

O/0394/25

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. UK00003898102
BY SHENZHEN ZHENXING RUITONG TECHNOLOGY CO., LTD
TO REGISTER:**

megelin

AS A TRADE MARK IN CLASSES 3, 8 & 10

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. OP000443285 BY
MAGELINE BIOLOGY TECH CO., LTD**

BACKGROUND AND PLEADINGS

1. On 6 April 2023, Shenzhen Zhenxing Ruitong Technology Co., Ltd. (“the applicant”) applied to register in the UK the trade mark shown on the cover page of this decision (“the applicant’s mark”). The application was accepted and published for opposition purposes on 30 June 2023 and registration is sought for the following goods:

Class 3: Hair color removers; Lipsticks; Beauty masks; Cosmetic cotton wool; Perfumes; Cosmetic sun-protecting preparations; Beauty gels; Make-up pencils; Shaving soaps; Cosmetic rouges; Skin moisturizer masks; Spot remover; Natural oils for cosmetic purposes; Depilatory creams; Wrinkle-minimizing cosmetic preparations for topical facial use.

Class 8: Laser hair removal apparatus, other than for medical purposes; Beard clippers; Electric hair crimper; Safety razors; Electric hair trimmers; Electrolysis apparatus [depilatory]; Electric and non-electric depilatory appliances; Electric razors; Manicure implements; Apparatus for tattooing; Pen knives; Electric hair clippers; Drills [hand tools]; Nail scissors.

Class 10: LED masks for therapeutic purposes; Therapeutic facial masks; Transcutaneous electrical muscle stimulators; Medical skin enhancement apparatus using lasers; Facial aesthetic treatment apparatus using ultrasonic waves; Electric esthetic massage apparatus; Electric scalp massagers for commercial use; Lasers for medical purposes; Lasers for surgical use; Laser pointers for medical use; Hair prostheses; Lasers for medical use; Ophthalmoscopes; Massage apparatus, electric or non-electric; Medical ice packs.

2. On 27 September 2023, Mageline Biology Tech Co., Ltd (“the opponent”) filed an opposition opposing the application in full under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the following registrations:



UK registration no. UK00918100767¹

Filing date 26 July 2019; registration date 9 January 2020.

Relying on all goods, being:

Class 3: Soaps; Stain removers; Polishing preparations; Abrasive preparations; Ethereal oils; Cosmetics; Air fragranting preparations; Cosmetics for animals; Scented wood; Dentifrices.

("the opponent's first mark"); and



International Registration designating the UK under no. WO0000001507878

International registration date: 9 December 2019

Date designated for protection in the UK: 9 December 2019

Date protection granted in the UK: 18 March 2020

Relying on all goods, being:

Class 3: Cosmetics for animals; soaps; cosmetics; air fragranting preparations; polishing preparations; stain removers; ethereal oils; scented wood; dentifrices.

("the opponent's second mark").

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

3. By virtue of relying on section 5(2)(b) of the Act, the opponent's case is that the marks at issue are similar and that the goods of the parties are either identical or similar, resulting in a likelihood of confusion.
4. The applicant filed a counterstatement denying all claims made against it by the opponent in their statement of grounds with the sole exception being the admission that the opponent's class 3 goods are similar to its own class 3 goods.
5. The opponent is represented by Springbird IP Limited. The applicant is represented by Pawel Wowra. The opponent filed evidence and written submissions. The applicant did not. No hearing was requested and no parties filed written submissions in lieu. This decision is taken following a careful perusal of the papers.
6. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

EVIDENCE

7. The opponent's evidence came in the form of the witness statement of Lisa Ormrod dated 11 March 2024. Lisa Ormrod is a Chartered Trade Mark Attorney at the opponent's representative. Their statement is accompanied by seven exhibits, being WSLO1 – WSLO7. The evidence was adduced to show how the goods covered by the parties' marks are used/presented on the market in reality and to demonstrate their similarity, complementarity and/or competition in the event they are not considered identical.
8. I do not intend to summarise the evidence filed by the opponent (or the opponent's written submissions) in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent deemed necessary below.

