O/0036/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004014896
BY TAIN MALTA LIMITED TO REGISTER:

AS A TRADE MARK IN CLASSES 9, 41 & 42

AND

IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 447749 BY
EAZEGAMES IE B.V.

BACKGROUND AND PLEADINGS

1. On 16 February 2024, Tain Malta Limited ("the applicant") applied to register the trade mark shown on the cover page of this decision in the UK ("the applicant's mark"). The applicant's mark was published on 1 March 2024 and registration is sought for the goods and services set out in **Annex 1** of this decision. The applicant's mark enjoys a priority date of 12 February 2024 stemming from an earlier EUTM (being 018985478).

2. On 30 May 2024, the applicant's mark was opposed by Eazegames IE B.V. ("the opponent"). The opposition is based on sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("the Act"). Under the section 5(2)(b) and 5(3) grounds of opposition, the opponent relies on the following trade mark:

   EAZEGAMES
   UK registration no. 917769795[1]
   Filing date 2 February 2018; registration date 22 June 2018
   Priority date: 8 August 2017 (Benelux)
   Relying on all services (in classes 35, 38, 41 and 42), being those set out in **Annex 2** of this decision.
   ("the opponent's mark").

3. Under the section 5(2)(b) ground, the opponent claims that the marks at issue are highly similar and that the goods and services at issue are identical or highly similar. As a result of the above, the opponent's position is that there is a likelihood of confusion between the marks on the part of the relevant consumer, which includes a likelihood of association.

[1] The opponent's mark is a comparable mark based on an earlier EUTM. On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with existing EUTMs. These comparable marks enjoy the same filing and registration dates as their European counterparts.

4. Turning to the section 5(3) ground, the opponent claims that it's mark has acquired a substantial reputation for all the services of its registration as a result of its longstanding use. It is claimed that due to the similarity of the marks, the relevant public will believe that the marks originate from the same or economically connected undertakings. As a result, the opponent's position is that use of the applicant's mark would take unfair advantage of the opponent's mark. In addition, the opponent claims that the use of the applicant's mark is likely to be detrimental to the reputation and/or distinctive character of the opponent's mark.

5. It is noted that under both the section 5(2)(b) and 5(3) grounds of opposition, the opponent gave a statement of use in respect of its mark for all of the services relied upon.

6. Lastly, under the section 5(4)(a) ground, the opponent relies on the earlier unregistered right of 'EAZEGAMES' which it claims to have used throughout the UK since April 2018 in respect of the same services as relied upon under the above grounds. As a result of this use, the opponent claims to have gained a substantial goodwill in the UK. The opponent's position is that use of the applicant's mark in respect of its goods and services would misappropriate and misrepresent the opponent's goodwill which may potentially cause damage to the opponent's services and business, including a decrease in sales and custom.

7. The applicant filed a counterstatement wherein it denied the claims against it as well as requesting that the opponent prove that it has genuinely used its mark.

8. The applicant is represented by Withers & Rogers LLP and the opponent is represented by Murgitroyd & Company. Only the opponent filed evidence and, in doing so, also filed submissions. No hearing was requested and both parties filed written submissions in lieu of the same. This decision is taken after careful consideration of the papers.

9. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

EVIDENCE

10. The opponent's evidence came in the form of the witness statement of Stijn Holthuizen dated 16 September 2024. Mr Holthuizen is the Chief Executive Officer of EAZEGAMES B.V. and the Managing Director of the opponent. He had held both positions for seven years as at the date of his statement. It is confirmed that both EASEGAMES B.V. and the opponent are part of the same group of companies and that Mr Holthuizen is duly authorised to file evidence in respect of both. Mr Holthuizen's evidence is accompanied by 16 exhibits, being SH1 to SH16, and was adduced in order to demonstrate genuine use of the opponent's mark as well as the existence of a reputation and goodwill in the mark/sign relied upon.

11. I do not intend to summarise the opponent's evidence in full here (or the parties' submissions, for that matter). However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

PRELIMINARY ISSUES

EUIPO Decisions

12. In its evidence, the opponent included copies of three decisions of the EUIPO which involve proceedings between the parties and in respect of marks and

goods/services that are the same or similar to those at issue here.[2] The opponent raises these decisions because it is submitted that the outcome here should follow the EUIPO decisions as they deal with 'virtually identical matters' as those that are at issue here. While this claim is noted, it is not correct. Firstly, I will say that decisions of the EUIPO are not binding on proceedings before this Tribunal. Secondly, in respect of the actual decisions relied upon, I note that the opponent's EUTM in the EU proceedings was not subject to the proof of use assessment. In the present case, proof of use of the opponent's mark is at issue which may mean that the goods/services at issue do not directly mirror those from the EUIPO proceedings. Lastly, having considered the filed decisions, it is noted that the finding of a likelihood of confusion was based on a significant part of the Italian and Spanish speaking public in the EU for which 'EAZE'/'EEZE' were both meaningless and distinctive.[3] In the present case, the issue of confusion is to be based on consumers in the UK, with English being the prominent language. Therefore, it cannot simply be said that because the EUIPO found confusion that I must also find confusion. As a result, the EUIPO proceedings are of no probative value here and I will say no more about them.

Applicant not filing evidence or submissions during the evidence rounds

13. In its written submissions in lieu, the opponent takes issue with the fact that the applicant did not file any evidence or submissions during the evidence rounds to substantiate and particularise what the opponent referred to as 'egregious and meritless denials' in its counterstatement. The opponent goes on to state that:

> "The absence of any such evidence or submissions being filed by the Applicant is a particularly salient admission on the part of the Applicant of the Opponent's evidence, observations and claims."

[2] SH16
[3] On this point, it is noted that the English speaking part of the EU public is confirmed as being able to perceive the words 'EAZE' and 'EEZE' as fanciful alterations of the English words 'ease' or 'easy'.

14. Firstly, I appreciate that the applicant's counterstatement included a series of blanket denials to the opponent's claims. However, I do not consider that it was in any way egregious or meritless. Secondly, I will say, for the avoidance of doubt, that the applicant failing to file its own evidence or submissions during the evidence rounds is not a salient admission of the opponent's claims. If it were, then it could be said that any case where an applicant does not file evidence/submissions would result in the success of that opposition. This is not the case and, instead, I will proceed with this decision by considering all the relevant assessments in the ordinary way.

15. In addition to the above, it is noted that the opponent sought to argue that because the applicant did not file evidence or submissions during the evidence rounds, any criticisms that follow in the applicant's submissions in lieu should be disregarded or given no weight. I appreciate that there is merit in such an approach where a party waits until the very last opportunity to unveil an extensive attack of the opposing parties' evidence. However, I do not consider this to be a blanket approach that means any submissions reserved until the conclusion of proceedings should be disregarded. For example, if a party wishes to raise issues with the sufficiency of the evidence (it is insufficient to demonstrate genuine use, for example), then reserving those points until written submissions in lieu is appropriate and such an approach in proceedings before the Tribunal is relatively common. On this point, I remind myself that the onus is on the party bearing the burden of proving use to file its best case as evidence in chief. In light of this, I will give the applicant's submissions in lieu the appropriate weight and where they raise points that I consider should have been brought at an earlier stage, I will confirm as such below.

DECISION

Proof of use

16. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

> "(6)(1) In this Act an "earlier trade mark" means –
>
> (a) a registered trade mark or international trade mark (UK) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,
>
> (aa) a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;
>
> (ab) a comparable trade mark (IR) or a trade mark registered pursuant to an application made under paragraph 28, 29 or 33 of Schedule 2B which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired.
>
> […]
>
> (2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if

registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered."

17. Section 6A is also relevant. It reads:

"(1) This section applies where:

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section "the relevant period" means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes –

(a) use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services."

18. Section 100 of the Act is also relevant. It reads:

"100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

19. As the opponent's mark is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

“7.— (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the relevant period referred to in section 6A(3)(a) (the "five-year period") has expired before IP completion day—

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day —

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A to the United Kingdom include the European Union”.

