

BL O-604-20

TRADE MARKS ACT 1994

**IN THE MATTER OF AN INTERNATIONAL REGISTRATION DESIGNATING THE
UNITED KINGDOM NO. 1493211**

BY

C.P.C. CREATIVE PERFUME COMPANY HOLDING SA

TO REGISTER:

OPUS KORE

AS A TRADE MARK IN CLASSES 3 & 4

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO. 418558

BY PENHALIGON'S LIMITED

Background and pleadings

1. On 26 July 2019 (claiming an International Convention priority date of 10 June 2019 from an earlier filing in France), C.P.C. Creative Perfume Company Holding SA (“the applicant”), designated the United Kingdom seeking protection of the trade mark shown on the cover page of this decision for the goods in classes 3 and 4 shown in Annex A of this decision. The designation was published for opposition purposes on 1 November 2019.

2. On 26 November 2019, the application was opposed in part by Penhaligon’s Limited (“the opponent”); the opposed goods are shown in the table in Annex B of this decision. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), in relation to which the opponent relies upon the goods shown in the table in Annex B, in the following United Kingdom and European Union Trade Mark (“EUTM”) registrations:

(1) UK no. 3247891 for the trade mark **OPUS** which was filed on 2 August 2017 and which was entered in the register on 29 December 2017.

(2) EUTM 14540835 for the trade mark **OPUS 1870** which was filed on 7 September 2015 and which was entered in the register on 23 December 2015.

3. The applicant filed a counterstatement in which it denies there will be a likelihood of confusion.

4. In these proceedings, the opponent is represented by Ashfords LLP and the applicant by Stevens Hewlett & Perkins. No evidence was filed. Although neither party requested a hearing, the applicant filed written submissions in lieu of attendance. I have reviewed the submissions filed and will, to the extent I consider it necessary, refer to them later in this decision.

DECISION

5. The opposition is based upon section 5(2)(b) of the Act which reads as follows:

“5(2) A trade mark shall not be registered if because –

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

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

5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

6. The trade marks relied upon by the opponent qualify as earlier trade marks under the provisions of section 6 of the Act. Given the interplay between the dates on which the opponent’s trade marks were entered in the register and the priority date of the designation, the earlier trade marks relied upon are not subject to the proof of use provisions.

Case law

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

The principles:

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a greater 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

8. In its written submissions, the applicant states:

“3.1 It is accepted that the goods in this matter are either identical or similar.”

9. In view of that admission, it is not necessary for me to conduct a full review of the competing goods. I will, however, return to this point when I consider the likelihood of confusion. For the sake of completeness, the relevant case law and the goods to be compared are shown in the table in Annex B to this decision.

The average consumer and the nature of the purchasing act

10. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods at issue. I must then determine 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 word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

11. In its Notice of opposition, the opponent states:

“5h. The goods in issue are commonly purchased in supermarkets or establishments where goods are arranged on shelves and consumers are guided by the visual impact of the mark they are looking for...

i. The goods in issue are general, ordinary consumer items, which in most cases are not expensive to purchase. The relevant public in relation to which the likelihood of confusion must be assessed is composed of average consumers, many of which will have no specialised knowledge or specialised experience in the area of the goods in question. Such a consumer is unlikely to evince a high degree of attentiveness. The degree of attentiveness will be average/normal and not especially high.”

12. The average consumer of the goods at issue is a member of the general public. As such goods are most likely to be the subject of self-selection from the shelves of bricks and mortar outlets or their on-line equivalents, I agree with the opponent that visual considerations are likely to dominate the selection process, although not to the extent that aural considerations in the form of, for example, requests to sales assistants or word-of-mouth recommendations can be ignored. Many of the goods at issue are likely to be fairly inexpensive and selected fairly frequently. However, as many are for use on, for example, the person, I would expect the average consumer to pay at least an average (medium) degree of attention to the selection of the vast majority of the goods at issue.

Comparison of the trade marks

13. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union (“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.”

