



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 081

Date of Decision: 2023-05-12

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Peloton Interactive, Inc.

Registered Owner: Mad Dogg Athletics, Inc.

Registration: TMA491,404 for SPINNING

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA491,404 for the trademark SPINNING (the Mark), owned by Mad Dogg Athletics, Inc. (the Owner).

[2] The Mark is registered for use in association with the following goods and services:

Goods:

Exercise equipment, namely stationary exercise bicycles and weight training equipment, clothing, namely men's and women's athletic clothing in the nature of sports and leisure clothing, namely T-shirts, sweatshirts, sweat pants, polo shirts, shorts, sports coats and jackets, socks, sweatbands, and warmup suits, nutritional supplements, namely vitamin

supplements, mineral supplements, and energy providing food supplements, pre-recorded video and audio cassettes (the Goods).

Services:

(1) Exercise training in health club facilities, namely personal, video and booklet instruction. (2) Providing training and instruction to others by simulating an outdoor bicycle workout completed indoors on stationary bicycles (the Services).

[3] For the reasons that follow, I conclude that the registration ought to be amended.

THE PROCEEDING

[4] At the request of Peloton Interactive, Inc. (the Requesting Party), the Registrar of Trademarks issued a notice to the Owner under section 45 of the Act on February 19, 2021.

[5] The notice required the Owner to show whether the Mark had been used in Canada in association with each of the Goods and Services at any time within the three-year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is February 19, 2018 to February 19, 2021. In the absence of use, the registration is liable to be expunged, unless the absence of use is due to special circumstances.

[6] The relevant definitions of use are set out in section 4 of the Act as follows:

4(1) A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

4(2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services

[7] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing “deadwood” from the register. This burden of proof is light; evidence must only supply facts from which a conclusion of use may follow as a logical inference [per *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 9].

[8] In response to the Registrar's notice, the Owner furnished the affidavit of John Baudhuin, the co-founder, owner and Chief Executive Officer of the Owner, sworn on September 17, 2021, together with Exhibits A to Z.

[9] Both parties filed written representations and were represented at the hearing. The hearing in this matter took place concurrently with the hearing in a summary expungement proceeding with respect to registration No. TMA549,985 for the trademark SPINNING. A separate decision will issue for registration No. TMA549,985.

PRELIMINARY REMARKS

[10] Mr. Baudhuin confirms at paragraph 9 of his affidavit that no evidence of use of the Mark is provided for the following registered goods:

...sweat pants, polo shirts, ... sports coats, ... sweatbands, and warmup suits, nutritional supplements, namely vitamin supplements, mineral supplements, and energy providing food supplements, and ... audio cassettes.

[11] Further, the affidavit does not put forward special circumstances to justify the absence of use of the Mark in Canada in association with these goods. Accordingly, they ought to be deleted from the registration.

[12] It remains to be decided whether the evidence furnished by Mr. Baudhuin satisfactorily establishes use of the Mark, within the meaning of sections 4 and 45 of the Act, in association with the registered goods identified below (the Remaining Goods) and the Services.

Exercise equipment, namely stationary exercise bicycles and weight training equipment, clothing, namely men's and women's athletic clothing in the nature of sports and leisure clothing, namely T-shirts, sweatshirts, ...shorts, ... and jackets, socks, ... pre-recorded video cassettes

OVERVIEW OF THE EVIDENCE

[13] What follows is a review of the evidence, of a general nature, provided by Mr. Baudhuin with respect to the Owner's business and the use of the Mark in association with the Remaining Goods and the Services. The evidence specifically

relating to each of the Remaining Goods and each of the Services, will be discussed in greater detail in the analysis below.

[14] Mr. Baudhuin states the Owner created the indoor cycling market with the introduction of its SPINNING branded bikes and program to the Canadian market in 1996 [para 4]. According to Mr. Baudhuin's assertions, the Owner runs a "renowned" Instructor Certification Program (the Certification Program) through which the Owner certifies fitness professionals interested in teaching indoor cycling classes; the Certification Program and indoor cycling classes are associated with the Mark [para 5].

