

**DECISION
of the Fifth Board of Appeal
of 5 November 2021**

In case R 349/2021-5

Hummel Holding A/S

Balticagade 20

8000 Aarhus C

Denmark

Opponent / Appellant

represented by Patrade A/S, Ceresbyen 75, 8000 Aarhus C, Denmark

v

Barry's Bootcamp Holdings, LLC

7373 Beverly Blvd.

90036 Los Angeles

United States of America

IR Holder / Defendant

represented by Noerr Alicante IP, S.L., Avenida México 20, 03008 Alicante, Spain

APPEAL relating to Opposition Proceedings No B 2 954 249 (International Registration No 1 344 281 designating the European Union)

THE FIFTH BOARD OF APPEAL

composed of V. Melgar (Chairperson and Rapporteur), R. Ocquet (Member) and S. Rizzo (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an international registration designating the European Union on 10 February 2017, Barry's Bootcamp Holdings, LLC ('the IR holder') sought to register the figurative mark



for the following list of goods and services as limited on 12 August 2021:


Class 25 - Clothing, namely, t-shirts, sweatshirts, pants, shirts, shorts and hats;

Class 41 - Physical fitness instruction; physical fitness training services; providing fitness and exercise facilities; physical fitness studio services, namely, providing exercise classes and group fitness classes.

The IR holder described the mark as follows:

The mark consists of the wording 'BARRY'S', where the 'A' in 'BARRY'S' is replaced with a chevron design, consisting of two downwardly angled 'V' stripes with a star centred beneath the stripes.

- 2 The international registration designating the European Union was published on 12 May 2017.
- 3 On 8 September 2017, Hummel Holding A/S ('the opponent') filed an opposition against the registration of the published trade mark application for all the goods and services.
- 4 The grounds of opposition were those laid down in Article 8(1)(b), and Article 8(5), EUTMR.
- 5 The opposition was based on the following earlier rights:


- a) German trade mark registration No 30 2016 007 995  (TM 1), filed on 17 March 2016 and registered on 29 April 2016 for the following goods:

Class 18 - Leather and imitation leather and articles of leather and imitation leather, namely, bags, leisure bags, travelling bags, shopping bags, shoulder bags, handbags, evening bags, briefcases, sports bags, bath bags, school bags, shoulder straps, children's bags, cosmetic bags, belt bags, suitcases, vanity cases, hat cases, attaché cases, briefcases, garment bags, duffel bags, backpacks, pouches, chest bags, toiletry bags, travel accessories, hosiery bags, shoe bags, sports bags, school satchels, small leather goods, namely card bags [wallets], identity card bags, purses; Luggage, bags, wallets and other carrying containers, as far as included in this class; sports bags; travelling bags; umbrellas; travelling accessories [leather goods]; cosmetic cases and bags

[not adapted]; rucksacks and suitcases, as far as included in this class; parts and accessories for all the aforesaid goods, as far as included in this class;

Class 21 - Tableware, cooking utensils and containers, included in this class; drinking bottles for sports activities; parts and accessories for all the aforesaid goods, included in this class;


Class 25 - Clothing; footwear; headgear; clothing, footwear and headgear for sports; leisure clothing, footwear and headgear; clothing, footwear and headgear for children and babies; fashionable clothing; socks; sweatbands; swimwear and bathing costumes for children and adults; Bathing sandals and slippers; nightwear; pyjamas; underwear, undergarments, including heat-insulating and perspiration-absorbing undergarments; gloves; snowsuits; water-repellent clothing; clothing for sports with hijab; parts and accessories for all the aforesaid goods, included in this class.

b) Danish trade mark registration No VR 2004 01 486  (TM 2), filed on 21 April 2004 and registered on 11 May 2004 for the following goods:

Class 3 - Bleaching preparations and other washing and dry-cleaning agents, cleaning preparations, polishing and stain removers, abrasives, soap, perfumery, ethereal oils, cosmetics, hair tonic, dentifrices;

Class 9 - Scientific, nautical, surveying, photographic, cinematographic, optical, glasses, sunglasses and weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment; fire-extinguishing apparatus;

Class 24 - Woven fabrics and textile goods (not included in other classes), towels, bed linen bed and table blankets.

c) Danish trade mark registration No VR 2007 00 864  (TM 3) filed on 4 December 2006 and registered on 28 March 2007 for the following goods and services:

