Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

8 November 2018 *

(EU trade mark — Revocation proceedings — EU word mark SPINNING — Partial revocation — Article 51(1)(b) of Regulation (EC) No 207/2009 (now Article 58(1)(b) of Regulation (EU) 2017/1001))

In Case T-718/16,

Mad Dogg Athletics, Inc., established in Los Angeles, California (United States), represented by J. Steinberg, lawyer,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by D. Walicka, acting as Agent,

defendant,

the intervener before the General Court, formerly Aerospinning Master Franchising, Ltd., s.r.o., the other party to the proceedings before the Board of Appeal of EUIPO, being

Aerospinning Master Franchising, s.r.o., established in Prague (Czech Republic), represented by K. Labalestra, lawyer,

ACTION brought against the decision of the Fifth Board of Appeal of EUIPO of 21 July 2016 (Case R 2375/2014-5), relating to revocation proceedings between Aerospinning Master Franchising and Mad Dogg Athletics,

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni, President, K. Kowalik-Bańczyk and C. Mac Eochaidh (Rapporteur), Judges,

Registrar: I. Dragan, Administrator,

having regard to the application lodged at the Court Registry on 4 October 2016,

having regard to the response of EUIPO lodged at the Court Registry on 17 March 2017,

having regard to the response of the intervener lodged at the Court Registry on 24 March 2017,

further to the hearing on 15 March 2018,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1 On 1 April 1996 the applicant, Mad Dogg Athletics, Inc., filed an application for registration of the word mark SPINNING ('the contested mark') with the European Union Intellectual Property Office (EUIPO), pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended, itself replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)).

2 On 3 April 2000 the contested mark was registered in respect of goods and services in Classes 9, 28 and 41 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and corresponding, for each of those classes, to the following description:

– Class 9: 'Audio and video cassettes';

– Class 28: 'Exercise equipment';

– Class 41: 'Exercise training'.

3 On 8 February 2012 the intervener, Aerospinning Master Franchising, s.r.o., filed an application for partial revocation of the contested mark pursuant to Article 51(1)(b) of Regulation No 207/2009 (now Article 58(1)(b) of Regulation 2017/1001). That application concerned the goods in Class 28 and the services in Class 41.

4 On 21 July 2014 the Cancellation Division revoked the applicant's rights in their entirety.

5 On 12 September 2014 the applicant filed a notice of appeal with EUIPO against the Cancellation Division's decision.

6 By decision of 21 July 2016 ('the contested decision'), the Fifth Board of Appeal of EUIPO annulled the decision of the Cancellation Division in part in so far as it concerned the goods in Class 9, even though those goods were not the subject matter of the application for partial revocation filed by the intervener. On the basis of Article 51(1)(b) of Regulation No 207/2009, the appeal was dismissed as to the remainder. In that regard, first, the Board of Appeal stated, in paragraphs 23 to 27 of the contested decision, that the grounds for revocation had to be assessed as at the date of filing of the application for revocation. Second, in paragraphs 28 to 33 of the contested decision, it considered that the supposed transformation of the contested mark into a common name for the goods and services at issue had to be examined by taking into account the perception of Czech end users. Accordingly, it refused to examine the evidence to the contrary submitted by the applicant concerning its activities defending its trade mark in Member States other than the Czech Republic. Third, in paragraphs 34 to 47 of the contested decision, the Board of Appeal considered that the evidence which had been submitted during the course of the proceedings proved that the term 'spinning' had become, in the Czech Republic, the common name for a type of 'exercise training' and for the 'exercise equipment' used for that training. Fourth, in paragraphs 48 to 56 of the contested decision, it considered that the fact that the contested mark had become a common name was due to insufficient activity by the applicant to protect its trade mark in the Czech Republic. Fifth, in paragraphs 57 to 61 of the contested decision, it considered that several decisions of the Úřad průmyslového vlastnictví (Office of Industrial Property, Czech Republic) and the Czech courts confirmed that the applicant had not been sufficiently vigilant and had not made reasonable efforts to protect its trade mark in the Czech Republic.