20. Given its earlier filing date, the opponent’s mark qualifies as an earlier trade mark under the above provisions. The opponent’s mark completed its registration process more than five years prior to the priority date of the applicant’s mark. As above, the applicant requested proof of use for the opponent’s mark for all the services it relies upon meaning that it is subject to the use provisions.

21. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp* v *Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent

of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32]."

22. Section 6A of the Act (cited above) sets out that the relevant period for the present assessment is the five-year period prior to the priority date of the applicant's mark, being 12 February 2024. The relevant period is, therefore, 13 February 2019 to 12 February 2024 ("the relevant period"). For completeness, I confirm that the relevant territory for genuine use prior to 31 December 2020 ("IP Completion Day") is the EU at large but, thereafter, it is the UK only.

23. Proven use of a mark which fails to establish that "the commercial exploitation of the mark is real"[4] because the use would not be "viewed as warranted in the economic sector concerned to maintain or create a share in the mark for the goods or services protected by the mark" is, therefore, not genuine use.

[4] *Jumpman* BL O/222/16

24. Before getting into the evidence, I wish to briefly discuss the applicant's submissions. The applicant has gone through the exhibits filed raising its own issues. While these are noted, I remind myself that the assessment I must make it based on my own consideration of the evidence before me. In summarising its submissions in respect of use, the applicant sets out that the evidence is only sufficient to give rise to use for "online gaming services", at the very most.[5] That being said, the submissions go on to say that the opponent has insufficiently proven use in the UK and the EU meaning that it cannot rely on its mark for the purposes of section 5(2)(b) and 5(3) of the Act. While the submissions are clearly contradictory, the latter point is made because the applicant states that the evidence does not demonstrate that a significant proportion of the relevant public would be aware of the mark through use. While noted, the test for genuine use does not require a level of awareness of the public but evidence of a genuine attempt to create or preserve a market share for the services relied upon. As such, the latter point is of no assistance here.

25. Whilst I bear in mind that the submissions made are contradictory, I see no alternative but to take the comments as to "online gaming services" as a concession of that there exists genuine use, but not for all services relied upon. Given the limited nature of the concession and the size of the opponent's specification, I consider it prudent to proceed in considering the evidence of use assessment in full and in the ordinary way, albeit whilst bearing this concession in mind.

Evidence of use

26. The evidence sets out that the opponent provides online games to consumers via its websites eazegames.com and easegames.co.uk. It is confirmed that the games provided are skill based games such as blackjack and bingo (amongst others) and

[5] It is noted that this is not a term in the opponent's specification.

that the ‘EAZEGAMES’ branding appears prominently throughout the websites. A screenshot of the opponent’s ‘.com’ website dated May 2020 is provided that shows the prominent presence of the ‘EAZEGAMES’ mark in a standard, yellow typeface (which qualifies as use of the mark as registered).[6] On this point, it is confirmed that this is how the website has appeared since 2018.

27. The evidence proceeds to discuss a downloadable application that can be found on Apple’s App Store or Google Play. Screenshots showing the download page for these apps are provided.[7] The screenshot makes reference to an ‘exciting new player rewards program’ which appears to have been launched just prior to the post shown, which is dated 10 August 2023. In respect of the app itself, it is noted that it is downloadable software, a good that is not covered by the specification at issue. That being said, I do appreciate that consumers are likely to be able to access the opponent’s services via a downloadable app so while the app may be of no assistance here, it clearly indicates an additional platform (as well as the opponent’s website) through which the services are provided.

28. It is explained in the narrative evidence that in order to play the games, consumers are required to deposit funds into their account in euros. Those funds are then used to play games in order to win cash prizes. On this point, I note that the opponent has provided a list of transactions from UK consumers spanning the years 2018 to 2024.[8] This list also shows transactions from EU consumers from 2018 to 2020. While I do not intend to break the transactions down, I note that the list provided covers approximately 30 pages worth of transactions, the majority of which are for €5 or €10. Further, in the respect of the fact that the relevant period did not begin until 2019, it is noted that the transactions on this list that come from prior to that are very limited in number.

[6] SH2
[7] SH3
[8] SH5

29. In respect of the opponent's turnover, I note that the evidence shows the gross revenue stemming from the EU and UK between 2018 and 2023. While the turnover from 2018 is not relevant here, I will include it in the following reproduction as it will be relevant later on in my decision:

Year	Turnover (€)
2018:	28,367
2019:	92,400
2020:	166,027
2021:	1,673,927
2022:	3,460,648
2023:	6,807,555
Total:	**12,228,924**

30. In discussing the turnover, the opponent sets out that approximately 4 to 5% of the above figures can be said to come from the UK. While the whole of the figures from 2019 and 2020 shown above will be applicable here as the opponent's mark is a comparable mark, the 2021 to 2023 figures are not because the assessment for that period is based on UK use only. Using the higher end of the opponent's own approximation of the above figures, I calculate that the UK use for 2021 to 2023 can be broken down to cover just €597,106.50. As a result, the total relevant use for the present assessment is approximately €855,533.50.

31. In respect of the geographical spread of the opponent's consumer base, I note that a pie chart is provided with the evidence.[9] This shows that the majority of the opponent's customers comes from the Netherlands and Belgium. These countries are followed by Germany and Great Britain, though I do note that Belgium and the Netherlands cover what appears to be over 75% of the pie chart. On this point, I note that the narrative evidence confirms that the services have (and continue to

[9] SH6

be) provided in countries such as Austria, Czechia, Romania and Sweden (amongst others).

32. The evidence then moves to discuss advertising. In respect of this point, I note that the evidence goes into very minute detail in respect of the same. While this is appreciated, it is not entirely necessary. I say this because the bulk of the evidence can be summarised with the opponent's actual advertising spend, of which the specific UK spend is provided. This shows a breakdown which shows the amounts spent in respect of Facebook ads, Google ads, Apple search ads, game development and conferences and events. The breakdown covers 2017 to 2023 and while I will reproduce them all here, the only figures that are relevant to the present assessment are 2019 to 203. The figures (all of which are in euros) are as follows:

Year	**Facebook**	**Google**	**Apple**	**Game development**	**Conference/ events**	**Total**
2017:	25	867	-	-	-	**892**
2018:	658	1050	1,000	-	-	**2,708**
2019:	3,393	-	-	-	2,500	**5,893**
2020:	5,029	-	-	2,662	-	**7,691**
2021:	18,301	6,960	1,122	7,500	-	**33,883**
2022:	22,080	20,000	-	-	-	**42,080**
2023:	-	10,400	-	-	-	**10,400**
Total:	**49,464**	**38,410**	**2,122**	**10,162**	**2,500**	**102,658**

33. While the entirety of the figures is shown above, I note that the advertising spend covers a total of €99,947 during the relevant period. In addition to the above, EU spend has been provided from 2017 to 2023 which follows the same format as the table set out above, albeit with one category being labelled as 'Other'. I will reproduce the figures for 2017 and 2018 because they may be relevant at other points in my decision. However, I will not reproduce the 2021 to 2023 figures as

they fall after IP Completion Day so are irrelevant to my decision. The figures are as follows:

Year	Facebook	Google	Apple	Other	Total
2017:	481	3,303	-	-	**3,784**
2018:	12,513	23,250	583	1,000	**37,346**
2019:	64,467	12,700	16	3,500	**80,683**
2020:	95,567	1,060	2,372	15,479	**114,478**
Total:	**173,082**	**40,313**	**2,971**	**19,979**	**236,291**

34. In respect of the relevant period, the above spend covers €195,161. A number of sample invoices are provided in evidence from Meta (the owner of Facebook), Google and Apple which support the figures for the first three columns across the above tables.[10] In addition, I note that a sample of Facebook advertisements are provided in evidence. It is claimed that these are directed at UK consumers as they relate to winning British pounds and, further, some of the adverts show appearances by UK celebrity Sarah Jayne Dunn.[11] While the posts are undated, I take no real issue with this as they are simply provided in support of the opponent's advertising efforts which, as above, clearly took place within the relevant period.