Class 5 - Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic preparations for medical use, food preparations for infants; plasters and dressings; materials for dental sealing and for dental impression; disinfectants; preparations for exterminating pests; fungicides and herbicides; dressings for bandages; therapeutic bath preparations; pharmaceutical preparations for skin care; medicinal oils, herbs and extracts; mineral supplements and beverages; mineral waters and beverages for pharmaceutical and/or dietetic purposes; dietetic beverages; vitamin drinks; nutritional drinks and drinks to replace meals;

Class 14 - Precious metals and their alloys and articles of precious metal or of metal clad with precious metal (not included in other classes); jewellery, precious stones; clocks and chronometric instruments, jewellery, clocks, imitation;

Class 18 - Leather and imitations of leather, and goods made of these materials (not included in other classes); skins and hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips and saddlery, bags, including sports bags, toilet sets and bags, rucksacks and cases (not included in other classes);

Class 20 - Furniture, mirrors, picture frames; articles (not included in other classes) of wood, cork, cane, wickerwork, horn, bone, ivory, fish bone, tortoise shell, amber, mother-of-pearl and meringue and of substitutes for these materials or of plastics;

Class 25 - Clothing, footwear and headgear, sportswear, footwear and headgear, leisurewear, footwear and headgear, businesswear, footwear and headgear, fashion clothing, footwear and headgear;

Class 28 - Games and toys; gymnastic and sporting articles (not included in other classes), Christmas ornaments, balls for sports and games;

Class 29 - Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and dairy products; edible oils and fats;

Class 30 - Coffee, tea, cocoa, sugar, rice, tapioca, sago, coffee substitutes; flour and food preparations of cereals, bread, pastry and confectionery; ice cream; honey, syrup; yeast, baking powder; salt, mustard; vinegar, including wine vinegar, sauces (condiments); spices; raw ice;

Class 32 - Beer; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; juices and other preparations for making beverages, energy drinks, tablets and powder for making beverages, isotonic drinks;

Class 35 - Advertising and publicity activities; assistance in the management and administration of businesses; assistance in the performance of clerical duties, assembling (not transporting) a selection of goods to enable others to easily browse and purchase these goods, retail sale of clothing, footwear, headgear, sports goods and bags.

d) Danish trade mark registration No VR 1990 08 147  (TM 4) filed on 17 April 1990 and registered on 14 December 1990 for the following goods:

Class 25 - The registration covers all goods or services in this class (see 5th edition of the Nice Classification).

e) Danish trade mark registration No VR 2014 02 508  (TM 5), filed on 5 November 2014 and registered on 21 November 2014 for the following goods:

Class 18 - Leather and imitations of leather; skins, hides; trunks and travelling bags; umbrellas and parasols; walking sticks; whips, harness and saddlery; bags, including sports bags, travelling bags, shoulder bags, toilet bags, not built-in, rucksacks, satchels, leather cases, wallets, clutch bags, handbags, ball bags;

Class 24 - Textiles and textile articles not included in other classes; bed and table linen; towels; bed linen; sheets; tea towels;

Class 25 - Clothing, footwear and headgear; clothing, footwear and headgear for sports; clothing, footwear and headgear for leisure; fashion clothing, footwear and headgear; business clothing, footwear and headgear; clothing, footwear and headgear for children and babies; sweatbands;

Class 28 - Games and toys; gymnastic and sporting articles (not included in other classes); Christmas tree decorations; balls for sports and games; resins for sportsmen; bags specially designed for balls; ball nets; ball pumps.

f) Danish trade mark registration No VR 2001 04 246  (TM 6) filed on 3 October 2001 and registered on 18 October 2001 for the following goods:

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

Class 25 - Clothing, footwear and headgear, all the aforesaid articles also for sports;

Class 28 - Gymnastic and sporting articles (not included in other classes), including balls.

g) International trade mark registration designating the European Union



No 1 306 318 (TM 7) filed on 20 April 2016 and registered on 20 April 2016 for the following goods:

Class 18 - Leather and imitations of leather, and goods made of these materials, 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 and headgear, all of the aforesaid goods also for sports;

Class 28 - Gymnastic and sporting articles, not included in other classes, including balls.