Forms of order sought

7 The applicant claims that the Court should:

– annul the contested decision in so far as it has revoked the contested mark in respect of 'exercise equipment' in Class 28 and 'exercise training' in Class 41;

– order EUIPO to pay the costs.

8 EUIPO contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

9 The intervener contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

10 In support of its action the applicant relies on, in essence, three pleas in law alleging infringement of (i) Article 51(1)(b) of Regulation No 207/2009, (ii) Article 41(2)(a) of the Charter of Fundamental Rights of the European Union and (iii) Article 41(2)(c) of the Charter of Fundamental Rights.

11 The first plea is based, in essence, on four complaints, the first, second and third alleging errors of law as regards the relevant date to be taken into account for the purposes of assessing the ground for revocation, the relevant territory to be taken into account for the purposes of assessing the ground for revocation and the relevant public to be taken into account for the purposes of assessing the ground for revocation, respectively, and the fourth alleging an incorrect assessment of the evidence.

First complaint of the first plea in law, alleging an error of law as regards the relevant date to be taken into account for the purposes of assessing the ground for revocation

12 The applicant submits, in essence, that the Board of Appeal infringed Article 51(1)(b) of Regulation No 207/2009 by considering that the relevant time for assessing the ground for revocation was the date on which the intervener filed its application for revocation of the contested mark. In the applicant's view, the relevant time for assessing whether the contested mark has transformed into a common name is not the date on which the application for revocation is filed but the date on which the revocation decision responding to that application, which has the force of *res judicata*, is adopted. According to the applicant, the ground for revocation must still apply at the time when the revocation decision is adopted.

13 EUIPO and the intervener dispute those arguments.

14 In that regard, in the first place, it should be noted that Article 55(1) of Regulation No 207/2009 (now Article 62(1) of Regulation 2017/1001) provides:

'The EU trade mark shall be deemed not to have had, as from the date of the application for revocation or of the counterclaim, the effects specified in this Regulation, to the extent that the rights of the proprietor have been revoked. An earlier date, on which one of the grounds for revocation occurred, may be fixed in the decision at the request of one of the parties'.

15 As the Board of Appeal correctly stated in paragraph 24 of the contested decision, in the event of the revocation of an EU trade mark, that revocation is effective as from the date of the application for revocation or, at the request of one of the parties, an earlier date on which one of the grounds for that revocation occurred.

16 By contrast, the EU legislature has not made provision for revocation to take effect from a date following the date of the application for revocation.

17 It is thus apparent from the wording of Article 55(1) of Regulation No 207/2009 that the revocation decision must be based on one of the grounds referred to in Article 51 of that regulation which applied at the latest on the date of filing of the application for revocation. Consequently, contrary to the applicant's assertions, it follows from that provision that the applicability of the ground for revocation must be examined in the light of the factual and legal context on that date at the latest.

18 In the second place, it has already been held, concerning Article 12(1) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1) and Article 51(1)(a) of Regulation No 207/2009 (now Article 58(1)(a) of Regulation 2017/1001), which are identically worded, that, regarding the revocation of a trade mark on the ground of a lack of genuine use, only circumstances which arise before the filing of the application for revocation may be taken into account, without prejudice to the possibility of taking into consideration circumstances arising after that filing which may make it possible to confirm or better assess the extent to which the trade mark was used during the relevant period and the real intentions of the proprietor during that time (order of 27 January 2004, *La Mer Technology*, C-259/02, EU:C:2004:50, paragraphs 29 to 33, and judgment of 2 February 2016, *Benelli Q. J.* v *OHIM — Demharter (MOTOBI B PESARO)*, T-171/13, EU:T:2016:54, paragraph 87).

19 First, contrary to the applicant's assertions, as the context of that case-law was the revocation of the rights of the proprietor of a trade mark on the ground of a lack of genuine use, it can be transposed, *mutatis mutandis*, to the context of examining an application for revocation of a trade mark on the ground that it has become the common name for a product or a service in the trade. This approach is required because the rule set out in Article 55(1) of Regulation No 207/2009 applies without distinguishing between the grounds for revocation referred to in Article 51(1) thereof.

