

o/0156/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003715297

BY SUNDAY MANTRA LTD

TO REGISTER THE TRADE MARK:

SUNDAY MANTRA

Sunday Mantra

(SERIES OF 2)

IN CLASS 3

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 431058

BY MANTRAPHARM OHG

BACKGROUND AND PLEADINGS

1. On 28 October 2021, Sunday Mantra LTD (“the applicant”) applied to register the trade mark (series of two) shown on the cover page of this decision in the UK. The application was published for opposition purposes on the 12 November 2021. The applicant seeks registration for the following goods:

Class 3 Cosmetics; Cosmetics and cosmetic preparations; Creams (Cosmetic -); Cosmetic soaps; Functional cosmetics; Moisturisers [cosmetics]; Skincare cosmetics; Multifunctional cosmetics; Tonics [cosmetic]; Natural cosmetics; Cosmetic moisturisers; Cosmetic masks; Cosmetic oils; Hair cosmetics; Mousses [cosmetics]; Colour cosmetics; Lip cosmetics; Organic cosmetics; Skin balms [cosmetic]; Cosmetic bath salts; Cleansing creams [cosmetic]; Non-medicated cosmetics; Cosmetic massage creams; Cosmetic eye gels; Cosmetic hand creams; Facial washes [cosmetic]; Cosmetic facial lotions; Facial masks [cosmetic]; Cosmetic facial packs; Body scrubs [cosmetic]; Facial gels [cosmetics]; Skin care cosmetics; Skin creams [cosmetic]; Facial creams [cosmetics]; Facial lotions [cosmetic]; Lip protectors [cosmetic]; Facial cleansers [cosmetic]; Skin masks [cosmetics]; Night creams [cosmetics]; Toning creams [cosmetic]; Moisturising gels [cosmetic]; Cosmetic nourishing creams; Face wash [cosmetic]; Facial scrubs [cosmetic]; Face packs [cosmetic]; Acne cleansers, cosmetic; Facial moisturisers [cosmetic]; Facial toners [cosmetic]; Skin cleansers [cosmetic]; Skin toners [cosmetic]; Beauty care cosmetics.

2. The application was opposed by MantraPharm oHG (“the opponent”) on 14 February 2022. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the following trade mark:

Mantra

UK registration no. UK00908748311

Filing date 20 November 2009

Registration date 11 June 2010.

Relying upon some of the goods for which the mark is registered, namely:

Class 5 Food supplements with a base of minerals; food supplements with a base of amino acids; nutritional additives for medical purposes; food supplements for medical purposes; vitamin preparations; dietetic foodstuffs or food supplements, not for medical purposes, with a base of fats, fatty acids, with added vitamins, minerals and/or trace elements; dietetic foodstuffs or food supplements, not for medical purposes, with a base of carbohydrates and roughage, with added vitamins, minerals and trace elements.

3. On 1 January 2021, the UK left the EU. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing EUTM. As a result, the opponent's earlier mark was automatically converted into a comparable UK trade mark. Comparable UK marks are now recorded on the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same.

4. The opponent claims that there is a likelihood of confusion because of the similarity between the marks and the goods.

5. The applicant filed a counterstatement denying the claims made.

6. The opponent is represented by Kilburn & Strode LLP and the applicant is unrepresented. A hearing was neither requested nor considered necessary, however, both parties filed evidence in chief. I have taken all of the evidence and the parties' submissions into consideration in reaching my decision and will refer to it where necessary below.

7. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU

law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

APPLICANT'S EVIDENCE

8. The applicant's evidence consists of the witness statement of Yazhini Luth dated 25 August 2022. Yazhini Luth is the director of the applicant, a position which they have held since 2021. Yazhini Luth's statement was accompanied by 2 exhibits (YL1-YL2).

9. I note that **exhibit YL1** contains screenshots of google searches for the following terms:

- Mantra beauty
- Mantra skincare
- Mantra cosmetics
- Mantra haircare
- Mantra

10. In *Zero Industry Srl v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-400/06 the General Court ("GC") stated that:

"73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word 'zero', it should be pointed out that the Opposition Division found, in that regard, that '... there are no indications as to how many of such trade marks are effectively used in the market'. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word 'zero' is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by

analogy, Case T-135/04 GfK v OHIM – BUS(Online Bus) [2005] ECR II-4865, paragraph 68, and Case T-29/04 Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH) [2005] ECR II-5309, paragraph 71). “

11. I note that the applicant has tried to show evidence of how the word MANTRA is being used in practice in the market for class 3 goods. However, firstly, it is not clear how extensive the use is, as I have only been provided with 6 screenshots of the above google searches. Secondly, all of the screenshots are undated and therefore I cannot say when these marks were in use. Consequently, this evidence does not assist the applicant.

