

O-455-18

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3245475

IN THE NAME OF ABHISHEK SHARMA

AND OPPOSITION THERETO UNDER NO. 410508

BY IBA CRAFTS PRIVATE LIMITED

Background

1. Application No. 3245475 was filed on 22 July 2017 and stands in the name of Abhishek Sharma (“the applicant”). Originally seeking registration also for services in class 35 (later withdrawn), it now seeks registration of the word HARMONIZE as a trade mark in respect of a range of goods in class 14 only, as set out later in this decision.

2. The application was published in the *Trade Marks Journal* on 11 August 2017 following which notice of opposition was filed by IBA Crafts Private Limited (“the opponent”). Originally including an objection under section 3(6) of the Trade Marks Act 1994 (“the Act”) (later withdrawn), the opposition is now founded on grounds under sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”) relying on the opponent’s own registration No 3229263 as follows:



Filing date: 5 May 2017

Date of entry in register: 28 July 2017

This mark is registered for goods and services in classes 5 and 35 as also set out later in this decision. Whilst this is an “earlier mark” within the meaning of section 6 of the Act, given the interrelationship between its date of registration and the date of publication of the application the subject of this decision, it is not subject to the requirement under section 6A of the Act that proof of its use be shown. There is a further ground of opposition under section 5(4)(a) of the Act based on claimed use throughout the UK since 2015 of a sign identical to that shown above.

3. The applicant filed a counterstatement in which it denies the grounds of opposition.

4. Evidence was received from the opponent in the form of a witness statement of Nitin Kapoor, a director of the opponent company. It also filed written submissions. I will refer to both as is necessary in this decision. Whilst the applicant also sought to

file certain documentation, it was received after the expiry of the period allowed to him for doing so. Furthermore, that which purported to be a witness statement was not signed by the witness as required. He was informed that he could file a Form TM9R seeking a retrospective extension of time to allow it to be properly filed but did not do so. The documentation was not therefore admitted into the proceedings. Neither party sought to be heard and I therefore give this decision from the papers before me.

Decision

The objection under section 5(2)(b) of the Act

5. Section 5(2)(b) of the Act states:

“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”.

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

The principles

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely

upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

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

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

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

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of the respective goods and services

7. Regardless of the ways the respective parties may have traded or what they may have sold, I must consider matters on a notional basis comparing the specifications as registered by the opponent and as applied for by the applicant. With that in mind, the goods and services to be compared are as follows:

Opponent's goods and services	Applicant's goods
<p>Class 5 Therapeutic and healing stones; therapeutic and healing crystals; reiki crystal stones (therapeutic and healing); reiki therapy stones; massage preparations (medicated and non-medicated).</p> <p>Class 35 Advertising; marketing; provision of business information via a website; advertising and marketing services provided by means of social media; retail services and wholesale services connected with the sale of massage preparations (medicated and non-medicated), therapeutic and healing stones, therapeutic and healing crystals, reiki crystal stones (therapeutic and healing), reiki therapy stones; information, consultancy and advisory services relating to all the aforesaid services.</p>	<p>Class 14 Action figures (Decorative-) of precious metal; Alarm clocks; Alarm watches; Alloys of precious metal; Anchors [clock and watch making]; Ankle bracelets; Apparatus for sports timing [stopwatches]; Apparatus for timing sports events; Articles of imitation jewellery; Articles of jewellery coated with precious metals; Articles of jewellery made from rope chain; Articles of jewellery made of precious metal alloys; Articles of jewellery made of precious metals; artificial gem stones; Artificial jewellery; Artificial stones [precious or semi-precious]; Atomic clocks; Automatic watches; Automatic watches ; Automobile clocks; Badges of precious metal; Bands for watches; Bangle bracelets ; Bangles; Barrels [clock and watch making]; Barrels [clock and watchmaking]; Beads for making jewelry; Bib necklaces; Body-piercing rings; Bottle caps of precious metals; Boxes for timepieces; Boxes of precious metal; Bracelets; Bracelets and watches combined; Bracelets for watches; Bracelets of precious metal; Busts of precious metal; Busts of precious metals; Cabinets for clocks; Cases adapted to contain horological articles; Cases adapted to contain items of jewellery; Cases adapted to contain watches; Cases [fitted] for clocks;</p>