DECISION

My approach

9. While its second mark is grey and white and its first is in black and white, I consider that the opponent's marks are identical². Further, the goods covered by its second mark's specification are identical to that of its first mark, though I note that the opponent's first mark has one additional term, being *abrasive preparations*. As a result, I will proceed to consider this opposition in respect of the opponent's first mark only. For the remainder of this decision, I will refer to the opponent's first mark as "the opponent's mark".

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

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

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

(a) ...

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

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

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

"Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the

² On this point, I note that marks registered in black and white and capable of being used in any colour. This include grey, hence the conclusion here that the marks are identical.

trade mark is applied for, the application is to be refused in relation to those goods and services only.”

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

“(6)(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark or international trade mark (UK) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

13. The opponent’s mark qualifies as an earlier trade mark under the above provisions. As the opponent’s mark had not completed its registration process more than five years before the filing date of the applicant’s mark, it is not subject to proof of use pursuant to section 6A of the Act. Consequently, the opponent may rely on the goods highlighted in its notice of opposition.

14. The following principles are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) (“OHIM”)*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed

and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

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

Comparison of goods and services

15. The parties goods are as follows:

The opponent's goods	The applicant's goods
Class 3: Soaps; Stain removers; Polishing preparations; Abrasive preparations; Ethereal oils; Cosmetics; Air fragrancing preparations; Cosmetics for animals; Scented wood; Dentifrices.	Class 3: Hair color removers; Lipsticks; Beauty masks; Cosmetic cotton wool; Perfumes; Cosmetic sun-protecting preparations; Beauty gels; Make-up pencils; Shaving soaps; Cosmetic rouges; Skin moisturizer masks; Spot remover; Natural oils for cosmetic purposes; Depilatory creams; Wrinkle-minimizing cosmetic preparations for topical facial use. Class 8: Laser hair removal apparatus, other than for medical purposes; Beard clippers; Electric hair crimper; Safety razors; Electric hair trimmers; Electrolysis apparatus [depilatory]; Electric and non-electric depilatory appliances; Electric razors; Manicure implements; Apparatus for tattooing; Pen knives; Electric hair clippers; Drills [hand tools]; Nail scissors.

	Class 10: LED masks for therapeutic purposes; Therapeutic facial masks; Transcutaneous electrical muscle stimulators; Medical skin enhancement apparatus using lasers; Facial aesthetic treatment apparatus using ultrasonic waves; Electric esthetic massage apparatus; Electric scalp massagers for commercial use; Lasers for medical purposes; Lasers for surgical use; Laser pointers for medical use; Hair prostheses; Lasers for medical use; Ophthalmoscopes; Massage apparatus, electric or non-electric; Medical ice packs.
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16. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account, as per *Canon*, where the CJEU stated at paragraph 23 of its judgement:

“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.”

17. 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.

18. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court (“GC”) stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

19. In *Kurt v Hesse v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers

may think that the responsibility for those goods lies with the same undertaking”.

20. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken against transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public is liable to believe that the responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.”

21. Whilst on the other hand:

“.....it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

22. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), paragraph 12, Floyd J (as he then was) gave the following guidance on construing the words used in specifications:

“[...] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks)* (*IP TRANSLATOR*) [2012] ETMR 42 at [47]-[49]. Nevertheless, the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of ‘dessert sauce’ did not include jam, or because the ordinary and natural description of jam was not ‘a dessert

sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

23. I bear in mind that it is permissible to group goods together for the purposes of assessment: *Separode* Trade Mark.³

24. In its statement of grounds, the opponent's position is that the goods for which protection is sought in classes 3, 8 and 10 by the applicant are identical and similar to those for which protection has been granted under the opponent's mark.

25. As stated at paragraph 4 above, the applicant filed a counterstatement denying all claims made against it with the sole exception being the admission that the opponent's class 3 goods are similar to the applicant's class 3 goods. The applicant stated that a comprehensive and detailed comparison between the goods of the applicant in class 8 and the opponent in class 3 reveals significant dissimilarities. The applicant further stated that when comparing the goods of the applicant in class 10 and the goods of the opponent in class 3, the detailed analysis across various aspects such as nature, intended purpose, method of use, complementarity and competition clearly demonstrates the dissimilarity between the applicant's medical and therapeutic goods and the opponent's cosmetics and fragrance goods and these fundamental differences underscore the argument that the goods are not similar.

