

BL O/0836/25

TRADE MARKS ACT 1994

IN THE MATTER OF UK REGISTRATION NO. 912529442

IN THE NAME OF JOHANNES FARKAS

IN RESPECT OF THE FOLLOWING TRADE MARK

happygum

IN CLASS 5

AND

AN APPLICATION FOR REVOCATION THEREOF

UNDER NUMBER 506804

BY FLOWERS SHINING EVERYWHERE INC. DBA LIVING LIBATIONS

BACKGROUND AND PLEADINGS

1. The UK trade mark (“UKTM”) shown on the front page of this decision (UKTM no: UK00912529442) (“the contested mark”) stands registered in the name of Johannes Farkas (“the registered proprietor”). It was filed on 23 January 2014 and completed its registration process on 13 May 2014. The mark stands registered for the following goods:

Class 5: Chewing gum for medical purposes;¹

2. On 18 December 2023, Flowers Shining Everywhere Inc. DBA Living Libations (“the cancellation applicant”) applied to revoke the contested mark in accordance with sections 46(1)(a) and 46(1)(b) of the Trade Marks Act 1994 (“the Act”). Revocation is sought in respect of the specification in its entirety. The periods in respect of which non-use is claimed are 14 May 2014 to 13 May 2019, with an effective date of revocation of 14 May 2019 under section 46(1)(a), and 18 December 2018 to 17 December 2023, with an effective date of revocation of 18 December 2023 under section 46(1)(b).

3. The contested mark is a comparable mark based upon an earlier EU Trade Mark (“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. The registered proprietor filed a defence and counterstatement in which it denies the claims against it in their entirety. The registered proprietor states that it has made genuine use of the contested mark, for the goods covered by the registration, within the relevant periods.

¹ Whilst the contested mark was registered for both *Chewing gum for medical purposes* and *Medicated chewing gum*, on 29 August 2024 a form TM23 was filed to partially surrender the contested mark in respect of *Medicated chewing gum*. The class 5 term as listed therefore reflects the specification as it now stands.

5. The registered proprietor is represented by IP-Active.com Limited and the cancellation applicant is represented by Kilburn & Strode LLP. Both parties filed evidence in these proceedings, and this will be summarised to the extent that it is considered appropriate. No hearing was requested, however both parties filed written submissions in lieu of a hearing. This decision is taken following a careful consideration of the papers filed.

EVIDENCE AND SUBMISSIONS

6. The registered proprietor filed evidence in chief in the form of a witness statement of Johannes Farkas, dated 13 August 2024, accompanied by exhibits JF1-JF8. Mr Farkas is the owner of the contested mark, and the CEO and Director of happygum G.m.b.H. I note that an earlier statement which included survey evidence was originally filed, however, given that leave had not been sought to file the survey evidence and also the statement itself was not in the correct format it was not admitted into the proceedings. The statement was subsequently re-filed. I will therefore only consider the re-filed evidence of 13 August 2024 within this decision.

7. The cancellation applicant filed evidence consisting of the witness statement of Celina Solmaz Özcan, dated 28 August 2024, accompanied by exhibits CS01-CS08. Ms Özcan is a European Trade Mark Attorney acting on behalf of the cancellation applicant.

8. The registered proprietor's evidence in reply was filed in the form of the witness statement of Timothy John Blower, dated 28 October 2024, accompanied by exhibits TJB1-TJB4. Mr Blower is a Trade Mark Attorney acting on behalf of the registered proprietor.

9. Both parties also filed written submissions in lieu of a hearing dated 16 December 2024 respectively.

10. I have given due consideration to all of the documents filed by both parties but will only refer to the evidence/submissions as appropriate to the extent that is necessary in my decision.

DECISION

11. Section 46 of the Act is relevant to the revocation proceedings, which states:

“46. - (1) The registration of a trade mark may be revoked on any of the following grounds-

(a) that within the period of five years following the date of completion of the registration procedure it has not 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, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) [...]

(d) [...]

(2) For the purpose of subsection (1) 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 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.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as in referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) [...]

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from-

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existing at an earlier date, that date.”

