BL O/0904/23

TRADE MARKS ACT 1994

IN THE MATTER OF

TRADE MARK APPLICATION No. 3722496

BY

PLAY’N GO MARKS LTD

TO REGISTER THE TRADE MARK:

EYE OF ATUM

IN CLASSES 9 AND 41

-AND-

THE OPPOSITION THERETO UNDER No. 431489

BY

ADP MERKUR GMBH

Background and pleadings

1. Play'n GO Marks Ltd (**"the Applicant"**) applied to register the trade mark 'EYE OF ATUM' in the UK on 17 November 2021.[1] It was accepted and published in the Trade Marks Journal on 3 December 2021. The goods and services for which registration is sought are:

Class 9

Computer games and video games (apps and software), hereunder apps and software for slot machine games, betting and wagering games, video slot games, casino games, games of chance and bingo games provided online and via computer networks and playable on any type of computing device including arcade games, personal computers, handheld devices and mobile phones; apps and software for games with monetary or non-monetary prizes; software for slot machine games, betting and wagering games, video slot games, casino games, games of chance and bingo games provided online and via computer networks and playable on any type of computing device including arcade games, personal computers, handheld devices and mobile phones.

Class 41

Games services provided online (via computer networks), hereunder providing slot machine games, betting and wagering games, video slot games, casino games, games of chance, games with monetary or non-monetary prizes and bingo games, playable via local or global computer networks; online gaming services; entertainment services, namely, conducting a game of chance simultaneously at multiple, independent gaming establishments; entertainment services, hereunder providing online computer games; prize draws [lotteries]; organising and conducting lotteries; Services for the operation of computerised bingo.

[1] The Applicant claims priority from a European Union Trademark (Number 18602776), which has the same filing date as its UK application i.e. 17 November 2021.

2. On 2 March 2022, adp Merkur GmbH (**"the Opponent"**)[2] opposed the application on the basis of section 5(2)(b) of the Trade Marks Act 1994 (**"the Act"**). The opposition is directed at all the applied-for goods and services.

3. The opposition is based on the Opponent's earlier word mark 'Eye of Horus',[3] which is a comparable UK trade mark (EU),[4] and is registered in respect of goods and services in Classes 9, 28 and 41. Details of the Opponent's registration are below:

Registration Number:	908687642
Filing Date:	16 November 2009
Registration Date:	24 May 2010

4. For the purposes of this opposition, the Opponent relies on all the goods and services for which its earlier mark is registered (these are laid out in their entirety at my paragraph 25), they include, inter alia:

(1) a variety of games hardware and software in Class 9, including the following terms:

"video games adapted for use with external screens or monitors only; computer game software; hardware and software for casino and amusement arcade games, for gaming machines, slot machines or video lottery gaming machines or games of chance via the Internet";

(2) a variety of games in Class 28, including the following terms:

"Games (including games of chance); gaming apparatus (including coin-operated apparatus); coin-operated arcade games (machines); casino games, gaming machines and games machines, in particular for commercial use in casinos and amusement arcades, with or without a prize payout, or prize games via the Internet"; and

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[2] Subsequent to the filing of the notice of opposition, the Opponent changed its name from to 'adp Gauselmann GmbH' to 'adp Merkur GmbH'. This is why the parties' evidence and submissions continue to refer to the Opponent as 'adp Gauselmann GmbH'.
[3] The Opponent's mark is an earlier trade mark in accordance with section 6 of the Act.
[4] Following the end of the transition period of the UK's withdrawal from the EU, all EU trade marks ("EUTM") registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A 'comparable trade mark (EU)' retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

(3) a variety of Class 41 services, including the following terms:

"gaming services; operating of lotteries; operating gaming establishments, amusement arcades and/or online Internet casinos and betting platforms".

5. The Opponent claims that the respective marks are similar and that the respective goods and services are identical and/or similar, giving rise to a likelihood of confusion. With regard to the similarity of the marks, the Opponent claims that they are similar on the basis that the words 'EYE OF', are contained in, and appear at the beginning of both marks, and that it is that part of each mark which the consumer is likely to recall. Indeed, it contends that the average consumer may not immediately be able to make a distinction between 'HORUS' and 'ATUM' on the basis that they are unfamiliar names and may not be easily retained in the mind of the average consumer, as a result they may be imperfectly recollected.

6. As the Opponent's trade mark had been registered for more than five years at the filing date of the application, the Opponent made a statement that it has used its mark during the relevant period, in relation to all of the goods and services relied on.

7. The Applicant filed a counterstatement denying the claims made and put the Opponent to proof of use of the earlier mark in relation to all the goods and services relied on. With regard to the comparison of the respective marks, the Applicant submits that whilst they *"share a common beginning, the final words are completely different and allow the marks to be differentiated".*[5]

8. Both parties filed submissions and evidence during the evidence rounds of these proceedings. The Opponent also filed submissions and evidence in reply. No hearing was requested, rather both parties elected to file submissions in lieu of a hearing.

9. The Applicant submits that the evidence filed by the Opponent is not sufficient to show that the earlier registration has been put to genuine use.

10. I have taken all of the evidence and submissions into account therefore I make this decision following a careful consideration of the papers before me.

[5] See the Applicant's Form TM8, 'Notice of Defence and Counterstatement', dated 20 May 2022.

11. The Opponent is represented by Dr Walther Wolff & Co, and the Applicant is represented by Appleyard Lees IP LLP.

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

Preliminary issue

The Opponent's Class 41 specification

13. The Opponent's Class 41 specification includes the term: *"games on the Internet"*. These are goods rather than services. It is apparent that this is an error that was not identified at the examination stage. Having regard to the Opponent's other Class 41 terms (such as *"gaming services; operating of lotteries; online game services (of a computer network)"*), and having regard to the context of Class 41 services, this term should be read as *"**operating of** games on the Internet"*, and I shall proceed on this basis.

EVIDENCE

14. The Opponent's evidence in chief is provided in the witness statement of Valentine Kohl, dated 31 August 2022. The witness is the Opponent's 'Head of Intellectual Property'. Attached to the witness statement are thirty-eight exhibits labelled VK1 to VK38. The majority of the Opponent's evidence in chief goes to 'proof of use' of the earlier mark; some exhibits relate to reviews of the 'Eye of Atum' game, which the Opponent has filed to support its submissions in relation to a likelihood of confusion, on the basis that these exhibits purport to demonstrate that the reviewers believe that the game 'Eye of Atum' is an intentional copy of the Opponent's 'Eye of Horus' game, both games being referred to in the reviews as 'Egyptian-themed' games.

15. The Applicant's evidence is provided in the witness statement of Beverley Robinson, dated 12 December 2022. The witness is a 'Senior Associate and Chartered Trade Mark Attorney' at Appleyard Lees IP LLP – the Applicant's representatives in these proceedings. Her witness statement presents five exhibits

labelled as BR1 to BR5. The exhibits consist of: online articles to support the Applicant's assertion that 'Egyptian mythology' is a popular theme in the gaming industry; UK trade mark registrations containing the term 'eye of' in the same classes at issue in these proceedings; and further exhibits purport to show active use of the term 'eye of' in the name of various casino slot games on the market.

16. The Opponent's evidence in reply is provided in the witness statement of David Neville Peters, dated 23 March 2023. The witness is a 'Chartered Patent Attorney and Registered Trade Mark Attorney' of Dr Walther Wolff & Co – the Opponent's representatives in these proceedings. Attached to the witness statement is one exhibit labelled DNP1. His evidence goes to support the Opponent's submissions in relation to the *"adequacy"* of certain parts of the Applicant's evidence.

PROOF OF USE

Legislation and case law

17. The relevant provisions of the Act are as follows:

Section 6A

(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.

[...]

(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.

Schedule 2A (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—[6]

(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

[6] I note that 'IP Completion Day' (i.e. 'Implementation Period' Completion Day) is defined by section 39(1) of the European Union (Withdrawal Agreement) Act 2020, as meaning the 31 December 2020 at 11:00pm.

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

<u>Section 100</u>

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.

18. The law relating to genuine use of a registered trade mark was summarised by Arnold J (as he then was), in *Walton International Ltd & Anor v Verweij Fashion BV.*[7] This summary includes, inter alia, that genuine use means actual use of the trade mark by the proprietor or a third party (with the authority to use the mark) and that such use must be by way of real commercial exploitation of the mark on the market, for the relevant goods or services, sufficient to create or maintain a market share for those goods or services.[8] The use must be more than merely token although there is no *de minimis* rule in relation to genuine use, and it is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use. The use must be consistent with the essential function of a trade mark which includes for example, affixing the mark to the relevant goods in order to guarantee to the consumer that the goods come from a single undertaking which controls the manufacture of those goods, and which is responsible for their quality.

