a list that Mr Joshi claims indicates that it was submitted on 19 October 2019. The text was included in the statement of grounds and I reproduce it below:

“My name is Kyle Kennedy. I run a record label Tuukka’s Tracks. We own the exclusive rights to the FIFA 2012 Official Eurocup Anthem: ‘Endless Summer’ by Oceana. We entered in to a distribution agreement whereby Level Music, a fully owned subsidiary of Warner Music Group, solicited us, to join their new distribution program ‘for free, where we would receive 100%

of the royalties'. We just received, on Monday, the accounting for June/July 2019 with a balance due of 10,000 GBP. Now, they are refusing to pay it, and we have copies of their statements. What's more, there will be an additional royalties for August/September/October, which are already earned, but not yet reported, and we have reason to believe, based on their irrational conduct, they have no intention to pay us, let alone send us proper accounting for the unaccounted months (Aug-Oct). We have noticed them with a termination of agreement, via email, and demanded all of the music is removed from the marketplace. This is a clear cut case of Breach of Contract, Unjust Enrichment, etc. London, England courts have exclusive jurisdiction as per the agreement terms.

Evidence:

I have the email chain between myself, and the director of LEVEL, whom is an employee of Warner Music UK in London. There are the agreed upon distribution terms and, moreover, a screenshot (time/dated), of the money owed to us, which is unpaid, from the Level/WMG Online Portal for 10,000 GBP.

Cause of Action.

The refusal to pay just occurred today. I phoned Level Music's Head of Operations, an employee of Warner Music Group, for clarification as to why our funds were being withheld, to which he was evasive, and refused to commit to paying the money due and owing.

Furthermore, whereas New York is a so-called 'One Party Consent State', as is England, I recorded the phone call with the noted employee of WMG/Level.

I come from a legal background myself, and was going to pen and post a 'Letter before Claims' to Level and Warner Music in the (Saturday 19th) Morning.

Damages:

As of today, they are 10k. That is simply proven by the royalty accounting statement provided by Level/WMG via their online portal for distributed labels/artists.

Full and complete damages will not be known until such time as royalties from August, September and October are fully accounted and paid out, however, there is no reason to believe that they will be any less, rather they might very well increase! The song is an iconic song of this decade globally. It is gold and platinum in several territories with over 150,000,000 Streams from all platforms (YouTube, Spotify, Apple Music, Amazon, etc.) not to mention the million in single unit sales from 2012 to present, on a global basis.

Service of Process:

Level Music is incorporated as a fully owned company of Warner Music Group, in New York City. It is my belief that WMG in London can accept service on behalf of Level, being 'an agent of Level Music'. In support to this, I'd reference the communication(s) and initial solicitation by the Director based in, and Employed by, Warner Music Group in London.

Desired Attorney-Client Fee Arrangement:

No win No fee basis/CONTINGENCY (I can pay filing fees)

Jurisdiction:

The terms of use state English Courts located in London are to have exclusive jurisdiction."

30. Mr Kennedy claimed at the hearing that he did not ask the question and that it was, in fact, a forgery. I asked him when he had first raised this concern:

“HEARING OFFICER: Mr. Kennedy, can I just clarify with you again; when was it you first raised your concerns and your allegations that that was a forgery?

MR KENNEDY: At the CMC on February 4th.

HEARING OFFICER: But you took no steps then to seek to strike out the evidence.

MR KENNEDY: It was mentioned in several emails. At that point there were – at February 4th there was no evidence filed. We already stated on the record that it was a forgery.

HEARING OFFICER: Okay.

MR KENNEDY: That was before it was filed as an exhibit of evidence. Rather, it was filed as an appendix to their application to strike.

HEARING OFFICER: The TM7 I believe it was included in.

