

**DECISION
of the Fifth Board of Appeal
of 3 August 2018**

In case R 2657/2017-5

Diesel S.P.A.

Via dell'Industria 4-6
36042 Breganze (VI)
Italy

Opponent / Appellant

represented by Barzano' & Zanardo Milano S.P.A., Via Borgonuovo, 10, 20121
Milano, Italy

v

Sprinter Megacentros del Deporte, S.L.

Polígono Vizcarra, Nave 17
03290 Elche (Alicante)
Spain

Applicant / Defendant

represented by Urquhart-Dykes & Lord LLP, Arena Point Merrion Way, LS2 8PA
Leeds, United Kingdom

APPEAL relating to Opposition Proceedings No B 2 160 110 (European Union trade
mark application No 11 404 019)

THE FIFTH BOARD OF APPEAL

composed of G. Humphreys (Chairperson), A. Kralik (Rapporteur) and A. Pohlmann
(Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 6 December 2012, SPRINTER MEGACENTROS DEL DEPORTE, S.L. ('the applicant') sought to register the figurative mark



for the following list of goods:

Class 18 – Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery; vanity cases; holdalls, back packs and rucksacks; wallets, key cases, purses and pouches; credit card cases, tote bags, bottle bags, record bags, book bags; handbags; sports bags; sports holdalls; shopping bags; luggage and suitcases; weekend bags; jewellery rolls; attaché cases and briefcases; parts and fittings for all the aforesaid goods;

Class 25 – Clothing; football boots; rugby boots; training shoes; running shoes; tennis shoes; indoor sports shoes; headgear; belts;

Class 28 – Gymnastic and sporting articles and equipment; games and playthings; parts and fittings for all the aforesaid goods.

- 2 The application was published on 8 January 2013.
- 3 On 5 April 2013, DIESEL S.P.A. ('the opponent') filed an opposition against the registration of the published trade mark application for part of the goods based on the following earlier rights:
 - EU trade mark registration No 583 708 for the figurative mark



filed on 10 July 1997, registered on 19 February 1999 and duly renewed for the following list of goods:

Class 3 – Soaps, perfumery, essential oils, cosmetics, hair lotions, dentifrices;

Class 9 – Spectacles, spectacle cases, spectacle frames, lenses, optical apparatus and instruments;

Class 14 – Precious metal and their alloys and goods in precious metal or coated therewith, not included in other classes; jewellery, precious stones; horological and chronometric instruments;

Class 16 – Paper, cardboard and goods made from these materials, not included in other classes, printed matter; bookbinding materials, photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic

materials for packaging (not included in other classes); playing cards; printers' type; printing blocks;

Class 18 – Leather and imitation of leather and goods made of these materials and not included in other classes; animal skins, hides, trunks and travelling bags; umbrellas, parasols and walking sticks, whips, harness and saddlery;

Class 24 – Textiles and textile goods, not included in other classes, bed and table covers;

Class 25 – Clothing, footwear, headgear.

- International registration designating the European Union No 881 767 for the figurative mark



filed and registered on 25 October 2005 for the following list of goods:

Class 3 – Soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices;

Class 9 – Discs, CD ROM, DVD, digital video, software; spectacles, cases and chains for spectacles, frames for spectacles, lenses; optic instruments and apparatus;

Class 14 – Precious metals and their alloys and goods in precious metals or coated therewith, not included in other classes; jewellery, precious stones; chorological and chronometric instruments;

Class 18 – Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery;



Class 25 – Clothing, footwear, headgear.

- 4 The grounds of opposition were those laid down in Article 8(1)(b) EUTMR. The opposition was based on only part of the goods specified by the earlier rights, namely:

Class 18 – Leather and imitation of leather and goods made of these materials and not included in other classes; animal skins, hides, trunks and travelling bags; umbrellas, parasols and walking sticks, whips, harness and saddlery;

Class 25 – Clothing, footwear, headgear.