19. In determining whether there is real commercial exploitation of the mark, all the relevant facts and circumstances must be taken into account, which include: (1) 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; (2) the nature of the goods or services; (3) the characteristics of the market concerned; (4) the scale and frequency of use of the mark; (5) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (6) the evidence that the proprietor is able to provide; and (7) the territorial extent of the use.

[7] [2018] EWHC 1608 (Ch), paragraphs 114 and 115 detail the summary in full.
[8] 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.

20. The genuine use provision is not there to assess economic success or large-scale commercial use;[9] rather, it is concerned with the sort of use that is appropriate in the economic sector concerned for preserving or creating market share for the relevant goods and services.

21. The onus is on the Opponent to have filed evidence of genuine use of its mark. I must consider what the evidential picture as a whole shows me, not whether each piece of evidence shows use by itself.[10]

Relevant period and territorial scope

22. The 'proof of use' period is the period of five years ending on the filing date of the opposed application or (where applicable) the date of the priority claimed for that application.[11] In these proceedings, the relevant 'proof of use' period is therefore **18 November 2016 to 17 November 2021**.

23. Given that the earlier mark is a comparable mark (EU) and that part of the relevant five year period for genuine use falls before IP Completion Day, the Opponent may rely on evidence of use in the EU (including the UK) dated between 18 November 2016 and 31 December 2020; and from the 1 January 2021 to 17 November 2021 on evidence relating solely to use in the UK.[12]

24. As regards the territorial scope of the use of an EUTM, I note the observations of the Court of Justice of the European Union in *Leno Merken BV v Hagelkruis Beheer BV*,[13] in particular, that use of an EUTM in the territory of a single member state of the EU, might satisfy the use conditions for genuine use of an EUTM.[14]

The Opponent's evidence in chief – 'proof of use'

25. The Applicant has put the Opponent to proof of use of the goods and services

[9] *MFE Marienfelde GmbH v OHIM*, Case T-334/01.
[10] *New Yorker SHK Jeans GmbH & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-415/09, paragraph 53.
[11] Section 6A(1A) of the Act.
[12] See Tribunal Practice Notice 2/2020, paragraph 4.
[13] Case C-149/11, paragraphs 36, 50 and 55.
[14] See words to that effect, Ibid. paragraph 50.

relied on in this opposition, they are as follows:

Class 9
Automatic vending machines, automatic distribution machines, reverse vending machines and juke boxes (coin-operated), and parts for the aforesaid automatic machines; automatic cash dispensers, automatic money counting and money changing machines; mechanisms for coin-operated apparatus; video games adapted for use with external screens or monitors only; computer game software; games software for use on any computer platform, including electronic entertainment and games consoles; apparatus for recording, transmission, processing or reproduction of data, including sound or images, including parts for all the aforesaid goods, except radio sets, television receivers, hi-fi systems, video recorders, telephone apparatus, fax machines and telephone answering machines; hardware and software for casino and amusement arcade games, for gaming machines, slot machines or video lottery gaming machines or games of chance via the Internet; electric, electronic, optical or automatic apparatus, for identifying data carriers, identity cards and credit cards, bank notes and coins; electric, electronic or optical alarm and monitoring installations, including video cameras and apparatus for image transmission and image processing; electric wiring harnesses; circuit boards, printed board assemblies (electronic components) and combinations thereof being assemblies and equipment parts, included in class 9.
Class 28
Games (including games of chance); toys; gaming apparatus (including coin-operated apparatus); coin-operated arcade games (machines); games for amusement arcades (included in class 28); coin-operated video gaming apparatus; casino fittings, namely roulette tables, roulette wheels; coin-operated automatic gaming machines and gaming machines, in particular for gaming arcades, with or without a prize payout; electronic or electrotechnical gaming apparatus, gaming machines, games machines and slot machines operated by coins, tokens, banknotes, tickets or by means of electronic, magnetic or biometric storage media, in particular for commercial use in casinos and amusement arcades, with or without a prize payout; casino games, gaming machines and games machines, in particular for commercial use in casinos and amusement arcades, with or without a prize payout, or prize games via the Internet; coin-operated gaming machines and/or electronic money-based gaming apparatus (machines), with or without prizes; housings adapted for gaming machines, gaming apparatus and automatic gaming machines, operated by means of coins, tokens, tickets or by means of electronic, magnetic or biometric storage media, in particular for commercial use in casinos and gaming arcades, with or without a prize payout; video output game machines; drawing apparatus for prize games and lotteries, draws or raffles; Apparatus for games (including video games), other than adapted for use with external screens or monitors only; electric, electronic or electromechanical apparatus for bingo games, lotteries or video lottery games and for betting offices, networked or unnetworked; electropneumatic and electric pulling machines (gaming machines); games tables, in particular for table football; quoits and darts; hand-held units for playing electronic games; automatic gaming machines; including all the aforesaid automatic machines, machines and apparatus operating in networks; apparatus and devices for accepting and storing money, being fittings for the aforesaid automatic machines, included in class 28.

Class 41
Rental of automatic slot machines and entertainment machines for casinos; arranging and conducting games; gaming services; operating of lotteries; games on the Internet; on-line game services (of a computer network); providing casino facilities (gambling), betting offices; operating gaming establishments, amusement arcades and/or online Internet casinos and betting platforms.

26. The Opponent's witness, Valentine Kohl, recounts the professional career of Paul Gauselmann – who is referred to as the founder of 'adp Gauselmann GmbH' – and the origins of the company (which is based in Germany). The witness explains that the company (i.e. the Opponent) has its roots in the gaming/ gambling industry, including arcades and casinos and the development and distribution of entertainment machines with cash prizes, casino slot machines and lottery terminals, in addition to server-based gaming systems for example.

27. The witness concludes the history and background of the company by stating that the Opponent and its group predecessors have been operating in the field of gaming for more than 50 years, and that a subsidiary of the Opponent (being Merkur Group UK) *"operates a total of 177 high street entertainment centres"* in the UK.

28. The witness asserts that the earlier mark has been used (my underlining, for clarity):

> *"primarily in relation to a computer game which can either be part of a games package which is installed in gaming machines (for example, arcade and casino slot machine) or is available to be played at, for example, casinos and amusement arcades, or online via gaming, betting and gambling websites etc. as well as by way of applications installed on mobile devices"*; and that *"the 'Eye of Horus' game is installed in a number of games packages, such as, for example: Merkur Multi VIII; Merkur Multi VIII Deluxe;* […] *Magie III DeLuxe 2016;* [and] *Merkur Magie 2012/1 Deluxe* […]*"* to name a few.

29. The witness continues by stating that *"these games packages are sold, rented, leased or licensed to customers. In addition, games machines themselves can also be leased to customers."*

30. An example of imagery of a 'game package' interface is as follows:[15]

31. The witness further asserts that the earlier mark has been used in *"inter alia, Germany since 2011, the United Kingdom since December 2017 and the Czech Republic since 2019".* Produced in evidence are copies of two certificates of compliance issued by governing bodies for gambling games – one being for the Czech Republic and the other for the UK – both expressly refer to games packages containing the game 'Eye of Horus'. The Czech Republic certificate is dated 27 December 2019 and is issued to *'adp Gauselmann GmbH'*; and the UK certificate is dated 31 March 2022 and is issued to *'adp MERKUR GmbH'*.

<u>Turnover and Invoices</u>

32. Valentine Kohl states: *"in Germany, turnover figures achieved for games packages which included the 'Eye of Horus' game are as follows:*

For the period November 2016 to November 2021:

Total number of games packages distributed	-	*9,079*
Approximate turnover (from rental, leasing, sales, etc.)	-	*€195.2 million."*

[15] Whilst this image derives from an undated exhibit, namely Exhibit VK2, I nonetheless include it for illustrative purposes.