MR KENNEDY: I believe it was also included in a TM7, which was stricken by the tribunal, but we did note at that time as well I believe, in the TM8 and e-mails et cetera, that it was a forgery. So it is not a ‘late in the day’ claim, it has been consistent from day one.”¹⁴

31. I have examined the case file and it appears that it was on 20 January 2021 that the applicant first claimed that Exhibit MJ20 was forged, in the context of the request for a summary judgment which, as I have already noted, was refused. Prior to the exchange quoted in the above paragraph, Mr Kennedy noted that the opponent had not applied for a Norwich Pharmacal order to find out the IP address of the person who had posted the question to justanswer.co.uk and submitted that “more likely than not” the post would have originated from a WMG IP address. Mr Kennedy stated at the hearing that he had spent 15 years in the music business and would not be posting on internet forums looking for legal advice.¹⁵

32. Nothing further has been filed to support Mr Kennedy’s allegation of forgery. In *DIXY FRIED CHICKEN Trade Mark*, [2003] EWHC 2902 (Ch), Laddie J said:

¹⁴ Transcript, page 11.

¹⁵ Transcript, page 12.

“The requirement for proper substantiation becomes particularly important in this case because one of the arguments advanced on behalf of New Stratford was that a franchise agreement relied upon by Euro in its evidence was a forgery. This is a strong allegation and one from which Mr Hamer did not resilie. The authorities which discuss the burden of proof when such allegations are raised are well known. They include *Hornal v Neuberger Products Limited* [1957] QB 247. The stronger the allegation, the better the proof needed. Furthermore, when allegations like this are made, not only must it be clear what is said to be forged but the indicia of that forgery must be identified so that the party against whom the allegation is made has a proper opportunity to respond.”¹⁶

33. I accept that it is probable that a legal question was asked on the forum on 19 October 2019. However, it does not seem to me to be likely that it would have come from WMG. The IPO wrote to the opponent’s representatives on 20 January 2020 stating that the contested mark would be published for opposition purposes, having written in the same terms on 9 January 2020 with respect to the Level Music mark. Before this, the petition to wind up the opponent was filed on or around 4 November 2019 – after the date that a question purporting to be from Mr Kennedy was asked. I find the suggestion that this would have come from a WMG IP address implausible. At the time of posting, the applicant had not applied for any Level trade marks nor had it presented the winding up petition. I can see no reason why a WMG IP address would be used on 19 October 2019 to post a question purporting to be from Kyle Kennedy.

34. I do not consider that the opponent’s failure to apply for a Norwich Pharmacal Order should be held against it. Registry proceedings are intended to be relatively low in cost and it is unlikely that applying for such an order would have been a proportionate action. Furthermore, the applicant has had ample opportunity to provide evidence to support its allegation of forgery. It will be recalled that at one point it had intended to file evidence, went so far as submitting an extension request, and then decided against it. The allegations therefore have not been made under a statement of truth. I refused to strike out Exhibit MJ20.

¹⁶ Paragraph 8.

Request to file additional evidence

35. In his skeleton argument, Mr Kennedy referred to the revised terms of service for the Level Music platform, dated 29 June 2021. He submitted that these showed that the platform was illegal in the UK and cited the following paragraph:

“2. Jurisdiction. The Site is controlled and/or operated from the United States, and is not intended to subject us to non-U.S. jurisdiction or laws, except as otherwise expressly stated in this Agreement. The Site may not be appropriate or available for use in some jurisdictions outside of the United States. If you access the Site, you do so at your own risk, and you are responsible for complying with all local laws, rules and regulations. We may limit the Site’s availability, in whole or in part, to any person, geographic area or jurisdiction we choose, at any time and in our sole discretion. Summary: Level is controlled and operated from the United States, and use of Level is governed by U.S. law (see Section 18 for more information). If you do access Level from outside the United States, it is your responsibility to comply with all non-U.S. laws.”

36. Mr Kennedy continued to submit that the Level Music platform does not support electronic signatures compliant with UK law, and so any licences would have been illegal, and the opponent had failed to show bad faith in line with the decision in *Red Bull GmbH v Sun Mark Ltd & Anor* [2012] EWHC 1929 and [2012] EWHC 2046 (Ch). He quoted paragraph 104 of Mr Joshi’s witness statement, which reads as follows:

“We also refer you to the UK Trade Mark decision in **Red Bull GmbH v Sun Mark Ltd & Anr [2012] EWHC 1929 and [2012] EWHC 2046 (Ch)** (“**Sun Mark**”) where Arnold J summarised the general principles underpinning Section 3(6), notably that ‘bad faith’ broadly covers:

- a. Unacceptable commercial behaviour involving lack of good faith on the part of the applicant towards the Trade Mark Office at the time of filing the application;

- b. Unacceptable commercial behaviour involving acts knowingly infringing a third party's rights. For example, the applicant seeks to register the trade mark of a third party with whom he has a relationship or of whom he is otherwise aware."