- 5 By decision of 31 October 2014 ('the contested decision'), the Opposition Division rejected the opposition in its entirety and ordered the opponent to bear the costs of the applicant.
- 6 On 29 December 2014, the opponent filed a notice of appeal against the decision. A statement of grounds of appeal was received on 27 February 2015.
- 7 The applicant submitted its observations on 13 March 2015.
- 8 On 18 June 2015, the Second Board of Appeal issued a decision dismissing the appeal and ordering the opponent to bear the costs, based on the following reasoning:
 - The earlier mark clearly resembles a capital letter 'D', while the mark applied for represents a basic geometrical shape – a small part of the public might perceive the mark applied for as a 'D';

- The marks have clear visual differences that outweigh the similarities (which are not particularly strong);
- Only that small part of the public who perceives  as a ‘D’ will link the signs phonetically and conceptually, and they will not be confused because:
 - The distinctive character of the earlier mark is weak in relation to the goods concerned in Classes 18 and 25;
 - Shared features generic to the letter ‘D’ are insufficient – attention must be paid to features which are not generic and these are not shared;
- In any event, the majority of the relevant public will not perceive  as a ‘D’;
- Even given the principles of interdependence, imperfect recollection and the identity of the goods, there was no reason to find that the relevant public would be misled into thinking that the contested goods emanate from the same undertaking or economically-linked undertakings;
- It is therefore unnecessary to compare the contested goods or to determine if the opponent had proved genuine use of the earlier mark.

9 The opponent appealed this decision of the Board of Appeal to the General Court, which in its judgment of 20 July 2017 in Case T-521/15 annulled the decision of the Second Board of Appeal and remitted the case back to the Boards. The Court found:

- Visually, there are slight stylistic differences, which cannot dispel the impression of overall similarity, which is valid irrespective of whether the relevant public perceives the mark applied for as a capital letter ‘D’:
 - The presence of two horizontal lines which are parallel and two vertically-oriented lines, which are not completely parallel, give both marks the same dynamism;
 - The overall proportions are similar: the width of the lines and presence of two rounded angles on the right;
 - The linear layout of the two marks and the same black on white colour of their layout.

For a non-negligible part of the relevant public, there is a high degree of visual similarity between the marks when viewed as a whole;

- The clothing sector abounds with small marks often affixed to those goods: It cannot be ruled out that consumers might experience difficulties differentiating minor stylistic differences between marks;
- The graphic stylisation requires a detailed examination on the part of consumers, who do not adopt a particularly attentive approach when confronted with single-letter signs;
- The marks are phonetically and conceptually identical, given that a significant part of the relevant public will perceive the mark applied for as a capital letter ‘D’, i.e., the same letter of the alphabet;

- Given that it is common in the clothing and fashion sector for the same mark to be configured in various different ways on different goods at different times, there is a risk that the relevant public will regard them as emanating from the same undertaking.
- 10 On 19 December 2017, the Registry of the Boards of Appeal sent a notification stating that in accordance with Article 35(4) EUTMDR, the appeal R 3291/2014-2 had been reallocated to the Fifth Board of Appeal and given the appeal number R 2657/2017-5.
 - 11 On 13 June 2018, the Rapporteur felt compelled to send the following communication to the opponent (copied to the applicant):

‘As part of its considerations under this appeal, the Fifth Board is considering the evidence submitted in relation to proof of use of the earlier rights EU trade mark registration No 583 708 and International registration number 881 767. The Board requests improved quality of reproductions of all or part of the following annexes, cited in submissions communicated to the Office on 10 June 2014 as part of the original opposition proceedings (No 2 160 110):

Annex 1: Images of goods;

Annex 2: Extracts from magazines.

This request is limited to these annexes only, the images of the trade marks in this evidence being (for the most part) indecipherable. This includes the DVD containing the copies of the images in Annex 1, which pixilate when enlarged.

The opponent has one month from the date of this letter to meet this request’.

- 12 The requested material arrived on 9 July 2018.

Reasons

- 13 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.
- 14 According to Article 81(2)(d) EUTMDR, Article 10 EUTMDR shall not apply to requests for proof of use made before 1 October 2017. Since the proof of use was in the present case requested before the above mentioned case, the relevant provisions of CTMIR shall apply.
- 15 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Scope of the appeal



- 16 Given the findings of the General Court, the Board considers that it is now necessary to carry out an analysis of the evidence of proof of use of the opponent’s earlier rights, before considering the other aspects of the appeal that are contingent on this analysis.