35. In respect of the 'game development' entry in the above UK table, it is noted that this relates to a game produced in partnership with the Hard Rock brand. A brief history of the Hard Rock Café brand is provided in evidence[12] but I see no need to discuss that here. Invoices regarding the development of this app are provided in evidence.[13]

36. There is discussion of the opponent's presence at a 2019 conference called 'Casual Connect Europe 2019'. This was held in London and it is claimed that it

[10] SH7 and SH9
[11] SH8
[12] See paragraph 25 of Mr Holthuizen's statement and SH11
[13] SH12

was used to promote and showcase the opponent's services. This is noted but the supporting evidence simply includes a description of the 2019 conference as well as a ticket for the witness's attendance at the same.[14] There is nothing in the evidence to demonstrate the opponent's brand's actual presence at the event. For example, there are no images of the opponent's booth at the event and neither is there anything to suggest promotional materials were handed out. Further, there is nothing to suggest what activities Mr Holthuizen undertook during his attendance at the event.

37. The narrative evidence sets out that since 2018, the opponent has recorded in the region of 54,000 new UK players with approximately 76,533 payments coming from approximately 3,000 paying UK customers. In support of this, there is a screenshot of an internal dashboard which shows the number of new UK players from March 2018 to February 2024.[15] Having considered this screenshot, I note that it supports the information provided in the narrative evidence.

Assessment of the evidence

38. In considering the evidence, I am of the view that it does not necessarily paint a picture of a large operation. I say this because the total turnover provided covers approximately €850,000 over a five year period throughout a very large territory, being the EU at large prior to IP Completion Day and the UK only thereafter. Further, it shows just a total of 54,000 players using the opponent's service in the UK from 2018 to 2023. When taking this level of use into account against the size of the market at issue, the use is plainly low. On this point, I note that while no evidence of the market at issue has been provided, I am content to conclude that it is large on the basis that it covers online games, which is likely to attract a very high volume of users. Lastly, while I appreciate that advertising spend has been

[14] SH13
[15] SH15

provided, it is not particularly compelling, especially when factoring into account that it covers both the UK and the EU at large prior to IP Completion Day.

39. The above being said, I remind myself that use need not be quantitatively significant in order for it to be deemed genuine. On this point, I accept that the evidence is clear that the opponent has genuinely attempted to create or preserve a market share for its services in the relevant territory throughout the relevant period. On this point, I also remind myself of the concession of the applicant. That being said, the specification relied upon is very broad and the evidence falls far short of covering the entirety of the opponent's specification. As such, I consider it necessary to proceed to consider a fair specification.

Fair specification

40. In considering the issue of a fair specification, I refer to the case of *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited,* BL O/345/10, wherein Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

> "In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned."

41. In addition, I refer to the Court of Appeal decision in *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834 wherein the proper approach to partial revocation was set out as follows:

> "245. First, it is necessary to identify the goods or services in relation to which the mark has been used during the relevant period.

246. Secondly, the goods or services for which the mark is registered must be considered. If the mark is registered for a category of goods or services which is sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, use of the mark in relation to one or more of the subcategories will not constitute use of the mark in relation to all of the other subcategories.

247. Thirdly, it is not possible for a proprietor to use the mark in relation to all possible variations of a product or service. So care must be taken to ensure this exercise does not result in the proprietor being stripped of protection for goods or services which, though not the same as those for which use has been proved, are not in essence different from them and cannot be distinguished from them other than in an arbitrary way.

248. Fourthly, these issues are to be considered having regard to the perception of the average consumer and the purpose and intended use of the products or services in issue. Ultimately it is the task of the tribunal to arrive at a fair specification of goods or services having regard to the use which has been made of the mark.

249. This approach does strike an appropriate balance. It gives effect to the clear intention of the EU legislature that marks must actually be used or, if not used, be subject to revocation. […] It is also fair to proprietors for it does not require a proprietor to prove that he has used his mark in relation to all possible variations of the goods or services covered by its registration but only those which are sufficiently distinct to constitute coherent categories or subcategories. I am also satisfied that it gives appropriate protection to the legitimate interest of a proprietor in being able in the future to extend his range of goods or services within the scope of the terms describing the goods or services for which its mark is registered."

42. Lastly, in *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch) at [47], the late Carr J pointed out that it is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do; for example, in *Pan World Brands v Tripp Ltd (Extreme Trade Mark)* [2008] RPC 2, it was held that use in relation to holdalls justified a registration for luggage generally.

43. The evidence before me is, plainly, focused solely on the provision of online games. This is a point that was also picked up on by the applicant in its submissions. In light of this, and given the broad nature of the specification at issue, it is clear that there is a broad range of services that the evidence does not cover. As such, I do not intend to labour over each and every term in the opponent's specification. Instead, I will briefly go over the terms for which use has been shown before discussing the remaining classes of services in order to explain why the use before me is insufficient.

44. Above, I set out that the applicant has accepted use for "online gaming services", in class 41. However, this is not a term present in the opponent's specification so I will, instead, consider what I deem to be the most closely associated term. In my view, this is "interactive online video and computer games and competitions provided via the internet". To me, this appears to be a fair reflection of how the consumer will perceive the use as the evidence is clear in that users can use the service to play games and compete to win cash prizes. Therefore, I am content to grant the opponent use for such term. In addition, the opponent's service plainly offers its customers access to software as a service as the user is required to use software online to access the games. While the opponent does offer a downloadable app, the evidence does confirm that the services are also offered via its website. The opponent's specification, in class 42, includes "software as a service" at large. This is an incredibly broad term and, as such, I consider it

appropriate to limit it to determine the actual use shown as to proceed with the term as a whole would offer far too broad a level of protection for the opponent when considering that the term is used for one purpose. In my view, the use shown can be fairly described as "software as a service, namely the provision of interactive online video and computer games and competitions provided via the internet". These two terms reflect the entirety of the use before me and while I confirm that there is no sufficient use for the remaining terms, I do consider it necessary to briefly cover some of the remaining services of the opponent.

45. I note that the class 35 list of services include loyalty related services. On this point, the evidence summarised above does make reference to a loyalty scheme that was launched just prior to 10 August 2023. This is noted but no figures are provided to confirm how many users signed up to such a service. Further, it was launched just a number of months prior to the end of the relevant period meaning that any window of use for such services would have been very limited. Also in respect of the opponent's class 35 services, the specification includes a range of advertising services. The opponent has submitted that the collaborative game between itself and Hard Rock is evidence of the provision of advertising services. While noted, I disagree. In short, the evidence shows that there was a partnership with Hard Rock to produce a game that is co-branded under the brandings Hard Rock and EazeGames.[16] I see no reason why this would constitute a genuine attempt to create or preserve a market share for the provision of advertising offered to third parties as a service. If it were, then it could be said that any attempt between brands to collaborate was the offering of advertising or promotional services. This is clearly not the case. Lastly in respect of this point, I note that there is no additional evidence before me that demonstrates that the opponent has offered any advertising services to any third parties.

[16] On this point, pages 4 to 7 of SH12 clearly demonstrate the offering of the game under the co-branding of Hard Rock and Eaze Games.

46. Further, I note that the opponent has a range of telecommunication services in class 38 that relate to computer and video games. This includes messaging services and internet chatrooms. In my view, even if the games had messaging functionality (for example, a lobby chat during a live game of blackjack), this is not the provision of the actual telecommunication service but is, instead, an ancillary service offered alongside the core purpose of the opponent's service, which is to provide an online game. For example, the provision of a game that has chat functionality is not a genuine attempt to create or preserve a market share for such services. If it were then any game that carries chat functionality (of which there are many) would automatically qualify as the provision of a telecommunication service. Such a conclusion would offer far too broad a level of protection to any undertaking that genuinely uses its mark on computer games.