	<p>Cases [fitted] for horological articles; Cases [fitted] for jewels; Cases [fitted] for watches; Cases for chronometric instruments; cases for clock- and watchmaking; Cases for clock and watch-making; Cases for horological chronometric instruments; Cases for jewels; Cases for watches; Cases for watches and clocks; Cases for watches [presentation]; Cases of precious metals for clocks; Cases of precious metals for horological articles; Cases of precious metals for jewels; Cases of precious metals for watches; Caskets for clocks and jewels; Chain mesh of precious metals [jewellery]; Chain mesh of semi-precious metals; Chains for watches; Chains [jewellery, jewelry (Am.)]; Chains made of precious metals [jewellery]; Chains of precious metals; Chains (Watch -); Charity bracelets; Charms in precious metals or coated therewith; Charms [jewellery, jewelry (Am.)]; Charms [jewellery] of common metals; Charms of precious metals; Charms of semi-precious metals; Chronographs; Chronographs as watches; Chronographs for use as watches; Chronographs [watches]; Chronological instruments; Chronometers; Chronometric apparatus and instruments; Chronometric instruments; Chronometrical instruments; Chronoscopes; Clip earrings; Clips of silver [jewellery]; Clips (Tie -); Clock and watch hands; Clock cabinets; Clock cases; Clock dials; Clock faces; Clock hands [clock and watch making]; Clock hands [clock and watch-making]; Clock housings; Clock movements; Clocks; Clocks and parts therefor; Clocks and watches; Clocks and watches, electric; Clocks and</p>
--	--

	<p>watches for pigeon-fanciers; Clocks and watches in general; Clocks for world time zones; Clocks having quartz movements; Clocks incorporating ceramics; Clocks incorporating radios; Clockwork movements; Clockworks; Cloisonne jewellery; Cloisonné jewellery [jewelry (Am.)]; Cloisonne pins; Closures for necklaces; Clothing ornaments of precious metals; Coins; Collectible coins; Collets being parts of jewellery; Commemorative coins; Commemorative medals; Commemorative shields of precious metal; Control clocks [master clocks]; Copper tokens; Crosses [jewellery]; Cubic zirconia; Cuff links; Cuff links and tie clips; Cuff links coated with precious metals; Cuff links made of gold; Cuff links made of imitation gold; Cuff links made of porcelain; Cuff links made of precious metals; Cuff links made of silver plate; Cuff links of precious metal; Cufflinks; Cuff-links; Decorative articles [trinkets or jewellery] for personal use; Decorative boxes made of precious metal; Decorative brooches [jewellery]; Decorative cuff link covers; Decorative pins [jewellery]; Decorative pins of precious metal; Desk clocks; Desktop statuary made of precious metal; Diadems; Dials [clock and watch making]; Dials (clock making and watchmaking); Dials for clock and watch-making; Dials for clocks; Dials for horological articles; Dials for watches; Dials (Sun -); Digital clocks; Digital clocks being electronically controlled; Digital clocks incorporating radios; Digital clocks with automatic timers; Digital time indicators having temperature displays; Digital watches with automatic timers; Divers' watches;</p>
--	---