20 Second, it is apparent from the case file that, contrary to the requirements of the case-law recalled in paragraph 18 above, the applicant is not seeking, by producing evidence relating to the period after the application for revocation, to confirm or better assess circumstances prevailing on or arising before that date. On the contrary, it seeks to give itself an opportunity to show that the ground for revocation might no longer apply after the filing of the application for revocation. To follow the applicant's argument would be to ignore the letter of Article 55(1) of Regulation No 207/2009, because that provision has not envisaged such a possibility.

21 In the third place, the applicant submits that account should be taken of the efforts made by the proprietor of a trade mark following the filing of the application for revocation in so far as those efforts have resulted in a change in the perception of the relevant public. In such a situation, the

contested sign would thus have been regarded, by the relevant public, as a common name at the time of filing of the application for revocation, but would then have lost that generic character to be viewed once again as a trade mark by that public at the time of adoption of the revocation decision.

22 Even allowing for the possibility of such a change of perception, this would not permit derogation from the rule set out in Article 55(1) of Regulation No 207/2009, which requires that the ground for revocation be examined in the light of the factual and legal context on the date of filing of the application for revocation at the latest. In any event, if that change of perception were established, the applicant could re-apply to EUIPO for registration of its mark.

23 Finally, the applicant asserts, in paragraph 8 of the application, that it is entitled, at every stage of the procedure before the decision of EUIPO acquires the force of *res judicata*, to submit evidence of efforts made or actions taken following the application for revocation to educate the public about the nature of the word sign SPINNING as a trade mark or to protect that mark.

24 That line of argument cannot succeed.

25 First, it runs counter to the assertion, expressed in paragraph 7 of the application and making implicit reference to Article 76(2) of Regulation No 207/2009 (now Article 95(2) of Regulation 2017/1001), that the parties may produce evidence only within the periods laid down by EUIPO for submitting observations.

26 Second, under Article 76(2) of Regulation No 207/2009, consideration of evidence which was not submitted within the period prescribed by EUIPO but was submitted at a later stage of the proceedings cannot be accepted, except by way of complement to the evidence submitted within that period (see, to that effect, judgments of 18 July 2013, *New Yorker SHK Jeans* v *OHIM*, C-621/11 P, EU:C:2013:484, paragraph 30, and of 26 September 2013, *Centrotherm Systemtechnik* v *OHIM and centrotherm Clean Solutions*, C-610/11 P, EU:C:2013:593, paragraphs 113 and 114). While that provision thus allows for evidence which is submitted late but is complementary to be taken into account, it does not, by contrast, authorise the Board of Appeal to extend its discretion to new evidence (see, to that effect, judgment of 21 July 2016, *EUIPO* v *Grau Ferrer*, C-597/14 P, EU:C:2016:579, paragraphs 25 to 27).

27 The application of that case-law, which permits evidence submitted late to be accepted, subject to conditions, nevertheless cannot entail disregard for the letter and effectiveness of Article 55(1) of Regulation No 207/2009. Evidence submitted late, in particular if it relates to facts arising after the date of filing of the application for revocation, thus cannot be taken into account unless, in accordance with what is stated in paragraphs 18 to 20 above, it confirms or makes it possible to better assess circumstances arising before, or prevailing on, the date of the application for revocation.

28 In view of all of those factors, the first complaint must be rejected as unfounded.

Second complaint of the first plea in law, alleging an error of law as regards the relevant territory to be taken into account for the purposes of assessing the ground for revocation

29 The applicant submits, in essence, that the Board of Appeal infringed Article 51(1)(b) of Regulation No 207/2009 by considering that the relevant territory for assessing the ground for revocation was limited to the Czech Republic. In the applicant's view, an assessment limited to that Member State alone is not sufficient for revocation of the contested mark, which has a reputation throughout the European Union. Revocation of the contested mark could be envisaged only if that trade mark were perceived as a common name by the relevant public throughout the European Union or at least in an overwhelming part of it, according to the applicant.