6 By decision of 17 December 2020 ('the contested decision'), the Opposition Division rejected the opposition in its entirety. It gave, in particular, the following grounds for its decision:

- The IR holder requested proof of use in relation to the opponent's Danish trade mark registrations No VR 2001 04 246, No VR 2004 01 486, No VR 2007 00 864 and No VR 1990 08 147. The opposition will be examined as if genuine use of the earlier marks mentioned had been proven for all the goods and services invoked.
- The relevant territories are Germany in relation to TM 1; Denmark in relation to TMs 2-6 and the European Union in relation to TM 7. The general public in the Scandinavian countries (including Denmark), Germany, the Netherlands and Finland have at least a basic understanding, if not a good command, of the English language.
- A chevron is one of the ordinaries in heraldry, one of the simple geometrical figures which are the chief images in many coats of arms. They are often used in military or police uniforms to indicate rank or length of service. A chevron is a banal element and as such lacks any distinctive character.
- The opponent claims that the relevant public is accustomed to seeing rather simple geometric devices on the goods in Classes 18 and 25. However, the opponent refers to examples that are not similar to the case at hand and does not elaborate if these marks acquired their distinctiveness through use.



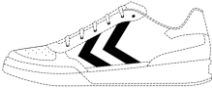
- The figurative element  in the contested sign will be perceived as the letter 'A' despite its stylization. The letter 'A' resembles a triangle which will


be recalled through the form of the chevrons in the contested sign. As such the contested sign will be read as ‘BARRY’S’ by the relevant public.

- The figurative element in the contested sign does not play an independent distinctive role. In any event, its distinctiveness is low.
 - The verbal element ‘BARRY’S’ is distinctive. It has either no meaning for the relevant public or it will be understood, e.g. by the English-speaking public as a reference to the male name ‘BARRY’, i.e. to the meaning of ‘belonging to Barry’.
 - Neither of the signs have an element that could be considered clearly more dominant than other elements.
 - Visually, the signs are not similar.
 - Aurally, it is not possible to compare the signs, as the earlier marks are purely figurative signs.
 - Conceptually, the signs are not similar.
 - Even if a part of the public were to see in the figurative element of the contested sign, apart from the letter ‘A’, also a combination of two grey-shaded chevrons, pointing upwards and placed above a grey star, the concept of a chevron is non-distinctive. Thus, conceptually, the signs are dissimilar also for that part of the public because they overlap in a non-distinctive element and the differentiating element of the contested sign conveys a different distinctive concept. Therefore, the overlap has no impact.
 - As the signs merely coincide in irrelevant aspects, they are dissimilar.
 - Since the signs are dissimilar, one of the necessary conditions of Article 8(1)(b) EUTMR is not fulfilled, and the opposition must be rejected. This finding would still be valid even if the earlier trade mark were to be considered as enjoying a high degree of distinctiveness, given that the dissimilarity between the signs cannot be overcome by the highly distinctive character of the earlier trade mark. The evidence submitted by the opponent in this respect does not alter the outcome reached above.
 - Given that the opposition is not well-founded it is unnecessary to examine the evidence of use filed by the opponent.
 - Since the signs are dissimilar, one of the necessary conditions of Article 8(5) EUTMR is not fulfilled, and the opposition must be rejected on this ground, too.
- 7 On 17 February 2021, the opponent filed an appeal against the contested decision in its entirety. The statement of grounds of the appeal was received on 23 April 2021.

- 8 On 7 June 2021, the IR holder submitted its observations in reply and requested that the appeal be dismissed.