Proof of use of the earlier marks

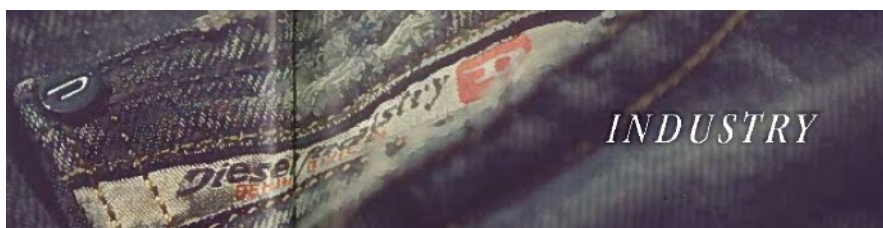
- 17 In observations in reply dated 6 January 2014, the applicant requested that the opponent demonstrate use of its earlier rights for the purposes of Article 47(2) EUTMR.
- 18 Given that the opposition was filed before 23 March 2016 (on 5 April 2013), the relevant five years are those preceding the publication of the contested sign (8 January 2013). The opponent must therefore prove use of its two rights between 8 January 2008 and 7 January 2013, inclusive.
- 19 There is ‘genuine use’ of a trade mark when the mark is used in accordance with its essential function, which is to guarantee the identity of the goods or services for which it is registered, in order to create or preserve an outlet for those goods and services (11/03/2003, C-40/01, *Minimax*, EU:C:2003:145, § 36 and 37). This does not include token use for the sole purpose of preserving the rights conferred by the mark. Furthermore, genuine use of the mark entails use of the mark on the market for the goods and services protected by that mark and not just internal use by the undertaking concerned (12/03/2003, T-174/01, *Silk Cocoon*, EU:T:2003:68, § 32 and 41).
- 20 When assessing whether use of the trade mark is genuine, it is necessary to consider all facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real. In particular, it is important to ascertain whether such use is viewed 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, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (11/03/2003, C-40/01, *Minimax*, EU:C:2003:145, § 36, 37, 38, 39, 41). Even minimal use can be sufficient to be deemed genuine, provided that it is viewed 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 (27/01/2004, C-259/02, *Laboratoire de la mer*, EU:C:2004:50, § 21).
- 21 In examining proof of use evidence, the Board is required by the courts to consider the latter as a totality in assessing its value in sum as to the narrative it provides in relation to the use of a sign. In other words, each piece of evidence is not to be analysed separately, but rather together – in order to determine the most likely and coherent meaning that it presents as to the activities of the relevant undertaking.
- 22 According to Rule 22(4) CTMIR, the evidence of use is, in principle, confined to the submission of supporting documents and items such as packages, labels, price lists, catalogues, invoices, photographs, newspaper advertisements, and statements in writing as referred to in Article 97(1)(f) EUTMR. Rule 22 (4) CTMIR also allows market surveys and quotations of the mark in lists and publications of associations of the relevant profession as suitable means of evidence. The evidence will be assessed according to the place, time, extent and nature of use, as set out in Rule 22(3) CTMIR.
- 23 The opponent supplied the following evidence.
 - Annex 1 consists of a DVD of (undated) images of various examples of the opponent’s denim jeans (male and female). There is a pocket label on most of

the items shown, but the quality of reproduction is poor and it is impossible to read the label with any certainty. For example:






One of these images is from an item called the 'JEGONFIRE'. The symbol in either reproduction could be  or , and the quality is very poor.

There is only one example of a readable reproduction, labelled 'INDUSTRY'. The latter is not perfect, but the  can be made out in the form: , while the  also appears on a stud:



It could be that the images shown on the other reproductions duplicate this branding, but this is not clear, either from the DVD images or in the hard copies supplied by the opponent;

- Annexes 2 and 3 contain extracts from various magazines (e.g. *MAXI*, *GQ STYLE*; *L'Uomo Vogue*). These are within the relevant period but, again, the brand  cannot be made out, but for the following examples:
 - A lace-up ankle shoe advertised in *FHM* on 1 April 2009;
 - A pair of hot-pants in *Glamour* from 2010;
 - Another pair of jeans containing the name 'dieselindustry' with the  sign (*Denim Trends*, 2010);
 - From *L'Uomo Vogue* dated 1 March 2011, another example of 'dieselindustry' jeans;
 - In *Be* magazine (1 November 2011) a lace-up ankle shoe;
 - From 5 August 2011 an unbranded pair of male denim jeans from *Vanity Fair* 30 March 2011.