OPPONENT’S EVIDENCE

12. The opponent’s evidence consists of the witness statement of Nora Fowler dated 28 June 2022. Ms Fowler is a Trade Mark Attorney at Kilburn & Strode LLP, who are the opponent’s representatives. Ms Fowler’s statement was accompanied by 6 exhibits (NF1-NF6).

13. **Exhibit NF1** contains screenshots of the opponent’s German and Lithuanian website using the Wayback Machine, dated between May 2017 and November 2020. I note that the following goods are offered by the opponent:

Food supplements:

- Mantra Frankincense capsules for cell protection and immune system.
- Mantra 400 Original Frankincense capsules.
- Mantra 3Protect Vascular Active for the blood vessels and the cytoprotection.
- Mantra ArthroSTAR for bones and cartilage nutrition for the joints.
- Mantra Eyes & Vision to maintain normal vision.
- Mantra Omega-3 capsules for heart, brain and vision.
- Mantra Active for bones and muscles.
- Mantra Base-Mineral for the acid-base balance.
- Mantra FirstLady Beauty Capsules for skin, hair, nails and connective tissue.

Dietary supplements:

- VIRimmun to support the immune system.
- Mantra Ladan Capsules which combine vitamin E and D, zinc and selenium.
- Mantra 400 original ladan capsules.
- Mantra 3 for the active protection of blood vessels.
- Mantra 400 Original Frankincense Capsules.
- Mantra Frankincense capsules.
- Mantra 3Protect Vascular Activ.
- Mantra Eyes & Vision Lutein 12.
- Mantra BestForm.

14. **Exhibit NF2** is a printout from amazon.de for the listing of “Mantra 400 Original Frankincense Capsules, Pack of 100” dated 21 June 2022. I note that there are no pictures of this product within the exhibit, nor any price included. However, the goods were first available from “29 Aug. 2012”. There are also 3 reviews of the product, 2 written in German, one rated 2 out of 5 stars and the other 5 out of 5 stars. The review written in English is rated 5 out of 5 stars stating that they are good for the immune system and used regularly for anti-inflammation purposes.

15. **Exhibit NF3** contains 2 invoices addressed to Natural Health Innovations LTD in the UK in relation to the sale of MANTRA branded supplements. I note the following from this exhibit:

Date	Customer location	Goods	Invoice total
19/01/2021	Lancashire, GB	Mantra Frankincense capsules Mantra Energy B12 Mantra First Lady Mantra ImmunFit Mantra HairComplex F Mantra Hair Complex M Mantra VIRimmun	€377.71
08/02/2022	Lancashire, GB	Mantra Frankincense capsules Mantra Energy B12 Mantra First Lady Mantra ImmunFit	€927.75

		Mantra 3 Protect VascularActive Mantra Q10 Premium Mantra for sleep Mantra eyes & vision Mantra ArthroSTAR Mantra Intestinal Flora Mantra VIRimmun	
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16. **Exhibit NF4** contains screenshots of the opponent’s goods being offered in pharmacies and online stores within the UK and EU using the Wayback Machine, dated between 2017 and 2020. I note the following from the screenshots:

- Mantra Bladder Comp, which prevents and reduces bladder infections, being listed for £41 on nathealthinnovations.com, dated 17 December 2019.
- Mantra PumpkinComp, which helps protect the prostate, being listed for £29.95 and £38.70 on nathealthinnovations.com, dated 17 December 2019.
- 3Protect, AKTIV Repair and Maintenance, BestForm (£34.90) and First Lady (£34.90) listed as “Best Sellers” on nathealthinnovations.com, dated 27 August 2018.
- MANTRA products listed on bio-apo.de dated 25 September 2020. Ms Fowler provides a “machine translation” of the website to show that the MANTRA Sleep Capsules, MANTRA 400 Original Frankincense Capsules and MANTRA Curculonga plus CC Capsules are priced at €16.78, €40.71 and €18.36.
- MANTRA products listed on internet-apotheke-freiburg.de dated 27 July 2017. Ms Fowler provides a “machine translation” of the website page, which shows a product list for MantraPharm. The website says; “All shop items of the company MantraPharm, sorted alphabetically”. The product list includes the following; MANTRA 3 Protect VesselActive capsules/tablets, MANTRA 400 Original Frankincense capsules, MANTRA ACTIVE for Bones & Joints capsules, MANTRA ACTIVE Joint Nutrition tablets, MANTRA ArthroSTAR capsules/tablets and MANTRA Eyes & Vision capsules, MANTRA BasesMineral capsules/powder, MANTRA BestForm capsules, MANTRA

BubblesComp capsules, MANTRA Carotene plus capsules, MANTRA Chlorella powder, MANTRA Cranberry Plus C capsules, MANTRA Curculonga Plus CC capsules, MANTRA Curcumin capsules, MANTRA Intestinal Flora Active capsules, MANTRA Energy B12 capsules, MANTRA First Lady Beauty capsules, MANTRA Heart BB capsules, MANTRA ImmunFit capsules and MANTRA Ginger capsules.

17. **Exhibit NF5** contains the following “Mantra for sleep 60 capsules” label, dated November 2016:



18. **Exhibit NF6** contains printouts from various websites showing examples of supplements and cosmetics being sold and marketed together. This includes “skincare gift boxes” and bundles of supplements, facemasks, creams and serums which help the users skin. I note that pages 35-47 are all undated screenshots. The exhibit also includes a screenshot of the opponent’s “Mantra FirstLady Beauty Capsules”, which is also included in **exhibit NF1** dated 24 November 2020. Page 49 of the exhibit shows the opponent’s “MANTRA frankincense balm extra strong 100 ml hemp oil, shea butter” reduced from £70 to £46.95 listed on eliveragroup.com. I note that this screenshot is also undated.

Proof of use

19. 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;

[...]”

20. Section 6A of the Act states:

“(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.”

21. As the earlier 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”.

22. The opponent’s mark qualifies as an earlier mark in accordance with section 6(1)(a) and 6(1)(ab) as its filing date is earlier than the filing date of the applicant’s mark. The opponent’s mark has completed its registration process more than five years before the relevant date (the filing date of the mark in issue); therefore it is subject to proof of use pursuant to section 6A of the Act.

23. I must assess whether, and to what extent, the above evidence supports the opponent's statement that it has made genuine use of its mark in relation to the class 3 goods it relies upon/for which it is registered. The relevant period for this purpose is the five years ending on the filing date of the applicant's mark, i.e. 29 October 2016 to 28 October 2021.

24. The relevant provisions about proof of use in opposition proceedings are contained in section 6A of the Act, which I have highlighted above. Section 100 of the Act is also relevant, which 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.”

25. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J (as he then was) summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversammlung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, 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] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases 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]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(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]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(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] and [22]. 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]; *Reber* at [29].

(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]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(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] and [76]-[77]; *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].”

Conclusions from the evidence on genuine use

26. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.¹

27. As indicated in the case law cited above, use does not need to be quantitatively significant in order to be genuine. The assessment must take into account a number of factors in order to ascertain whether there has been real commercial exploitation of

¹ *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

the mark which can be regarded as “warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark”.

28. As the opponent’s First Earlier Mark is a comparable mark, the relevant territory for the period before IP Completion Day (31 December 2020) is the EU, and for the remainder of the period is the UK.

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

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

30. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed

in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

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

31. As far as the form of the mark is concerned, I am satisfied that the mark has been used as registered: it is the plain word which appears on all of the products and labels of the goods.

32. The case law summarised in the passage from *Walton* quoted above makes it clear that real commercial exploitation of the trade mark must be shown. Even in a case where the use is not sham, i.e. it is not use engineered solely to preserve the

trade mark registration, the use must be more than trivial if it is to be considered genuine. An example of this can be seen in *Memory Opticians Ltd's Application*, BL O/528/15, where the Appointed Person, Professor Ruth Annand, upheld the decision to revoke the protection of the mark STRADA on the grounds that it had not been put to genuine use within the requisite 5-year period. There had in fact been sales of goods bearing the mark, but these were very low in volume (circa 40 pairs of spectacles per year) and all the sales were local, from 3 branches of an optician. There was no advertising of the goods under the mark, and the evidence indicated that they were only displayed in-store on occasion. The mark was said to have been applied to the goods via a sticker applied to the arms of a dummy lens. This level of use was held to be insufficient to create or maintain a market under the mark. Consequently, it was not genuine use.