11. As the mark is a comparable mark, paragraph 8 of part 1, schedule 2A is relevant. It reads:

“8. Non-use as defence in infringement proceedings and revocation of registration of a comparable trade mark (EU)

(1) Sections 11A and 46 apply in relation to a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the period of five years referred to in sections 11A(3)(a) and 46(1)(a) or (b) (the "five-year period") has expired before [IP completion day]—

(a) the references in sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in sections 11A and 46 to the United Kingdom include the European Union.

(3) Where [IP completion day]² 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 sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark, are to be treated as references to the corresponding EUTM ; and

(b) the references in sections 11A and 46 to the United Kingdom include the European Union”.

12. Section 100 of the Act states:

“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.”

13. 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.

14. 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 C40/01 *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 Bunderversammlung 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 Marken 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].

15. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person stated that:

“22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

16. What I take from this case law is that there is no requirement to produce any specific form of evidence, but that I must consider what the evidence as a whole shows me, and whether on this basis I can reasonably be satisfied on the balance of probabilities that there has been genuine use of the contested mark.

EVIDENCE OF USE

Relevant Periods

17. The relevant periods for the purposes of this revocation are from 14 May 2014 to 13 May 2019 (the First Relevant Period) and from 18 December 2018 to 17 December 2023 (the Second Relevant Period). As the contested mark is a comparable mark, the registered proprietor can rely upon use of the mark in the EU for any and all parts of the relevant periods which fall prior to IP Completion Day, namely, 31 December

2020.² A finding of genuine use during the second relevant period will be sufficient to avoid revocation of the contested mark under section 46(1)(b), and, by virtue of section 46(3), section 46(1)(a). Provided that such use is deemed to be genuine use, this will be the case even if the evidence in relation to the earlier period is deemed insufficient.

18. I note that the registered proprietor has filed some evidence which falls outside of the relevant periods. I will not consider this evidence unless it is relevant to the operation of section 46(3).

The Registered Proprietor's Evidence

19. I note the following from the witness evidence of Mr Farkas:

- a. Mr Farkas submits that the happyGum product was developed during the period of 2014 to 2018 and launched in 2018 by marketing to the medical, dental and psychiatric professions. It was, and continues to be, sold at a premium price due to its efficacious properties in helping relieve anxiety and stress.
- b. Mr Farkas submits that a patent application was made in Germany on 1 July 2020. I note that aside from the USA patent application³, there is no further evidence produced.
- c. Mr Farkas has provided evidence of the website which operates under the name of the contested mark and displays the Trade Mark⁴ in a figurative form as follows:

² paragraphs 7 and 8 of Part 1 Schedule 2A of the Act.

³ Exhibit JF1

⁴ Exhibit JF2



The web page provides descriptions of the happygum product as well as professing its capabilities / benefits and also features an online store. The webpage is listed in English, German, French and Spanish. The registered proprietor has made its products bearing the contested mark available for order through its main online store since 2018.

- d. Mr Farkas has also provided evidence via internet screenshots of websites www.myproduct.at and www.neckermann.at which list the products bearing the contested mark. There are no submissions in respect of this, and the screenshots are undated, however, I understand these to be Austrian websites.
- e. Invoices have been provided dated between 01 January 2018 and 03 July 2023⁵ (as they are EU invoices, rather than UK invoices, only those invoices dated up until IP Completion Day will be considered in line with paragraph 17 above). Whilst the invoices have been exhibited to the witness statement, Mr Farkas has also provided the following breakdown within his statement:

Invoice No	Invoice Date	Location	No of Display Packs	No of units	Net Invoice Amount (EUR)
452124	01/01/2018	Austria	12	144	162.55
455303	05/10/2018	Austria	2	24	39.84
503424	08/01/2019	Austria	6	72	119.52
503428	14/01/2019	Austria	4	48	79.68
503433	08/03/2019	Austria	1	12	19.92
503435	18/03/2019	Austria	2	24	39.84
503520	13/09/2019	Austria	6	72	119.52
503565	10/10/2019	Austria	2	24	39.84

⁵ Exhibit JF5

55527	04/04/2020	Austria	1	12	19.92
55700	03/07/2020	Austria	4	48	79.68
55805	08/09/2020	Austria	1	12	19.92
55892	12/10/2020	Austria	12	144	162.55
55950	20/11/2020	Austria	1	12	19.92

I note that all of these sales have been made in Austria.