	<p>Diving watches; Dress ornaments in the nature of jewellery; Dress watches; Ear clips; Ear ornaments in the nature of jewellery; Ear studs; Earrings; Earrings of precious metal; Electric alarm clocks; Electric timepieces; Electric watches; Electrical timepieces; Electrically operated movements for clocks; Electrically operated movements for watches; Electronic alarm clocks; Electronic clocks; Electronic timepieces; Electronic watches; Electronically operated movements for clocks; Electronically operated movements for watches; Enamelled jewellery; Escapements; Faces for chronometric instruments; Faces for clocks; Faces for horological instruments; Faces for watches; Fake jewellery; Fancy keyrings of precious metals; Figures of precious metal; Figurines coated with precious metal; Figurines for ornamental purposes of precious stones; Figurines made from gold; Figurines made from silver; Figurines of precious metal; Figurines [statuettes] of precious metal; Finger rings; Fitted covers for jewelry rings to protect against impact, abrasion, and damage to the ring's band and stones; Fitted jewelry pouches; Flexible wire bands for wear as a bracelet; Floor clocks; Fobs for keys; Friendship bracelets; Friendship rings; Gold; Gold alloy ingots; Gold alloys; Gold and its alloys; Gold base alloys; Gold bracelets; Gold bullion coins; Gold chains; Gold coins; Gold earrings; Gold ingots; Gold jewellery; Gold medals; Gold necklaces; Gold plated bracelets; Gold plated brooches [jewellery]; Gold plated chains; Gold plated earrings; Gold plated rings; Gold rings; Gold thread</p>
--	---

	<p>[jewellery, jewelry (Am.)]; Gold thread jewelry; Gold, unworked or semi-worked; Gold, unwrought or beaten; Gold-plated necklaces; Grandfather clocks; Hands (Clock -) [clock and watch making]; Hands for clocks; Hands for watches; Hat ornaments of precious metal; Hoop earrings; Horological and chronometric instruments; Horological articles; Horological instruments; Horological instruments having quartz movements; Horological instruments made of gold; Horological products; Housings for clocks and watches; Identification bracelets [jewelry]; Imitation gold; Imitation jet; Imitation jewellery; Imitation jewellery ornaments; Imitation jewelry; Imitation pearls; Imitation precious stones; Industrial clocks; Ingots of precious metal; Ingots of precious metals; Insignia of precious metals; Insignias of precious metal; Iridium; Iridium alloys; Iridium and its alloys; jewelry [(Am.)]; Jewel cases [fitted]; Jewel cases of precious metal; Jewel chains; Jewel pendants; Jewellery being articles of precious metals; Jewellery boxes; Jewellery boxes [fitted]; Jewellery boxes of precious metals; Jewellery cases; Jewellery cases [caskets]; Jewellery cases [caskets] of precious metal; Jewellery cases [fitted]; Jewellery chain; Jewellery chain of precious metal for anklets; Jewellery chain of precious metal for bracelets; Jewellery chain of precious metal for necklaces; Jewellery chains; Jewellery, clocks and watches; Jewellery coated with precious metal alloys; Jewellery coated with precious metals; Jewellery containing gold; Jewellery fashioned from bronze; Jewellery fashioned from non-precious</p>
--	--

	<p>metals; Jewellery fashioned of precious metals; Jewellery findings; Jewellery for personal adornment; Jewellery for personal wear; Jewellery in non-precious metals; Jewellery in precious metals; Jewellery in semi-precious metals; imitation jewellery and plastic jewellery; Jewellery items; Jewellery made from gold; Jewellery made from silver; Jewellery made of bronze; jewelery made of glass; Jewellery made of non-precious metal; Jewellery made of plastics; Jewellery made of plated precious metals; Jewellery made of precious metals; Jewellery of precious metals; Jewellery ornaments; Jewellery (Paste -); Jewellery plated with precious metals; Jewellery; Jewellery rolls; Jewellery rope chain for anklets; Jewellery rope chain for bracelets; Jewellery rope chain for necklaces; Jewellery watches; Jewelry boxes; Jewelry boxes not of metal; Jewelry boxes, not of precious metal; Jewelry boxes of metal; Jewelry boxes of precious metal; Jewelry cases; Jewelry cases [caskets]; Jewelry cases not of precious metal; Jewelry cases of precious metal; Jewelry caskets; Jewelry caskets of precious metal; Jewelry chains; Jewelry clips for adapting pierced earrings to clip-on earrings; Jewelry findings; Jewelry for the head; Jewelry organizer rolls for travel; Jewelry (Paste -) [costume jewelry]; Jewelry pins for use on hats; Jewelry rolls for storage; Jewelry stickpins; Jewelry watches; Key chains as jewellery [trinkets or fobs]; Key charms coated with precious metals; Key charms of precious metals; Key charms [trinkets or fobs]; Key fobs; Key fobs made of precious metal; Key fobs,</p>
--	---