14. It would be wrong, therefore, artificially to dissect the trade marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions they create. The trade marks to be compared are as follows:

Opponent's trade marks	Applicant's trade mark
(1) OPUS	OPUS KORE
(2) OPUS 1870	

Overall impression – the opponent’s trade marks

15. Trade mark no. (1) consists of the word “OPUS” presented in block capital letters. The overall impression it conveys and its distinctiveness lies in the single word of which it is composed.

16. Trade mark no. (2) contains two components. The first component consists of the word “OPUS” presented in block capital letters; the second component consists of the numerals “1870” presented in a conventional fashion. In relation to the latter, in its Notice of opposition, the opponent states:

“5b...(with the date “1870” being seen as the date on which the “OPUS” products in question were first launched/produced/sold...”

17. In its submissions, the applicant refers to the numerals “1870” as “a four digit year number”. Like the parties, I agree the numerals “1870” will be seen as a year. Proceeding on that basis and while the numerals “1870” will contribute to the overall impression the opponent’s trade mark conveys, they are likely to have little or no distinctive character. Rather, it is the first word in the trade mark i.e. “OPUS” which will dominate the overall impression conveyed and it is in this word the distinctiveness lies.

Overall impression - the applicant’s trade mark

18. This also consists of two components. The first, presented in upper case letters, is the word “OPUS”. The second component consists of the word “KORE” presented in upper case letters. In its Notice of opposition, the opponent states that this component is:

“5b...quite likely to be perceived by many of the public concerned as a foreign or fancy or invented (and meaningless) word.”

19. Given its obvious visual similarity and aural identity to the English language word “CORE”, many average consumers may construe this word as, for example, a

foreign language equivalent of the English language word mentioned. Other average consumers may, as the opponent suggests, simply treat it as an invented word with no meaning. Either way, it is likely to be regarded as distinctive, as is the word “OPUS” which precedes it. Considered overall, both components will make a roughly equal contribution to both the overall impression the trade mark conveys and its distinctiveness.

Visual similarity

20. In its written submissions, the applicant states:

“4.5. Visually, the Applicant’s Mark differs from the Opponent’s marks given the presence of the distinctive KORE word element, there being no counterpart in the Opponent’s marks.

4.6. The Opponent’s marks consist of one word consisting of four letters, and one word plus a four digit year number. By contrast, the Applicant’s mark consists of two words, each consisting of four letters. Accordingly, the marks are visually dissimilar.”

21. The applicant’s trade mark consists of two words each of four letters. The word “KORE” in the applicant’s trade mark is alien to both of the opponent’s trade marks. The opponent’s trade mark no. (1) consists of a single word consisting of four letters which are identical to the first four letters/first word in the applicant’s trade mark. The same is true of the first component in the opponent’s trade mark no. 2, which also contains the numerals “1870” which are alien to the applicant’s trade mark. Bearing in mind my comments above, in particular, the positioning of the component in common i.e. the word “OPUS”, it results in what I regard as a medium degree of visual similarity between the applicant’s trade mark and both of the opponent’s trade marks.

Aural similarity

22. In its written submissions, the applicant states:

“4.7. In spoken use, the Applicant’s mark is distinguishable from the Opponent’s: the emphasis in pronunciation of OPUS KORE falls naturally on the word KORE, both since the word OPUS has an adjectival function in the two-word combination, and also since the hard sound produced when vocalising KORE dominates and is the sound which leaves a residual impression when the goods are requested aurally by the consumer.”

23. The word “OPUS” in the competing trade marks will be pronounced in an identical fashion and the word “KORE” in the applicant’s trade mark is, for the reasons mentioned earlier, most likely to be pronounced as the English language word “CORE”. Despite the applicant’s submissions, I see no reason why the emphasis falls on the word “KORE” as opposed to the first word the average consumer will verbalise. As a consequence, there is a medium degree of aural similarity between the applicant’s trade mark and trade mark no.1. As for trade mark no. 2, given the non-distinctive nature of the numerals “1870”, I think it is highly that the average consumer will not articulate these numerals at all. In those circumstances, the degree of aural similarity would be the same as that in relation to trade mark no. 1. However, if I am wrong in that regard and the numerals are verbalised, given the positioning of the common element, it still results in what I consider to be a below medium (but not low) degree of aural similarity.