26. In its written submissions, the opponent stated that it notes the applicant conceded that the goods covered by the application in class 3 are similar to the opponent's goods in class 3. The opponent maintains that many of the goods at issue in class 3 are identical and for any class 3 goods not found to be identical, the goods are highly similar.

³ BL O-399-10 (AP)

27. I do not intend to summarise the opponent's statement of grounds or written submissions, or the applicant's counterstatement in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent deemed necessary below.

28. While the opponent's specification does not include any goods in class 8 or class 10, I remind myself of section 60A of the Act which sets out that where goods and services are in different classes, it does not mean that they are automatically dissimilar.

Class 3

29. As above, the applicant admits that the opponent's class 3 goods are similar to the applicant's class 3 goods. While noted, the applicant has not stated the level of similarity between the applicant's goods and the opponent's goods. Therefore, it remains necessary for me to conduct a full comparison below. On this point, I remind myself that I have to take into account the concession, meaning I am bound to find some similarity at the very least between the class 3 goods of the opponent and the applicant.

Shaving soaps.

30. The term "soaps" in the opponent's specification is a broad term that includes the above term of the applicant. As a result, I find these goods to be identical in accordance with the principle in *Meric*.

Lipsticks, beauty masks, beauty gels, make up pencils, cosmetic rouges, skin moisturizer masks, natural oils for cosmetic purposes, depilatory creams, wrinkle minimizing cosmetic preparations for topical facial use.

31. The opponent's goods contain "cosmetics". The witness statement of Lisa Ormerod states that the Cambridge Dictionary definition of cosmetics is namely "substances you put on your face or body that are intended to improve your appearance". This definition provided falls within my understanding of cosmetics. As a result, this is the definition of cosmetics that I will proceed with. Therefore, I consider that the

term “cosmetics” is sufficiently broad and covers any type of product for the beautification of the user’s body, face and skin. As all of the above goods fall within this definition, I find that they are identical in accordance with the principle in *Meric*.

Spot remover.

32. As a good in class 3, it is my understanding that spot remover is a cleanser used to remove grease from the skin to prevent the formation of spots. Consequently, I find the above term to be identical to the opponent’s “cosmetics” under the principle used in *Meric* as spot remover is used for the beautification of the face and skin.

Perfumes.

33. In their written submissions, the opponent submits that “perfumes are identical to air fragrancing preparations” covered by the opponent’s mark. In doing so, it refers to paragraph 34 of *Biologische Heilmittel Heel GMBH v BESTWAY PANACEA HOLDINGS LIMITED*, ‘DERMAWELL’⁴ which sets out that the “ordinary meaning of perfumery would be a scent applied to the body, hair, or to a product or room to emit an aroma”. Alternatively, the opponent submits that the goods would be highly similar based on the fact they are both scented products and share their nature, purpose, channels of trade and users.

34. My understanding of a perfume as a term in class 3 covers a liquid that is used to improve the scent of the human body, an object or a living space. Given this, I find perfume to be identical to “air fragrancing preparations” under the principle used in *Meric*. If this conclusion is incorrect, I find the goods in question to have a high degree of similarity as they share the same purpose which is to improve the smell of something be that a body, object or room. They overlap in nature as perfumes and air fragrancing preparations can both take the form of sprays. Lastly, the user and trade channels for both goods will also overlap.

⁴ O-753-18

Hair color removers.

35. I will now give consideration to whether hair colour remover is similar to “cosmetics”. While I consider that a cosmetic can include something that improves the colour of the hair, it does not cover something that removes colour from the hair. I say this because its purpose is to reverse the process that was carried out to change the colour of the hair. In this context (namely hair dye being a cosmetic), I find that while the natures, method of use and purpose differ, these goods have the same user and trade channels. As a result, and reminding myself of the applicant’s concession above, I find hair colour remover and cosmetics to have a low level of similarity.

Cosmetic cotton wool.