37. There are several points I need to make here. First, Mr Kennedy appeared unable to explain in clear terms the relevance of the terms of service to the present proceedings, which is, after all, a trade mark opposition. Secondly, the revised terms of service do not, to my mind, necessarily imply that the opponent was aware that its licensing service was illegal (if, indeed, it was). Finally, and perhaps most importantly, the terms of service were revised after the relevant date of 12 February 2020 and do not give any insight into what the position was on that date. I refused to admit this additional evidence.

DECISION

38. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts.

39. Section 3(6) of the Act is as follows:

"A trade mark shall not be registered if or to the extent that the application is made in bad faith."

40. In *Sky Limited & Ors v Skykick, UK Ltd & Ors*, [2021] EWCA Civ 1121 the Court of Appeal considered the case law from *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, Case C-529/07 EU:C:2009:361, *Malaysia Dairy Industries Pte. Ltd v Ankenævnetfor Patenter Varemærker* Case C-320/12, EU:C:2013:435, *Koton Mağazacılık Tekstil Sanayi ve Ticaret AŞ*, Case C-104/18 P, EU:C:2019:724, *Hasbro, Inc. v EUIPO, Kreativni Dogaaji d.o.o. intervening*, Case T-663/19,

EU:2021:211, *pelicantravel.com s.r.o. v OHIM, Pelikan Vertriebsgesellschaft mbH & Co KG (intervening)*, Case T-136/11, EU:T:2012:689, and *Psytech International Ltd v OHIM, Institute for Personality & Ability Testing, Inc (intervening)*, Case T-507/08, EU:T:2011:46. It summarised the law as follows:

“68. The following points of relevance to this case can be gleaned from these CJEU authorities:

1. The allegation that a trade mark has been applied for in bad faith is one of the absolute grounds for invalidity of an EU trade mark which can be relied on before the EUIPO or by means of a counterclaim in infringement proceedings: *Lindt* at [34].

2. Bad faith is an autonomous concept of EU trade mark law which must be given a uniform interpretation in the EU: *Malaysia Dairy Industries* at [29].

3. The concept of bad faith presupposes the existence of a dishonest state of mind or intention, but dishonesty is to be understood in the context of trade mark law, i.e. the course of trade and having regard to the objectives of the law namely the establishment and functioning of the internal market, contributing to the system of undistorted competition in the Union, in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin: *Lindt* at [45]; *Koton Mağazacılık* at [45].

4. The concept of bad faith, so understood, relates to a subjective motivation on the part of the trade mark applicant, namely a dishonest intention or other sinister motive. It involves conduct which departs from accepted standards of ethical behaviour or honest commercial and business practices: *Hasbro* at [41].

5. The date for assessment of bad faith is the time of filing the application: *Lindt* at [35].

6. It is for the party alleging bad faith to prove it: good faith is presumed until the contrary is proved: *Pelikan* at [21] and [40].

7. Where the court or tribunal finds that the objective circumstances of a particular case raise a rebuttable presumption of lack of good faith, it is for the applicant to provide a plausible explanation of the objectives and commercial logic pursued by the application: *Hasbro* at [42].

8. Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all the factors relevant to the particular case: *Lindt* at [37].

9. For that purpose it is necessary to examine the applicant's intention at the time the mark was filed, which is a subjective factor which must be determined by reference to the objective circumstances of the particular case: *Lindt* at [41] – [42].

10. Even where there exist objective indicia pointing towards bad faith, however, it cannot be excluded that the applicant's objective was in pursuit of a legitimate objective, such as excluding copyists: *Lindt* at [49].

11. Bad faith can be established even in cases where no third party is specifically targeted, if the applicant's intention was to obtain the mark for purposes other than those falling within the functions of a trade mark: *Koton Mağazacılık* at [46].