Conceptual similarity

24. In its Notice of opposition, the opponent states:

“5e. The opponent’s trade marks and the applicant’s marks are conceptually similar, as they all begin with the word “OPUS”, which means a large-scale artistic work.”

25. In its written submissions, the applicant states:

“4.8. It is denied that OPUS KORE is conceptually similar to either OPUS or OPUS 1870. The word OPUS when used would be readily understood by the consumer as meaning “a work of art, particularly of a piece of music”, which for the avoidance of doubt, is defined as such in the Cambridge English Dictionary definition. The Opponent’s mark has the meaning therefore as a piece of music, and in the case of OPUS 1870, a piece of music dating from 1870. In the Applicant’s mark, when used in conjunction with the word KORE, the word OPUS loses its musical connotation, since OPUS KORE is a fanciful creation; the word OPUS in this context is rendered meaningless and conveys the impression of being an invented word, in exactly the same way as the word KORE is. The conceptual impression conveyed by the Applicant’s mark is of an invented totality. It is conceivable however, that the average consumer may perceive the phrase OPUS KORE as an artwork of the Greek goddess ‘Kore’, which is the alternative name of Persephone. Alternatively, the word KORE may be perceived by the average consumer as a misspelling of the readily understood word CORE, meaning “the centre of” or “important part of”, which for the avoidance of doubt, is defined as such in the Cambridge English Dictionary definition. Irrespective of whether the applicant’s mark is perceived to be invented, as an artwork of the Greek goddess ‘Kore’, or containing the word CORE, it shares no conceptual similarity with the Opponent’s marks.”

26. I accept the word “OPUS” has the dictionary meaning to which the parties refer. However, despite the applicant’s reference to the word being “readily understood by the consumer...”, there is no evidence to support that submission. That said, the opponent appears to agree with the applicant that that is how the average consumer will understand the word “OPUS”. As a consequence, I shall proceed on the basis that a significant proportion of average consumers will be familiar with the word “OPUS” and its meaning. While I think it most unlikely that many average consumers will be familiar with the Greek goddess “KORE”, as mentioned earlier, it is likely that some average consumers will equate the word “KORE” with the English language word “CORE”.

27. For an average consumer familiar with the word “OPUS”, the opponent’s trade marks will evoke the concept of either an artistic work (trade mark no.1), or an artistic work produced in 1870 (trade mark no.2). Even if the word “KORE” in the applicant’s trade mark is equated with the word “CORE” and, as a consequence, introduces a concept alien to the opponent’s trade marks, I see no reason why, as the applicant submits, that would render the word “OPUS” meaningless. Rather, in my view, the average consumer would simply accord the word “OPUS” the meaning with which they are familiar. Consequently, for an average consumer familiar with the word “OPUS” and its meaning, even if the word “KORE” in the applicant’s trade mark is equated with the word “CORE”, there is at least a medium degree of conceptual similarity between the competing trade marks resulting from the shared use of the word “OPUS”. If the average consumer familiar with the word “OPUS” and its meaning attributes no meaning to the word “KORE”, the degree of conceptual similarity is higher still.

Distinctive character of the earlier trade marks

28. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

29. As the opponent has filed no evidence of any use it may have made of its earlier trade marks, I have only their inherent characteristics to consider. In its Notice of opposition, the opponent states:

“5g. The Opponent's Trade Marks have at least an average/normal degree of inherent distinctive character. The word "OPUS" has no meaning in relation to the goods in issue and is not a descriptive term for them, or their characteristics...”

30. Although “OPUS” is a dictionary word, there is nothing to suggest that when considered in relation to the goods upon which the opponent relies, it is either descriptive or non-distinctive. As I mentioned earlier, the numerals “1870” are non-distinctive. Absent use, I agree the opponent’s trade marks enjoy at least an “average/normal degree of inherent distinctive character.”

Likelihood of confusion

31. In determining whether there is a likelihood of confusion, 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 vice versa. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and 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 he has retained in his mind.

32. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods down to the responsible undertakings being the same or related.