Submissions and arguments of the parties

- 9 The arguments raised in the statement of grounds may be summarised as follows:
- Danish trade marks No VR 2004 01 486, No VR 2007 00 864, No VR 1990 08 147 and No VR 2001 04 246 have been put to genuine use in Denmark pursuant to Article 47(2) and (3), and Article 18, EUTMR.
 - The contested sign should be refused pursuant to Article 8(1)(b) EUTMR, as there is a likelihood of confusion with (i) German trade mark registration No 30 2016 007 995, (ii) Danish trade marks No VR 2004 01 486, No VR 2007 00 864, No VR 1990 08 147, No VR 2014 02 508 and No VR 2001 04 246, and (iii) International trade mark registration designating the European Union No 1 306 318.
 - The contested sign should be refused pursuant to Article 8(5) EUTMR, as the abovementioned earlier marks all have a reputation in Denmark, Germany and the European Union respectively, and use without due cause of the trade mark applied for would take unfair advantage of, and be detrimental to, the distinctive character and the repute of the above earlier marks.
 - Reference is made to all the arguments and evidence submitted before the Opposition Division (i.e. on 13/08/2019, 05/12/2019, 02/10/2020 and 05/10/2020, as well as Annexes 1 and A-AAAAA).
- 10 The arguments raised in response may be summarised as follows:
- The findings of the contested decision are endorsed.
 - Reference is made to the findings of the General Court of the European Union in the ‘Adidas’ case (19/06/2019, T-307/17, DEVICE OF THREE PARALLEL STRIPES (fig.), EU:T:2019:427, § 72), as well as to comparable past decisions of the Office rejecting the opponent’s signs as devoid of distinctive character.
 - This continued and longstanding practice of the EUIPO was recently confirmed again (09/12/2020, EUTM No 18 256 549 , which was found devoid of distinctive character for ‘Footwear’ in Class 25).
 - The opponent failed to provide proof of genuine use of its Danish trade marks Nos. VR 2001 04 246, VR 2004 01 486, VR 2007 00 864 and VR 1990 08 147 for the relevant goods and services. In this respect, and to avoid repetitions, reference is made to the applicant’s submission before the Opposition Division (15/05/2020).

- As demonstrated in this respect, the evidence submitted by the opponent relates to signs which are not broadly equivalent to the registered form of the earlier marks at issue and as such cannot be taken into account.
- First, the majority of the signs shown in the evidence do not feature the same number of chevrons (either two or four) as in the earlier marks, and thus cannot be held to correspond to - nor be deemed broadly equivalent to - the earlier marks as registered. Instead, the number of chevrons in the signs which appear in the evidence are either fewer than those for which the earlier marks are registered or feature more chevrons than those which appear in the opponent's earlier marks, ranging from three to over fifteen chevrons.
- Second, the evidence mainly relates to signs which present a reversed or indeed entirely different colour scheme, which - given the extremely simplistic nature of the earlier marks - cannot be seen as an insignificant variation as compared to the registered form of the earlier marks.
- Third, many of the signs referenced in the evidence show chevrons orientated to face a different direction/rotated 90° to the side, a set of inverted commas of different sizes and/or varying-sized chevrons with a slanted/tapered appearance (for example ) and/or a different colour scheme.
- In any event, even if the Board were to hold that some entirely symbolic use can be deduced, the opponent failed to provide evidence from independent/third parties such as to corroborate the genuine use claimed in the relevant territory, namely Denmark. Further, an objective, factual assessment as to the time of use of the earlier marks does not support use of the marks as registered. Finally, the evidence submitted does not provide sufficient information concerning the commercial volume thereof.
- The dissimilarity and the lack of likelihood of confusion has already been confirmed in two sets of proceedings, namely in the judgment of the Higher Regional Court of Hamburg (11/02/2020, case No 5 W 85/19) and in the judgment of the Regional Court of Frankfurt (27/01/2020, case No 2-06 O 544/19). These proceedings are based on the same signs as in the present case, and they are between the same parties (i.e. Hummel A/S vs. Barry's Bootcamp Holdings LLC before the Higher Regional Court of Hamburg) or related parties (i.e. Hummel A/S vs. the licensee of Barry's Bootcamp Holdings LLC, LifeFit Group MidCo GmbH, before the Regional Court of Frankfurt); these courts are designated EUTM courts in their respective regions and both decisions are final.
- Even if the Board were to deem the signs similar, the opponent has not shown reputation of the earlier marks according to Article 8(5) EUTMR.

Reasons

- 11 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.
- 12 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Scope of the appeal

- 13 Following the limitation request filed by the applicant on 12 August 2021, the opponent confirmed that it maintains its opposition (see relevant reply of 3 September 2021).
- 14 As a result, the list of the goods and services at issue now reads as mentioned at paragraph 1.

