

O/0653/25

TRADE MARKS ACT 1994

**IN THE MATTER OF INTERNATIONAL REGISTRATION
NO. WO0000001780567 IN THE NAME OF ZOEFULL LTD
FOR THE FOLOWING TRADE MARK:**

FOREVER YOUNG

AS A TRADE MARK IN CLASSES 35 & 44

AND

**IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 449649 BY
EURARK, LLC**

BACKGROUND AND PLEADINGS

1. ZOEFULL LTD (“the holder”) is the holder of the International Registration (“the IR”) shown on the cover page of this decision. The IR was registered on 14 September 2023 and, with effect from the same date, the holder designated the UK as a territory in which it seeks to protect the IR under the terms of the Protocol of the Madrid Agreement. The IR was accepted and published in the Trade Marks Journal for opposition purposes on 14 June 2024. As it presently stands, the holder seeks protection in the UK for the following services:

Class 35: Presentation of products to the public, business management, and marketing agency services for health professionals, nutritionists, well-being professionals, artists, musicians, singers, writers, actors, models, performers, photographers and others involved in the well-being, wellness, health, nutrition, beauty, industries.

Class 44: Providing an online marketplace for buyers and sellers of goods and services relating to health, beauty, nutrition, wellbeing and wellness.

2. The IR derives from an earlier EUTM which was filed at the EUIPO on 14 March 2023. As a result, the IR benefits from that date as the priority date in these proceedings.
3. On 13 September 2024, the IR was opposed by EURARK, LLC (“the opponent”). The opposition is based upon section 5(2)(a) of the Trade Marks Act 1994 (“the Act”) and is reliant upon the following trade mark:

FOREVER YOUNG

UK registration no. 900078295

Filing date 1 April 1996; registration date 16 July 1998

Relying on all goods, namely:

Class 3: Cosmetics, namely, cellular moisturizing creams, lotions and gels.

("the opponent's mark")

4. The opponent's mark is a comparable mark based on an earlier EUTM. On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with existing EUTMs. These comparable marks enjoy the same filing and registration dates as their European counterparts.
5. The opponent claims that the marks at issue are identical and that the goods and services at issue are similar. As a result, the opponent claims that there exists a likelihood of confusion between the marks.
6. The holder filed a counterstatement wherein it denied the claims against it. In addition, the holder requested that the opponent provide proof of use for the mark relied upon.
7. Only the opponent filed evidence. A short format hearing took place before me on 4 June 2025, by video conference. The holder was represented by Mr Ian Bartlett of Beck Greener LLP, who have represented the holder throughout these proceedings. The opponent was not represented at the hearing but it elected to file written submissions in lieu of its attendance. It is noted that Gill Jennings & Every LLP represented the opponent throughout these proceedings.
8. 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

9. The opponent's evidence came in the form of the witness statement of Mr Scott Lancaster dated 17 January 2025. Mr Lancaster is General Counsel of the opponent. His statement is accompanied by six exhibits, being SL1 to SL6, and was adduced to prove use of the opponent's mark.

10. I do not intend to summarise the evidence in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

DECISION

Proof of use

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

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

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

(aa) a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a

valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;

(ab) a comparable trade mark (IR) or a trade mark registered pursuant to an application made under paragraph 28, 29 or 33 of Schedule 2B which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired.

[...]

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

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

“(1) This section applies where:

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a),
 - (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

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

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

(3) The use conditions are met if –

- (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
- (b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes –

- (a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and
- (b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

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

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

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

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

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

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

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

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

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

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

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

15. Given its filing date, the opponent’s mark qualifies as an earlier trade mark under the above provisions. The opponent’s mark completed its registration process over five years prior to the priority date of the IR. As set out above, the holder requested that the opponent provide proof of use in respect of its mark. As a result, the opponent’s mark is subject to the proof of use assessment.

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

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

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

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

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

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

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

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create

or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

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

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

17. While section 6A of the Act (cited above) is silent on the issue of IRs, the Trade Marks (International Registration) Order 2008 sets out that this section of the Act

extends to apply to IRs. As such, the relevant period for the present assessment is the five-year period prior to the priority date of the IR, being 14 March 2023. The relevant period is, therefore, 15 March 2018 to 14 March 2023 (“the relevant period”).