30 EUIPO and the intervener dispute those arguments.

31 In that regard, it should be borne in mind that, pursuant to the principle of the unitary character of the EU trade mark, expressed in recital 3 of Regulation No 207/2009 (now recital 4 of Regulation 2017/1001) and specified in Article 1(2) of that regulation (now Article 1(2) of Regulation 2017/1001), EU trade marks are given uniform protection and produce their effects throughout the entire area of the European Union. Under that latter provision, the EU trade mark may not, save as otherwise provided in Regulation No 207/2009, be registered, transferred or surrendered or be the subject of a decision revoking the rights of the proprietor or declaring it invalid, nor may its use be prohibited, save in respect of the whole of the European Union (judgment of 20 July 2017, *Ornua*, C-93/16, EU:C:2017:571, paragraph 26).

32 Furthermore, Article 51(2) of Regulation No 207/2009 (now Article 58(2) of Regulation 2017/1001) states that there may be a partial revocation in respect of some of the goods or services concerned. While that provision thus allows for the possibility of adjusting the revocation from a substantive point of view, it must be pointed out that the EU legislature has made no provision for such an adjustment with regard to territory.

33 It is therefore apparent from the provisions referred to in paragraphs 31 and 32 above that a revocation decision has binding force for the whole of the territory of the European Union.

34 Thus, where it is established that an EU trade mark has lost all distinctive character in a limited part of the territory of the European Union or, as the case may be, in a single Member State, that finding necessarily means that the mark is no longer capable of producing the effects listed by Regulation No 207/2009 throughout the European Union. Accordingly, contrary to the applicant's assertions, it is sufficient that the transformation of such a mark into a common name be established in a single Member State for its proprietor's rights to be revoked in respect of the whole of the European Union.

35 That solution is, moreover, consistent with the objectives pursued by Regulation No 207/2009 and the principle of the unitary character of the EU trade mark which gives concrete expression to those objectives.

36 If recitals 2, 4 and 6 of Regulation No 207/2009 (now recitals 3, 5, and 7 of Regulation 2017/1001) are read together, it is apparent that the regulation seeks to remove the barrier of territoriality of the rights conferred on proprietors of trade marks by the laws of the Member States by enabling undertakings to adapt their activities for the internal market and carry them out without restriction. The EU trade mark thus enables its proprietor to distinguish its goods and services by identical means throughout the entire European Union, regardless of frontiers. On the other hand, undertakings which do not wish to protect their trade marks at EU level may choose to use national trade marks and are not obliged to apply for registration of their marks as EU trade marks. The purpose of the system of EU trade marks is thus — as can be seen from recital 2 of Regulation No 207/2009 — to offer on the internal market conditions which are similar to those obtaining in a national market (see, to that effect, judgment of 19 December 2012, *Leno Merken*, C-149/11, EU:C:2012:816, paragraphs 40 and 42).

37 In that regard, the applicant submits that, in order for a revocation application to be accepted, the mark at issue must have become a common name, owing to the activity or inactivity of its proprietor, throughout the European Union or in an overwhelming part of it.

38 That argument cannot be accepted. As is correctly emphasised, in essence, by EUIPO and the intervener, protection of a trade mark at EU level means that, in return, its proprietor must exercise sufficient vigilance in defending and asserting its rights throughout the European Union. Accordingly,

the proprietor of a trade mark must have its rights revoked if, owing to the proprietor's inactivity, the trade mark in question is transformed into a common name even in a limited part of the territory of the European Union or, as the case may be, in a single Member State.

39 Revocation thus permits other operators freely to use the registered sign. It thus pursues an aim which is in the public interest, namely that signs or indications which have become a common name for goods or services in respect of which a trade mark has been registered may be available to or freely used by all. Thus, Article 51(1)(b) of Regulation No 207/2009 seeks to guarantee the distinctive character of a trade mark as an indication of origin and to avoid generic terms being reserved indefinitely for a single undertaking by reason of their having been registered as trade marks (see, to that effect and by analogy, concerning Article 12(2)(a) of Directive 89/104, Opinion of Advocate General Léger in *Björnekulla Fruktindustrier*, C-371/02, EU:C:2003:615, points 53 and 54).