	<p>not of metal; Key fobs of common metal; Key fobs of imitation leather; Key fobs of precious metals; Key fobs [rings] coated with precious metal; Key holders of precious metals; Key holders [trinkets or fobs]; Key rings and key chains; Key rings of precious metals; Key rings [trinkets or fobs]; Key rings [trinkets or fobs] of precious metal; Key tags [trinkets or fobs]; Lapel badges of precious metal; Lapel pins [jewellery]; Lapel pins [jewelry]; Lapel pins of precious metals [jewellery]; Leather jewelry boxes; Leather key fobs; Leather watch straps; Links (Cuff -); Locketts; Man-made pearls; Mantle clocks; Master clocks; Mechanical watch oscillators; Mechanical watches; Mechanical watches with automatic winding; Mechanical watches with manual winding; Medallions; Medallions [jewellery, jewelry (Am.)]; Medallions made of non-precious metals; Medallions made of precious metals; Medals; Medals coated with precious metals; Medals made of precious metals; Metal badges for wear [precious metal]; Metal expanding watch bracelets; Metal key fobs; Metal tokens used for mass transit; Metal watch bands; Metal wire [precious metal]; Metal works of [precious metal]; Miniature clocks; Miniature figurines [coated with precious metal]; Model animals [ornaments] coated with precious metal; Model animals [ornaments] made of precious metal; Model figures [ornaments] coated with precious metal; Model figures [ornaments] made of precious metal; Monetary coin sets for collecting purposes; Movements for clocks and watches; Musical jewelry boxes; Neck</p>
--	---

	<p>chains; Necklaces; Necklaces [jewellery]; Necklaces [jewellery, jewelry (Am.)]; Necklaces of precious metal; Non-leather watch straps; Non-monetary coins; Objet d'art made of precious metals; Objet d'art of enamelled gold; Objet d'art of enamelled silver; Ornamental figurines made of precious metal; Ornamental lapel pins; Ornamental pins; Ornamental pins made of precious metal; Ornamental sculptures made of precious metal; Ornaments for clothing [of precious metal]; Ornaments (Hat -) of precious metal; Ornaments [jewellery, jewelry (Am.)]; Ornaments of jet; Ornaments (Shoe -) of precious metal; Ornaments [statues] made of precious metal; Oscillators for clocks; Oscillators for timepieces; Oscillators for watches; Osmium; Osmium alloys; Osmium and its alloys; Palladium; Palladium alloys; Palladium and its alloys; Parts for clocks; Parts for clockworks; Parts for watches; Paste jewellery; Paste jewellery [costume jewelry (Am.)]; Pendant watches; Pendants; Pendants for watch chains; Pendants [jewellery]; Pendulum clocks; Pendulums [clock and watch making]; Pendulums [clock and watch-making]; Personal ornaments of precious metal; Pet collar charms; Pewter jewellery; Pins being jewellery; Pins being jewelry; Pins [jewellery, jewelry (Am.)]; Pins (Ornamental -); Pins (Tie -); Platinum; Platinum alloy ingots; Platinum and its alloys; Platinum ingots; Platinum jewelry; Platinum [metal]; Pocket watches; Precious metal alloys; Precious metal alloys [other than for use in dentistry]; Precious metals; Precious metals and alloys thereof; Precious</p>
--	--