18. As the opponent’s mark is a comparable mark based upon an earlier EUTM, use of the same in the EU prior to IP Completion Day (being 31 December 2020) is relevant to the present assessment.¹ Therefore, the relevant territory for 15 March 2018 to 31 December 2020 is the EU at large. However, thereafter, the relevant territory is the UK only. On this point, I refer to the case of *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, wherein the Court of Justice for the European Union (“CJEU”) noted that:

“It should, however, be observed that ... the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.”

And

“50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as ‘genuine use’, it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the

¹ See paragraph 4 of Tribunal Practice Notice 2/2020

territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark.”

19. Proven use of a mark which fails to establish that “the commercial exploitation of the mark is real”² because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the mark for the goods or services protected by the mark” is, therefore, not genuine use.
20. At the hearing, the holder set out that the opponent’s evidence was not only insufficient in its volume to demonstrate genuine use but that the use that has been demonstrated does not fall within the scope of the actual goods relied upon. This was on the basis that the opponent’s goods are limited to being cellular moisturising creams, lotions or gels and that the evidence covers goods that simply do not fall into such a category. While these arguments are noted, I will state for the avoidance of doubt that the present assessment is one that must be based upon my own consideration of the evidence before me.

Evidence of use

21. The evidence begins by setting out that the opponent operates throughout the world under the name ‘Lifeplus’. A printout from its UK-based website is provided in evidence that purports to show the range of different goods that it sells.³ This includes a range of supplements and creams. Firstly, some of the goods, such as the supplement goods, are not at issue here. Further, the printout is undated so cannot be said to accurately reflect the position during the relevant period. Lastly, the printout shows products under brandings other than ‘FOREVER YOUNG’.

² *Jumpman* BL O/222/16

³ SL1

22. In respect of 'FOREVER YOUNG', I note that a second printout from the opponent's website is provided that shows goods under that branding. Again, this printout is undated and purports to show the current range of products. While noted, there is nothing to suggest availability of these goods during the relevant period. That being said, the opponent has provided a range of product catalogues from the years 2018 to 2022.⁴ I note that a 2012 catalogue is provided but this is of no assistance here as it falls prior to the relevant period. Having considered these catalogues, I note that they include goods such as food supplements, anti-aging serums, day/night renewal moisturisers, eye creams, eye firming gel, cleansers, bath and shower gels, body lotions, shampoos, conditioners, hand creams and hand washes. In addition, I note that the opponent has provided a number of UK price lists and order forms for its goods.⁵ It is confirmed that these price lists cover 2018 to 2022. It is noted that the 'FOREVER YOUNG' goods shown are in line with those in the catalogues, being those that I have discussed above. As such, I see no merit in discussing this evidence further.

23. The evidence then proceeds to discuss sales figures. This is provided via a breakdown showing both unit sales and total revenue for a range of different products. I have reproduced this table in full below.

Product	Unit sales	Revenue (£)
Gentle Cream Cleanser	75	973.29
Rejuvenating Eye Crème	78	961.27
Radiance Serum	83	2,222.46
Rich Moisturising Crème	119	3,197.59
Strengthen and Restore Shampoo	86	604.24
Repair & Protect Conditioner	79	1,159.47
FY Purifying Cream Cleanser	125	1,594.68
FY Anti-Aging Serum	292	9,144.99

⁴ SL3

⁵ SL4

FY Eye Firming Gel	202	3,094.23
FY Day Night Renewal Moisturizer	647	18,046.32
FY Eye Complex	118	2,279.60
FT Botanicals Foaming Hand Wash	2642	2,329.16
FY Botanicals Shampoo	659	3,194.20
FY Botanicals Conditioner	330	1,289.81
FY Botanicals Bath & Shower Gel	688	3,452.62
FY Botanicals Body Lotion	487	2,813.54
FY Botanicals Hand Cream	552	1,434.91
Total:	7,262	57,794.38

24. The above figures are confirmed in evidence as covering 14 March 2018 to 14 March 2023. They are, therefore, wholly within the relevant period. In support of the sales above, the opponent has filed a selection of invoices to customers in the UK.⁶ There are over 100 pages of invoices and while I have no intention of discussing them in full, I note that they cover sales during the relevant period to addresses across the breadth of the UK.