33. Having noted that the applicant admits that the competing goods are identical or similar, I have concluded that:

- The average consumer is a member of the general public who, whilst not ignoring aural considerations, will select the goods at issue by predominantly

visual means whilst paying at least a medium degree of attention during that process;

- Having determined what I regard as the overall impressions the competing trade marks convey, I found there was a medium degree of visual similarity, at least a below medium (but not low) degree of aural similarity and having accepted that a significant proportion of average consumers are likely to be familiar with the word “OPUS” and its meaning, at least a medium degree of conceptual similarity;
- The opponent’s earlier trade marks enjoy at least an average/normal degree of inherent distinctive character.

34. Given the presence of the distinctive word “KORE” in the applicant’s trade mark, I think the likelihood of direct confusion is remote. That leaves indirect confusion to be considered. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

35. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two trade marks share a common element. In this

connection, he pointed out that it is not sufficient that a trade mark merely calls to mind another trade mark. This is mere association not indirect confusion.

36. Given the applicant's admission regarding the goods at issue mentioned above, I shall proceed on the basis that the competing goods are similar to at least a low degree. I also remind myself that the average consumer will pay at least a medium degree of attention when selecting the goods at issue. In its Notice of opposition, the opponent states:

"5m. Further, even if the UKIPO concludes that it is unlikely that there will be direct confusion between the marks (which, for the avoidance of doubt, the Opponent submits there will be), it is submitted that there is a very real risk of indirect confusion between the marks. Bearing in mind that all 3 marks start with the distinctive word/element "OPUS", followed by (in the case of "OPUS 1870" and "OPUS KORE") a less distinctive word/number, it is quite likely that relevant consumers will make a connection between the conflicting trade marks and assume that the goods in question come from the same undertaking or, as the case may be, from economically-linked undertakings. Consumers will reasonably assume that the number (1870) or word (KORE) distinguish different lines of products originating from the same undertaking or from connected entities. The different elements between the marks/signs in issue are the number "1870" (which can be understood as the year of first creation of 'OPUS'), and the word "KORE" (which may well be perceived by many of the public concerned as a foreign or fancy or invented (and meaningless) word). It is usual for the same mark to be configured in various different ways according to the type of product which it designates. Furthermore, it is also common for the same manufacturer or provider to use sub-brands, that is to say, signs that derive from a principal mark and which share with it a common element, in order to distinguish its various lines from one another. Thus, in this case, there is a risk that average consumers will conclude that "OPUS KORE" is another brand or sub-brand of the owner of the "OPUS" and/or "OPUS 1870" brand(s). The common element/component "OPUS" is significant in trade mark terms. It is not trivial or descriptive. It is distinctive and it retains independent distinctive role in the composite mark

“OPUS KORE”. The different endings to the marks in issue are not enough to counteract the similarities between the marks. The relevant public could easily believe that the goods in issue come from the same undertaking or from economically linked undertakings... In summary, there is a real risk that consumers, exposed at different moments to the marks/signs in issue, will reasonably assume that the marks distinguish different lines of products originating from the same undertaking or from connected entities. It is more than conceivable that the targeted public may regard the identical and similar goods designated by the opposed mark as originating from the same undertaking as the one behind the OPUS and/or OPUS 1870 brand(s) or from connected entities.”

37. Even proceeding on the basis indicated at paragraph 36, for the reasons explained by the opponent, the medium degree of visual similarity combined with (at worst) the below medium degree of aural similarity and the (at least) medium degree of conceptual similarity, will result in indirect confusion. Having reached that conclusion on the basis of goods which are only similar to a low degree, the likelihood of indirect confusion in relation to those goods in the application which are similar to a higher than low degree or identical is even stronger.

Overall conclusion

38. The opposition has been successful in relation to all the goods which have been opposed (Annex B refers) and, subject to any successful appeal, the request to designate the United Kingdom in relation to those goods will be refused.

39. The following goods have not been opposed and may proceed to registration:

Spray products for freshening the breath; sachets for perfuming linen; decorative transfers for cosmetic use; adhesives for affixing false eyelashes; adhesives for affixing false hair; beard dyes; cosmetic dyes; dentifrices; lipstick cases; breath freshening strips; teeth whitening strips; bath preparations, other than for medical use; hair straightening preparations; hair

waving preparations; color-removing preparations; leather bleaching preparations; mouthwashes other than for medical use; cosmetic preparations for slimming; make-up removing preparations; collagen preparations for cosmetic use; sunscreens; breath freshening preparations for personal hygiene; towels impregnated with make-up removing preparations; hair dyes; neutralizers for permanent waving; bleaching preparations [decolorants] for cosmetic use; henna ink [cosmetic dye].