33. A table setting out details of *“a selection of invoices, which were issued* [to customers based in Germany] *(by either the Opponent or its division Merkur Freizeit Leasing) during the period 2016 to 2019 and which show sales in relation to games packages including the ‘Eye of Horus’ game”* is provided in the witness statement as follows (I note that the first six invoices included in the table are dated 1 November 2016, and therefore are dated just outside of the relevant period):[16]

Date	Invoice No	Town/City	Games package	Amount	Issuer *
01-11-2016	96980253	Nürnberg, DE	Merkur Multi VIII	€ 202.90	mfl
01-11-2016	96983050	Kaschenbach, DE	Merkur Magie 2013	€ 202.90	mfl
01-11-2016	96981311	Weinheim, DE	Merkur Magie 2014 DeLuxe (x 4)	€1,011.60	mfl
01-11-2016	96980542	Kempen, DE	Merkur Multi VIII DeLuxe	€ 252.50	mfl
01-11-2016	96981663	Darstein, DE	Multi Explosion DeLuxe	€651.90	mfl
01-11-2016	97027303	Enkenbach-Alsenborn, DE	Merkur Magie III DeLuxe 2016	€ 252.90	mfl
30-11-2016	97025711	Espelkamp, DE	Magie III DeLuxe 2016	€ 250.00	adp
30-11-2016	97024540	Espelkamp, DE	Magie 2016 HK DeLuxe (x 2)	€ 500.00	adp
30-11-2016	97024878	Espelkamp, DE	Magie III DeLuxe 2016 (x 2)	€ 500.00	adp
01-12-2016	97027587	Berlin, DE	Merkur Magie 2012 DeLuxe	€ 250.00	mfl
01-11-2018	98045987	Pliening, DE	Merkur Magie III DeLuxe 2016	€ 250.00	mfl
01-11-2018	98039662	Potsdam, DE	Merkur Magie 2012 DeLuxe	€ 250.00	mfl
01-11-2018	98043469	Hamburg, DE	Merkur Magie 2013	€ 202.90	mfl
01-11-2018	98041928	Mühlacker-Enzberg, DE	Merkur Magie 2014 DeLuxe	€ 252.50	mfl
01-11-2018	98045611	Freiburg, DE	Merkur Multi VIII DeLuxe	€ 252.90	mfl
30-11-2018	98119123	Espelkamp, DE	Magie III DeLuxe 2016 (x 2)	€ 500.00	adp
01-12-2018	98138920	Oftersheim, DE	Multi Explosion DeLuxe	€ 250.00	mfl
30-09-2018	97965622	Espelkamp, DE	Magie 2016 HD Deluxe	€ 250.00	ad
01-02-2019	98263727	Hamburg, DE	Merkur Multi VIII	€ 200.00	mfl

* mfl = Merkur Freizeit Leasing (a division of the Opponent)

* adp = adp Gauselmann GmbH

34. The witness states that the game ‘Eye of Horus’ is distributed in the UK by ‘Blueprint Gaming Ltd’ (a subsidiary of the Opponent) and that its UK customers include a number of online casinos, for example: ‘Playtech plc’, ‘Sky Betting & Gaming’, ‘Paddy Power Betfair’, ‘Gamesys Group’ and ‘William Hill Group’. The witness explains that (my underlining for clarity): *“the distribution system is structured*

[16] This table, contained in the witness statement of Valentine Kohl, relates to the invoices exhibited in Exhibit VK7.

in such a way that the operators of the online casinos share the revenues with the game providers, Blueprint Gaming Ltd. The operator of the online casino is obliged to send monthly reports to Blueprint Gaming Ltd and a settlement is then made on the basis of these reports. […] *An approximate turnover of £10.3 million was achieved in the United Kingdom during the period December 2017 to October 2021"*.

35. Copies of four of these reports are exhibited to the witness statement – they refer to 'royalties due'. The reports from 'Sky Betting & Gaming' and 'William Hill' are undated. I am able to discern however, from the 'Playtech' report (although it is poorly reproduced), that it relates to a period spanning from September 2018 to November 2020, and that during that period, it is discernible that the total revenue for: 'Eye of Horus (Blueprint)' was in excess of £322,000; 'Eye of Horus Gambler (Blueprint)' was in excess of £32,000; 'Eye of Horus Jackpot King (Blueprint)' was in excess of £25,500; and 'Eye of Horus Megaways (Blueprint)' was in excess of £6,500.[17]

36. I note that the 'Playtech' report also includes revenue information for other games such as 'Super Charmed Deluxe SA' and 'Luck of the Irish SA'. Unlike the revenue figures, the royalty figures are not broken down per individual game and are instead provided in 'total' amounts at the bottom of the report. As such, the total royalties for 'Eye of Horus' alone is not clear because it is not discernible from this evidence that the royalty figures relate solely to that game.

37. The royalties due in relation to 'Eye of Horus', from:

- 'Paddy Power' relate to January 2018 – the 'Net Revenue' for the period was £18,120.45 and the royalties were £1,217.11;[18] and
- 'Gamesys' relate to September 2020 – the royalties were £1,066.88.[19]

Advertising

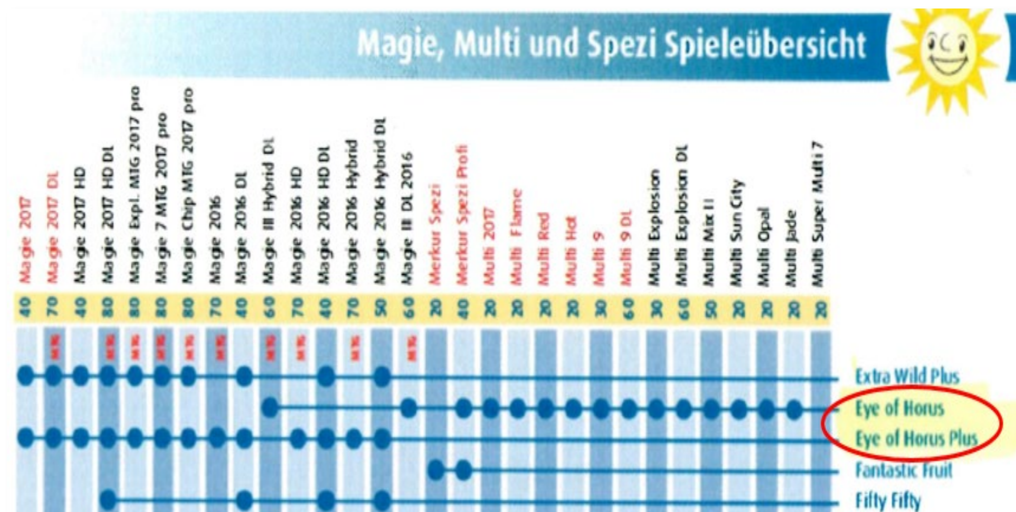
38. The witness states that *"advertising and promotion of the 'Eye of Horus' game has taken place by way of, inter alia, entry into the 'Highlightfolders' of the Opponent"* and

[17] Taken from Exhibit VK8.
[18] Exhibit VK10
[19] Exhibit VK11

asserts that: "*'Highlightfolders' are handed out to visitors and customers at trade fairs such as, for example, ICE London. ICE London is the world's leading innovation showcase for the gaming industry and is usually attended by in excess of 30,000 people."*

39. The witness refers to several extracts from six different 'Highlightfolders', dated between 'Autumn 2016' and 'Autumn 2019',[20] and the *"associated invoices for printing these brochures"*, dated between 14 September 2016,[21] and 11 September 2019.[22] This evidence is in German, although the witness has provided English translations in the witness statement when referring to specific parts of this evidence.

40. The 'Highlightfolders' each contain spreadsheets / overviews showing lists of individual games included in various game packages, all of which include 'Eye of Horus', as can be seen in the example below:



41. The 'Highlightfolders' evidence contains long lists of other games produced by the Opponent and included in various games packages.

[20] Exhibits VK13, VK15, VK17, VK19, VK21 and VK24.
[21] The 14 September 2016 invoice is dated outside of the relevant period, although I appreciate that it would have been in relation to advertising that was disseminated for Autumn 2016 (which is within the relevant period) and therefore I shall take it into consideration.
[22] Exhibits VK14, VK16, VK18, VK20, VK22, VK23 and VK 25.