40 Moreover, by revoking the rights of the proprietor of the trade mark in question for the whole of the territory of the European Union, even where the transformation of that mark into a common name is established in only a limited part of that territory or, as the case may be, in a single Member State, it is possible to prevent inconsistent decisions on the part of EUIPO and national courts or tribunals ruling as EU trade mark courts and, as a result, to ensure that, here too, the unitary character of EU trade marks is not undermined (see, to that effect and by analogy, judgment of 19 October 2017, *Raimund*, C-425/16, EU:C:2017:776, paragraph 28).

41 Those findings are not called into question by the applicant's other arguments.

42 First, the applicant considers that the Board of Appeal erred in referring, in paragraph 30 of the contested decision, to the judgment of 6 October 2009, *PAGO International* (C-301/07, EU:C:2009:611), to substantiate its reasoning.

43 In that regard, the Court has previously held that that case-law concerns the interpretation of provisions relating to the extended protection conferred on trade marks that have a reputation or are well known in the European Union or in the Member State in which they have been registered. However, the requirements laid down by Article 51 of Regulation No 207/2009, which could result in the trade mark being revoked, pursue a different objective from those provisions (see, to that effect, judgments of 19 December 2012, *Leno Merken*, C-149/11, EU:C:2012:816, paragraph 53, and of 3 September 2015, *Iron & Smith*, C-125/14, EU:C:2015:539, paragraph 21).

44 While it is true that the reference to the judgment of 6 October 2009, *PAGO International* (C-301/07, EU:C:2009:611), is incorrect, it cannot entail the annulment of the contested decision, because it is an ancillary element in the Board of Appeal's reasoning. It was not on the basis of that case-law, but on the basis of the principle of the unitary character of the EU trade mark, that the Board of Appeal decided, in paragraph 31 of the contested decision, to limit its examination to the territory of the Czech Republic.

45 Second, the applicant considers that the Board of Appeal was wrong to draw a parallel between the conditions for the registration of a sign, which prohibit, in particular, the registration of a sign where there is an absolute ground for refusal in only one part of the European Union, and the conditions for the revocation of the rights of the proprietor of an EU trade mark. For the applicant, the conditions laid down by Article 7 of Regulation No 207/2009 (now Article 7 of Regulation 2017/1001) differ considerably from those laid down by Article 51(1)(b) of that regulation.

46 That argument must be rejected. As was correctly noted by the Board of Appeal in paragraph 31 of the contested decision and as was recalled by EUIPO during the hearing, the unitary character of the EU trade mark is the basic legal principle underpinning the entirety of Regulation No 207/2009. That principle implies, in particular, that an EU trade mark is, at the time of its registration, distinctive

throughout the European Union, and retains that distinctive character by not becoming, in even a limited part of the European Union or, as the case may be, in a single Member State, the common name in the trade for the goods and services in respect of which it was registered.

47 Furthermore, the applicant's argument that Article 52 of Regulation No 207/2009 (now Article 59 of Regulation 2017/1001) refers to Article 7(2) of Regulation No 207/2009 (now Article 7(2) of Regulation 2017/1001), whereas Article 51(1)(b) of that regulation contains no such reference, cannot be accepted. First, Article 52 of Regulation No 207/2009 concerns the invalidity of an EU trade mark and not, as in the present case, the revocation of its proprietor's rights. Second, as is apparent from paragraph 46 above, the unitary character of the EU trade mark constitutes the basic legal principle underpinning the entirety of Regulation No 207/2009. It is therefore irrelevant that certain provisions of that regulation, such as Article 7(2), explicitly give concrete expression to that principle, while others do not.