Costs

40. As the opponent has been successful, it is entitled to a contribution towards its costs. Awards of costs in proceedings are governed by Annex A of Tribunal Practice Notice (“TPN”) 2 of 2016. Applying the above guidance, I award costs to the opponent on the following basis:

Filing the Notice of opposition and reviewing the counterstatement:	£300
Official fee:	£100
Total:	£400

41. I order C.P.C. Creative Perfume Company Holding SA to pay to Penhaligon’s Limited the sum of **£400**. This sum is to be paid within twenty one days of the expiry of the appeal period or within twenty one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 1st day of December 2020

C J BOWEN
For the Registrar

Goods applied for

Class 3 - Amber [perfume]; aromatic products [essential oils]; room fragrancing preparations; cake flavorings [essential oils]; flavorings for beverages [essential oils]; food flavorings [essential oils]; spray products for freshening the breath; balms other than for medical use; lip glosses; sachets for perfuming linen; scented waters; Javelle water; lavender water; eaux de toilette; depilatory wax; mustache wax; massage gels, other than for medical use; heliotropine; make-up products; deodorants for pets; deodorants for human beings or for animals; depilatory preparations; room fragrance reed diffusers; scented wood; perfumes; perfumery products; decorative transfers for cosmetic use; ionone [perfumery]; eyebrow pencils; cosmetic pencils; adhesives for affixing false eyelashes; adhesives for affixing false hair; hair conditioners; beard dyes; cosmetic dyes; cosmetic creams; skin whitening creams; incense; hair sprays; nail polish; hair lotions; lotions for cosmetic use; after-shave lotions; beauty masks; oils for perfumes and scents; oils for cosmetic use; oils for toilet purposes; essential oils; essential oils of cedar wood; essential oils of lemon; essential oils of citron; oils for cleaning purposes; bergamot oil; gaultheria oil; jasmine oil; lavender oil; almond oil; rose oil; almond milk for cosmetic use; cleansing milk for toilet purposes; musk [perfumery]; deodorant soaps; shaving soap; brightening soaps; cakes of toilet soap; antiperspirant soaps; soaps for foot perspiration; soaps; almond soap; mint for perfumery; cosmetic kits; eaux de Cologne; bases for flower perfumes; incense sticks; dentifrices; lipstick cases; breath freshening strips; teeth whitening strips; lipsticks; pomades for cosmetic use; shaving preparations; cosmetic preparations for baths; bath preparations, other than for medical use; hair straightening preparations; hair waving preparations; color-removing preparations; leather bleaching preparations; mouthwashes other than for medical use; cosmetic preparations for slimming; make-up removing preparations; nail care preparations; collagen preparations for cosmetic use; aloe vera preparations for cosmetic use; sunscreens; breath freshening preparations for personal hygiene; make-up powders; nail polish removers; vaginal baths for personal hygiene or as deodorants; tissues impregnated with cosmetic lotions; towels impregnated with make-up removing preparations; massage candles for cosmetic

use; potpourris [fragrances]; bath salts, other than for medical purposes; fumigating preparations [perfumes]; astringents for cosmetic use; cosmetic products for the eyebrows; make-up preparations; sun-tanning preparations [cosmetic products]; hair dyes; neutralizers for permanent waving; cosmetic preparations for eyelashes; cosmetic preparations for skin care; cosmetic products; cosmetic products for children; cosmetic products for animals; mascaras; cleansing products for intimate personal hygiene, not medicated; douching preparations for intimate hygiene, deodorant preparations or for sanitary purposes [toiletries]; bleaching preparations [decolorants] for cosmetic use; antiperspirants (toiletries); toilet preparations; phytocosmetic preparations; talcum powder for toilet use; terpenes [essential oils]; henna ink [cosmetic dye]; shampoos for animals [non-medicated grooming preparations]; shampoos for pets [non-medicated grooming preparations]; dry shampoos; shampoos; plant extracts for cosmetic use; extracts of flowers [perfumes]; ethereal essences; badian essence; mint essence [essential oil].