42. The 2016, 2017 and 2018 ‘Highlightfolders’ contain images of players on games machines, all these images show players on machines displaying the ‘Eye of Horus’ game. For example, in the image below, the witness draws attention to the machine on the right with a red circle to emphasise that it displays the ‘Eye of Horus’ game, I also note that the machine on the left displays what I take to be one of the Opponent’s ‘game package’ interfaces:

43. Below is a close-up of the machine on the right for ease of reference:

44. Below are close-ups of the 'Eye of Horus' game shown in the other images I have mentioned (I have circled the images for ease of reference):

45. Another example of 'Eye of Horus' imagery taken from the 'Highlightfolders' is below. Although this evidence is in German, the witness informs me that it shows 'Eye of Horus' as the *"top game within the Merkur Multi VIII DeLuxe game"* and draws my attention to this with a red circle around the 'Eye of Horus' icon (for clarity, I have underlined 'Eye of Horus' where it appears in the text):[23]

Merkur Multi VIII De Luxe – das Premium-Spieleangebot

Den optimalen Mix bringen **Merkur Multi VIII De Luxe** mit 10 und **Merkur Multi VIII** mit 5 neuen Spielen, wie zum Beispiel „Eye of Horus", „Doppel Buch" oder „Mystic Dew". Durch den optimierten Spielemix werden diese Spielepakete Ihr Publikum begeistern.

60 Spiele

Top-Spiele

Eye of Horus

HIGHLIGHTS

- Erstklassiges Spieldesign
- Menüführung mit „Wischbewegung"
- Quick-Menü – alle Spiele auf einen Blick
- Vier einstellbare Spielvarianten: A, B, C, D
- Auch als kleine Variante Merkur Multi VIII mit 30 Spielen erhältlich

Doppel Buch

Mystic Dew

[23] Exhibit VK13.

46. The ‘Eye of Horus’ game is also singled out in a ‘Highlightfolder’ from 2017. Again this evidence is in German, however, the witness informs me that it *“mentions that the Merkur Spezi machine includes the game ‘Eye of Horus’” (*for clarity, I have underlined ‘Eye of Horus’ where it appears in the text).[24]

47. The witness refers to advertisements the Opponent placed in two German ‘games magazines’ in 2016 and 2017, namely ‘AutomatenMarkt’ and ‘Games & Business’, stating that both magazines are published monthly in Germany and both have a circulation of c.5,000 copies per issue respectively, and that the advertisements feature ‘Eye of Horus’.

48. Three examples of the magazine advertisements are provided, which the witness states are dated 15 August 2016 (although there is no date information contained in the exhibit itself, and in any event, I note that 15 August 2016 is outside of the relevant period);[25] February 2017;[26] and 15 August 2017.[27] The February 2017 advertisement refers to ‘Eye of Horus’ as being a *“popular classic”* game, and the August 2017 advert shows images of games machines which the witness has demarcated with arrows. Although the images are poorly reproduced, I am able to discern that the arrows are

[24] Exhibit VK15.
[25] Exhibit VK26
[26] Exhibit VK27
[27] Exhibit VK28

pointing at an 'Eye of Horus' game icon. Invoices from 2019, relating to magazine advertisements are also provided.

49. I have set out in the table below, details of the 'advertising spend' which includes the spend for 'printing costs' for the 'Highlightfolders' (seven invoices in total) and the spend for the 'magazine advertisements' (two invoices in total). The invoices are all issued by German companies:

Date of Invoice	**Invoice type**	**Provider**	**Total (Euros)**
14 September 2016	Printing spend	Altman-Druck GmbH *(Berlin, Germany)*	€6,547.55
20 January 2017	Printing spend	Altman-Druck GmbH *(Berlin, Germany)*	€14,922.60
20 January 2017	Printing spend	Altman-Druck GmbH *(Berlin, Germany)*	€7.190.34
18 September 2017	Printing spend	Altman-Druck GmbH *(Berlin, Germany)*	€17,238.34
23 January 2018	Printing spend	Altman-Druck GmbH *(Berlin, Germany)*	€17,435.88
13 February 2018	Printing spend	Altman-Druck GmbH *(Berlin, Germany)*	€10,982.15
3 April 2019	Magazine advertisement	Media Verkaufsförderung und Werbeagentur GmbH *(Espelkamp, Germany)*	€27,693.20
16 April 2019	Magazine advertisement	Media Verkaufsförderung und Werbeagentur GmbH *(Espelkamp, Germany)*	€29,851.09
11 September 2019	Printing spend	Altman-Druck GmbH *(Berlin, Germany)*	€39,031.05

Form of the mark

50. The earlier mark is a word-only mark and is presented on the Register as follows:

Eye of Horus

51. The evidence shows that the Opponent's game is referred to as 'Eye of Horus', and that the following sign is used in the game icon and on the interface of the game itself:

52. The Opponent may rely on use of a mark *"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"*.[28] Put plainly, if the form in which it is used alters the distinctive

[28] Section 6A(4)(a) of the Act.

character of the mark, then that form is not a 'variant form' and use of such sign cannot be relied on to establish genuine use of the registered trade mark.

53. The purpose of this provision is to avoid imposing strict conformity between the used form of the trade mark and the form in which the mark was registered, and therefore to allow its proprietor, on the occasion of its commercial exploitation, to make variations in the sign, which, without altering its distinctive character, enables it to be better adapted to the marketing and promotion requirements of the goods or services concerned. Where the sign used in trade differs from the form in which it was registered only in negligible elements, so that the two signs can be regarded as broadly equivalent, the abovementioned provision envisages that the obligation to use the trade mark registered may be fulfilled by furnishing proof of use of the sign which constitutes the form in which it is used in trade.[29]

54. The correct approach in assessing whether a mark has been used in a 'variant form' requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences).[30]

55. The stylised sign shown in use consists of the words 'EYE OF HORUS' in a block-capital typeface. The letters are in a mustard yellow with a dark outline; the centre of the letter 'O' in the word 'OF' is filled-in with a contrasting burnt-orange colour. The typeface of the 'O' is not altered as it is the same typeface as the letter 'O' in the word 'HORUS'.

56. As the earlier mark is a word mark, the protection afforded by the registration is not limited by any features such as typeface or capitalisation appearing on the Register. Therefore the typeface and capitalisation of the sign shown in use is considered to remain identical to the registered mark and the colour of the typeface also does not affect this finding. Notwithstanding the stylisation, the distinctive character of the mark has not been altered, and the way in which it has been used continues to indicate origin, therefore the Opponent can rely on it.[31]

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[29] See the General Court ruling in T-194/03 *Il Ponte Finanziaria* [2006] ECR II-445 at paragraph 50 (not overturned by the Court of Justice C-234/06 *Il Ponte Finanziaria* [2007] ECR I-7333).
[30] See *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, paragraph 13.
[31] Ibid., paragraphs 13 – 17.

Conclusions on the proof of use evidence

57. I note there are some deficiencies with the 'proof of use' evidence, for instance: some exhibits are undated;[32] the witness makes broad statements, for example (1) that the games machines themselves can be leased to customers, yet there is no evidence to support any leasing activity nor indeed any evidence that suggests that the trade mark used in relation to a leasing service is 'Eye of Horus'; and (2) that a subsidiary of the Opponent (being Merkur Group UK) *"operates a total of 177 high street entertainment centres"* in the UK – although this statement is not challenged by the Applicant, considering the evidential picture as a whole, it seems unlikely that those entertainment centres are branded 'Eye of Horus' as all the evidence points to 'Eye of Horus' being a game.[33]

58. Further, whilst there are images in the evidence of arcade game machines, there is no evidence that the mark is used on the games machines themselves.

59. That being said, I have been provided with revenue and royalty figures that relate solely to the 'Eye of Horus' game (notwithstanding it is included in a game package) and these figures are not insignificant. Although it is not possible to know exactly what amount of the advertising spend relates to 'Eye of Horus' alone, the printing spend of the 'Highlightfolders' does relate to the promotion of 'Eye of Horus' and therefore the percentage spend is unlikely to be trivial, given the value of the invoices (whilst the advertising spend only relates to Germany, this is not a detrimental factor, given the level of revenue in the UK during the relevant period).

60. The game is referenced in brochures for potential customers, and it is highlighted as a 'top game' within a games package. The Opponent's 'Highlightfolders' evidence also specifically shows 'Eye of Horus' on the screens of games machines in casinos.

61. When I view the evidential picture as a whole, it is clear that the Opponent used the earlier mark, during the relevant period, in relation to a computer game that is included within a multi-game package. Although the territorial scope of the evidence is limited to Germany and the UK,[34] the Opponent's use in those territories alone is

[32] For instance, Exhibits VK1, VK9 and VK12, amongst others.
[33] Broad statements purporting to verify use should be critically considered – see *Awareness Limited v Plymouth City Council* Case BL O/236/13, in particular paragraph 28.
[34] There is no evidence to show use in the Czech Republic.

sufficient to satisfy the genuine use conditions for that relevant part of the five-year period prior to IP Completion Day (for which use of its EUTM must be shown); and the use demonstrated in the UK after IP Completion Day is also enough to satisfy me that the Opponent has met the use conditions in the UK for its comparable mark (EU). However, I am not satisfied that the Opponent has proven use of the earlier mark in relation to all of the goods and services on which it relies.