47. Lastly, I note that some of the class 41 services relate to the organisation of online competitions and that the class 42 services relate to the design and development of games. While I have no doubt that the opponent organises its own competitions and likely designs and develops its own game, there is nothing before me to suggest that it actually provides such services to third parties. As a result, I find that simply running its own competitions or designing its own software without offering them as services to third parties does not constitute genuine use of such services.

48. As a result of the above, I consider that the following represents a fair specification of the opponent's mark and it is for these services that the sections 5(2)(b) and 5(3) grounds proceed:

Class 41:	Interactive online video and computer games and competitions provided via the internet

Class 42: Software as a service, namely the provision of interactive online video and computer games and competitions provided via the internet.

Section 5(2)(b): legislation and case law

49. Section 5(2)(b) of the Act reads as follows:

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

(a) […]

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

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

50. Section 5A of the Act states as follows:

"Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

51. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V*. Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonization in the Internal Market*

(Trade Marks and Designs) ("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:

(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 might 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

52. The services upon which the opponent may rely are set out at paragraph 48 above. As for the applicant, its goods and services are set out in Annex 1.

53. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. 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 that:

> "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".

54. 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.

55. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court 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."

56. I have submissions from both parties in respect of the goods and services at issue. While these submissions are noted, I note that they are based on the opponent's specification in its entirety. As that specification has been significantly reduced and given size of said reduction, these submissions are no longer particularly relevant. Saying that, where the submissions do relate to services that remain, they are applicable. For the avoidance of doubt, I have given these submissions due consideration.

Class 9

Electronic game software for mobile phones; Software; Interactive multimedia software for playing games; Computer programmes for interactive television and for interactive games and/or quizzes; Computer gaming software; Computer video game software; Software programs for video games; Interactive multimedia computer game programs; Application software for mobile phones; Computer game software for use on mobile and cellular phones; Computer software applications, downloadable; Computer games programmes downloaded via the internet [software]; Downloadable computer games; Software for smartphones; Downloadable electronic game programs; Computer programs for video and computer games; Computer game software, downloadable; Electronic game software for handheld electronic devices; Downloadable video game programs; Downloadable software; Computer software that permits games to be played; Computer software for the administration of on-line games and gaming; Computer graphics software; Entertainment software; Computer programs for pre-recorded games; Computer game software for use with on-line interactive games; Downloadable application software for smartphones; Video game cartridges; Computer application software featuring games and gaming; Virtual reality game software; Video game programs; Mobile software; Gaming software that generates or displays wager outcomes of gaming machines; Interactive entertainment software; Interactive entertainment software for use with personal computers; Interactive entertainment computer software for video games.

57. All of the above terms are those that either expressly cover games or are sufficiently broad enough so as to cover computer games. Given that both terms in the opponent's specification relate to online games, I am of the view that there is a degree of similarity between them. While their natures differ (the above being downloadable goods whereas the opponent's are not), there is a degree of overlap in end purpose, trade channels and user. Alternatively, I consider that there is a degree of competition between the goods and services on the basis that a consumer may wish to play a game via downloadable software over accessing it as a service, or vice versa. Overall, I consider that these goods and services are similar to a medium degree.

Games cartridges for use with electronic games apparatus.

58. The above are physical goods and are therefore different in nature and method of use with the opponent's services. That being said, I do consider that there is some overlap in respect of purpose, trade channels and user. I say this because, in my view, the above goods will be for use in playing games and I consider it likely for a provider of physical games to also provide them online. On this point, I consider that it is common in the trade for games to not only be available in stores on physical cartridges but also as a service via subscription packages bought through gaming consoles. I also find that the user of physical game cartridges will also use the opponent's services. Alternatively, the user may choose to play one over the other, resulting in a competitive relationship. Overall, I find these goods and services to be similar to a medium degree.

Computer hardware for games and gaming.

59. The above goods cover those such as video game consoles and keyboards or mice used to play games. The goods and services at issue differ in nature, method of use and purpose. As for trade channels, I am of the view that some online game providers may provide a range of hardware to use alongside their games. As such,

there is an overlap here. As for complementarity, I appreciate that the above goods will be important to the playing of online games but I do not consider that their relationship is such that consumers would think that they originate from the same undertakings.[17] Lastly, I find that the user of the above goods will also use the opponent's services. Overall, I consider that the above goods are similar to a low degree with the opponent's services.

Electronic publications, downloadable, relating to games and gaming; Downloadable information relating to games and gaming.

60. The above goods differ in nature, method of use and purpose when compared to the opponent's services. However, the above goods are likely to be provided by undertakings that also offer online games. For example, the provider of an online game may release publications and information (such as tutorials) specifically for those games. Further, these goods will be aimed at the same user who accesses the opponent's online games. As a result, I find that the above goods overlap in trade channels and user with the opponent's services. These goods and services are, therefore, similar to a low degree.

Electronic data processing equipment; Apparatus for the processing of images; Data processing apparatus; Data processing equipment and accessories (electrical and mechanical); Apparatus for electronic payment processing; Data processing equipment; Audio processing apparatus.

61. I see no obvious reason why any of the above goods would share any overlaps with either of the opponent's services. As such, I find that these goods are dissimilar.

[17] *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

Class 41

Gaming machine entertainment services; On-line gaming services; Providing games; Video game entertainment services; Administration [organisation] of poker games; Providing on-line video games; Electronic games services; Electronic games services provided via a global computer network; Electronic game services provided by means of the internet; Game services provided online from a computer network; Provision of on-line computer games; Providing on-line interactive computer games; Providing interactive multi-player computer games via the internet and electronic communication networks; Internet games (non-downloadable); Electronic games services provided from a computer database or by means of the internet; Providing a computer game that may be accessed by users on a global network and/or the internet; Provision of games by means of a computer based system; Games services provided via computer networks and global communication networks; Electronic games services, including provision of computer games on-line or by means of a global computer network; Conducting multiple player games of chance; Electronic games services provided by means of a global communication network; Gaming services for entertainment purposes; Online interactive entertainment; Provision of on-line entertainment; Providing multi-media entertainment via a website; Providing online entertainment in the nature of fantasy sports leagues; Entertainment services provided on-line from a computer database or the internet.

62. Despite the varied descriptions of all of the above terms, I am of the view that they all cover the provision of online games. As this is the service that is also covered by the opponent's class 41 service, being "interactive online video and computer games and competitions provided via the internet", I find that the above terms are all identical to the opponent's, be that self-evidently or under the principle outlined in *Meric*. Alternatively, if I am incorrect and some of the above services cannot be said to be for the provision of online games, then I consider them to be at least similar to a medium degree on the basis that they overlap in purpose, trade channels and user.

Providing of casino and gaming facilities; Gambling services; Casino, gaming and gambling services.

63. While the above services relate to casinos and gambling, the opponent's class 41 term is not limited in any way and can, therefore, be casino or gambling games. As a result, I find that the primary finding in the preceding paragraph applies here. Therefore, I find that these services are identical to the opponent's class 41 service, be that self-evidently or under the principle outlined in *Meric*.

Arranging of games; Arranging and conducting of games; Organising of educational games; Organisation of games and competitions; Administration [organisation] of gaming services.

64. All of the above are sufficiently broad so as to cover the arranging, organising and administration of online games. However, by their very nature, they are for the arranging, organising and administration of games and not for the actual provision of said games, being what is covered by the opponent's services. While the above differ in nature and method of use with the opponent's services, it can be said that there is a degree of overlap in end purpose. I say this because while the above services aim to arrange, organise or administer, their ultimate goal is to provide games to the consumer. Further, I consider that the undertaking that arranges, organises and administers games would also seek to provide the actual games. In respect of user, there is a degree of overlap also in that someone looking to arrange or organise games at a party, for example, is likely to also seek to play those games. As a result, I find that these services are similar to a medium degree.