Article 8(1)(b) EUTMR

- 15 Pursuant to Article 8(1)(b) EUTMR, a European Union trade mark application shall be rejected upon opposition where there is an earlier trade mark as referred to in Article 8(2) EUTMR and if, because of the identity with, or similarity to, the earlier sign and the identity or similarity between the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier mark is protected. A likelihood of confusion includes a likelihood of association with the earlier mark.
- 16 According to settled case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 16-18; 29/09/1998, C-39/97, Canon, EU:C:1999:323, § 17). For the purposes of applying Article 8(1)(b) EUTMR, a likelihood of confusion presupposes both that the marks at issue are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (22/01/2009, T-316/07, easyHotel, EU:T:2009:14, § 42 and the case-law cited therein).
- 17 In line with the same case-law, a likelihood of confusion must be assessed globally, based on how the relevant public would perceive the marks and the goods and services in question and taking into account all factors relevant to the circumstances of the case (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 16; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 18).

The relevant public

- 18 Account should be taken of the average consumer of the goods and services at issue, who is reasonably well-informed and reasonably observant and

circumspect. The consumer's level of attention is likely to vary according to the category of goods and services in question (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26; 13/02/2007, T-256/04, Respicur, EU:T:2007:46, § 42).

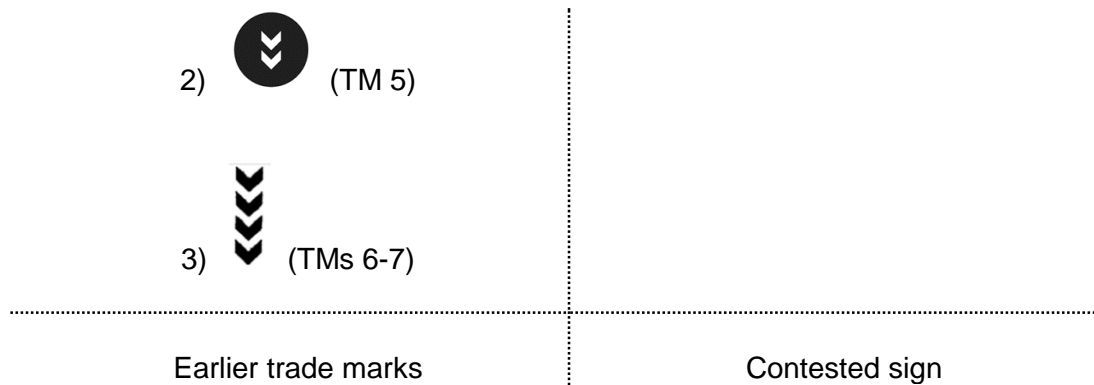
- 19 The relevant public is made up of consumers liable to use both the services of the earlier mark and the services covered by the mark applied for (13/05/2015, T-169/14, Koragel / CHORAGON, EU:T:2015:280, § 25 and the case-law cited).
- 20 The contested goods in Class 25 are clothing, namely, t-shirts, sweatshirts, pants, shirts, shorts and hats. The relevant public is therefore composed of the general public and professionals in the clothing sector. Their level of attention may vary depending on the type of goods at issue, the frequency of purchase and their price, and ranges from average to high (27/06/2019, T-385/18, CRONE (fig.) / crane (fig.) et al., EU:T:2019:449, § 25; 21/02/2021, T-117/20, PANTHÉ (fig.) / P PANTHER (fig.) et al., EU:T:2021:81, § 23).
- 21 The contested services in Class 41 are physical fitness instruction, physical fitness training services, providing fitness and exercise facilities, physical fitness studio services, namely, providing exercise classes and group fitness classes. The relevant public is therefore composed of the general public and professionals in the fitness sector. Their level of attention may vary depending on the type and the price of the services at issue, and ranges from average to high.
- 22 The opposition is based, among others, on an earlier IR designating the European Union. Therefore, the relevant territory in respect of which the likelihood of confusion must be assessed is the European Union as a whole. i.e. all Member States and official languages of the Union. However, for an EUTM application to be refused registration, it is sufficient that the relative ground of Article 8(1)(b) EUTMR exists in only part of the European Union (09/12/2020, T-190/20, Almea, EU:T:2020:597, § 21; 05/02/2020, T-44/19, TC Touring Club, EU:T:2020:31, § 84).
- 23 The word element of the contested sign has a meaning in countries where English is understood, namely Ireland, Malta, Denmark, the Netherlands, Finland, Sweden and Cyprus (20/01/2021, T-253/20, IT'S LIKE MILK BUT MADE FOR HUMANS, EU:T:2021:21, § 35; 29/09/2021, T-60/20, Mastihacare, EU:T:2021:629, § 42). Thus, in the same line with the Opposition Division, which is also not disputed by the parties, the Board will focus on the English-speaking public.