The parties' submissions

62. Before I proceed with framing a fair specification based on the use shown, I note that the Applicant has submitted the following:[35]

> *"30. In order for use to be genuine, it must be public in that it must be external and apparent to actual or potential customers of the goods and services. The mark must be used publicly and outwardly in the context of commercial activity with a view to economic advantage for the purpose of ensuring an outlet for the goods and services that it represents (T-174/01, Silk Cocoon). As above, the evidence filed on behalf of the Opponent refers to slot machine game packages which are marketed and sold under the package names. The use demonstrated for game packages is not sufficient to prove use for one of the games included in the game packages – such use does not equate to the mark at hand being used to indicate the commercial origin of goods and services.*
>
> *In this regard, we refer to the decision in EU trade mark opposition no. B3077642, in which the exact same principles were applied by the EU Office in a case where the facts were synonymous with this case in terms of the proof of use evidence that was filed. In essence, the evidence filed by the Opponent was found not to be sufficient to prove genuine use on the grounds that the use demonstrated was in relation to game packages, which were branded and marketed under package names as opposed to the trade mark relied upon by the Opponent."*[36]

63. The applicant relies on the EUIPO decision, number B3077642, which is between the same parties as the current proceedings, in respect of a different game, namely

[35] See the Applicant's submissions dated 12 December 2022, which were re-filed (the substantive content of which was unabridged) on 14 February 2023 to include an Annex omitted on the initial filing.
[36] The Applicant filed a copy of the EU trade mark opposition decision No. B3077642 as an Annex to its submissions.

‘Gladiator’. The crux of the EUIPO’s finding on use relates to its conclusion that the evidence presented in those proceedings was insufficient to satisfy the requirements of proof of use because: *“The use demonstrated for game packages branded under ‘Magie’ or ‘Multi’ does not suffice to prove use for one of the games included in the game packages. The materials submitted do not demonstrate that the earlier mark was used to indicate the commercial origin of the relevant goods”* – this is a finding made in relation to the specific evidence in that case. The mark at issue was different and the facts in that case are not on all fours with this one. It does not assist the Applicant.

64. As a final note on this issue, the Opponent directed me to the comments in an earlier decision of this Tribunal, which I deem relevant and pertinent to mention in my decision, and I agree with it. Namely:

> *“In assessing the genuine use of a mark, I must consider the nature of the goods and the characteristics of the market concerned. I bear in mind that the opponent’s goods are games software and I am aware of my experience that games software can be sold either on its own or as pre-installed software. In those circumstances, I do not consider that it necessary for the opponent to show that its goods were always sold independently of the multi-games package.”*[37]

<u>Fair specification</u>

65. Where a trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the tribunal to arrive at a fair specification. In arriving at a fair specification the tribunal is not constrained by the existing wording of the specification, although sometimes all that is required is a ‘blue pencil’ approach.

66. In framing a fair specification, I am required to not only consider the use presented to me but also what the terms specified in the Opponent’s registration, based on their ordinary and natural meaning, are apt to protect, bearing in mind that a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration.[38] The resulting fair

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[37] See BL O/582/20, paragraph 38.

[38] *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), paragraph 47 (vi).

specification should accord with the perceptions of the average consumer of the goods or services concerned.[39]

67. In light of my conclusions on the evidence before me, I have applied a 'blue pencil' approach to remove the terms in the Opponent's specification for which no use of the earlier mark has been shown. The evidence supports use of certain goods in the Opponent's Class 9 and Class 28. A fair specification is set out in the table below, and I will proceed on this basis for the purposes of determining the outcome of this opposition. For the avoidance of doubt, the fair specification is based on the actual evidence presented to me (and it is not based on any broad statements purporting to verify use over a wide range of goods and services that are not supported by the evidence).

Class 9
Video games adapted for use with external screens or monitors only; computer game software; games software for use on any computer platform, including electronic entertainment and games consoles; software for casino and amusement arcade games, for gaming machines, slot machines or games of chance via the Internet.
Class 28
Games (including games of chance); games for amusement arcades (included in class 28).

<u>Remainder of the Opponent's evidence in chief</u>

68. I now turn to the remainder of the Opponent's evidence in chief, namely in relation to 'Egyptian mythology' and online reviews relating to 'Eye of Atum'.

<u>Egyptian mythology</u>

69. Valentine Kohl states that: *"The name 'Horus'* […] *is considered to be one of the most important of Egyptian gods* […] *Horus was often depicted as a falcon or as a man with a falcon head.* […] *The right eye of the god Horus is said to equate to the sun and the left eye to the moon. The Egyptians sometimes called the lunar eye the 'Eye of Horus' and called the solar eye the 'Eye of Ra'; Ra was the pre-eminent sun god in ancient Egyptian religion.* […] *'Atum' was also an ancient Egyptian god* […]

[39] *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited,* BL O/345/10

Atum appears to have been closely associated with Ra. […] *Ra's eye is equated with the sun and Atum's eye with the moon."*

70. The witness quotes the 'Wikipedia' website as the source of this information,[40] providing internet links.[41]

Online reviews relating to 'Eye of Atum'

71. Valentine Kohl states that *"it has become apparent from Internet searches that many gamers who have reviewed the game 'Eye of Atum' have indicated that they believe the game recently launched as 'Eye of Atum' to be an intentional copy of the established game known as 'Eye of Horus'."* In this regard, the witness refers to seven exhibits comprising of online reviews about the game 'Eye of Atum',[42] stating that *"whilst these reviews may be more recent than the* [filing] *date of the opposed application* […]*, since the Applicant's 'Eye of Atum' game appears to have been released only in March 2022, the Opponent believes them to have a bearing on these opposition proceedings as an indication that a risk of association or confusion between the marks 'Eye of Atum' and 'Eye of Horus' is likely to arise."* I note that only two of the reviews are dated (being 13 March and 24 March 2022), the remaining five are undated.

72. The reviews inform me that 'Eye of Atum' is an Egyptian-theme online slot game (scheduled to launch on the 24 March 2022) from software provider Play'n GO, who according to the reviews, has a reputation for creating Egyptian-themed online slot games. One review states *"anybody that's been playing slot games, both online and land-based, for a while must know the iconic game Eye of Horus. This game […] is a classic and is still a popular game. Now Play'n Go has released their own version called Eye of Atum. Not really an original name, but at least you know right away what to expect."*

[40] I note that a 'wiki' web page, as defined by the Oxford English Dictionary, is *"a type of web page designed so that its contents can be edited by anyone who accesses it, using a simplified markup language"*.
[41] Evidence containing website links is not acceptable since the content of those links is not fixed at a particular point in time and what was at that link when the evidence was filed may not be what is there now – or what may have been there during the relevant period. Evidence from websites must be printed and shown to be from a relevant date. The tribunal does not access web links, and I cannot take this evidence into consideration (See the 'Manual of trade marks practice – Tribunal section' – paragraph 4.8.4 'Exhibits'.)
[42] Exhibits VK 32 to VK38.

73. The general recurring comments throughout the reviews is that the 'Eye of Atum' game should *"strike a chord"* with players of 'Eye of Horus' on the basis that it is reminiscent of the *"massively successful"* and still *"popular"* 'Merkur' / 'Blueprint' game 'Eye of Horus', with some reviews pointing out that *"it almost exactly replicates the style in Eye of Horus",* dubbing it a *"copycat"* of the 'Eye of Horus' game; and some going as far as to say that 'Play'n GO' has 'ripped off' the 'Eye of Horus' game. One review states for example that *"Eye of Atum is almost a carbon copy of Merkur Gaming's Eye of Horus. With a fresh lick of paint, Play'n GO mimics the classic game that has entertained players* […] *for years."* I note that the reviews provided in evidence consistently refer to 'Eye of Atum' as being a game from 'Play'n Go' and make the distinction that the game 'Eye of Horus' is by 'Merkur' / 'Blueprint'.

74. Below is an image of the 'Eye of Atum' game which appears in some of the reviews:

DECISION

Legislation and Case Law

75. Section 5(2)(b) and 5A of the Act are as follows:

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

[...]

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

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

"5A 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."