Providing on-line information in the field of computer gaming entertainment; Providing information on-line relating to computer games and computer enhancements for games; Information relating to computer gaming entertainment provided online from a

computer database or a global communication network; Providing information to game players about the ranking of their scores of games through the web sites;

65. Given the nature of the above terms, I see no reason why the comparison I made at paragraph 60 above cannot be said to apply here. I say this because while the goods compared in that paragraph were downloadable, the provision of such information as a service would also share the same overlaps in trade channels and user as I have discussed above. Therefore, I find that the above services are similar to a low degree with the opponent's services.

Leasing of casino games; Rental of video games.

66. While the terms leasing and rental may imply the leasing or rental of physical games, I see no reason why it would not also cover games provided online (by way of something akin to a subscription, for example). It is my understanding that such a service would essentially be the provision of software as a service. This would result in the above terms being identical under the principle outlined in *Meric* with the opponent's term of "software as a service, namely the provision of interactive online video and computer games and competitions provided via the internet". That being said, if this is incorrect on the basis that the services cannot be similar by virtue of appearing in different classes, then I find that the services are similar to a high degree as they overlap in nature, method of use, purpose, trade channels and user.

Rental of slot machines [gaming machines]; Games equipment rental.

67. The above services clearly differ in nature, method of use and purpose with the opponent's services. As for trade channels, as far as I am aware, it is not common in the trade for online games providers to also rent slot machines or other gaming equipment. On this point, I note that I have nothing before me in evidence to suggest otherwise. As such, I am not willing to find that there is any overlap here

simply because both services relate to games, despite what I have said above in respect of the fact that the opponent's services can cover gambling. As for user, I do not consider it likely that the user who rents slot machines or equipment for games would also seek to use the opponent's online game services. As a result, I find that these services are dissimilar.

Educational and training services relating to games.

68. The above services differ in nature, method of use and purpose with the opponent's goods. While I appreciate that games, such as the online games provided by the opponent, may offer tutorials, I do not consider that this is an education or training service. As such, I am not necessarily convinced that the provider of the opponent's service would provide the above services simply because they relate to games. Further, I have no evidence to suggest otherwise. Lastly, in respect of users, I accept that there may be some overlap in those looking to play the opponent's games via a service may also seek education and training in respect of games, generally. That being said, I do not consider that an overlap in user alone is sufficient to give rise to a finding that the services are similar to any material degree. As such, I find them to be dissimilar.

Entertainment services provided by on-line streams; Entertainment in the nature of e-sports competitions.

69. While the above may involve the watching of video game streams, they are not the provision of video games and neither are they software as a service. That being said, despite being different in nature, method of use and purpose with the opponent's services, I do consider that there is a degree of similarity. This is because the services overlap in trade channels and user. I say this as, in my view, the provider of online games is likely to also seek to provide online streams of said games or competitions and those will be aimed at the same user as those who use

the opponent's services. As a result, I find that these services are similar to a low degree.

Multimedia entertainment software publishing services.

70. While the above services relate to games, they are software publishing services and, as far as I am aware, the provider of online games is unlikely to offer such services to customers. There is, therefore, no overlap in trade channels. Further, the services clearly do not overlap in nature, method of use or purpose. As for user, I do not consider that this overlaps either as the user of the above will be actual game providers and not the same end user that will play the opponent's games. As a result, I find that these services are dissimilar.

Class 42

Design and development of video game software; Development of hardware for video games; Design and development of computer game software and virtual reality software; Rental services relating to data processing equipment and computers; Advisory and consultancy services relating to computer and video games software; Design, development and programming of computer software; Advice relating to the development of computer systems; Programming of data processing equipment; Programming of video game software; Programming of computer game software; Database design and development; Research and development of computer software; Development of computer programs; Software design and development; Research relating to the development of computer programs and software; Video game development services; Video game software development; Computer rental; Design of games; Development of computer systems; Computer programming of computer games; Development of computer database software; Development of computer game software; Computer programming of video and computer games; Design and development of computer software architecture; Design and development of operating software for computer networks and servers; Computer software design; Design of

computer game software; Computer programming of video games; Development and maintenance of computer database software; Design, maintenance, development and updating of computer software; Development of computer platforms; Research, development, design and upgrading of computer software; Research relating to the development of computer software; Design and development of computer game software; Rental of […] data processing equipment and computer peripheral devices; Providing information in the field of computer software development; Software development; Video game software design; Development of data processing apparatus; Consultancy relating to the design and development of computer software programs; Hosting multimedia entertainment content.

71. All of the above services relate to the design and development of various products, mostly games. Even where the above services relate to video games, I see no reason why there exists any obvious degree of similarity with the opponent's services. I say this because, plainly, the services differ in nature, method of use and purpose. Further, I do not consider it likely that that the trade channels will overlap. I say this because while a game provider may design and develop its own games, it is my understanding that such undertakings do not offer such design/development services to third parties. On this point, I have nothing before me in evidence to suggest that such a practice is common in the trade to the point that it results in a sufficient degree of overlap here. As for user, I consider that the user of the above services will be producers of games and not the end user who actually plays the games. As such, these services do not overlap in user either. Lastly, while the design and development of games may be important to the games themselves, I do not consider that their relationship is such that would give rise to the existence of complementarity. As a result, I find that these services are dissimilar.

Platforms for gaming as software as a service [SaaS];

72. While categorised as a 'platform', the term is confirmed as being software as a service. As a result, I find that the above term encompasses the opponent's class 42 service meaning that they are identical under the principle outlined in *Meric*.

Rental of computer software.

73. It is my view that the rental of computer software can cover the rental of digital software provided online. This, in my view, is the same as software as a service meaning that the above term encompasses the opponent's class 42 service. These terms are, therefore, identical under the principle outlined in *Meric*. Alternatively, if I am wrong on this point then I find that these services are similar to a high degree on the basis that they overlap in nature, purpose, trade channels and user.

Conclusion of the goods and services comparison.

74. Under the present ground, a likelihood of confusion can only exist where there is at least some similarity between goods and services.[18] This means that as a result of my findings above, the present ground may only proceed against some goods and services. I do not intend to list those goods/services in their entirety here but, for the avoidance of doubt, the present ground fails against all of those goods and services that I have found to be dissimilar.

The average consumer and the nature of the purchasing act

75. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods/services. I must then decide the manner in which these goods and services are likely to be selected by the average

[18] *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA

consumer in the course of trade. 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. (as he then was) 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."

76. It is my view that the average consumer for the goods and services at issue consists of members of the general public at large, albeit the gambling related goods/service will be sought by those over the age of 18. The goods and services will be available either in physical stores or online. As for the gambling goods/services, these will be available either via online casinos or in physical ones. Regardless of where the goods/services are selected, the selection process will be primarily visual. That being said, I do not discount the aural component coming by way of word of mouth recommendations.

77. The goods and services at issue are broad enough that they may cover games that are bought at a reasonable cost or those that are provided for free online. On this point, I appreciate that some free games will be played as a result of a wager being put forward by the user. The degree of frequency with which the consumer selects the goods and services at issue will vary. I say this because the consumer base not only includes avid gamers who will play games frequently but more casual gamers who may play them on a far less frequent basis. In terms of the level of attention paid, this will, again, vary. I say this because for some consumers who are buying a game to play will pay attention to the content, the genre and the

features (whether it has online gameplay or even co-operative gameplay, for example). Such goods will be selected with a medium degree of attention. Alternatively, some games may be free and accessed via online downloadable platforms such as Apple's App Store, for example. When selecting such goods, the consumer will likely pay a lower (though not outright low) degree of attention due to the ease of access and the fact that they are free. In respect of the goods/services which involve gambling, I am of the view that this will not mean that the consumer pays any higher degree of attention than medium. This is on the basis that while consumers may be wagering their own money on the game, the decision to gamble would have already been made when the consumer was deciding on which game to play. In my view, consumers will simply consider the type of game (blackjack, online slots or poker, for example), the rules and the advertised odds.