- f. Product endorsements have been provided by the following⁶:
- i. Dr Nikolaus Duschek, Dermatologist in Austria (undated);
 - ii. Prof Dr Lukas Pezawas, Psychiatrist in Austria (undated);
 - iii. Dr Markus Rachinger, Medical Advertising Agency, Austria (undated).
- g. Mr Farkas has produced copies of awards that have been won for the products bearing the Contested Mark, including “Most Innovative Health, Wellness and Plant Based Product” at Gulfood in 2022 and the “Superior Taste Award” from the International Taste Institute in Brussels in 2023. Mr Farkas states that Gulfood is a trade show held in Dubai World Trade Centre each year and that “there were many UK visitors to this exhibition”, however, I note that I have not been provided with documentary evidence of this or detail as to how many visitors were from the UK.
- h. A printout of website analytics has been produced which shows that during the period between 1 January 2020 and 30 June 2024, there were 533 UK visits to the happygum website⁷. Mr Farkas submits that the average engagement time for UK users was 15 seconds.
- i. Further invoices directed at the UK have been provided dated between 4 March 2022 and 20 June 2023 which total €192.30⁸. Mr Farkas has provided narrative evidence that these prices were discounted as a

⁶ Exhibit JF6

⁷ Exhibit JF7

⁸ Exhibit JF8

marketing strategy and that “key practices were identified and approached to act as “advocates”. The advocates were offered support and discounted products and asked to report on patient experience of the happygum chewing gum product. Advocates were identified based in different locations around the UK including Manchester, Cambridge, Canterbury, London (Victoria), Wimbledon and Camberley”.

The Cancellation Applicant’s Evidence

20. I note the following from the witness evidence of Ms Özcan:

- a. Ms Özcan has produced various exhibits showing that the wording on the registered proprietor’s website has been altered or amended⁹.
- b. Ms Özcan has produced a copy of an online conversation that she had with an AI Bot on the registered proprietor’s website, pertaining to the chewing gum being unmedicated¹⁰.
- c. Ms Özcan has produced an Amazon.de review of the products bearing the contested mark¹¹.
- d. An article has been reproduced, which was published on 7 February 2023 by Newcastle University entitled “*Can chewing help manage stress, pain and appetite? Here’s what the science says*”¹².
- e. A further article has been produced, which was published on 31 October 2023 by WebsiteBuilderExpert entitled “*The Average Time Spent On a Website: Increase Visitor Engagement*”¹³.

Evidence in reply

⁹ Exhibits CS01 – CS03

¹⁰ Exhibit CS05

¹¹ Exhibit CS06

¹² Exhibit CS07

¹³ Exhibit CS08

21. I note the following from the witness evidence of Mr Blower:

- a. Extracts have been provided from MedlinePlus, an official website of the US government, which provides definitions of medical conditions including anxiety and stress. Mr Blower gives evidence that these documents were accessed and downloaded on 25 October 2024¹⁴.
- b. Mr Blower has produced customer reviews from Amazon.de which, he states, were downloaded on 25 October 2024¹⁵. I note that underneath each customer review it states “reviewed in the United States”.
- c. Mr Blower has produced a definition of psychotropic substance taken from the National Cancer Institute Website (a US Government site) and pages from a TM classification system in relation to the terms “psychotropics”, “medical purposes” and “for medical purposes” in Class 5¹⁶.
- d. Mr Blower has produced an abstract article published in Community Dental and Oral Epistemology in Feb 2010 (official website of the USA) regarding “*The effects of lavender scent on dental patient anxiety levels: a cluster randomised-controlled trial*” which was downloaded on 25 October 2024¹⁷.

Form of the mark in use

22. Before I move on to assess the sufficiency of the evidence, I shall begin by addressing the way in which the contested mark has been displayed in relation to the relevant goods and services in evidence.

¹⁴ Exhibit TJB1

¹⁵ Exhibit TJB2

¹⁶ Exhibit TJB3

¹⁷ Exhibit TJB4

23. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the Court of Justice of the European Union found that:

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, ‘use’ within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish ‘use’ within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the ‘use’ of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35 Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark

must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1)." (emphasis added)

24. In *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, Phillip Johnson, sitting as the Appointed Person, considered the correct approach to the test under s. 46(2). He said:

"13. [...] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still 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) (see for instance, T-598/18 *Grupo Textil Brownie v EU*IPO*, EU:T:2020:22, [63 and 64]).