25. In addition to its sales figures, the opponent has provided a range of printouts taken from its 'Life Plus' Facebook account.⁷ Of the two posts shown, only one is from within the relevant period. In considering this evidence, I note that there is nothing to confirm that the account is aimed at the UK consumer and given that the opponent is based in the US, it could reasonably be said to be a post aimed at the US market. That being said, even if it was aimed at the UK consumer, it does not show any actual FOREVER YOUNG products and it is noted that the engagement level for the post is very limited, showing just 175 likes and 15 shares. Therefore, even at its best, this evidence is of very little assistance.

⁶ SL6

⁷ SL5

Assessment of the evidence

26. In assessing the use before me, I consider it necessary to first discuss the nature of the turnover figures provided. At the hearing, the holder's representative stated that the evidence covers goods that are not included within the scope of the opponent's specification. Having considered the evidence, I am inclined to agree. My reasons follow.

27. Firstly, the opponent's specification covers one term, being "cosmetics, namely, cellular moisturizing creams, lotions and gels". The use of the word 'namely', limits the type of cosmetic covered in that it solely covers cellular moisturising creams, lotions and gels. In its submissions in lieu, the opponent sets out that the reference to cellular is immaterial as every product in this area would be considered cellular to some extent. While this argument is noted, there is no evidence before me to suggest that any product sold in the area of cosmetics is 'cellular' to some extent. Further, I am of the view that the inclusion of cellular must have some relevance and it is my understanding that it would imply that the goods are those that work at a deeper level in the skin, so as to improve the cells within it. For example, this could reasonably cover an anti-aging serum that purports to improve the cellular structure of the skin (by firming it) in order to make the user look younger. It does not, therefore, cover goods such as bath and shower gels or ordinary body lotions, for example. I refer to these not only for illustrative purposes but because they are actual goods that are covered by the opponent's evidence. The catalogues provided regarding these goods is as follows:⁸

⁸ Taken from page 31 of the evidence at SL3



Bath & Shower Gel

Nourishing botanicals, gentle cleansers and the rejuvenating aroma of Peppermint, Rosemary and Lavender essential oils replenish your skin and revitalise the senses. Formulated to help exfoliate your skin. Skin-softening moisture-filled beads instantly restore your skin's natural glow. Contains Panthenol and Hydrolysed Wheat Protein to help moisturise and Chamomile Extract to soothe and calm your skin. Vitamin E and White Tea Extract provide antioxidant and nourishing benefits leaving your skin clean, soft and rejuvenated. Formulated for all skin types.

Product 4564



Body Lotion

Ultra hydration with the benefits of three moisturisers including Jojoba Oil, Shea Butter and Sodium Hyaluronate. This moisture-rich lotion contains Aloe Vera to soothe and calm your skin along with the protective antioxidant White Tea Extract. Scented with the fragrance of natural essential oils, this hydrating body lotion leaves you with soft radiant skin. Formulated for all skin types.

Product 4565

28. While I accept that the above goods have moisturising benefits, the descriptions shown do not appear to me to indicate that they are goods that offer any cellular benefits. In addition, I note that the opponent also categorises such goods differently than it does the goods that would more reasonably be said to be cellular in nature. Goods such as anti-aging serum and eye firming gel are referred to as 'advanced performance skin care'⁹ whereas the goods shown above are referred to as 'bodycare products' used to treat the user's body "to a little pampering". It is noted that this issue applies to a range of other goods such as shampoo, conditioner, hand cream and foaming hand wash. In addition, while the day/night renewal moisturiser and cream cleansers are shown under the 'advanced performance skincare' range, their descriptions appear in evidence as follows:

Day/Night Renewal Moisturiser

Balancing moisture to improve the condition of your skin. To further nourish and hydrate, extracts of Spirulina and Ginseng will give your skin what it needs to stay soft, smooth and absolutely rejuvenated.