36. Just because the above term contains the word cosmetic does not mean it is a cosmetic. That being said, I still consider the above is similar to the opponent’s “cosmetics”. To my knowledge, cosmetic cotton wool is typically used alongside cosmetic products to help apply them to the user’s skin. As such, I find that the goods are complementary as they are important to one another and such a relationship between them is likely to lead the consumer to believing that they originate from a single undertaking. Further, the goods are likely to be selected by the same users and respective trade channels may be similar even if the goods are not sold in close proximity. Taking all factors into account, I find a medium degree of similarity.

Cosmetic sun-protecting preparations.

37. While offering protection from the sun, cosmetic sun-protecting preparations can still define as a cosmetic and can, therefore, still have beautification qualities such as those that contain bronzing ingredients. As such, I find that the above term is identical under the principle outlined in *Meric* with the opponent’s “cosmetics”. However, if this is incorrect, then I find that they are still similar. Insofar as the applicant’s term describes the aforementioned type of goods, it overlaps in purpose with the opponent’s term. Further, the goods may move via the same trade

channels and be sold in the same or similar establishments, though not necessarily on the same shelves. The goods are not complementary, nor do I consider them competitive. I consider the goods to be similar to a medium degree.

Class 8

Laser hair removal apparatus, other than for medical purposes; Beard clippers; Safety razors; Electric hair trimmers; Electrolysis apparatus (depilatory); Electric and non-electric depilatory appliances; Electric razors; Electric hair clippers.

38. The contested goods are all hair removal tools or appliances (electric and non-electric). The closest comparable term from the opponent's specification is "cosmetics" in Class 3, where cosmetics can be used for beautification of the body and skin. However, hair removal does not necessarily beautify the body or skin in the same way that cosmetics do. The competing goods differ in nature, method of use and purpose. While they may share the same users and may be sold via the same distribution channels, I do not consider that they would be sold in close proximity (the above goods are, instead, likely to be sold in electrical sections of stores). Further, I have nothing to suggest that the same undertaking would produce and sell cosmetics as well as the above goods of the applicant, or vice versa. Lastly, there is no complementarity between the respective goods. I find them to be dissimilar.

Electric hair crimpers.

39. Electric hair crimpers are tools used to style the hair using heat. Following similar reasoning to that discussed above, I find that there is no degree of similarity between this contested good and the opponent's goods. I find them to be dissimilar.

Manicure implements.

40. Manicure implements are used to improve the appearance of the user's nails. The closest comparable term in the opponent's specification is "cosmetics" in class 3. Plainly, these goods differ in nature and method of use. As for their purposes, as

stated previously, cosmetics are defined as “substances you put on your face or body that are intended to improve your appearance”. You ‘use’ manicure implements on a user’s nails to improve their appearance, you do not ‘put’ manicure implements on a user’s nails. As such, I find that the purpose of these goods differ. The trade channels and users are likely to be similar for both of the goods in question as the above goods are likely to be produced and sold by the same undertakings and, further, will be displayed either on the same shelves or in close proximity to a range of different nail cosmetics in retail establishments. Given this, I find these goods to have a low level of similarity.

Nail scissors.

41. The contested goods are tools intended to make the users nails less sharp or shorter. The closest comparable term from the opponent’s specification is “cosmetics” in Class 3, which may include goods such as hand and nail creams. The competing goods differ in nature, method of use and purpose. There is no competition or complementarity between the goods. The goods may be sold in close proximity in the same shops and supermarkets and may share the same end user. Additionally, I understand that such goods are likely to be produced by the same undertaking. Taking all of this into account, I find nail scissors and the opponent’s goods to have a low level of similarity.

Apparatus for tattooing.

42. The contested goods are apparatus used for tattooing the user’s skin. There is no apparent similarity with any of the opponent’s goods. Therefore, I find the respective goods to be dissimilar.

Pen knives; Drills [hand tools].

43. The contested goods are tools. A drill is a tool or machine that makes holes.⁵ A pen knife is a small knife that folds into a case and is usually carried in a pocket.⁶ There is no apparent similarity with any of the opponent's goods. Therefore, I find the respective goods to be dissimilar.