14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.

15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hypen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative elements are usually less likely to change the distinctive character than those related to the word elements.

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*,

EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

17. It is also worth highlighting the recent case of T-615/20 *Mood Media v EUIPO*, EU:T:2022:109 where the General Court was considering whether the use of various marks amounted to the use of the registered mark MOOD MEDIA. It took the view that the omission of the word “MEDIA” would affect the distinctive character of the mark (see [61 and 62]) because MOOD and MEDIA were in combination weakly distinctive, and the word MOOD alone was less distinctive still.”

25. The contested mark is a word only mark presented in lower case. Given that normal and fair use of the registration will cover use in any standard typeface or font, where the mark is used in capitals or title case this is use of the mark as registered and is use upon which the registered proprietor may rely. The mark is also shown as follows throughout the evidence:



26. The above variation is a figurative mark in which the words ‘happygum’ are presented in differing fonts and colours. This variation also includes a purple stick type person who appears to be jumping/dancing to the upper right-hand side of the mark and swoosh lines in the colours yellow, purple and blue coming off the words. I consider that the use of different fonts and the swoosh lines do not detract from the words themselves and will merely be seen as stylistic elements. Underneath the words ‘happygum’ there is the phrase ‘your piece of happiness’. As the product comes in pieces, I consider the phrase to be a play on words, and to highlight that the piece of gum will make you happy. This reinforces the meaning of the words ‘happygum’ and the properties of the product. I consider that the words ‘happygum’ remain the dominant element of the figurative mark, and that this figurative form is therefore an

acceptable variation of the mark and is use upon which the registered proprietor can rely.

Genuine Use

Assessment of Evidence

27. The registered proprietor has failed to put forward any evidence of annual sales figures resulting from its use of the mark, aside from the limited number of invoices provided, and there is no information as to market share. In respect of the invoices submitted under exhibit JF5, these all relate to sales made in Austria. The registered proprietor has submitted 46 invoices which amount to €3,168.88 in total, however, I am only able to consider use in the EU up until IP Completion Day (31 December 2020) which amounts to €922.70 overall. For the First Relevant Period these amount to a total of €461.35 and for the Second Relevant Period these amount to a total of €720.31. All other invoices fall outside of the relevant periods. Whilst I bear in mind that use after the relevant periods may be relevant (as discussed above), given that the use is in Austria only, and after IP Completion Day, it does not assist the registered proprietor in this case. I do note that within the relevant periods there are some repeat purchases.

28. The registered proprietor submits as follows regarding their marketing strategy:

“5. HAPPYGUM chewing gum was developed during the period 2014 to 2018 and launched in 2018 by marketing to the medical, dental and psychiatric professions. It was and continues to be sold at a premium price because of its efficacious properties in helping relieve anxiety and stress in these situations and we have received good feedback from medical, dental and psychiatric professionals that it is effective. For example, the patients can be provided with free HAPPYGUM chewing gum as part of the preparation for the consultation and this benefits the professional because the patient is more relaxed in the consultation.

...

9. The initial marketing strategy of targeting the specific niche of medical, dentist and psychiatric waiting rooms has been continued, Advantageously, as a small company with limited resources, this strategy has enabled HAPPYGUM chewing gum to gain credibility through the endorsement of the professionals concerned”

I also note from the registered proprietor’s submissions that their marketing strategy involved sending product to advocates at a discounted rate to allow the same to be trialled. There is no indication of how the goods have been promoted, such as via posters, television or via other marketing means. The registered proprietor’s submissions do indicate that some preparations to secure customers were underway¹⁸. I will consider whether these preparations were sufficient later in my decision.

29. Turning to the three product endorsements provided, these amount to ‘hearsay evidence’ as section 1 of the Civil Evidence Act 1995. The factors that are relevant to the weight to be attributed to hearsay evidence are set out in section 4 of the Civil Evidence Act 1995. Having consideration for all of these factors, but bearing in mind that there does not appear to be any reason why these individuals could not have given evidence, I find that very little weight can be attributed to these endorsements. However, in any event, given that the endorsements are undated, and they appear to relate to sales outside the UK and after IP Completion Day, they would not have assisted the registered proprietor.