The  symbol appears in Annex 3 on one example of casual shoes and on examples of shoulder bags, tote type bags, jeans and overnight bags in promotions in *Go*, *XL* and *AMÍCA*, all from within the relevant period;





- Annex 4: A DVD of invoices dated between 2011 and 2013. The invoices reference sales in France, Germany, Italy, Benelux and the United Kingdom;






The Board carefully analysed this evidence by combining all the invoices into one *pdf* file and searching for relevant terms in French, German, Italian and English. The invoices, for the most part, record sales of clothing, with some mention of belts, hats and caps. There is also a mention of jewellery (bracelets). However, the Board was unable to find any reference at all to footwear, in any language, when a range of words was searched (boot, loafer, pump, slipper,

sneaker, clog, flip-flop, moccasin, sandal, and high heel). A similar search was completed in relation to bags, and none was identified in any of the invoices. It appears that detailed evidence of sales is only provided in the invoices in Annex 4 and is restricted to clothing, with some sales of belts, hats and caps and other goods that are not relevant to this case;

- Annex 5: This annex is described in submissions as ‘extracts of the catalogue “Diesel Class Hero” – Spring/Summer 2012. It contains a series of reproductions of bags, rucksacks and cases which have various names (‘Happy Days’; ‘Royal Oak FW08’; ‘New Generation FW09’ etc.). None of these bags are featured in the invoice evidence;
- Annex 6: Contains an affidavit sworn by the head of the opponent’s legal department, Stefano Iesurum. He states that:
 - The opponent produces clothing collections (male and female – ranging from jeans to sweaters, intimate apparel, bags, eyeglasses, sunglasses, shoes and other accessories);
 - The opponent is an international company with an annual turnover of over EUR 1 Billion, 85% of which is generated outside Italy;
 - Sales figures in the years 2009 to 2013 averaged some EUR 238 million per annum;
 - The ‘D’ logo appears on the clothing and bags in Annexes 1 and 5, which were taken from company catalogues over the period 2008 to 2013;
 - The invoices (Annex 4) are within the period 2008 to 2013 and refer to clothing, bags and shoes all bearing the ‘D’ logo.

Mr Iesurum refers to the ‘D LOGO’ in the singular, but fails to distinguish between which of the earlier rights he is referencing.

- 24 As noted previously, given the quality of reproduction of key evidence (Annex 1: Images of goods and Annex 2: Extracts from magazines) the Rapporteur requested from the opponent reproductions with better resolution. This material arrived on 9 July 2018.
- 25 The requested evidence consisted of some 54 copies of material that reproduces that supplied at first instance. Much of this was equally unreadable, despite the opponent claiming that the material was of better quality. The following instances were identified with readable labels:
- The ‘Industry’ label associated with  mentioned previously;
 - A pair of casual boots advertised in *FHM* in Germany on 1 April 2009, where the  can be made out;
 - There is a just discernible image of the  on a pair of ‘hot-pants’ from *Glamour* magazine from 2010. This product is called the ‘Mintha 8XT’ and does not appear in the invoice evidence;
 - A further depiction from a publication called *Special Denim Trends 2010* which gives an example of the logo . However, no product brand names are mentioned, the document being mainly concerned with denim treatment effects;

- From *Glamour* magazine in 2010 in Italy, a sneaker shows the  symbol;
 - *L'UOMO VOGUE – Signs of Excellence* from March 2011, shows another example of  on a jeans pocket;
 - A sneaker type shoe in *Down Town* magazine dated November 2011, where the  is visible;
 - A similar example from *Be* magazine dated August 2011 of a causal boot;
 - A promotion from *Vanity Fair* March 2011 where a pair of jeans is shown with the 'Diesel Industry' label and the ;
 - Jeans shown in *Cosmopolitan* from March 2012, where the 'Diesel Industry' label and the sign  are visible.
- 26 The Board notes that the applicant supplied further submissions in relation to this material on 17 July 2018. These submissions were substantially the same as those submitted at first instance, with the applicant additionally pointing out that, at that stage of the proceedings, the submission of additional material was well out of time. The Board considered the request made by the Rapporteur was a matter of clarification and within the discretion set out in Article 71(1) EUTMR.

Findings in relation to the proof of use

- 27 The law speaks of establishing place, time, extent and nature of use in respect of the goods and services specified by opposing earlier rights. The goods for which the opponent must prove use are the following:

Class 18 – Leather and imitation of leather and goods made of these materials and not included in other classes; animal skins, hides, trunks and travelling bags; umbrellas, parasols and walking sticks, whips, harness and saddlery;

Class 25 – Clothing, footwear, headgear.