48 Third, during the hearing the applicant asserted that it would be serious and unfair to revoke the rights of the proprietor of an EU trade mark if that mark had become, in a single Member State, the common name in the trade for a product or a service in respect of which it was registered.

49 The Court notes that a revocation decision based on such a ground, however far-reaching its consequences for the proprietor of the trade mark in question, is inherent in the rule of law sought by the EU legislature, as can be seen from, in particular, Article 1(2) of Regulation No 207/2009. Further, in view of the principles of institutional balance and conferral of powers as enshrined in Article 13(2) TEU (see judgment of 28 July 2016, *Council* v *Commission*, C-660/13, EU:C:2016:616, paragraphs 31 and 32 and the case-law cited), the General Court does not have jurisdiction to adjust that regulation. Accordingly, those rules can be amended only through intervention by the EU legislature. Moreover, the applicant has not raised any plea of illegality in respect of Article 51(1)(b) of Regulation No 207/2009.

50 In view of all of those factors, it must be held that the Board of Appeal did not err in law in relying, in order to revoke the contested mark, on evidence limited to the Czech Republic and the second complaint must, accordingly, be rejected as unfounded.

Third complaint of the first plea in law, alleging an error of law as regards the relevant public to be taken into account for the purposes of assessing the ground for revocation

51 In support of the third complaint of the first plea in law, the applicant submits that the Board of Appeal infringed Article 51(1)(b) of Regulation No 207/2009 by considering, in essence, that the relevant public for the assessment of the ground for revocation was confined to end users and that it was therefore not necessary to take the perception of the professionals concerned into account.

52 EUIPO and the intervener dispute those arguments.

53 In that regard, it is apparent from case-law that the question whether a trade mark has become the common name in the trade for a product or service in respect of which it is registered must be assessed not only in the light of the perception of consumers or end users but also, depending on the characteristics of the market concerned, in the light of the perception of professionals, such as sellers. However, in general, the perception of consumers or end users will play a decisive role. Thus, in a situation characterised by the loss of distinctive character of the trade mark concerned from the point of view of end users, that loss may result in the revocation of the rights conferred on the proprietor of the mark in question. The fact that sellers are aware of the existence of that trade mark and of the origin which it indicates cannot, on its own, preclude such revocation (see, to that effect and by analogy, concerning Article 12(2)(a) of Directive 2008/95/EC of the European Parliament and of the

Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25), judgment of 6 March 2014, *Backaldrin Österreich The Kornspitz Company*, C-409/12, EU:C:2014:130, paragraphs 28 and 29 and the case-law cited).

54 It follows from that case-law that the relevant public, whose views must be taken into account in determining whether the contested mark has become the common name in the trade for a product or service in respect of which it is registered, must be defined in the light of the characteristics of the market for that product or service (see, to that effect and by analogy, judgment of 29 April 2004, *Björnekulla Fruktindustrier*, C-371/02, EU:C:2004:275, paragraph 26; Opinion of Advocate General Cruz Villalón in *Backaldrin Österreich The Kornspitz Company*, C-409/12, EU:C:2013:563, points 58 and 59).

55 In the present case, the Board of Appeal considered, in paragraph 32 of the contested decision, that it was necessary to examine only the perception of Czech end users of the goods and services in question. According to the Board of Appeal, it was not established that the markets for 'exercise training' and 'exercise equipment' had characteristics requiring the perception of professionals operating on those markets to be taken into consideration.

56 In its application, the applicant submits that the majority of its indoor cycles are sold to commercial operators of gyms, sports facilities and rehabilitation facilities.

57 In response to a written question from the Court, the applicant stated that, unlike commercial operators of gyms, sports facilities and rehabilitation facilities, end users very rarely buy its indoor cycles owing to their high purchase price. During the hearing, the applicant also stated, without being contradicted by the other parties, that its indoor cycles were sold to professional customers in 95% of cases.

58 At the hearing, all the parties agreed, in response to an oral question from the Court, that the sporting activity in question was practised on indoor cycles, in a group, generally in gyms, and under the guidance of a fitness instructor. Furthermore, the Court observes that that description is similar to the one used by the Cancellation Division and recalled by the Board of Appeal in the 'Summary of the facts' section of the contested decision.