	<p>metals, unwrought or semi-wrought; watches; Presentation boxes for horological articles; Presentation boxes for jewelry; Presentation boxes for watches; Presentation cases for horological articles; Presentation cases for watches; Prize cups of precious metals; Processed or semi-processed precious metals; Quartz clocks; Quartz watches; Rhodium; Rhodium alloys; Rhodium and its alloys; Ring bands [jewellery]; Ring holders of precious metal; Rings being jewellery; Rings coated with precious metals; Rings [jewellery] made of non-precious metal; Rings [jewellery] made of precious metal; Rings [trinket]; Rope chain [jewellery] made of common metal; Rope chain made of precious metal; Ruthenium; Ruthenium alloys; Ruthenium and its alloys; Scale models [ornaments] of precious metal; Sculptures made from precious metal; Sculptures made of precious metal; Semi-finished articles of precious metals for use in the manufacture of jewellery; Semi-precious articles of bijouterie; Ship's chronometers; Shoe ornaments of precious metal; Signet rings; Silver; Silver alloy ingots; Silver alloys; Silver and its alloys; Silver ingots; Silver objets d'art; Silver thread; Silver, unwrought or beaten; Small clocks; Small jewellery boxes of precious metals; Split rings of precious metal for keys; Sports watches; Springs (Watch -); Spun silver [silver wire]; Square gold chain; Stands for clocks; Statues of precious metal; Statues of precious metal and their alloys; Statues of precious metal of religious icons; Statues of precious metals; Statuettes made of semi- precious metals;</p>
--	--

	<p>Statuettes made of semi-precious stones; Statuettes of precious metal; Statuettes of precious metal and their alloys; Sterling silver jewellery; Stop watches; Stopwatches; Straps for watches; Straps for wrist watches; Straps for wristwatches; Sun dials; Sundials; Table clocks; Table watches; Threads of precious metal [jewellery, jewelry (Am.)]; Threads of precious metals; Tie bars of precious metals; Tie bars; Tie chains of precious metal; Tie clasps of precious metals; Tie clips; Tie clips of precious metal; Tie holders of precious metal; Tie pins; Tie pins of precious metal; Tie tacks of precious metals; Tie-pins of precious metal; Time clocks [master clocks] for controlling other clocks; Timekeeping instruments; Timekeeping systems for sports; Timepieces; Timing clocks; Tokens (Copper -); Topaz; Travel clocks; Trinkets coated with precious metal; Trinkets [jewellery, jewelry (Am.)]; Trinkets of bronze; Trinkets of precious metal; Trophies coated with precious metal alloys; Trophies coated with precious metals; Trophies made of precious metal alloys; Trophies made of precious metals; Trophies of precious metals; Unwrought silver; Unwrought silver alloys; Wall clocks; Wall clocks [horological]; Watch and clock springs; Watch bands; Watch boxes; Watch bracelets; Watch cases; Watch casings; Watch chains; Watch clasps; Watch crowns; Watch dials; Watch faces; Watch fobs; Watch glasses; Watch hands; Watch movements; Watch parts; Watch pouches; Watch springs; Watch straps; Watch straps made of metal or leather or plastic; Watch straps of nylon; Watch straps of plastic; Watch straps of</p>
--	---

	<p>polyvinyl chloride; Watch straps of synthetic material; Watch winders; Watchbands; Watches; Watches bearing insignia; Watches containing a game function; Watches containing an electronic game function; Watches for nurses; Watches for outdoor use; Watches for sporting use; Watches incorporating a memory function; Watches incorporating automatic generating systems; Watches made of gold; Watches made of plated gold; Watches made of precious metals; Watches made of precious metals or coated therewith; Watches made of rolled gold; Watches with the function of wireless communication; Watchstraps; Watchstraps made of leather; Wedding bands (Jewellery); Wedding rings; Wire of precious metal [jewellery, jewelry (Am.)]; Wire thread of precious metal; Women's jewelry; Women's watches; Wooden bead bracelets; Wooden jewellery boxes; Works of art of precious metal; Wrist bands [charity]; Wrist straps for watches; Wrist watch bands; Wrist watches; Wristbands [charity]; Wristlet watches; Wristwatches; Wristwatches with GPS apparatus; Wristwatches with pedometers.</p>
--	--

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

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

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

10. In *Avnet Incorporated v Isoact Limited* [1998] FSR 16, Jacob J (as he then was) stated:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meaning attributable to the rather general phrase.”