Class 4 - Nightlights [candles]; perfumed candles; Christmas tree candles; candles.

Comparison of goods

The opponent's goods	The applicant's goods being opposed
<p>Trade mark no. 1:</p> <p>Class 3 - Perfumery.</p> <p>Trade mark no. 2:</p> <p>Class 3 - Cosmetics; perfumery; colognes; eau de cologne; eau de toilette; solid perfumes; deodorants; bath and shower gels; bath oils; soaps; hand wash; body oils; body lotions; hand lotions; body milks; body creams; nail cream; shampoos; hair lotions; perfumed powder; perfumed talcum powder; toiletries; scented oils; aftershaves; aftershave balms and lotions; shaving gels; shaving soap; shaving foam; shaving balm; shaving preparations; essential oils; room fragrances; room fragrancng preparations; scented room sprays.</p> <p>Class 4 - Candles and wicks for lighting; scented candles; musk scented candles; fragranced candles; tea lights; candles for night lights.</p>	<p>Class 3 - Amber [perfume]; aromatic products [essential oils]; room fragrancng preparations; cake flavorings [essential oils]; flavorings for beverages [essential oils]; food flavorings [essential oils]; balms other than for medical use; lip glosses; scented waters; Javelle water; lavender water; eaux de toilette; depilatory wax; mustache wax; massage gels, other than for medical use; heliotropine; make-up products; deodorants for pets; deodorants for human beings or for animals; depilatory preparations; room fragrance reed diffusers; scented wood; perfumes; perfumery products; ionone [perfumery]; eyebrow pencils; cosmetic pencils; hair conditioners; cosmetic creams; skin whitening creams; incense; hair sprays; nail polish; hair lotions; lotions for cosmetic use; after-shave lotions; beauty masks; oils for perfumes and scents; oils for cosmetic use; oils for toilet purposes; essential oils; essential oils of cedar wood; essential oils of lemon; essential oils of citron; oils for cleaning purposes;</p>

	<p>bergamot oil; gaultheria oil; jasmine oil; lavender oil; almond oil; rose oil; almond milk for cosmetic use; cleansing milk for toilet purposes; musk [perfumery]; deodorant soaps; shaving soap; brightening soaps; cakes of toilet soap; antiperspirant soaps; soaps for foot perspiration; soaps; almond soap; mint for perfumery; cosmetic kits; eaux de Cologne; bases for flower perfumes; incense sticks; lipsticks; pomades for cosmetic use; shaving preparations; cosmetic preparations for baths; nail care preparations; aloe vera preparations for cosmetic use; make-up powders; nail polish removers; vaginal baths for personal hygiene or as deodorants; tissues impregnated with cosmetic lotions; massage candles for cosmetic use; potpourris [fragrances]; bath salts, other than for medical purposes; fumigating preparations [perfumes]; astringents for cosmetic use; cosmetic products for the eyebrows; make-up preparations; sun-tanning preparations [cosmetic products]; cosmetic preparations for eyelashes; cosmetic preparations for skin care; cosmetic products; cosmetic products for children; cosmetic products for animals; mascaras; cleansing products for intimate personal hygiene, not medicated; douching preparations</p>
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	<p>for intimate hygiene, deodorant preparations or for sanitary purposes [toiletries]; antiperspirants (toiletries); toilet preparations; phytocosmetic preparations; talcum powder for toilet use; terpenes [essential oils]; shampoos for animals [non-medicated grooming preparations]; shampoos for pets [non-medicated grooming preparations]; dry shampoos; shampoos; plant extracts for cosmetic use; extracts of flowers [perfumes]; ethereal essences; badian essence; mint essence [essential oil].</p> <p>Class 4 - Nightlights [candles]; perfumed candles; Christmas tree candles; candles.</p>
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The relevant case law

In the judgment of the CJEU in *Canon*, Case C-39/97, the Court stated at paragraph 23:

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

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.

In *Kurt Hesse v 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court (“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”.

In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the GC stated:

“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”.