30. The registered proprietor has provided 7 invoices relating to sales within the UK which he describes as being for the period 4 March 2021 to 20 June 2023¹⁹. As there is no suggestion that this is only a sample of invoices, I will proceed on the basis that these are the only sales made in the UK during this time period. These invoices amount to €192.30 in total. I bear in mind that all of these invoices fall after the first relevant period, and some fall after the end of the second relevant period (albeit more than 3 months prior to the application for revocation). In addition to these sales, the registered proprietor submits that:

¹⁸ Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439

¹⁹ Exhibit JF8

“In the United Kingdom, a marketing strategy has been pursued similar to that pursued originally in Austria, targeting key medical, dental and psychiatric practices. Key practices were identified and approached to act as “advocates”. The advocates were offered support and discounted product and asked to report on the patient experience of the HAPPYGUM chewing gum product. Their professional opinion is important in providing credibility for the product. Advocates were identified based in different locations around the UK, including Manchester, Cambridge, Canterbury, London (Victoria), Wimbledon and Camberley”.

I note the registered proprietor’s submissions regarding their UK marketing strategy, and that this is the same as the strategy that they have used within the EU. I also bear in mind that, as per *Ansul*, where preparations are underway to secure customers, particularly in the form of advertising campaigns, this may be sufficient to establish genuine use. Whilst the registered proprietor has explained his preparations and marketing strategy, I have no evidence before me that enables me to assess the extent of the advertising undertaken (clearly there must have been at least 6 advocates approached, given the locations for the advocates listed above), or the scale. I note that purchases have been made by 7 individuals, resulting in a very small amount of sales being made, with no repeat purchases within the UK.

31. The registered proprietor has provided website analytics which show that in the UK, over the period of 1 January 2020 to 30 June 2024, there were 533 users who visited the company website spending an average engagement time of 15 seconds. The registered proprietor submits that “this indicates that nearly one-third of the users found the content engaging, which is a positive indicator of user interest and interaction”. The cancellation applicant has produced an article which was published on 31 October 2023 by WebsiteBuilderExpert entitled “*The Average Time Spent On a Website: Increase Visitor Engagement*”²⁰ in which it states that the average time spent on ecommerce pages is between 44 seconds and 1 minute 22 seconds. The time spent on the registered proprietor’s site per user is significantly less than this. There

²⁰ Exhibit CS08

is nothing to suggest any volume of sales that stemmed from UK consumers accessing the website during this time. In any event, I note that the period to which the website views relate extended not only beyond the end of the second relevant period, but beyond the application date for revocation (which was 18 December 2023). As such, I have no way of knowing how many of these views would have taken place during the second relevant period or, indeed, prior to the application for revocation being made.

32. The registered proprietor has provided a number of website screenshots²¹. I remind myself that where goods and services have been advertised on a website which is not obviously directed at the UK, I must consider whether the advertisement is targeted at consumers in the UK. The internet screenshots of www.myproduct.at and www.neckermann.at both show that products bearing the contested mark are available to purchase from the sites, but these appear to be Austrian websites. Both screenshots are undated. I note that the sites are not displayed in English and appear to be targeted at the Austrian market. I also note that the currency is in Euros²². In light of this, I cannot see that these webpages are targeting UK consumers.

33. In respect of the registered proprietor's submissions regarding the awards won, namely Gulfood Innovative Wellness award 2022 (Dubai) and the Superior Taste Award - International Taste Institute Brussels 2023 respectively, both took place after IP Completion Day and neither award is based within the UK. Although the registered proprietor submits that there were many UK visitors to the Dubai exhibition, I have no documentary evidence of this and there is no indication how many UK consumers, or those in the trade, were exposed to the mark, or whether these have converted into sales.