59 The Board of Appeal was therefore wrong to consider, in paragraph 32 of the contested decision, that professional customers were not part of the relevant public as regards 'exercise equipment', since, in general, those indoor cycles are purchased by commercial operators of gyms, sports facilities and rehabilitation facilities.

60 It is true that, as was maintained by EUIPO at the hearing, the category of 'exercise equipment' is not limited to indoor cycles and that the other goods in question may be purchased by individuals. However, it is apparent from paragraph 57 above that, in view of their high purchase price, indoor cycles are rarely purchased by individuals. EUIPO's argument does not therefore permit the exclusion of professional customers from the relevant public as regards 'exercise equipment'.

61 In view of those factors, the Board of Appeal was wrong to exclude the perception of professional customers as regards 'exercise equipment' from its analysis in order to assess whether the contested mark had become the common name in the trade for the 'exercise equipment' in respect of which it was registered. Accordingly, the Board of Appeal made an error of assessment in defining the relevant public as regards the market for 'exercise equipment' in Class 28 by failing to take account of the perception of professional customers operating on that market.

62 That conclusion is not undermined by the fact that, as the intervener maintained during the hearing, the contested decision refers, in paragraphs 41, 45 to 47, 49, 53 and 62 thereof, to the perception of commercial operators. It must be pointed out that those references concern only the sporting activity

in question, and not the 'exercise equipment'. Only paragraph 44 of the contested decision makes explicit reference to the perception of the contested mark by commercial operators with regard to indoor cycles and shoes, but that reasoning concerns only the sellers of those sporting goods.

63 By contrast, the contested decision contains nothing relating to the perception of the contested mark by professional customers, such as, inter alia, operators of gyms, sporting facilities and rehabilitation facilities, acting as buyers of those goods. As is apparent from paragraphs 58 and 59 above, it is those operators who, as a general rule, purchase indoor cycles and subsequently make them available to their own customers in order to enable them to practise the sporting activity in question.

64 It must therefore be found, first, that those operators play a central role on the 'exercise equipment' market and, second, that they have a decisive influence on the selection, by end users, of 'exercise training' services. Through their knowledge of the contested mark's function as an indication of origin, those operators thus enable the process of communication between providers and end users of those services to be successfully carried out (see, to that effect and by analogy, Opinion of Advocate General Cruz Villalón in *Backaldrin Österreich The Kornspitz Company*, C-409/12, EU:C:2013:563, point 59).

65 That error of assessment in defining the relevant public vitiates the contested decision in its entirety and, accordingly, justifies its annulment.

66 However, as the applicant has limited the subject matter of the present action to the 'exercise equipment' in Class 28 and 'exercise training' in Class 41 covered by the contested mark, the effects of the contested decision must be maintained in respect of the 'audio and video cassettes' in Class 9 covered by that mark.

67 In the light of all of the foregoing, and without its being necessary to examine either the fourth complaint of the present plea in law or the second and third pleas raised in the present action, the third complaint of the first plea in law must be upheld and, accordingly, the contested decision must be annulled in so far as it concerns the goods in Class 28 and the services in Class 41 covered by the contested mark.

Costs

68 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

69 Since EUIPO and the intervener have been unsuccessful, first, EUIPO must be ordered to bear its own costs and to pay those incurred by the applicant, in accordance with the form of order sought by the latter, and, second, the intervener must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. **Annuls the decision of the Fifth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 21 July 2016 (Case R 2375/2014-5) in so far as it concerns the goods in Class 28 and the services in Class 41 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended;**

2. Orders EUIPO to bear its own costs and to pay those incurred by Mad Dogg Athletics, Inc.;

3. Orders Aerospinning Master Franchising, s.r.o. to bear its own costs.

Gervasoni Kowalik-Bańczyk Mac Eochaidh

Delivered in open court in Luxembourg on 8 November 2018.

E. Coulon
Registrar

S. Gervasoni
President