12. It is relevant to consider the extent of the reputation enjoyed by the sign at the time when the application was filed: the extent of that reputation may justify the applicant's interest in seeking wider legal protection for its sign: *Lindt* at [51] to [52].

13. Bad faith cannot be established solely on the basis of the size of the list of goods and services in the application for registration: *Psytech* at [88], *Pelikan* at [54]".

41. According to *Alexander Trade Mark*, BL O/036/18, the key questions for determination in a claim of bad faith are:

(a) What, in concrete terms, was the objective that the applicant has been accused of pursuing?

(b) Was that an objective for the purposes of which the contested application could not be properly filed? and

(c) Was it established that the contested application was filed in pursuit of that objective?

42. It is necessary to ascertain what the applicant knew at the relevant date: *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch). Evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date: *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited* and others, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16).

43. As I have already noted in paragraph 5 above, the opponent claims that the applicant did not have a *bona fide* intention to use the contested mark in relation to the services in the application. It further claims that the applicant's intention was to try to prevent or disrupt the opponent, or any third party under the control of WMG, from using the LEVEL and/or LEVEL Music brands or to gain an advantage in his dispute with WMG. Those are objectives for the purposes of which a trade mark application could not properly be filed, and so I must now determine whether the evidence succeeds in establishing that this was indeed the applicant's objective.

44. In *John Williams and Barbara Williams v Canaries Seaschool SLU*, BL O-074-10, Mr Geoffrey Hobbs QC as the Appointed Person stated that:

"21. I think it is necessary to begin by emphasising that a decision taker should not resort to the burden of proof for the purpose of determining the rights of the parties in civil proceedings unless he or she cannot reasonably make a finding in relation to the disputed issue or issues on the basis of the

available evidence, notwithstanding that he or she has striven to do so:
Stephens v. Cannon [2005] EWCA Civ. 222 (14 March 2005).”

45. I am satisfied that the evidence shows that Level Music was an online platform for independent artists to distribute their music to a variety of streaming and downloading services, such as Spotify and Apple Music, and receive royalty payments. It has been operating since 2018.¹⁷

46. The only direct evidence of a royalty dispute between the applicant and WMG is the extract from the justanswer.co.uk website. As I have already noted, Exhibit MJ20 contains not only the text of the question, but a list of questions submitted to the site on 19 October 2019. This list shows the first words of those questions, and one is identical to the first words of the full question I have reproduced in paragraph 29 above. Mr Joshi invites me to infer that they are the same.

47. It may be that the question asked on 19 October 2019 is not the same as the one shown in Exhibit MJ20. However, the content of the full question points to a probable date of October 2019. The writer says they have just received a royalty statement relating to June and July 2019, that royalties have been earned up to October and that they have informed WMG of their desire to terminate the contract. They mention that they are intending to write to WMG on Saturday 19th. In 2019, 19 October was a Saturday. I have already considered the applicant’s claims that this letter is a forgery and was unpersuaded.

48. I set this question seeking legal advice via the website beside the evidence showing that the applicant attempted to have the opponent wound up and the contemporaneous applications for trade marks in the UK and Ireland for variants of “Level”. In particular, the petition to wind up the opponent is consistent with the justanswer.co.uk question, as Mr Kennedy claimed to be a creditor of the opponent.

49. Mr Kennedy denies that there was a licensing relationship between the applicant and the opponent. In his skeleton argument, he submits that no documentary evidence

¹⁷ Exhibits MJ1 and MJ4.

has been filed and then sets out what he understands to be the requirements for electronic signatures in the UK. This issue, he submits, is integral to the present proceedings. I have reproduced his final paragraphs below:

“35. Applicant finally points out that the Tribunal has already, in response to Applicant’s TM8, that it has put forth sufficient legal argument for a defense that its trademark is unique; therefore, Opponent’s long-shot argument relies on the existence of a licensing relationship with Applicant.

36. Simply put: No valid signature, be it ‘qualified electronic’ or physical, No valid contact/deed license assignment of intellectual property/copyright exists between the parties as a matter of law; therefore, Opponent’s reliance on **Redbull, supra**, fails.”