11. In *Altecnic Ltd's Trade Mark Application* [2002] RPC 34 (COA) it was stated:

“It is permissible to take into account the class number specified by the applicant when assessing the meaning of the descriptions of goods/services included in the application.”

12. For its part, the opponent submits:

“The Applicant has filed for a very lengthy specification in Class 14. This includes the following items:

- Artificial gem stones
- Artificial stones (precious or semi-precious)
- Imitation precious stones
- Topaz

There is an overlap between the healing stones of interest to the Opponent and the stones of interest to the Applicant, and it should be noted that healing stones are often placed in jewellery...As explained, the Applicant’s mark covers artificial stones which are identical to healing stones. Artificial stones or gem stones share with healing stones the same purpose, the same use, the same user. They are likely to be of the same nature e.g. healing. The evidence filed by the Opponent shows that they share the same channel of trade and the same area of shops...Having the same purpose, the goods are clearly in competition...In effect there is no real difference between healing stones in class 5 and stones in class 14. The respective goods are identical/similar to a high degree.

In relation to the rest of the goods covered by the Application in class 14, these are still regarded similar to those covered by the Opponent’s earlier rights as the opponent covers the broad class 35 which includes ‘Advertising, marketing, advertising and marketing services provided by social media’ and would be regarded as complimentary to the sale of goods in class 14.”

13. In its counterstatement, the applicant submits (as written):

“Opponent stated that “there is an overlap between gemstones and healing crystals” while there is no overlap between these two type of goods or services

Healing Crystals means: Tending to Heal, a piece of crystalline substance believed to have healing powers.

While gemstones means “A precious or semi-precious stone, especially one cut, polished, and used in a piece of jewelery”

Therefore the applicants’ goods in Classes 14 bear little or no similarity to the goods for which the opponents’ mark is registered...

There is no overlap between these two goods, thus there is no similarity in goods and services or there is no exists of likelihood of confusion on the part of public. Even though if registry founds any overlap or similarity of goods and services, We request the registry to remove those goods and services from our application and approve our trademark application with rest of the goods and services.”

14. The applicant seeks registration of a wide range of goods in class 14 of the International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement, (15th June 1957, as revised and amended) (“The Nice Agreement”). Under the Nice Agreement, whilst jewellery, precious and semi-precious stones are appropriate to class 14, stones (and crystals) for therapeutic purposes are appropriate to class 5 (as per the opponent’s registration) whilst articles and devices for the treatment or improvement of function or conditions of persons or animals are appropriate to class 10. The latter would include items of jewellery such as e.g. copper bracelets which are intended to alleviate rheumatism. With this in mind, the opponent’s goods as registered will be used for therapeutic purposes by those who are seeking to improve their health or wellbeing. This differs from those sought to be registered by the applicant which do not include goods for therapeutic purposes but are instead ones which will be used by those members of the general public who wish to adorn themselves with particular items of jewellery or those in business who use stones e.g. in making jewellery. Whilst it is possible (I put it no higher than that) that stones for therapeutic purposes and stones for jewellery may come from the same initial source, as the applicant’s goods as applied for in class 14 would not include any such goods for therapeutic purposes, I have no evidence that they reach their respective markets through the same trade channels. Non-therapeutic jewellery and therapeutic or healing stones and crystals do not share the same trade channels. Given all of the

foregoing, I have no reason to believe nor evidence to show that the respective goods are in competition or complementary. I find them to be dissimilar goods.