Product 4543

Purifying Cream Cleanser

Normal to Dry Skin Formula.

This creamy-rich and gentle formula is perfect for normal to dry, delicate skin. Gently and effectively dissolves facial makeup and dirt, then rinses away cleanly. Leaves skin feeling soft, soothed, comfortable. Panthenol and Walnut Seed Extracts are combined to encourage clarity and brightness. This cleanser is specially formulated to help keep skin purified with a fresh, healthy feeling.

⁹ See page 29 of the evidence at SL3

29. Such descriptions do not allude to any advanced cellular qualities and, instead, they appear to me to describe an ordinary moisturising and cleansing products.

30. As a result of the above, I find that the shower and bath gels, body lotions, shampoos, conditioners, handwashes, moisturisers and cleansers actually shown before me in evidence are not of a cellular nature. Therefore, I do not consider that they fall within the scope of the opponent's term. As such, any use in relation to the same is of no assistance here as it does not pertain to the goods relied upon. In reaching this finding, I remind myself of the case law surrounding the sufficiency of evidence of use, namely that case of *Awareness Limited v Plymouth City Council*, Case BL O/236/13, wherein 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.”

31. In considering the principles of the above case law and bearing in mind everything I have said above, I am of the view that the only goods that are capable of being relied upon are those that I can firmly say are those that work on a cellular level. In considering such goods against the table of sales/revenue, I find that the only goods that the opponent may rely on are those that are labelled as “rejuvenating eye crème”, ‘radiance serum’, ‘FY anti-aging serum’, ‘FY eye firming Gel’ and ‘FY eye complex’. On this point, it is noted that the holder argues that serums are not gels, creams or lotions so should not be included either. In my view, a serum is a type of cream or gel so I see no merit in this argument.

32. Bearing in mind the above finding, the actual turnover/unit sales of the opponent that are relevant to these proceedings are as follows:

Product	Unit sales	Revenue (£)
Rejuvenating Eye Crème	78	961.27
Radiance Serum	83	2,222.46

FY Anti-Aging Serum	292	9,144.99
FY Eye Firming Gel	202	3,094.23
FY Eye Complex	118	2,279.60
Total:	773	17,702.55

33. In considering the above figures, I am of the view that it is first necessary to discuss the nature of the market at issue. I appreciate that I have no evidence on this point but I do not consider it controversial to suggest that the relevant market for my assessment is the cosmetic market which is, plainly, a very large market which is likely to attract annual revenue in the billions of pounds. In the present case, I note that the opponent's actual use of relevant goods covers just under £18,000 over a five-year period. In comparison to the market at issue, it is clear that the level of sales is vanishingly low. I appreciate that the case law cited above sets out that use need not be quantitatively significant in order for it to be deemed genuine. However, aside from a range of catalogues, the opponent has provided very little evidence to support a genuine attempt to create or preserve a market share for its goods in the UK. On this point, I note that the evidence lacks any reference to an attempt at advertising in the UK. Such evidence would ordinarily include reliance upon an advertising spend or examples of marketing campaigns. In the present case, the only evidence I have that could even remotely point to such activity is one Facebook post which, even taken at its best, is of very limited assistance.

34. Taking all of the evidence into account and bearing in mind everything I have set out above, I am of the view that the opponent has failed to demonstrate that it has made a genuine attempt to create or preserve a market share in the UK (or the wider EU territory prior to IP Completion Day) for the goods relied upon. In short, the level of use is just too low to warrant such a finding. In addition, even if I was wrong to dismiss the reliance upon some goods above, the totality of the evidence is just £57,000 over five years. This is still a very low level of use in comparison to the relevant market and without anything further pointing to marketing activities in the relevant territory, I am not willing to find that it represents a genuine attempt by

the opponent to use its mark. Therefore, even at its highest point, the evidence is insufficient to demonstrate genuine use.