Comparison of the marks

- 24 The signs to be compared are:



BARRY'S



- 25 Earlier marks TM 1 to TM 4  consist of two black chevrons pointing down. Earlier mark TM 5  includes two white chevrons pointing down and placed within a black circle. Earlier marks TM 6 and TM 7  include equally-shaped, positioned, and coloured four black chevrons.
- 26 A chevron has been repeatedly considered as a banal and ornamental element lacking of any distinctive character (in relation to footwear in Class 25, 12/04/2012, C-307/11 P, Footwear, EU:C:2012:254, § 14-26; 15/02/2019, R 2604/2017-5, FORM AF EN SPORTS SKO (fig.), § 28-30).
- 27 The earlier marks consist of several inverted chevrons, two or four, respectively, while earlier trade mark TM 5 includes also another basic geometrical shape, i.e. a circle. The colours used, namely black and white, cannot be considered particularly distinctive either. It is the concrete combination of these non-distinctive elements, which bestows the necessary, and at least minimum, degree of distinctiveness on the signs at issue. Thus, as correctly concluded by the Opposition Division, all the earlier marks have an inherent low degree of distinctive character.
- 28 The contested mark is composed of five slightly stylized capital letters **BARRY'S**, all in dark grey/black colour. Between the letters 'Y' and 'S' there is an apostrophe. The figurative element consists of two grey shaded chevrons pointing up and centred above a grey-coloured star. The figurative element is placed after the letter 'B' in the same line and bears the same size as the letters.
- 29 The Opposition Division also observed that the figurative element  in the contested sign will be perceived as the letter 'A' resembling a triangle which will be recalled through the form of the chevrons. As such the contested sign **BARRY'S** will be read as 'BARRY'S' by the relevant public. This finding must be endorsed by the Board (see also the judgment of the Higher Regional Court of Hamburg of 11/02/2020 in case No 5 W 85/19, and the judgment of the Regional Court of Frankfurt of 27/01/2020 in case No 2-06 O 544/19, both regarding the same contested sign in comparison with the earlier signs).

- 30 The figurative element in the contested sign does not play an independent distinctive role. In any event, its inherent distinctive character is low, considering that the chevron lacks distinctiveness in the present case and a depiction of a star in general conveys a positive, laudatory message in the perception of the relevant public and as such its distinctiveness is low.
- 31 The verbal element 'BARRY'S' will be understood by the relevant English-speaking public as a reference to the male name 'BARRY', i.e. to the meaning of belonging to Barry, since the elements 'S' denote possession in English.
- 32 According to the case-law, the relevant public perceives marks containing surnames or forenames of persons without any particular conceptual meaning, unless the forename or surname is particularly well-known, inter alia, as the name of a famous person (27/06/2019, T-268/18, Luciano Sandrone / DON LUCIANO, EU:T:2019:452, § 87; 30/06/2021, T-531/20, ROLF (Fig.) / Wolf et al., EU:T:2021:406, § 63).
- 33 In the present case, it was not proven, and the Board did not identify, any term with which the relevant public could associate the male name 'BARRY'. Therefore, the contested sign as a whole has no meaning in relation to the relevant goods in Class 25 and services in Class 41 and is, thus, normally distinctive (09/07/2019, T-397/18, Hugo's Burger Bar (fig.) / H'ugo's et al., EU:T:2019:489, § 62).
- 34 Neither of the signs have an element that could be considered clearly more dominant than other elements.
- 35 **Visually**, the signs are not similar. They only coincide in the inclusion of two chevrons, pointing downwards in the earlier signs, and pointing upwards in the contested sign. This coincidence is clearly insufficient to create any similarity between the signs: Firstly, because the contested sign includes the additional letters 'B*RRY'S' which create a clearly different overall visual impression and, secondly, because the chevrons, as the only common elements of the signs in conflict, have different directions and colours.
- 36 According to the evidence submitted, the earlier marks are often applied to clothing and are thus presented to the general public in a variety of directions. However, as correctly stated by the Opposition Division, and contrary to the opponent's arguments that the earlier trade marks are not limited to the direction for which they are registered, the signs in conflict are to be compared in the form in which the earlier mark is registered and the contested mark is applied for, not as they are possibly used on the marketplace (19/09/2018, T-623/16, Main Auto Wheels (fig.) / VW (fig.) et al., EU:T:2018:561, § 42-43; 21/05/2019, C-744/18 P, Main Auto Wheels (fig.) / VW (fig.) et al., EU:T:2018:561, § 9).
- 37 **Aurally**, it is not possible to compare the signs at issue, as the earlier marks are purely figurative signs, which are not subject to a phonetic assessment.