34. Finally, the registered proprietor submits that a patent application was made in Germany on 1 July 2020 and that from 1 July 2021 further applications have been filed in Australia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Israel, Japan, Korea, Mexico, Peru, USA and Europe (which covers 39 countries). The registered proprietor submits that the patent filings constitute considerable investment of around €50,000 to date. I also note that the USA patent application has been produced in evidence. I

²¹ Exhibit JF3

²² *Warner Music UK Ltd v TuneIn Inc.* [2019] EWHC 2923 (Ch), at paragraph 17

have no evidence of the additional applications that have been made, however, given that registered proprietor has confirmed that these applications were made from 1 July 2021 onwards, and I have no evidence of a UK application, this does not assist the registered proprietor. In any event, the fact that applications have been made for patents does not show an attempt to maintain or create a share in the market for the goods and this evidence will, therefore, be disregarded.

35. For the use to be genuine, there must have been real commercial exploitation of the mark, in the course of trade, sufficient to create or maintain a market for the goods at issue in the relevant territory during the relevant five-year period. It is now necessary for me to assess whether the evidence demonstrates sufficient use to create a market for the goods, in accordance with the case law.

36. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

and further at paragraph 28:

“28. I can understand the rationale for the evidence being as it was but suggest that, for the future, if a broad class, such as “tuition services”, is sought

to be defended on the basis of narrow use within the category (such as for classes of a particular kind) the evidence should not state that the mark has been used in relation to “tuition services” even by compendious reference to the trade mark specification. The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a broader category is nonetheless appropriate for the specification. Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted.”

37. In *Jumpman* BL O/222/16, Mr Daniel Alexander QC, as the Appointed Person, upheld the registrar’s decision to reject the sale of 55k pairs of training shoes through one shop in Bulgaria over 16 months as insufficient to show genuine use of the EU trade mark in the European Union within the relevant 5 year period. Proven use of a mark which fails to establish that “*the commercial exploitation of the mark is real*” because the use would not be “*viewed as warranted in the economic sector concerned to maintain or create a share in the [European Union] market for the goods or services protected by the mark*” is therefore not genuine use.

38. I have carefully considered the evidence provided by the proprietor and whether this meets the requirements for genuine use as per *easyGroup*, set out earlier in this decision. I am also mindful of the guidance from the *Dosenbach-Ochsner* and *Awareness* appeal cases emphasising the need to consider what the evidence fails to “show”, and what might reasonably have been conclusively shown. As I have set out above, I find there are several shortcomings in the evidence.

39. Taking all of the above into account and bearing in mind not only section 100 of the Act but the case law of *Awareness* and *Dosenbach* (cited above), I consider the sales evidence to be insufficient in this instance. I consider it reasonable to suggest that the overall turnover is something that would have been known to the registered proprietor and, should have been provided in evidence. Therefore, the invoices provided are the only evidence that I have of actual sales during the relevant periods.

40. Whilst I accept that there has been some repeat custom, I note that the Austrian sales made are to only 7 customers in total. Whilst I accept that within trade mark proceedings, the Registrar continues to entertain the possibility that use of an EUTM in an area of the Union corresponding to the territory of one Member State may be sufficient to constitute genuine use of an EUTM²³, the combination of this limited number of customers and the low sales figures, when compared to the EU market for chewing gum as a whole (even bearing in mind that this is specifically chewing gum for medical purposes), presents a fairly poor picture of the use that has been made of the mark prior to IP Completion Day. In terms of the UK use, the sales made have been astonishingly small and I have very little in terms of supporting evidence or detail about marketing activities or preparations for use. When taken as a whole, I consider that the evidence falls short of establishing that there has been genuine use of the contested mark during the relevant periods.

CONCLUSION

41. The application for revocation on grounds of non-use against the registered proprietor's registration No. UK0000912529442 has been successful. As a result, the contested registration is hereby revoked, with effect from 14 May 2019, for all of the goods in its specification.

COSTS

42. The cancellation applicant has been successful and is entitled to a contribution towards their costs. In the circumstances I award the cancellation applicant the sum of £1,150 as a contribution towards the cost of the proceedings, in accordance with Tribunal Practice Notice 1/2023.

The sum is calculated as follows:

Official fee:	£200
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²³ Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816]

Preparing and filing the TM26(N) and
considering the counterstatement: £350

Considering the other side's evidence
and preparing and filing evidence: £600

Total: £1,150

43. I therefore order Johannes Farkas to pay Flowers Shining Everywhere Inc. DBA Living Libations the sum of £1,150. The above sum should be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this day 11th of September 2025

LA Bailey

For the Registrar