Class 10

Electric esthetic massage apparatus; Electric scalp massagers for commercial use; Massage apparatus, electric or non-electric.

44. The applicant's goods above include a range of massage devices. I find the nature and method of use of these devices to be different to the opponent's goods. I do not find the goods to be complementary and I find it unlikely that there will be competition between the goods. Whilst the intended user may be shared and it may be argued that an electric aesthetic massage apparatus is to improve the beauty of someone, I believe the primary purpose of a massage apparatus is not to improve someone's beauty in the same way a cosmetic does. Lastly, I see no reason to find that there is any overlap in trade channels. I find the goods to be dissimilar.

Ophthalmoscopes; Lasers for medical use; Lasers for medical purposes; Lasers for surgical use; Laser pointers for medical use.

45. The above goods are likely to be used by health care providers. There is no apparent similarity with the opponent's goods. Consequently, I find the goods to be dissimilar.

⁵ Cambridge dictionary definition of drill.

⁶ Cambridge dictionary definition of pen knife.

Hair prostheses.

46. The above goods are custom made wigs manufactured for patients who have lost their hair following medical treatment or natural hair loss. The closest comparable term in the opponent's specification is "cosmetics". As stated above, the definition of cosmetics is namely "substances you put on your face or body that are intended to improve your appearance", I do not consider that the purpose is the same as that of a cosmetic. Further, I do not consider that they would ordinarily be considered a cosmetic product. Whilst hair prostheses may be said to improve the appearance of the user, I find that the trade channels will not be similar as a producer of hair prostheses is unlikely to produce and sell cosmetics, or vice versa. The goods will not be sold in the same retail establishments or on the same websites. Hair prostheses are more specialist goods that will be bought by a smaller number of users than cosmetics so there is no obvious overlap in user. Taking all of this into account, I find the goods to be dissimilar.

Medical ice packs.

47. Medical ice packs are goods that can be used by health care providers or the general public for treating injuries. There is no apparent similarity with the opponent's goods. Consequently, I find the goods to be dissimilar.

LED masks for therapeutic purposes; Therapeutic facial masks.

48. The above goods are masks that you apply to your face or other parts of the body for therapeutic purposes. The closest comparable term in the opponent's specification is "cosmetics". The purpose of the above goods differs from cosmetics as "therapeutic" goods are goods to help with healing. I find that the trade channels will not be similar as a producer of the above will not also produce and sell cosmetics, or vice versa. While these goods may be available via the same large retail establishments, they will not be displayed on the same shelves or within close proximity. The user base will overlap, however, this is so broad that it is not sufficient to result in a level of similarity. As a result, I find there is such a fleeting level of similarity that the goods are dissimilar.

Medical skin enhancement apparatus using lasers; Facial aesthetic treatment apparatus using ultrasonic waves.

49. I will compare these goods with the opponent's "cosmetics". Following similar logic to that discussed in the preceding paragraph, I find that these goods share no overlaps in nature, method of use, purpose or trade channels. While the user may overlap, this alone is not sufficient to warrant a finding of similarity. As such, I find the goods to be dissimilar.

Transcutaneous electrical muscle stimulators.

50. As far as I understand it, transcutaneous electrical muscle stimulators are instruments applied to the body to deliver electrical impulses to the muscles through the surface of your skin. This good has no obvious overlaps with any of the opponent's goods. I find the goods to be dissimilar.

Conclusion on the goods comparison

51. Where there is no similarity of goods, there can be no likelihood of confusion in respect of oppositions brought under s5(2)(b) grounds.⁷ As a result, my findings above mean that the opposition fails in respect of the following goods, being those that I have found dissimilar:

Class 8: Laser hair removal apparatus other than for medical purposes; beard clippers; electric hair crimper; safety razors; electric hair trimmers; electrolysis apparatus (depilatory); electric and non-electric depilatory appliances; electric razors; apparatus for tattooing; pen knives; electric hair clippers; drills [hand tools].