33. Turning to the present case, where proof of use is required, it is typical to see evidence such as turnover figures, numbers of units sold and invoices showing the sale of goods to customers, whether retail or wholesale. Albeit the opponent has provided 2 invoices, which pertain to the UK, they are both addressed to the same company, in the same location (Lancashire), and the invoice dated 08/02/2022 falls after the relevant period. Therefore the only sale figure for the relevant period amounts to €377.71. It is not necessarily fatal to the assertion of genuine use that there is no such evidence, if other material filed by the opponent is sufficient to show that there has been a real attempt to exploit the mark in the sector. However, there is very little evidence of other activity in this case.

34. I have been provided with a variety of screenshots, from the opponent's website, and other websites, listing its MANTRA food supplements and dietary supplements. I note that all of the websites are for German and Lithuanian users, apart from the screenshots within **exhibit NF4** which contains screenshots from nathealthinnovations.com, with the ".com" element indicating that it can be accessed by anyone across the globe. These appear to offer the facility to purchase the goods, and some of the screenshots do display the price of the goods. However, no context has been provided whether any of these goods have actually been purchased through these websites. The only evidence I have to support the sale of these goods is 1

invoice, and the 3 reviews left on the amazon.de page dated 17, January, 28 February and 13 March 2020.

35. Furthermore, I note that **exhibit NF4** contains “machine translations” of German websites (.de). I note that as highlighted in paragraph 32 of *Pollini* (BL O/146/02), “where an exhibit is in a foreign language, a party seeking to rely on it in registry proceedings must provide a verified translation into English”. Therefore, the translations within this exhibit should have been prepared in a translator’s own witness statement. Consequently, I cannot take these translations into consideration.

36. Beyond these websites, there is no evidence of any advertising or promotional activity, whether in terms of traditional print advertising, web advertising or via social media. The opponent does not give any total turnover or advertising figures, which is plainly information which should have been both available and relatively easy to provide. Therefore, taking the evidence as a whole, my view is that it does not establish that there has been genuine use of the mark for any of the goods.

37. The consequence of my finding on use is that UK00908748311 may not be relied upon in these proceedings. As there is no other basis for the opposition, the action must fail.

CONCLUSION

38. The opposition is unsuccessful, and the application may proceed to registration.

COSTS

39. The applicant has been successful and is entitled to a contribution towards his costs.

40. On 10 March 2021, the applicant submitted a costs proforma setting out the costs incurred in defending these proceedings. These consisted of:

Task	Time
Notice of Defence	20 hours
Considering forms filed by the other party	12 hours
Considering witness statement and exhibits	15 hours
Preparing evidence and written submissions	60 hours
Total:	107 hours

41. The registrar usually awards costs on a scale published in Tribunal Practice Notice 2/2016. As a matter of practice, litigants in person are asked to complete a costs proforma. The purpose of this is to ensure that the costs awarded do not exceed the amount spent on the proceedings. There is no right to be awarded the amount claimed. This is subject to an assessment of the reasonableness of the claim and must also take account of the registrar's practice of awarding costs on a contributory, not compensatory, basis.

42. Approaching the matter in this way, I consider the following figures to be a fair and reasonable award of costs:

Task	Time
Notice of Defence:	5.5 hours
Considering forms filed by the other party	2 hours
Considering witness statement and exhibits	10 hours
Preparing evidence and written submissions	3 hours
Total	20.5 hours @ £19
	£389.50

43. I have calculated the latter by adopting the standard rate used to calculate costs for unrepresented parties under The Litigants in Person (Costs and Expenses) Act 1975 (as amended) which sets the minimum level of compensation for litigants in person at £19 per hour. I multiplied this by the time I consider was reasonably spent on this application (20.5 hours).

44. I therefore order MantraPharm oHG to pay Sunday Mantra LTD the sum of £389.50. This sum is to 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 13th day of February 2023

L FAYTER

For the Registrar