Comparison of the marks

78. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

79. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

> "… it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the

light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

80. 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.

81. The respective trade marks are shown below:

The opponent's mark	The applicant's mark
EAZEGAMES	

82. I have submissions from both parties as to the similarity of the marks. While these are noted, I do not intend to reproduce them here but, for the avoidance of doubt, can confirm that I have given them due consideration.

Overall impression

83. The opponent's mark is a word only mark that, despite being presented as one word, will be viewed as the conjoining of the words 'EAZE' and 'GAMES'. For reasons that I will expand upon further below, I find that the words form a unitary meaning despite 'GAMES' being directly descriptive of the services at issue. As such, the overall impression of the mark lies across the words equally.

84. The applicant' mark is a figurative mark that consists of the word 'eeze' presented in purple and in a stylised, somewhat dissected typeface (namely a section of the horizontal line in the letter 'e' in the marks has been removed) with a figurative green and blue lightning bolt extending from the last letter 'e'. Protruding inwards

from that last letter is a short blue line, seemingly an extension of the lightning bolt. The letters 'ee' at the start of the mark and the 'ze' at the end are connected to one another. The word 'eeze' will play a stronger role in the overall impression of the mark on the basis that consumers are drawn to elements of marks that can be read. Saying that, given the meaning associated with 'eeze', which I will discuss further below, I find that the stylisation and the lightning bolt device will still both play considerable roles in the applicant's mark.

Visual comparison

85. Visually, the marks' similarity lies in their 'EAZE' and 'eeze' elements. These elements share three of four letters. On this point, I do not consider that the difference in their second letters will be overlooked. I say this because these elements are short and while there is no special test that applies to short marks,[19] I am of the view that in the present case, the shortness of the 'EAZE'/'eeze' elements means that the average consumer is more likely to notice the difference. Further, the stylisation used in the applicant's mark is not, in my view, covered by the fair and notional use of word only marks. As such, it acts as a point of visual difference between the marks. The marks also differ in the lightning bolt device in the applicant's mark and the word 'GAMES' in the opponent's. Regardless of the role that these different elements play in their respective marks, they are still points of visual difference. Lastly, I appreciate that the points of similarity sit towards the beginnings of the marks and I remind myself that beginnings of marks tend to have more visual impact than their ends.[20] However, in the present case, it cannot be said that the beginnings are identical as, to do so, would ignore the fact that the second letter in the marks is different. Overall, find that the marks are visually similar to a medium degree.

[19] See paragraph 44 of *BOSCO*, BL O/301/20
[20] On this point I remind myself of *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02 which sets out that beginnings of marks tend to have more impact than end

Aural comparison

86. In considering the opponent's mark, I remind myself that just because an element of a mark may be descriptive, it does not render it aurally invisible.[21] As such, I find that the opponent's mark will be pronounced in full. In respect of the 'EAZE' element, I consider that it will either be pronounced as 'EASE' or 'EASY'. I make the latter finding because I consider that some consumers may break 'EAZE' down into two syllables, being 'EAZ-E'. Therefore, I find that the opponent's mark will be pronounced as either 'EASE GAMES' or 'EASY GAMES', being two and three syllables in length, respectively. Following the same reasoning set out above, the applicant's mark will be pronounced as either one or two syllables, being 'EASE' or 'EASY'. In considering the comparison of these marks, they are aurally short marks and while there is no special test which applies to the comparison of 'short' marks, I find that the shortness of the marks at issue means that the average consumer is more likely to notice the differences. As a result, I consider that the word 'GAMES' acts as a point of difference.[22] Overall, I find that these marks are aurally similar to a medium degree.

Conceptual comparison

87. Conceptually, I consider that the word 'EAZE' will be recognised by a majority of average consumers to be a play on or a deliberate misspelling of the words 'EASE' or 'EASY'.[23] I say this because the word closely resembles these words, especially due to the way in which the letter 'S' in 'EASE' and 'EASY' is pronounced similarly to the letter 'Z', therefore reinforcing this impression. In support of this finding, I remind myself that it is established that consumers will seek to attribute meaning to words that resemble words known to them.[24] I find that the connection to these

[21] *Purity Hemp Company Improving Life as Nature Intended* (Case BL O/115/22)
[22] For the avoidance of doubt, I find that regardless of whether consumers pronounce 'EAZEGAMES' as 'EASY GAMES' or 'EASE GAMES', those same consumers are likely to pronounce 'eeze' in the same way.
[23] I appreciate that some consumers may not make this connection but, in my view, these consumers do not constitute a significant proportion of consumers.
[24] *RESPICUR*, T-256/04, EU:T:2007

words will be clearly understood by the consumer as referring to something that is not difficult or that requires little effort. This means that, when viewed as a whole, 'EAZEGAMES' will be viewed as a reference to games that are easy to play or complete. For the avoidance of doubt, this is the basis for my finding above wherein I concluded that the overall impression of this mark lied equally across both words, despite 'GAMES', solus, being descriptive.

88. As for the applicant's mark, I consider that the same finding made above in respect of 'EAZE' will apply to 'eeze', though I appreciate that there will be no direct reference to what is being referred to as easy, as was the case with the opponent's mark. Regardless, the idea that the goods/services at issue will be easy to use remains.[25] As this is the only element capable of carrying a concept, this is the ultimate concept of the applicant's mark.

89. In comparing the marks, the words 'EAZE' and 'eeze' are a point of conceptual identity despite their difference in spelling. That being said, the opponent's reference to 'GAMES' acts as a point of conceptual difference. While I accept that this is descriptive, it does give clarity as to what is being referred to as 'easy'. This connection is missing in the applicant's mark and, as such, I do consider it to be a point that offsets the identity of 'EAZE' and 'eeze'. Overall, I find that these marks are conceptually similar to a medium degree due to the shared reference to something being easy.

Distinctive character of the opponent's mark

90. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

[25] I consider that the reference to something being 'easy' carries a weaker distinctive character and, for the avoidance of doubt, it is the association with this meaning that let me to conclude that the figurative element and stylisation used in the applicant's mark still carried considerable weight in the mark as a whole.

"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)."

91. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of marks can be enhanced through use, and I note that the opponent has filed evidence of use. I will, therefore, consider whether the opponent's evidence is sufficient to give rise to a finding that the distinctiveness of the opponent's mark has been enhanced through use. Before doing so, I will consider the inherent position.

92. As set out above, the opponent's mark will be viewed as the conjoining of two words, being 'EAZE' and 'GAMES'. Plainly, the word 'GAMES' is descriptive of the fact that the opponent's services relate to games. As for the word 'EAZE', this will be seen as a play on or deliberate misspelling of the words 'EASE' or 'EASY'. I would ordinarily conclude that the word 'easy' was non-distinctive due to the fact that it is clearly understood by the consumer as referring to something that is not difficult or that requires little effort. However, in the present case, the misspelling to 'EAZE' adds a degree of distinctiveness to the word. That being said, the distinctiveness of the same would still be low as it would still readily be viewed as a reference to something being easy. When viewed as a whole, the opponent's mark will be understood as a reference to games that are easy to play or complete. Such a meaning will be viewed as heavily allusive to the services relied upon. In light of this, I find that the opponent's mark benefits from only a low degree of inherent distinctive character.

93. I turn now to consider whether the opponent's mark benefits from an enhanced degree of distinctive character in the eyes of consumers in the UK. I have summarised the evidence of the opponent at paragraphs 26 to 37 above. I do not intend to reproduce that evidence here. I remind myself that the evidence was sufficient to warrant a finding of genuine use. However, I remind myself that the requirement for a finding of an enhanced distinctive character is considerably more onerous than that of genuine use. I say this on the basis that use need not be quantitatively significant in order for it to be genuine, whereas distinctive character is a measure of how strongly the mark identifies the goods/services of a single undertaking. It follows that a finding of an enhanced degree of distinctive character requires use at such a level that is capable of pointing to the fact that a proportion of consumers would identify the goods and services as originating from a particular undertaking. Put simply, that has not been demonstrated here. Even at its highest point, the opponent's evidence covers a total turnover of approximately

€883,900.50 in the EU and UK over a 6-year period,[26] with just 54,000 total players in the UK during that same time frame. These are not significant figures by any means, especially in light of the size of the relevant market. In addition, I note that the present assessment is based on the knowledge of the UK consumer meaning that the total figure provided above is not wholly applicable here and, based on a calculation that 5% of the turnover provided covers the UK, this renders the opponent's turnover between 2018 and 2023 to just €611,446.20.