15. Absent any specific submissions on the point and taking into account the case law set out above, I cannot see that any of the opponent's goods in class 5 are in any way similar to the remaining goods within the applicant's specification in class 14. The users, uses and trade channels do not coincide and the respective goods are neither in competition nor complementary.

16. I go on to consider the position as regards the opponent's services. These are, in short, advertising, marketing and business information services as well as retail and wholesale services and information, consultancy and advisory services connected with the sale of therapeutic and healing stones and crystals. I do not consider that its retail, wholesale, information, consultancy and advisory services put the opponent in any stronger position given that they also relate to therapeutic and healing goods which are not those covered by the applicant's specification. In respect of the opponent's submissions that its advertising and marketing services have a degree of similarity with those of the applicant's goods, I reject them. As the decision in *Avnet* makes clear, I have to consider the core meaning of the services. The core meaning of advertising etc. services is one of promotion of a third party's business and its goods and/or services or providing information about a business; it is not the sale of goods and/or services itself. The nature, purpose and users of the respective goods and services differ as do their trade channels and they are neither in competition nor are they complementary. The respective goods and services are dissimilar.

17. In *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated:

“49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity.”

18. As I have found the opponent's goods and services to be dissimilar to the applicant's goods, there can be no likelihood of confusion. The opposition on grounds under section 5(2)(b) of the Act therefore fails.

The objections under sections 5(3) and 5(4)(a) of the Act

19. I shall deal with both objections briefly. In order to succeed, the opponent has to show that it has a reputation or goodwill under the mark. Its evidence, from Mr Kapoor, is not extensive. Whilst he states the mark was first used in the UK in 2015, there is no evidence to support this claim. He states the opponent trades via the Amazon website and provides figures for turnover under the mark amounting to some £201,775 in 2016 and £378,787 in 2017. He does not specify how much of the 2017 accrues to a period before the relevant date. And whilst he says these figures refer to goods sold under the trade mark, he does not state that they refer to the sale of goods for which the earlier mark is registered. It appears from his evidence that the figures of turnover he provides include sales made of goods other than those covered by the earlier registration. He exhibits, at NK3, what he refers to as sample invoices. There are six in total dated between April 2016 and November 2017 with two of these post-dating the relevant date. Three of them relate to jewellery and one to table decor, none of which are goods for which the earlier mark is registered. The two remaining invoices are dated before the relevant date and relate to 1 x "Harmonize Tumbled Amethyst Stone with Rune Meditation Balancing Alphabet Symbol Reiki Healing Crystal" (£6.38) and to 1 x "Harmonize Turquoise Pyramid Orgone Reiki Healing Crystal Chakra Orgonite Energy Generator" (£8.99). Whilst the buyers' details have been partially redacted, both invoices are addressed to UK addresses. The invoices show the seller's name to be "indianbeautifulart". A further printout from the Amazon website included within this exhibit shows that this is a trading name of the opponent. Neither invoice shows the earlier mark as registered. Indeed nowhere in the evidence is there anything that shows the earlier mark as registered, not even on what Mr Kapoor states is the first page of its store on the Amazon website. The evidence does not show the opponent to have a reputation or goodwill under the mark as registered. The claims founded on grounds under sections 5(3) and 5(4)(a) of the Act fail.

Summary

20. The opposition fails in its entirety.

Costs

21. The applicant having succeeded, it would, ordinarily, be entitled to an award of costs in its favour. The applicant has not been professionally represented in these proceedings, however, and so, in line with the registrar's practice, he was informed by way of a letter dated 27 April 2018, that if he intended to make a claim for an award of costs, he should complete and return the pro-forma attached on or before 25 May 2018. He was also advised that if he did not do so, no award of costs (other than official fees, excluding those relating to any extension of time request) would be made. No completed proforma has been filed and the applicant did not incur any official fees. That being the case, I make no award of costs in the applicant's favour and each party will bear its own costs.

Dated this 24th day of July 2018

A Corbett

Ann Corbett

For the Registrar