Class 10: Electric esthetic massage apparatus; Electric scalp massagers for commercial use; Massage apparatus, electric or non-electric; Ophthalmoscopes; Lasers for medical use; Lasers for medical

⁷ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

purposes; Lasers for surgical use; Laser pointers for medical use; Medical ice packs; Hair prostheses; LED masks for therapeutic purposes; Therapeutic facial masks; Medical skin enhancement apparatus using lasers; Facial aesthetic treatment apparatus using ultrasonic waves; Transcutaneous electrical muscle stimulators.

The average consumer and the nature of the purchasing act

52. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

53. The goods at issue are ordinary consumer goods that will be selected by the general public at large. They will be available via general or specialist retailers (such as beauticians, make-up shops or supermarkets) and their online equivalents (where available). However, I acknowledge that the average consumer might also include professional users (such as beauticians and make-up artists). In physical stores, the goods will be displayed on shelves where they will be self-selected by the consumer. When the selection takes place online, the goods will be selected after viewing an image of it on a webpage. Clearly, the visual component will dominate such selection processes, though I do not discount the aural component entirely as suggestions may come from word-of-mouth recommendations or advice

from sales assistants, especially in beauticians or make-up shops where some of the goods may be selected after a discussion with the beautician or make-up artist. Regardless of the importance of the aural component, the consumer will still view the goods.

54. The goods are likely to be selected on a fairly frequent basis and at a relatively low cost. In respect of the level of attention paid, I am of the view that when selecting the goods, the consumer is likely to consider factors such as the colour, ingredients used, the desired effects on the skin, ease of application, scent and whether the goods have been tested on animals. Generally speaking, the average consumer will pay a medium degree of attention.

Comparison of marks

55. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components.

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

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

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

58. The respective trade marks are shown below:

The opponent's mark	The applicant's mark
	megelin

59. In the notice of opposition and statement of grounds, the opponent argues that the opponent's mark and the applicant's mark are highly similar. The opponent states that it is an established principle that the verbal elements of a mark are considered to be more distinctive than the figurative elements, the average consumer will quote the name 'Mageline' rather than describe the figurative element displayed at the top of the mark or translate the Chinese symbols, the word element 'Mageline' is highly similar to 'megelin' both visually and phonetically, a conceptual comparison is not relevant as neither the opponent's mark nor the applicant's mark have a meaning, the opponent's mark and the applicant's mark are of a similar length being 8 letters versus 7, the majority of the letters are the same and in the same order, both marks consist of three syllables the last two of which are identical and the first being visually and phonetically very similar.

60. In its counterstatement, the applicant denies all of the opponent's comments on the similarity of the marks. I do not intend to summarise the applicant's comparison of the opponent's mark and the applicant's mark here but I can confirm I have taken

it into account to the extent deemed necessary when marking the following comparison.

Overall impression

61. The applicant's mark is a word only mark consisting solely of the word 'megelin' in a black lower case font. There are no other elements that contribute to the overall impression of the mark, which lies in this word.

62. As for the opponent's mark, this is a figurative mark which consists of the word 'Mageline' in a black standard typeface font with three black Chinese symbols placed centrally below the text with a black dash placed either side of the Chinese symbols. A circle outlined in black is placed centrally above the text with a shape pattern inside the circle. I find that it is the word 'Mageline' that will dominate the overall impression of the mark with the Chinese symbols contributing to a lesser degree as, for the most part, UK consumers will not be able to understand their meaning. As for the circle device, I find this contributes to a lesser degree also, albeit a greater degree than that of the Chinese symbols.

Visual comparison

63. At the outset of this comparison, I consider it necessary to set out that the applicant's mark, being 'megelin', is a word only mark. As such, it is capable of being presented in the exact same typeface as that used in the opponent's mark on the basis that, as above, the typeface used in the opponent's mark is a fairly standard one. Whilst it is not legitimate to perform a comparison between a word mark and a figurative mark by considering specific ways in which the word *might* be presented, the point I make here is that the typeface in which the opponent's mark is presented does not provide a point of distinction in itself.⁸ As a result, the points of visual difference are the circle device, the Chinese symbols and dashes in the opponent's mark, the letter 'a' instead of 'e' between the 'M' and 'g' and the letter 'e' at the end of the opponent's mark. All of these points of difference will have an impact on the visual comparison of the marks. Overall, I am of the view that when compared as wholes, the shared use of the letters 'M-G-E-L-I-N' in both

⁸ See *HERNO S.p.A. v Miss Sparrow Ltd*, BL O/954/22, paragraphs 23 and 34.

marks in sufficient to result in a finding that the marks are similar to a medium degree.