- 28 The first finding of the Board is that there is no evidence of usage of the earlier signs on ‘leather and imitation of leather, animal skins, hides, trunks, umbrellas, parasols and walking sticks, whips, harness and saddlery’. Examples of the latter appear nowhere in the evidence and can be excluded from further consideration.
- 29 The evidence enclosed shows use of ‘D’ trade marks as registered and within the relevant time frame, within the European Union. However, the evidence, in the view of the Board, is deeply flawed in relation to establishing both the nature and extent of use of the earlier rights. The Board sets out its reasoning as follows.

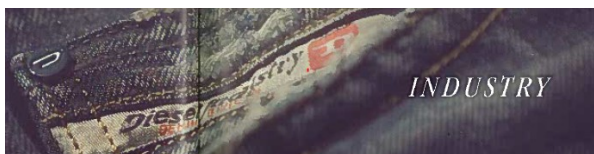
Goods made of leather and imitation of leather, footwear and bags

- 30 Mr Iesurum states in his affidavit that the invoices in Annex 4 reference clothing, bags and shoes bearing the ‘D’ mark. However, this is not the case in relation to the latter two products. In fact, there is no sales evidence provided in relation to bags and shoes. The opponent has supplied reproductions, as summarised above, featuring various items of footwear and some bags which clearly show the ‘D’ motifs. Unfortunately for the opponent, it has no other corroborating or supporting material that indicates actual sales of these items. The sales figures produced in Mr Iesurum’s affidavit are not probative in this respect as they are not broken down into individual classes of items. Consequently, the Board cannot come to any soundly based conclusion as to the extent of sales of bags and shoes, and must find that use has not been demonstrated for ‘footwear’ in Class 25 and ‘travelling bags’ in Class 18.
- 31 This finding must also apply to ‘goods made of leather and imitation of leather’. The latter excludes items such as clothing, footwear and headgear, as these relate to Class 25, and the opponent’s specification is limited to Class 18. There are brief mentions of belts in invoice evidence, which could be made from leather (they are described as ‘100% Buffalo’), but these are also applicable to Class 25 and, in any event, there are no examples in evidence of these products carrying the opponent’s ‘D’ signs.

Clothing












- 32 Even though there is some evidence of sales of caps and hats in the invoice evidence, there are no reproductions of the latter products in other evidence showing that they were marketed under the opponent’s ‘D’ signs. Pictures of such products in catalogues and in magazines would have been probative in this respect, but have not been provided. There is thus no link between the sale of these items and the earlier rights, meaning that the Board has no option but to find that use has not been demonstrated in relation to ‘headgear’.

- 33 On the basis of the same reasoning (other than male and female denim jeans which are discussed below) though there is significant mention of various items of clothing in the invoices (sweat shirts, t-shirts, dresses, tops, for instance), this information is of no value, as the opponent has failed to provide examples of these products linked to the ‘D’ earlier rights.
- 34 The only evidence that merits detailed consideration by the Board is in relation to male and female denim jeans, for which, at least, there is various kinds of evidence (invoice, catalogue and promotional). In passing, following the decision of the Grand Board in 15/06/2018, R 2595/2015-G, PELLICO (fig.), the Board is of the view that ‘men and women’s denim jeans’ is an acceptable subcategory in relation to the goods in this case. In particular, the Board notes (15/06/2018, R 2595/2015-G, PELLICO (fig.), § 36):
- ‘When defining the criteria to establish the category of products for which genuine use has been demonstrated, market realities are determinant and, within that framework, it has to be taken into consideration whether there are specialised industries, specialised designers, specialised shops and trade practices and what is the behaviour of the relevant consumer’.
- 35 It seems that denim jeans fall into many of these descriptions, consisting of a specialised industry, being of interest to specialised designers, on sale in specialised shops (and sections in large stores) and directly targeted to all consumers at some time or another. On the basis of the products shown by the opponent, there is certainly no justification for a finding of use for ‘clothing’ in general, ‘trousers’ in particular or even ‘jeans’ as such (which could include items for children).
- 36 However, this consideration is somewhat moot, as the material supplied to the Board is problematic in terms of establishing a ‘chain of evidence’ that will safely and unequivocally lead to a clear indication that the opponent has marketed its ‘men and women’s denim jeans’ under its ‘D’ earlier rights.
- 37 Many of the clothing products shown in Annex 1 appear in the invoices (Annex 4) by name referenced by sub-brand (e.g. ‘BOOTZEE’; ‘KOOLTER’; ‘TIMMEN’; ‘FAYZA’). These may, or may not, carry the opponent’s ‘D’ signs, but the Board is unable to determine this as the reproductions in Annex 1 are so poor.
- 38 It is impossible to make out the nature of the symbols that appear even in the original reproductions provided by the opponent. The newly submitted evidence, requested by the Rapporteur, does not help in this respect, as the same issues arise.
- 39 These may well reproduce the motif ‘dieselindustry’ followed by , as shown here:



- 40 That is, it could be that this is the image that appears on the products in other reproductions in Annex 1, which are cited in the invoices. For example:



- 41 However, this remains an assumption (the example given is one of the better reproductions from the opponent's evidence) and such a conclusion can have no certainty – not in the least because the red splodge shown could be either  or  or neither. It also retains differences from the 'INDUSTRY' example, where the letter is white on a red background () , while in this case the letter (if that is what it is) is in red and without a border.
- 42 The brand 'INDUSTRY' is not cited in any of the invoices. In this respect, had the opponent shown that 'INDUSTRY' is a sub-brand under which the sub-sub-brands of its male and female jeans were marketed, then this might have been sufficient to complete the chain between the various items of submitted evidence. The statement of Mr Iesurum could have been singularly helpful in this regard, if such clarity had been supplied as part of his affidavit.
- 43 However, Mr Iesurum's statement only confuses the issue further, by referring to 'the 'D' LOGO'. He makes no distinction between the signs  and , and does not even appear to be aware that more than one 'D' brand exists. This is hardly helpful. (The Board notes from submissions at first instance, that the opponent regards both these signs as variations on the letter 'D', but makes a clear distinction between them).
- 44 The Board was keenly aware of this clarity of evidence issue and hence the issuance of the letter from the Rapporteur. None of the subsequently submitted material helped. The same issues arise. In particular, where a version of the  is visible on a product (the 'hot-pants' described above, for example) the items do not appear in the invoice evidence and where items do appear in the invoice evidence, the reproduction of the earlier  and  signs is not clear. Finally, it is further noted that none of the 9 July material shows examples of the  symbol.
- 45 There has also been something of an evidential failure in this case. In any proof of use case, the opponent is in the best position to provide its best material and it seems that Board is entitled to be sceptical of assertions of use that could, or should, have been convincingly demonstrated but where, however, the material actually provided is unsatisfactory. The opponent in this matter could not have but known of the short comings in its evidence following receipt of the letter from the Rapporteur dated 13 June 2018. The criticisms of the initial evidence were very specific. The opportunity to rectify the evidence was given to the opponent, yet it has singularly failed to take advantage of this by providing material that would have laid this matter to rest. Even when considering the evidence as a whole the lacunas identified above do not disappear and the applicant could fairly and rightly cry foul if the Board were to rely on this evidence as evidence of use of the earlier rights, that is, the  and  symbols.
- 46 The Courts have insisted that genuine use cannot be established by means of probabilities or mere suppositions but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (06/10/2004, T-356/02, Vitakraft, EU:T:2004:292, §28 and 12/12/2002, T-39/01,

Hiwatt, EU:T:2002:316, § 47). In failing to submit the evidence where the earlier marks would clearly appear, the opponent has left the Board in the position of having to make assumptions and engage in suppositions of exactly the kind rejected by the General Court.

- 47 Given that the opponent has not been able to meet the use requirement by the submission of material of a sufficient probative standard, the opposition must be considered to be without foundation and the appeal fails in its entirety.

Costs

- 48 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the opponent, as the losing party, must bear the applicant's costs of the opposition and appeal proceedings.
- 49 These consist of the applicant's costs of professional representation of EUR 550.
- 50 As to the opposition proceedings, the Opposition Division ordered the opponent to bear the applicant's representation costs which were fixed at EUR 300. This decision remains unaffected. The total amount for both proceedings is therefore EUR 850.

Order

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal;**
- 2. Orders the opponent to pay EUR 550 for the applicant's costs in the appeal proceedings. The total amount to be paid by the opponent in the opposition and appeal proceedings is EUR 850.**

Signed

G. Humphreys

Signed

A. Kralik

Signed

A. Pohlmann

Registrar:

Signed

H.Dijkema