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

(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

77. In *Gérard Meric v Office for Harmonisation in the Internal Market,*[43] ("**Meric**"), the General Court held to the effect that goods and services can be considered as identical when the goods and services designated by the earlier mark are included in a more general category, designated by the trade mark application and vice versa.

78. For the purposes of making a comparison, the goods and services can be grouped together where the same reasoning applies.[44]

79. The goods and services to be compared are set out below. The Opponent's goods comprise of the 'fair specification' based on the Opponent's use shown in evidence:

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[43] Case T- 133/05
[44] *Separode Trade Mark* BL O/399/10, paragraph 5

Earlier Registration	Contested Application
Class 9 Video games adapted for use with external screens or monitors only; computer game software; games software for use on any computer platform, including electronic entertainment and games consoles; software for casino and amusement arcade games, for gaming machines, slot machines or games of chance via the Internet.	Class 9 Computer games and video games (apps and software), hereunder apps and software for slot machine games, betting and wagering games, video slot games, casino games, games of chance and bingo games provided online and via computer networks and playable on any type of computing device including arcade games, personal computers, handheld devices and mobile phones; apps and software for games with monetary or non-monetary prizes; software for slot machine games, betting and wagering games, video slot games, casino games, games of chance and bingo games provided online and via computer networks and playable on any type of computing device including arcade games, personal computers, handheld devices and mobile phones.
Class 28 Games (including games of chance); games for amusement arcades (included in class 28).	
	Class 41 Games services provided online (via computer networks), hereunder providing slot machine games, betting and wagering games, video slot games, casino games, games of chance, games with monetary or non-monetary prizes and bingo games, playable via local or global computer networks; online gaming services; entertainment services, namely, conducting a game of chance simultaneously at multiple, independent gaming establishments; entertainment

	services, hereunder providing online computer games; prize draws [lotteries]; organising and conducting lotteries; Services for the operation of computerised bingo.

Class 9

80. The following term in the Applicant's specification, namely:

> *"Computer games and video games (apps and software), hereunder apps and software for slot machine games, betting and wagering games, video slot games, casino games, games of chance and bingo games provided online and via computer networks and playable on any type of computing device including arcade games, personal computers, handheld devices and mobile phones."*

falls within the following broad categories in the Opponent's specification:

> *"Video games adapted for use with external screens or monitors only; computer game software; games software for use on any computer platform, including electronic entertainment and games consoles; software for casino and amusement arcade games, for gaming machines, slot machines or games of chance via the Internet."*

these terms are therefore **identical** on the principle outlined in *Meric*.

81. The following term in the Applicant's specification, namely:

> *"Apps and software for games with monetary or non-monetary prizes."*

falls within the following broad categories in the Opponent's specification:

> *"Computer game software; software for casino and amusement arcade games, for gaming machines, slot machines or games of chance via the Internet."*

these terms are therefore **identical** on the principle outlined in *Meric*.

82. The following term in the Applicant's specification, namely:

> *"Software for slot machine games, betting and wagering games, video slot games, casino games, games of chance and bingo games provided online and via computer networks and playable on any type of computing device including arcade games, personal computers, handheld devices and mobile phones."*

falls within the following broad categories in the Opponent's specification:

> *"Video games adapted for use with external screens or monitors only; computer game software; games software for use on any computer platform, including electronic entertainment and games consoles; software for casino and amusement arcade games, for gaming machines, slot machines or games of chance via the Internet."*

these terms are therefore **identical** on the principle outlined in *Meric*.

83. I have found the goods in Class 9 of the Applicant's specification to be identical to the goods in the Opponent's Class 9 specification. I proceed on the basis of the Class 9 goods and will return to the rest of the Applicant's specification later, if it proves necessary to do so.

The average consumer and the nature of the purchasing act

84. Trade mark questions, including the likelihood of confusion, must be viewed through the eyes of the average consumer of the goods in question. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. The word 'average' merely denotes that the person is typical,[45] which in substance means that they are neither deficient in the requisite characteristics of being well informed, observant and circumspect, nor top performers in the demonstration of those characteristics.[46]

85. It is therefore necessary to determine who the average consumer of the respective goods is, and how the consumer is likely to select those goods. It must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question.[47]

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[45] *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), paragraph 60
[46] *Schutz (UK) Ltd v Delta Containers Ltd* [2011] EWHC 1712, paragraph 98
[47] *Lloyd Schuhfabrik Meyer & Co. GmbH* v *Klijsen Handel BV*, Case C-342/97

86. The parties' Class 9 goods would be purchased either by businesses who then offer the games to their customers to use (for example via 'pay for play'); or they would be purchased by members of the general public, who download the software onto, for example, their mobile phones in order to play the games.

87. The respective Class 9 specifications broadly relate to game software. When buying such goods, the average consumer who is a member of the general public will be paying a medium level of attention in order to make sure they are purchasing/ downloading the correct game and that the game suits their needs and purposes. A business consumer providing games and game platforms, will be making slightly different considerations and the level of attention is likely to be a little higher. For example, they will be looking for games that entice customers to play so they can earn money off them – they therefore may be influenced to buy/ lease certain games packages because they contain particular games that have a high earning potential; or packages that provide their customers with more choice and variety.

88. In each instance, the consumer will select the goods having viewed them or an image or description of them first. The selection of the goods is therefore primarily visual, although I do not discount that aural considerations would also play a part by way of word-of-mouth recommendations.

<u>Comparison of marks</u>

89. It is clear from established case law that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details.[48] The assessment of likelihood of confusion must be made by considering and comparing the respective marks – visually, aurally and conceptually – as a whole, by reference to the overall impressions created by the marks in the mind of the average consumer, bearing in mind the distinctive and dominant components of the marks.[49] Then, in light of the overall impression, and all factors relevant to the circumstances of the case, it is necessary to assess the likelihood of confusion.[50]

90. It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to take into account the distinctive and dominant components of the marks

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[48] *Sabel BV v. Puma AG,* Case C-251/95, paragraph 23
[49] Ibid.
[50] *Bimbo SA v OHIM,* Case C-591/12P, paragraph 34

and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

91. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another,*[51] Arnold J. (as he then was) considered the impact of the judgment in *Bimbo,* on the Court's earlier judgment in *Medion v Thomson.* Making reference to the composite trade mark for which registration was sought, the judge said that *Bimbo* confirmed three points where a composite mark contains an element which is similar to an earlier mark (my emphasis):

> *"19. The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole.* […] *there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.*
>
> *20. The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components.* ***That includes the situation where the meaning of one of the components is qualified by another component****, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).*
>
> *21. The third point is that,* ***even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion.*** *It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors."*

[51] [2015] EWHC 1271 (Ch)

92. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
Eye of Horus	EYE OF ATUM

93. The Opponent submits that:[52]

"2. […] *it is commonly held that the beginning or first part of a mark – in this case the phrase 'Eye of' – is likely to have a greater visual and aural impact than the remainder.*

3. Although both 'Horus' and 'Atum' are different gods in Egyptian mythology, the names are unlikely to be well-known or recognised by consumers in the United Kingdom, in which case there is a risk of confusion due to the concept of imperfect recollection […]*. In this respect, it is considered that the average consumer of goods and services connected with computers, gaming, etc., is unlikely to be familiar with Egyptian mythology and consequently might not realise that, for example, a game entitled EYE OF ATUM is not the same game and is not connected in any way with the Opponent's 'Eye of Horus' game. The phrase 'Eye of' might be retained in the mind of a consumer, but since 'Horus' and 'Atum' are unfamiliar names, they might not be immediately recalled or distinguished, thus leading to confusion on the part of the consumer."*

94. The Applicant submits that:[53]

"The Opponent does not have a monopoly on all trade marks beginning with EYE OF in the relevant commercial field. […] *Both marks consist of the same two words, EYE OF, however they are short in length, have a generic meaning and lack distinctive character. HORUS on the other hand, is distinctive and is the longest word found within the Opponent's mark. It therefore possesses a dominant and distinctive role within the mark overall. This is also true for ATUM within the*

[52] See the Opponent's statement of grounds contained in its Form TM7 – 'Notice of Opposition and Statement of Grounds', dated 2 March 2022.
[53] See the Applicant's Form TM8, 'Notice of Defence and Counterstatement', dated 20 May 2022.

Applicant's mark. HORUS and ATUM, which share no similarities, are therefore likely to be more easily remembered by consumers."

Overall impression

95. Both marks are word marks, therefore the overall impression of the earlier mark rests in the words 'Eye of Horus' and the overall impression of the contested mark lies in the words 'EYE OF ATUM'.