Aural comparison

64. In considering the opponent's mark, I am of the view that as the three Chinese symbols will not be understood by a majority of UK consumers, they will not be pronounced. This leaves the only aural element being 'Mageline'. In comparing the marks, I note that both have multiple ways that they could be pronounced. For the opponent's mark these could include 'MAG-UH-LINE', 'MAJ-UH-LINE', 'MAG-UH-LIN', 'MAJ-UH-LIN', 'MAG-UH-LEEN' or 'MAJ-UH-LEEN'. As for the applicant's mark, this may also be pronounced in a variety of ways including 'MEG-UH-LIN' or 'MEJ-UH-LIN'. While the marks have a variety of pronunciations, I am of the view that if a consumer pronounces the opponent's mark as 'MAJ-UH-LIN' they are likely to pronounce the applicant's mark as 'MEJ-EH-LIN', whereas if it pronounces the opponent's mark as 'MAG-UH-LIN' logic dictates it is likely to pronounce the applicant's mark as 'MEG-EH-LIN'.⁹ This results in a greater degree of aural similarity between the marks. Regardless of how the marks will be pronounced, both marks have three syllables. I find that the marks are aurally similar to a medium to high degree.

Conceptual comparison

65. Conceptually, the opponent submits that neither mark has a meaning and so a conceptual comparison is not relevant. The applicant submits that if neither mark conveys a meaning in relation to the goods they are associated with, the conceptual comparison becomes less significant. The applicant states that both 'megelin' and 'Mageline' do not inherently describe or suggest the nature, quality or characteristics of the goods. Therefore, any conceptual similarity is rendered irrelevant as the terms do not engage the consumers' understanding of the products in a descriptive or suggestive manner.

⁹ For the avoidance of doubt, I find that the consumers that pronounce the marks in this way will constitute a significant proportion of consumers.

66. In comparing the marks, I accept that they both consist of words that will be viewed as either made-up or foreign language words with no obvious meaning to the UK consumer. As neither mark has a meaning, they are not capable of a conceptual comparison. The conceptual position is, therefore, neutral.

Distinctive character of the opponent's mark

67. 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 C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

68. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The

distinctiveness of a mark can be enhanced by virtue of the use that has been made of it. However, the opponent has not pleaded that its mark has obtained an enhanced level of distinctiveness and, no evidence has been filed to that effect. Therefore, I only have the inherent position to consider.

69. I have discussed above that it is the word 'Mageline' that will dominate the overall impression of the opponent's mark. While the figurative elements contribute to the distinctive character of the mark, I find that they will not contribute to any material degree so as to increase the distinctive character of the mark beyond that which is conveyed by the word 'Mageline'. Therefore, the distinctive character of the mark lies in the word element. As above, I found that the average consumer will see 'Mageline' either as an invented word or a foreign language word with no meaning. It is not descriptive of and nor does it allude to the goods for which it is registered. Given this, I find that the opponent's mark has a high degree of inherent distinctive character.

Likelihood of confusion

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

71. Whilst conducting a global assessment of the likelihood of confusion I must be aware of the fact that not all aspects of the respective marks will necessarily have the same impact. For example, the importance of the respective visual, aural and conceptual aspects will be dependent on factors such as the way the goods at issue are marketed, and in which type of store/platform they are made available.
72. Throughout the course of this decision, I have found some goods to be identical and others to be similar to varying degrees, including low. The average consumers are members of the general public at large and may also include professional users (such as beauticians and make-up artists) who will select the goods via primarily visual means (though I do not discount an aural component) after having paid a medium level of attention during the purchasing process. I have found the marks to be similar to a medium degree from a visual perspective and similar to a medium to high degree from an aural perspective. The position is neutral from a conceptual perspective resulting in no conceptual hook for consumers. I have found the opponent's mark to possess a high degree of inherent distinctive character.
73. The device elements in the opponent's mark are fairly banal and despite sitting at the top and bottom of the mark, will not be used by consumers in order to assist them in accurately recalling the parties' marks, particularly when taking into account the notion of imperfection recollection. I also take into account that consumers will be drawn to the element of the mark that can be read, and I remind myself of my findings regarding the role that the device element plays in the opponent's mark. I therefore am of the view that the presence of the device elements do not preclude a finding of direct confusion.
74. In light of the above, it is my view that it is the verbal elements of the marks, being 'Mageline' in the opponent's mark and 'megelin' in the applicant's mark, that will be used by consumers seeking to recall the marks (be that when they are recalled visually or aurally).¹⁰ Put simply, these words are similar to a higher degree from