50. Respectfully, I would suggest that these submissions are founded on a misunderstanding of an early letter from the Registry, as confirmed by Mr Kennedy at the hearing. He appeared to be under the impression that the Registry had agreed that he had successfully defended the application and, in response to my questioning, referred me to a letter of 19 November 2020, which said:

“The hearing officer has considered the opponent’s request to refuse the applicant’s Form TM8 and counterstatement, however, the Registry is satisfied that the applicant has provided sufficient reasons for his defence. The amended Form TM8 and counterstatement filed on the 19 October 2020 is, therefore, acceptable and the evidence deadline is reset.”

51. What the letter states is that the Registry considered that the defence put forward by the applicant was sufficiently clear for the proceedings to move on to the evidence round. Furthermore, for a section 3(6) ground to succeed, it is not necessary for the opponent to own a similar trade mark. The opponent’s claim does not depend on there being a licensing relationship between the parties. In this context, it is also important to note that in *Red Bull*, Arnold J (as he then was) gave as an example of the type of situation that could constitute bad faith the application for a mark belonging to a third party with which the applicant had a relationship. This is one example; there are others.

52. The opponent's evidence could have been stronger. It will be recalled that I agreed with the applicant's critique of Exhibit WMG1. However, I consider that the opponent has done enough to establish a *prima facie* case of bad faith, that the application was made with the intention of disrupting the opponent's, or another WMG company's use, of "Level" marks for the music platform.

53. In *Holzer y Cia de CV v EUIPO*, joined cases T-3/18 and T-4/18, the General Court held (at paragraph 36 of the judgment) that although there is a presumption of good faith, the objective circumstances of a particular case may lead to the rebuttal of that presumption. In that event, it is for the applicant or proprietor of the trade mark to provide plausible explanations on the objectives and commercial logic pursued by the application for registration of the trade mark.

54. The applicant has provided no such explanations, notwithstanding the claim in its counterstatement that it possesses evidence of actual use of the contested mark. As I have mentioned above, the applicant did not file any evidence at all, even after having requested an extension of time. Consequently, I find that the opposition under section 3(6) succeeds.

Outcome

55. The opposition succeeds and registration of application no. 3466030 is refused.

Costs

56. The opponent has been successful and is entitled to a contribution towards the costs of these proceedings. At the end of his witness statement, Mr Joshi said:

"The Opponent requests an award of costs in relation to this matter, including the CMC and various other Hearings and unnecessary requests made by the Applicant. In view of the Applicant's behaviour, conduct and

clear dishonest intent, the Opponent requests a cost order which is off the standard scale.”¹⁸

57. The Tribunal is able to award off-scale costs to deal proportionately with unreasonable behaviour: see *Rizla Ltd’s application* [1993] RPC 365. Mr Kennedy has at times during these proceedings made personal allegations against the opponent’s representative, used intemperate language and raised a large number of points that have not been relevant.

58. On the other hand, I note that in its statement of grounds the opponent claims that the contested application is identical to its earlier mark.¹⁹ Earlier, it had asserted that the applied-for services were the same as, or similar to, the services for which the earlier mark had been registered. However, the opponent chose to pursue this opposition purely on section 3(6) grounds, rather than multiple grounds including a section 5(2) claim. This approach has complicated what might have been more straightforward proceedings.

59. Therefore I will award costs on the scale set out in Tribunal Practice Notice 2/2016, but towards the higher end of it, to reflect the conduct of the applicant during these proceedings. I have also allowed a contribution towards the costs of the CMC held on 4 February 2021. In the circumstances, I award the opponent the sum of £3300 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Preparing a statement and considering the other side’s statement: £600

Preparing evidence: £2000

Preparation for and attendance at the CMC: £500

Official fees: £200

TOTAL: £3300

¹⁸ Paragraph 120.

¹⁹ Paragraph 34.

60. I therefore order Tuukka's Tracks KY to pay Radar Scope Ltd the sum of £3300, which should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 17th day of December 2021

**Clare Boucher
For the Registrar,
Comptroller-General**