96. Both marks contain the term 'eye of' followed by different words, 'Horus' and 'Atum' respectively. The Opponent has stated that these are the names of gods worshipped by ancient Egyptians, which is not contested by the Applicant. However, the average consumer may not know that these are the names of Egyptian gods, and they may just perceive them as names or even as invented words.

97. As far as I am aware, the term 'eye of' is not a standalone term. For example, in general terms, I am aware that 'eye of', when used as a prefix to the words 'the storm', refers to the calm region at the centre of a storm; and that when the exact term is used as a prefix to the words 'a needle' it refers to the hole at the end of a needle through which yarn is threaded. In each instance, the term 'eye of' is qualified by something else. The same can be said for the term 'eye of' in the respective marks. 'Horus' and 'Atum' qualify the term 'eye of', to mean the 'eye of' – 'Horus' or 'Atum' (which is not dissimilar to the way a surname can qualify a first name and vice versa). The name / word (whether it be 'Horus' or 'Atum') therefore qualifies the term 'eye of'.

98. With all the foregoing in mind, it is my opinion that whilst the average consumer may perceive that the respective marks consist of two components – the one being 'eye of' and the other a name/ word – the term 'eye of' does not have a distinctive significance in the marks, which is independent of the significance of the whole. This is because 'eye of' does not have one distinct separate meaning and its meaning is altered/ different depending on the word(s) / name used after it. The respective marks will therefore be perceived as whole marks.

Visual comparison

99. Mr Iain Purvis KC, sitting as the Appointed Person noted on two separate occasions that, *"it is well established that a 'word mark' protects the word itself, not simply the word presented in the particular font or capitalisation which appears in the Register of Trade Marks";*[54] and *"a word mark grants exclusive rights over the word or words themselves when used in relation to the goods or services of the mark. It is entirely agnostic as to the form in which the word is used. The typeface which appears on the Register is therefore entirely irrelevant."*[55] As such, the words 'EYE OF' are identical in both marks and the difference in capitalisation is completely irrelevant.

100. Whilst I acknowledge the case law surrounding the assessment of identical 'beginnings of marks' giving rise to a strong visual similarity,[56] this is not a rule of law and each case must be assessed on its own facts, and that involves applying a multi-factorial assessment.[57] Indeed, it is this multifactorial assessment that has led to decisions where marks are deemed to not be similar, despite their shared identical beginnings.[58]

101. The marks differ in relation to the third word – being 'Horus' in the earlier mark and 'ATUM' in the contested mark. These words bear no visual similarity to each other whatsoever. The degree of visual similarity is medium.

Aural comparison

102. The words 'Eye of' are pronounced identically in both marks. The aural differences lie in the words 'Horus' and 'Atum' which bear no resemblance to one another. I find the aural similarity to be medium.

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[54] See the comments of Iain Purvis QC, sitting as the Appointed Person in *Groupement Des Cartes Bancaires v China Construction Bank Corporation,* Case BL O/281/14, paragraph 21.
[55] *HERNO S.p.A. v Miss Sparrow Ltd,* paragraph 37.
[56] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02
[57] It is important to recall that in *El Corte Inglés*, the marks being compared i.e. the ten letter word 'MUNDICOLOR' and the eight letter word 'MUNDICOR', not only had identity owing to the same seven letters at the beginning, they also shared identity with regard to the last letter (and the only visual difference between the signs was the letters 'LO'). Indeed, the General Court recognised that the identity of the first seven letters gave rise to a strong visual similarity which was, moreover, reinforced by the presence of the letter 'R' at the end of the two signs.
[58] I note the findings of the General Court in *CureVac GmbH v OHIM,* T-80/08, paragraph 41, where, in reference to the comparison between the signs 'RNActive' and 'RNAiFect' the Court stated that: *"even assuming that, as the applicant claims, the signs were both written in upper case or lower case letters, it must be pointed out that, in any event, the visual similarity would not be more pronounced, since the difference owing to the positioning of the last five letters would always offset the similarity owing to the identity of the first three letters."*

Conceptual comparison

103. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.[59] It is not made out in the evidence whether the average consumer of the goods would know that 'Horus' and 'Atum' are names of Egyptian gods. In my opinion, some consumers will recognise the Egyptian mythology reference, in which case, the marks share a similar concept (although it appears, based on the evidence, that this is not a particularly original concept in the market in which the goods would be found). Alternatively, where the average consumer does not know the ancient Egyptian reference, then there is no clear concept that is capable of immediate grasp, other than they are both 'eye of' someone/ something.

Distinctive character of the earlier mark

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

> *"22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C108/97 and C-109/97 Windsurfing Chiemsee v Huber and Attenberger [1999] ECR 1-2779, 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 promotion of 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*

[59] This is highlighted in numerous judgments of the General Court and the CJEU including *Ruiz Picasso v OHIM* [2006] E.C.R. I-643; [2006] E.T.M.R. 29.

commerce and industry or other trade and professional associations (see Windsurfing Chiemsee, paragraph 51).”

105. 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.

106. The degree of distinctiveness of the earlier mark is one of the factors that must be taken into account when assessing whether there is a likelihood of confusion, this includes considering whether the distinctive character of the earlier mark has been enhanced through the use that has been made of it. If a mark has an inherently high level of distinctiveness, the greater the likelihood of confusion may be, although it is the distinctive character of a component that is similar between the marks that is particularly relevant.[60]

107. The Applicant has submitted that ‘Egyptian mythology’ is a popular theme which has wide-spread use in the gaming industry (particularly slot games) and that *“the words ‘EYE OF’ are commonly used in the gaming industry and in relation to Egyptian mythology and are therefore low in distinctiveness”*.[61]

108. The Applicant has filed evidence in support of these submissions. The evidence filed with regard to ‘Egyptian-mythology’ being a popular theme relates to various online articles from gaming websites.[62] Titles of the articles include “*Why Egyptian themed slot machines are so popular”;* and *“Why are Egyptian games so popular?”.* The articles highlight the popularity of the theme and name various slot games on the market with that theme (including the Opponent’s ‘Eye of Horus’ game) and various game developers that specialise in that theme (including both the Opponent and the Applicant); some articles also refer to ‘Horus’ being an Egyptian god that appears as a character in some games and one article refers to the ‘eye of Horus’ as being one of the *“stereotypical symbols”* that appear in Egyptian-themed games.

109. The Opponent points out that some of the online articles produced in the Applicant’s evidence, are dated after the filing date of the contested application.

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[60] *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, paragraphs 38 and 39.
[61] Applicant’s submissions dated 12 December 2022, paragraphs 37 and 40.
[62] Exhibit BR5.

Nonetheless, they are discussing a market trend that initiated before the filing date (dating back as far as the 1990s according to the evidence) and not a trend that came afterwards, they therefore cast light backwards on the position at the relevant date.[63]

110. Whilst the evidence supports the statement made by the witness i.e. that 'Egyptian-themed' slot games are popular and ubiquitous in casinos /online casinos, it merely serves to show that: (1) the average consumer of the goods (i.e. computer games and casino games) may recognise that the mark has a conceptual message; and (2) that 'Eye of Horus' is not an invented term. The Opponent's goods are not limited to 'Egyptian themed' games and I am not persuaded that this evidence demonstrates that the distinctive character of the earlier mark has been weakened as a result of the popularity of that genre of game.

111. The Applicant's evidence also comprises of a list of trade marks beginning with the words 'EYE OF' in Class 9 (and additionally Classes 28 and/or 41), I note that the filing dates for some of these marks are after the relevant date. This is state of the register evidence which in itself does not establish that the distinctive character of this element of the earlier mark has been weakened.[64] *"The state of the register does not tell you what is actually happening out in the market and in any event one has no idea what the circumstances were which led the registrar to put the marks concerned on the register."*[65]

112. The remainder of the Applicant's evidence purports to show that a number of the marks contained in the register evidence are used on the UK market in relation to 'Egyptian-themed' slot games. As far as I can tell, these are:[66] 'Eye of the Kraken' (which is owned by the Applicant) – released 17 September 2015; 'Eye of the Amulet' – released 8 November 2017; 'Eye of Gold' – released on 11 December 2020; 'Eye of the Storm' – released 27 January 2021; and 'Eye of the Queen' – released 27 April 2021. The Applicant's evidence additionally includes the names of other slot games (not included in the register evidence) – the ones which have release dates prior to the relevant date are: 'Eye of Anubis', 'Eye of Dead' (by Blueprint); 'Eye of Ra'; and

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[63] *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited,* [2012] EWHC 1929 (Ch).
[64] See *Zero Industry Srl v OHIM,* Case T-400/06, paragraph 73.
[65] See *British Sugar Plc v James Robertson & Sons Ltd,* [1996] RPC 281 at 305.
[66] I note that the evidence clearly shows that the 'Slot Ranks' for these games have the UK flag next to them and that some display the following wording: *"Please, pass the age verification procedure to get access to the demo game, as it is required for the visitors from the UK."*

‘Eye of Hathor’.[67] There are others but they are either undated or dated after the relevant date.