94. In short, I consider that the evidence filed falls far short of demonstrating that the UK consumer, as at the relevant date, possessed any level of knowledge of the opponent's mark to the point that it could be said that it benefits from an enhanced degree of distinctive character. Therefore, I find that the inherent position applies.

Likelihood of confusion

95. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier registrations, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the

[26] This figures includes the 2018 turnover which was not relevant to the genuine use assessment above.

opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

96. I have found the goods and services at issue to be identical or similar to varying degrees, including low. The average consumer base is formed of members of the general public who will select the goods and services via primarily visual means (though not discounting an aural component) whilst paying either a lower or a medium degree of attention. In respect of the similarity of the marks, I have found the applicant's mark is visually, aurally and conceptually similar to a medium degree. Lastly, I found the opponent's mark to be inherently distinctive to a low degree.[27]

97. Taking all of the above factors into account and even bearing in mind the principle of imperfect recollection, I do not consider that the marks at issue will be misremembered or inaccurately recalled for one another. While the marks share visual, aural and conceptual similarities, I do not consider that the consumers would overlook the stylistic differences between the marks or the word 'GAMES', despite its descriptive nature. I make the latter point due to the fact that the opponent's mark forms a unit so the reference to something being easy will be attributed to easy games. As set out above, the stylisation of the applicant's mark is not covered by the fair and notional use of word only marks so will not go overlooked. In addition, the common element between the marks is a shared reference to the words 'ease' or 'easy', albeit spelt differently. On this point, I have set out above that the difference in spelling would not go unnoticed. This is particularly the case given the fact that this element is an unremarkable reference to something being 'easy' which would, ordinarily, be non-distinctive. Here though, I remind myself that the distinctiveness of 'EAZE' lies more so in its misspelling and not its conceptual reference to 'ease' or 'easy'. As such, I fail to see why consumers would misremember the marks for one another solely due to their

[27] On this point, I remind myself that a weak distinctive character does not preclude a likelihood of confusion. See *L'Oréal SA v OHIM*, Case C-235/05 P

common reference to the concept that the goods/services at issue are easy to use. Consequently, I do not find that there exists a likelihood of direct confusion between the marks at issue, even when viewed on identical services or in circumstances wherein the consumer is paying a lower degree of attention.

98. I will now proceed to consider indirect confusion. In doing so, I remind myself of the case of *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, wherein Mr Iain Purvis Q.C., as the Appointed Person, explained that:

> "16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually 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'.
>
> 17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:
>
> (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ('26 RED TESCO' would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as 'LITE', 'EXPRESS', 'WORLDWIDE', 'MINI' etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)".

99. While the above examples in *L.A. Sugar* are noted, they are not intended to be treated as an exhaustive list of the only instances whereby indirect confusion occurs.

100. Further, I note the case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, wherein Arnold LJ referred to the comments of James Mellor Q.C. (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at paragraph 16 that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

101. In considering the issue of indirect confusion, it is clear to me that the shared reference to 'ease' or 'easy' is not so distinctive that consumers would believe that only one undertaking would use it, especially given that the misspellings of said words are not identical across the marks, being 'EAZE' in the opponent's mark and 'eeze' in the applicant's. On the contrary, I am of the view that a shared reference to the idea that the goods/services at issue are easy to use would be viewed as coincidental. Following on from this point, I see no reason why consumers would view the opponent's mark and believe that the undertaking responsible for the

same would re-brand itself so as to adopt a different spelling of the word 'EAZE' (being 'eeze'), and vice versa. I say this because, instead, consumers would simply view the parties' marks as those originating from economically unconnected undertakings, both of which are purporting to offer easy to use goods/services, a concept that while shared, is entirely unremarkable. Consequently, I do not consider that there exists a likelihood of indirect confusion between the marks, even when viewed on identical services or in circumstances where the consumer pays a lower degree of attention.

102. The present ground fails in its entirety and I will now proceed to consider the remaining grounds of opposition.

Section 5(3)

103. Section 5(3) of the Act states:

> "5(3) A trade mark which –
>
> > is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark."

104. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors,* Case 252/07, *Intel,* Case C-408/01, *Adidas-Salomon,* Case C-487/07, *L'Oreal v Bellure,* Case C-323/09, *Marks and Spencer v Interflora,* Case C383/12P, *Environmental Manufacturing LLP v OHIM.* The law appears to be as follows:

(a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Salomon*, paragraph 29 and Intel, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel*, paragraph 42

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; Intel, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel*, paragraphs 76 and 77 and *Environmental Manufacturing*, paragraph 34.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel*, paragraph 74.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV*, paragraph 40.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the holder of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure*).

105. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that the marks at issue are similar. Secondly, the opponent must show that its mark has achieved a level of knowledge/reputation amongst a significant part of the public throughout the relevant territory. Thirdly, it must be established that the level of reputation and the similarities between the parties' marks will cause the public to make a link between them. Finally, assuming the first three conditions have been met, section 5(3) requires that one or more of the types of damage will occur. It is

unnecessary for the purposes of section 5(3) that the goods or services be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

Reputation

106. I have assessed the opponent's evidence of use at paragraphs 26 to 37 above. I do not intend to repeat this evidence in full here but taking into account the fact that the 2018 turnover is relevant here, the opponent's total relevant turnover by the relevant date stood at €883,900.50[28] for the EU prior to IP Completion Day and the UK thereafter. Over six years, this is clearly a low level of turnover, especially given that the relevant market pertains to video games and the size of the relevant market. The same can be said to apply to the advertising spend which, when considering it as a whole, covers just €338,949 over the seven year period of 2017 to 2023 (being both the pre-IP Completion Day EU spend and the total UK spend together). As was the case with enhanced distinctive character, the present assessment of a reputation is far more onerous than that for genuine use as the use does need not be quantitively significant in order for it to be genuine whereas a finding of a reputation requires that the marks relied upon are known by a significant part of the relevant public in the relevant territory. Given that the size of the relevant territory and the relevant market, it is clear to me that the use before me is just at too low a level to warrant the existence of a reputation. As a result, I find that the present ground falls at the first hurdle.

Section 5(4)(a)

107. Section 5(4)(a) of the Act states as follows:

[28] This takes into account the opponent's confirmation that approximately 5% of the total turnover shown relates to the UK. This applies to 2021 to 2023 only.

"5(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -

a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

aa)…

b) …

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of "an earlier right" in relation to the trade mark".

108. Subsection (4A) of section 5 of the Act states:

"(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application."

109. I consider that I can deal with this ground briefly. I say this because based on the evidence before me (which I have discussed at paragraphs 26 to 37 above), I find that there exists a level of protectable goodwill in the opponent's business in respect of the same services for which there exists genuine use. Further, I find that the opponent's signs are distinctive of and/or associated with that goodwill. That being said, the level of goodwill is only minimal due to the fact that the use before me is far from significant.

110. However, under the 5(2)(b) ground, I found there to be no likelihood of confusion between the parties' marks, even when viewed on identical services. In

assessing the present ground, I remind myself of the case of *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, wherein Kitchin LJ set out that it was doubtful whether the difference between the legal tests for likelihood of confusion and misrepresentation will (all other factors being equal) produce different outcomes. Because the opponent's sign is identical to the mark relied upon under the section 5(2)(b) ground, I am of the view that this principle applies here. As such, I find that there exists no misrepresentation under the present ground for the same reasons as set out at paragraphs 97 to 101 above and especially due to the low distinctiveness of the similar 'eeze' and 'EAZE' elements. Without a finding of misrepresentation there can be no damage, meaning that this ground of opposition fails in its entirety.