- 38 **Conceptually**, the signs are dissimilar, as they will be associated with a dissimilar meaning. The contested sign will be perceived as the verbal element 'BARRY'S'. The earlier figurative marks will be perceived as a combination of two or four black chevrons pointing downwards, which, in particular in the earlier marks TM 6-7 might be perceived as a chevron pattern. Earlier mark TM 5 will be perceived as two white chevrons also pointing downwards and placed within a black circle.
- 39 Even if a part of the public would see in the figurative element of the contested sign, apart from the letter 'A', also a combination of two grey-shaded chevrons, pointing upwards and placed above a grey star, the concept of a chevron is non-distinctive, as mentioned above. Thus, conceptually, the signs are dissimilar also for that part of the public because they overlap in a non-distinctive element and the differentiating element of the contested sign conveys a clearly different distinctive concept. Therefore, the overlap has no impact.
- 40 Considering the visual and conceptual dissimilarities, the insignificance of the common features and the fact that a verbal comparison is not possible, the signs in question are, in their overall impression, dissimilar, as correctly concluded by the Opposition Division (see also the judgment of the Higher Regional Court of Hamburg of 11/02/2020 in case No 5 W 85/19, and the judgment of the Regional Court of Frankfurt of 27/01/2020 in case No 2-06 O 544/19, both regarding the same contested sign in comparison with the earlier signs).
- 41 In any event, the clear conceptual differences between the signs at issue would counteract / neutralise any potential visual similarities between them, thus rendering the signs in question dissimilar overall (04/03/2020, C-328/18 P, Black Label By Equivalenza (Fig.) / Labell (fig.) et al., EU:C:2020:156, § 74-75; 05/05/2021, T-442/20, Âme / .A.M E N. (fig.), EU:T:2021:237, § 63-73; 16/06/2021, T-368/20, Miley cyrus / Cyrus et al., EU:T:2021:372, § 62-63).
- 42 Given that the similarity between the signs is one of the cumulative conditions for the application of Article 8(1)(b) EUTMR, it is not necessary to compare the goods and services to reach this conclusion (20/09/2019, T-67/19, Dokkio / <IO (fig.), EU:T:2019:648, § 60; 24/03/2021, T-354/20, Representation of a fish (fig.) / Blinka, EU:T:2021:156, § 70; see also EUIPO Trademark Guidelines, Part C, Opposition, Section 2 Double Identity and Likelihood of Confusion, Chapter 4.4 Dissimilarity of Signs).
- 43 The similarity between the signs in conflict is also a precondition for Article 8(5) EUTMR and the similarity must be sufficient for the relevant section of the public to establish a link between those marks (01/10/2019, C-295/19 P, PEAR (fig.) / APPLE BITE (fig.) et al., EU:C:2019:805, § 6-8 and the case-law cited; see also EUIPO Trademark Guidelines, Part C, Opposition, Section 5 Trade marks with reputation, Chapter 3.2 The similarity of the signs, and Chapter 3.2.1 Notion of 'similarity' pursuant to Article 8(5) EUTMR compared with Article 8(1)(b) EUTMR).
- 44 Therefore, the above findings on the lack of likelihood of confusion would still be valid even if the earlier trade marks were to be considered as enjoying a high

degree of distinctiveness or reputation, as correctly concluded by the Opposition Division.

Conclusion

- 45 Since the signs were found visually and conceptually dissimilar and no verbal comparison could be made, the Board concludes that the signs are dissimilar overall.
- 46 Since one of the conditions necessary for there to be a likelihood of confusion, namely similarity between the signs at issue, is not satisfied, there is no need to carry out a comparison of the goods and services or a global assessment of the likelihood of confusion either. It follows that the opposition based on Article 8(1)(b), and Article 8(5), EUTMR is rejected.
- 47 In light of the above, the appeal is dismissed.

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
V. Melgar

Signed
R. Ocquet

Signed
S. Rizzo

Registrar:
Signed
p.o. R. Vidal