113. Although it is apparent that there were computer games (including casino slot games) in the relevant UK market prior to the filing date, I am cautious to give this evidence too much weight on the basis that it does not clearly establish that the words ‘EYE OF’ lack distinctive character. I do not find the Applicant’s evidence sufficiently demonstrates that the words ‘EYE OF’ are not distinctive and as a result would be overlooked by the average consumer and in any case, the overall impression created by the earlier mark rests in the whole mark, which is not simply ‘EYE OF’, but includes another element.

114. Whilst ‘Eye of Horus’ is not an invented term, it does not describe the Opponent’s goods and has no meaning in relation to them. For the average consumer who knows of Egyptian mythology, they may perceive that the goods are Egyptian-themed, however, this does not mean that the mark lacks distinctive character. I consider the mark, as a whole, to be inherently distinctive to a medium degree.

115. I now turn to consider whether the distinctiveness of the Opponent’s mark has been enhanced through the use made of it. Whilst the Opponent is entitled to rely upon the use it has made of its mark in the EU prior to 31 December 2020, it is only use in the UK which is relevant to the question of whether that use has been enhanced and thus may increase the likelihood of confusion.[68] This is because the assessment is made from the perspective of the UK average consumer, therefore the relevant market for assessing this is the UK market.

116. Whilst I am satisfied that the Opponent has shown use of its earlier mark in the UK, I only have limited revenue figures, which, although not insignificant, only provide limited information about the extent of use; I also do not have any information on market share and I note that the advertising spend relates solely to Germany.

117. Although the Opponent has provided evidence of reviews in which the Applicant’s ‘Eye of Atum’ game is likened to the Opponent’s ‘Eye of Horus’ game, such reviews stating that ‘Eye of Horus’ is a classic, iconic, popular game – I bear in mind that they

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[67] These are not included in the register evidence therefore I have no evidence before me that would indicate that these are registered marks in relation to the relevant goods.
[68] Tribunal Practice Notice 2/2020.

are written by professional reviewers who would likely have a more in-depth knowledge about their subject matter i.e. they represent the ‘top performers’ of the characteristics of being well informed, observant and circumspect, therefore I am not convinced that the reviews are written by the average consumer of the goods at issue. In any event, it is not clear that the articles are all intended for the UK consumer, and the Opponent has not directed me to, nor highlighted where this information can be found, indeed, the domain names of the websites from which they have been taken have not been included in the evidence.

118. Consequently, taking all of the above into account, I do not consider the evidence sufficient for me to be persuaded that the earlier mark has been used in the UK to such an extent, that the mark’s distinctive character has been enhanced above the medium degree of inherent distinctive character I have already attributed to it.

Conclusions on likelihood of confusion

119. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them that they have kept in mind.[69] I must also consider the average consumer of the services, the nature of the purchasing process and bear in mind that 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.[70]

120. Making an assessment as to the likelihood of confusion is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused. The global assessment is supposed to emulate what happens in the mind of the average consumer on encountering the later mark with an imperfect recollection of the earlier mark in mind. It is not a process of analysis or reasoning, but an impression or instinctive reaction.[71] The relative weight of the factors is not laid down by law but is a matter of judgement for the tribunal on the particular facts of each case.[72]

[69] *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*, Case C-342/97, paragraph 27
[70] *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, Case C-39/97, paragraph 17
[71] *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, paragraph 81
[72] See paragraph 33 of the Appointed Person’s decision in Case No. O/049/17, (*Rochester Trade Mark*).

121. Confusion can be direct, which is a simple matter of the consumer mistaking one mark for another, or indirect, which is where the consumer notices that the marks are different, but the later mark and the earlier mark share common elements that lead the consumer to conclude that it is another brand of the owner of the earlier mark.[73]

122. I have found that the earlier mark has a medium level of inherent distinctive character which has not been enhanced beyond that, and I do not consider the term 'eye of' to be a standalone term within the respective marks – its inclusion in the marks is qualified by the presence of 'Horus' / 'Atum'. It is my opinion that notwithstanding the shared identity of the term 'eye of' and the arguable shared concept (i.e. in the event the average consumer is aware of Egyptian mythology), that overall, the average consumer of the goods at hand (who is paying a medium level of attention in the selection and purchasing process) would not confuse one mark with the other, particularly on account of the presence of 'Horus' and 'Atum', which bear no similarity to each other.

123. I make this finding despite the Class 9 goods being identical to each other and having regard to the market evidence presented to me, to the extent it is relevant.

124. In my opinion, the average consumer would need to rely on something other than the term 'eye of' as an indication of trade origin i.e. they would rely on 'Horus' and 'Atum' to distinguish between the two marks and there is no likelihood that 'Horus' could be confused with 'Atum' – they are dissimilar both visually (and in this regard I note that visual considerations dominate when selecting the relevant goods); and aurally – what's more, the conceptual similarity alone is not enough for me to make a finding of confusion (particularly as I have found that such concept may not be perceived by the average consumer of the goods at hand).

125. I also do not consider that there would be indirect confusion, since there is no *"proper basis"* for such a finding,[74] for example, there is no evidence that the Opponent has a family of 'eye of' marks (and this has not been claimed by the Opponent in any event). 'Eye of' is not a standalone term within the earlier mark such that any addition to it could be seen as a sub-brand or brand extension of the house brand 'eye of'.

[73] See *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10, paragraphs 16 to 17 wherein Mr Iain Purvis QC, sitting as the Appointed Person, dealt with the distinction between direct and indirect confusion
[74] *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, paragraph 16

126. Therefore, although the marks share the common element ‘eye of’, I do not think the average consumer would be indirectly confused as to the origin of the goods. I note that even if I had made a finding that ‘eye of’ had an independent distinctive role, that: *“even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion”.*[75]

127. In my opinion, after applying the multifactorial assessment, the contested mark would merely call to mind the earlier mark (and vice versa), this is mere association, and not indirect confusion. Even if I had found a modest degree of enhanced distinctiveness of the earlier mark, that would not have altered my findings.

128. Finally, I note that the Opponent has adduced evidence which it states shows that there is actual confusion in the marketplace (namely, the reviews for the ‘Eye of Atum’ game). I do not consider this to be the case. Although the reviews state that the Applicant’s game is a ‘copycat’ game, reminiscent of the Opponent’s game, nowhere in this evidence does it show confusion between the marks, this is because in each instance, the respective marks/ games, are identified with reference to the respective producer of the game. Whilst actual confusion in the marketplace is not necessary for a finding of likelihood of confusion, I mention it as a matter of completeness, and in any event, my conclusion that there is no confusion would have been the same had this evidence not been presented to me. Whether the Applicant’s ‘Eye of Atum’ game is a ‘copycat’ of the Opponent’s ‘Eye of Horus’ game or not, is not a consideration I am required to make under a section 5(2)(b) opposition claim.

Final remarks

129. As the outcome is no likelihood of confusion where the respective goods are identical, it follows that the outcome would also be the same where the goods/services are only similar, therefore there is no need to return to consider the rest of the Applicant’s specification.

[75] Whyte and Mackay Ltd, paragraph 21.

OUTCOME

130. The opposition under section 5(2)(b) of the Act fails. Subject to appeal, the application shall proceed to registration for all the goods and services applied for.

COSTS

131. The Applicant has been successful and is entitled to a contribution towards its costs. I award the Applicant the sum of £800 based on the contributory scale set out in Tribunal Practice Notice (2/2016) as follows:

Preparation of the Notice of Defence and Counterstatement	£200
Preparing evidence and considering and commenting on the Opponent's evidence	£300
Preparing written submissions	£300
TOTAL	**£800**

132. I therefore order adp Merkur GmbH to pay Play'n GO Marks Ltd the sum of **£800**. The sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 21st day of September 2023

Daniela Ferrari

For the Registrar