¹⁰ In saying this, I am mindful to point out that I do not consider that this results in an artificial dissection of the opponent's mark. Instead, for the reasons set out in the preceding paragraph, this is as a result of what I consider consumers will seek to pin their recollection of the marks on.

both a visual and aural perspective.¹¹ They share the same six letters in the same order (which makes up six of the eight letters in the opponent's mark and six of the seven letters in the applicant's mark) and differ only in their second letter and end letter. Taking all of the above into account whilst bearing in mind the principle of imperfect recollection and the fact that consumers will only pay a medium degree of attention when selecting the goods, I consider it likely that in seeking to recollect the parties' marks for one another, consumers are liable to misremember which mark is which due to the higher level of similarity between their word elements. Consequently, I consider that there exists a likelihood of direct confusion between the marks at issue. Given the higher level of similarity between the dominant element of the marks (being that which the consumer will pin their recollection on), I am of the view that this finding applies in circumstances where the marks are viewed on goods that are only similar to a low degree.

CONCLUSION

75. The opposition succeeds in respect of all the goods that have found to be identical or similar. Therefore, the applicant's mark is, subject to any successful appeal of my decision, refused registration for the following:

Class 3: Shaving soaps; Lipsticks; beauty masks; beauty gels; make up pencils; cosmetic rouges; skin moisturizer masks; natural oils for cosmetic purposes; depilatory creams; wrinkle minimizing cosmetic preparations for topical facial use; perfumes; hair color removers; spot remover; cosmetic cotton wool; cosmetic sun-protecting preparations.

Class 8: Manicure implements; nail scissors.

¹¹ I appreciate that my findings of visual similarity resulted in similarity to a medium degree, however, this comment relates to the similarity of the words themselves.

76. That being said, the applicant's mark may proceed (again, subject to any successful appeal of my decision) for the following goods, which I have found to be dissimilar:

Class 8: Laser hair removal apparatus other than for medical purposes; beard clippers; electric hair crimper; safety razors; electric hair trimmers; electrolysis apparatus (depilatory); electric and non-electric depilatory appliances; electric razors; apparatus for tattooing; pen knives; electric hair clippers; drills [hand tools].

Class 10: Electric esthetic massage apparatus; Electric scalp massagers for commercial use; Massage apparatus, electric or non-electric; Ophthalmoscopes; Lasers for medical use; Lasers for medical purposes; Lasers for surgical use; Laser pointers for medical use; Medical ice packs; Hair prostheses; LED masks for therapeutic purposes; Therapeutic facial masks; Medical skin enhancement apparatus using lasers; Facial aesthetic treatment apparatus using ultrasonic waves; Transcutaneous electrical muscle stimulators.

COSTS

77. On balance, I consider that the applicant has enjoyed the greater degree of success in these proceedings. Therefore, I consider that the applicant is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. Given that the opponent has succeeded in opposing some of the applicant's goods, I consider it appropriate to reduce the costs award to a degree in order to reflect the opponent's success.

78. In the circumstances, I hereby award the applicant the sum of £150 as a contribution towards its costs. The sum is calculated as follows:

Considering the notice of opposition and
preparing the counterstatement:

£250

Reduction: -£100

Total: £150

79.I hereby order Mageline Biology Tech Co., Ltd to pay Shenzhen Zhenxing Ruitong Technology Co., Ltd. the sum of £150. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 30th day of April 2025

**N Barratt
For the Registrar**