CONCLUSION

111. The opposition fails in its entirety and the applicant's mark will, subject to any successful appeal of my decision, proceed to registration for all of the goods and services applied for.

COSTS

112. The applicant has succeeded in defending its application. It is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the applicant the sum of £1,200 as a contribution towards its costs. The sum is calculated as follows:

Considering a notice of opposition and preparing a counterstatement:	£250
Considering the opponent's evidence:	£600

Filing submissions in lieu:	£350
Total:	**£1,200**

113. I hereby order Eazegames IE B.V. to pay Tain Malta Limited the sum of £1,200. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 21st day of January 2026

A COOPER
For the Registrar

Annex 1

Class 9

Electronic game software for mobile phones; Software; Interactive multimedia software for playing games; Computer programmes for interactive television and for interactive games and/or quizzes; Computer gaming software; Computer video game software; Electronic publications, downloadable, relating to games and gaming; Apparatus for the processing of images; Downloadable information relating to games and gaming; Software programs for video games; Interactive multimedia computer game programs; Application software for mobile phones; Computer game software for use on mobile and cellular phones; Computer software applications, downloadable; Electronic data processing equipment; Computer games programmes downloaded via the internet [software]; Downloadable computer games; Software for smartphones; Data processing apparatus; Computer software that permits games to be played; Data processing equipment and accessories (electrical and mechanical); Downloadable electronic game programs; Computer programs for video and computer games; Computer game software, downloadable; Electronic game software for handheld electronic devices; Downloadable video game programs; Downloadable software; Apparatus for electronic payment processing; Computer software for the administration of on-line games and gaming; Computer graphics software; Entertainment software; Games cartridges for use with electronic games apparatus; Computer hardware for games and gaming; Computer programs for pre-recorded games; Computer game software for use with on-line interactive games; Downloadable application software for smartphones; Data processing equipment; Computer application software featuring games and gaming; Virtual reality game software; Video game programs; Mobile software; Video game cartridges; Gaming software that generates or displays wager outcomes of gaming machines; Audio processing apparatus; Interactive entertainment software; Interactive entertainment software for use with personal computers; Interactive entertainment computer software for video games.

Class 41

Arranging of games; Gaming machine entertainment services; On-line gaming services; Providing games; Video game entertainment services; Arranging and conducting of games; Administration [organisation] of poker games; Casino, gaming and gambling services; Games equipment rental; Providing on-line video games; Electronic games services; Electronic games services provided via a global computer network; Electronic game services provided by means of the internet; Organising of educational games; Game services provided online from a computer network; Provision of on-line computer games; Rental of video games; Providing on-line interactive computer games; Providing on-line information in the field of computer gaming entertainment; Providing of casino and gaming facilities; Gambling services; Multimedia entertainment software publishing services; Providing interactive multi-player computer games via the internet and electronic communication networks; Internet games (non-downloadable); Leasing of casino games; Electronic games services provided from a computer database or by means of the internet; Providing a computer game that may be accessed by users on a global network and/or the internet; Educational and training services relating to games; Rental of slot machines [gaming machines]; Providing information on-line relating to computer games and computer enhancements for games; Provision of games by means of a computer based system; Games services provided via computer networks and global communication networks; Administration [organisation] of gaming services; Electronic games services, including provision of computer games on-line or by means of a global computer network; Organisation of games and competitions; Conducting multiple player games of chance; Electronic games services provided by means of a global communication network; Information relating to computer gaming entertainment provided online from a computer database or a global communication network; Gaming services for entertainment purposes; Providing information to game players about the ranking of their scores of games through the web sites; Online interactive entertainment; Provision of on-line entertainment; Entertainment services provided by on-line streams; Providing multi-media entertainment via a website; Entertainment in the nature of e-sports competitions; Providing online entertainment in the nature of

fantasy sports leagues; Entertainment services provided on-line from a computer database or the internet.

Class 42

Design and development of video game software; Development of hardware for video games; Design and development of computer game software and virtual reality software; Rental services relating to data processing equipment and computers; Advisory and consultancy services relating to computer and video games software; Design, development and programming of computer software; Advice relating to the development of computer systems; Programming of data processing equipment; Programming of video game software; Programming of computer game software; Database design and development; Research and development of computer software; Development of computer programs; Software design and development; Research relating to the development of computer programs and software; Video game development services; Video game software development; Computer rental; Design of games; Platforms for gaming as software as a service [SaaS]; Hosting multimedia entertainment content; Development of computer systems; Computer programming of computer games; Development of computer database software; Development of computer game software; Computer programming of video and computer games; Design and development of computer software architecture; Design and development of operating software for computer networks and servers; Computer software design; Design of computer game software; Computer programming of video games; Development and maintenance of computer database software; Design, maintenance, development and updating of computer software; Development of computer platforms; Research, development, design and upgrading of computer software; Research relating to the development of computer software; Design and development of computer game software; Rental of computer software, data processing equipment and computer peripheral devices; Providing information in the field of computer software development; Software development; Video game software design; Development of data processing apparatus; Consultancy relating to the design and development of computer software programs.

Annex 2

Class 35

Advertising, business management and consultancy relating thereto; Business administration; Office functions; Advertising and promotion; Business mediation related to the purchase and sale of goods and services; Business mediation in relation to e-commerce via virtual marketplaces (online shops and communities) for bringing together supply and demand relating to online video and computer games on electronic media, in particular on the internet and mobile devices; Presentation of goods and services on communication media; Mediation in the establishment of business contacts via the Internet (public relations); Providing of consumer information, namely price and order information, compilations, rankings, ratings, reviews, references and recommendations in relation to suppliers of online video and computer games on electronic media; Dissemination of advertisements for others via an online electronic communications network; Providing of advertising space, whether or not on-line; Loyalty, incentive and bonus programmes, including arranging, managing and implementing customer loyalty schemes and office functions for loyalty schemes based on discounts or incentives; Information and consultancy relating to the aforesaid services; Including all the aforesaid services provided via electronic channels, such as the Internet.

Class 38

Telecommunications via electronic computer and video games; Providing user access to the internet (services providers); Email data services, Transmission of electronic mail; Providing internet chatrooms; Electronic communication by means of chatrooms, chat lines and Internet forums; Providing access to e-commerce platforms on the Internet; Providing access to digital networks and platforms; Information and consultancy relating to the aforesaid services; All the aforesaid services whether or not via electronic channels, including the Internet.

Class 41

Interactive online video and computer games and competitions provided via the internet; Entertainment; Online interactive entertainment; Production and providing of interactive online video and computer games via computer networks and global communications networks; Organisation of events in the field of interactive online video and computer games; Organisation of tournaments and competitions involving interactive online video and computer games; Organisation of contests involving interactive online video and computer games; Information and consultancy relating to the aforesaid services; Including all the aforesaid services provided via electronic channels, including the internet.

Class 42

Software as a service; computer platform as a service (PaaS); Providing of computer software for competitions involving interactive online video and computer games; Providing of computer software for online banking, online bank services, financial transaction management, financial planning, and monitoring and managing expenses and costs; Providing of payment software; Providing of computer software for sending and receiving chat, e-mail and push messages; Computer software design, development, maintenance, implementation, testing and updating; Providing temporary use of non-downloadable online computer software for managing, uploading, sharing and storing data, information, images, graphics, audio, video and text; Design of searchable information indexes, websites and other information sources; Providing the use of a non-downloadable computer interface for providing information relating to the supply and demand of interactive online video and computer games; Technical consultancy and support in relation to interactive online video and computer games; Information and consultancy relating to the aforesaid services; The aforesaid services also via electronic channels, including the Internet.