35. The consequence of the above is that the opponent is unable to rely on its mark for the purpose of the present proceedings. As a result, the opposition fails in its entirety.

36. For the avoidance of doubt, even if the opponent was able to provide genuine use for its mark, the opposition would have failed in any event. I say this because I am of the view that the goods and services at issue are dissimilar. On this point, I remind myself of the case of *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA which set out that there needs to be at least some similarity between goods and services in order for there to be likelihood of confusion under section 5(2) grounds. For the sake of completeness and to further demonstrate this point, I will conduct the relevant goods and services below.

Comparison of goods and services

37. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

“Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

38. 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.

Class 35

Presentation of products to the public, business management, and marketing agency services for health professionals, nutritionists, well-being professionals, artists, musicians, singers, writers, actors, models, performers, photographers and others involved in the well-being, wellness, health, nutrition, beauty, industries.

39. Plainly, the above services differ in nature, method of use and purpose with the opponent's goods. In respect of the user, the consumer of the above services will be acting in a business capacity. So even though it can be said that a health professional or a musician may select cosmetic goods, the different context of the goods and services is such that any overlap will be tenuous. As for trade channels, the above services are likely provided by marketing companies or those operating in business management. I appreciate that companies that sell cosmetics would seek the above services but I have nothing to suggest that they would actually offer

the above services to third parties. As such, I do not consider that there exists any degree of overlap in trade channels. While the presentation of a product may be important to the sale of said product from a marketing standpoint, the relationship between the goods and services is not one that would leave consumers to believe that the goods or services originate from the same undertaking.¹⁰ Lastly, the goods and services are clearly not competitive in nature. Taking all of this into account, I find that these goods and services are dissimilar.

Class 44

Providing an online marketplace for buyers and sellers of goods and services relating to health, beauty, nutrition, wellbeing and wellness.

40. As was the case above, these services share no overlaps in nature, method of use or purpose with the opponent's goods. In respect of these services, I note that the opponent made submissions wherein it referred to oft-cited case law that points to similarity between goods and services for the retail of those goods.¹¹ While I appreciate the presence of these cases, I do not consider that they are applicable in the present circumstances. I say this because the above services are not retail services. Instead, it is my understanding they cover the provision of an open platform which is akin to eBay or Amazon Marketplace wherein various third-party users can buy and sell goods to other users. Such services are not ordinarily provided by the same undertakings that produce and sell their own range of cosmetic goods. On this point, I note that I have nothing before me in evidence to suggest that such a practice is common in the trade.¹² The goods and services are not complementary as a service for the provision of a marketplace is not important to the goods themselves, or vice versa. The goods are not competitive either.

¹⁰ *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

¹¹ *TRECOLORE*, Case T-365/14 and *Oakley, Inc v OHIM*, Case T-116/06

¹² I appreciate that companies like Amazon offer marketplace services and sell their own branded goods. However, this is just one example and, as set out here, I have nothing to suggest that this business operation is common in the trade.

Lastly, I appreciate that there may be an overlap in user on the basis that someone looking to buy a cosmetic may do so from the producer directly or via an online marketplace. However, I do not consider this sufficient by itself to warrant a finding of similarity between them. As a result, I find that these services are dissimilar to the opponent's goods.

41. As I have set out above, there needs to be a degree of similarity between goods and services in order for there to be confusion under section 5(2)(a) grounds. As such, and despite the clear identity between the marks, I find that even if use was proven, the opposition fails in its entirety due to the lack of similarity between the parties' goods and services.

CONCLUSION

42. The opposition fails in its entirety and, subject to any successful appeal of my decision, the IR is hereby granted protection in the UK for all of the services applied for.

COSTS

43. The holder has succeeded in full and is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the holder the sum of £1,650 as a contribution towards its costs. The sum is calculated as follows:

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

Preparation for and attendance at a hearing: £800

Total: £1,650

44. I hereby order EURARK, LLC to pay ZOEFULL LTD the sum of £1,650. 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 17th day of July 2025

A COOPER

For the Registrar