[15] Mr. Baudhuin asserts that at all times during the relevant period, the Owner has used the Mark in Canada in the normal course of business in association with each of the Remaining Goods and each of the Services [para 10]. In that regard, Mr. Baudhuin asserts that during the relevant period:

- Each of the Remaining Goods have been advertised and sold by the Owner and/or its licensees through third-party retailers, such as Canadian Tire, Fitness à Rabais, and Pop A Wheelie, or through the Owner's online retail channels, including through the Owner's website at *www.spinning.com* (the Website) [paras 11, 14 and 16].
- Each of the Services have been offered, advertised and performed by the Owner and/or its licensees [para 12].
- The Owner directly controlled the character and quality of the Remaining Goods and the Services advertised, offered, sold, or performed in association with the Mark by a licensee [para 13].
- The Website, where Canadians could view and purchase the Remaining Goods and the Services, was visited by more than 235,000 Canadians [para 17].

[16] Mr. Baudhuin provides as Exhibit B to his affidavit an informational brochure (the Brochure) to demonstrate the manner in which the Owner promoted the Remaining Goods and the Services associated with the Mark during the relevant period. Mr. Baudhuin explains that the Brochure, which has been distributed in Canada

since 2017, provides specifics on some of the Remaining Goods and the Services, for instance specifics on the “commercial exercise bike line” and the “home bike product line” [para 15]. I will return to the Brochure in the analysis section below.

ANALYSIS AND REASONS FOR DECISION

[17] I note from the outset that the Requesting Party contends that the Owner has failed to show that the Mark was in use in Canada during the relevant period in association with each of the Remaining Goods and each of the Services. In support of its contention, the Requesting Party points to various purported flaws in statements and exhibits provided by Mr. Baudhuin.

[18] The Owner contends that the Requesting Party’s dissection of the evidence amounts to an overly technical approach that is inconsistent with the purpose of a section 45 proceeding. There are certainly instances where the Requesting Party’s submissions are based on an improper dissection of the evidence. For example, the Requesting Party submits that the Brochure of 2017 is outside the relevant period. However, Mr. Baudhuin clearly states, at paragraph 15 of his affidavit, that the brochure remained in use during the relevant period.

[19] In any event, it is well established that evidence in a section 45 proceeding must be considered as a whole and focusing on individual pieces of evidence in isolation is not the proper approach [*Dundee Corp v GAM Ltd*, 2014 TMOB 152 at para 21; *Reckitt Benckiser (Canada) Inc v Tritap Food Broker*, 2013 TMOB 65 at para 27]. As well, reasonable inferences can be made from the evidence provided [*Eclipse International Fashions Canada Inc v Shapiro Cohen*, 2005 FCA 64].

[20] As I will discuss later, the Requesting Party also submits that some of the Remaining Goods which might have been sold in Canada during the relevant period were not associated with the Mark, but rather with other trademarks of the Owner. To the extent that it is relevant to the consideration of the Requesting Party’s representations, I note that other trademarks of the Owner, including SPIN, SPINNER, SPIN FITNESS, and SPIN Power, are referenced in the copyright notice of the

Brochure, in addition to the Mark. At this time, suffice it to say that there is nothing in the Act that precludes a trademark owner from using more than one trademark at the same time in association with the same goods [*AW Allen Ltd v Warner-Lambert Canada Inc* (1985), 6 CPR (3d) 270 (FCTD)].

[21] With the above in mind, I now turn to the analysis of the evidence specifically relating to the each of the Remaining Goods and each of the Services.

The Remaining Goods

Exercise equipment

[22] I will deal with the evidence for the goods “stationary exercise bicycles” first, and with the evidence for the goods “weight training equipment” afterwards.

Stationary exercise bicycles

[23] Mr. Baudhuin asserts that the Mark is displayed on stationary exercise bicycles also known as indoor cycling bikes [para 19]. He further asserts that SPINNING branded indoor cycling bikes, available for purchase from retailers and through the Website, were sold to Canadian consumers during the relevant period [paras 20 and 21].

[24] In support of his assertions, Mr. Baudhuin attaches the following exhibits to his affidavit:

- Exhibit C: redacted invoices issued by the Owner during the relevant period and provided as representative sales invoices of SPINNING branded indoor cycling bikes to Canadian Tire [para 18].
- Exhibit D: “a close up image of a SPINNER® L5 SPIN® Indoor Cycling Bike”. Mr. Baudhuin states that this bike displays the Mark and was sold at Canadian Tire throughout the relevant period [para 19].
- Exhibit E: screenshots from the website of Fitness à Rabais, at *www.fitnessrabais.com*. Mr. Baudhuin states that these screenshots show various indoor cycling bikes displaying the Mark which are representative of

SPINNING branded stationary exercise bicycles sold by Fitness à Rabais through its website during the relevant period [para 20].

- Exhibit F: screenshots of web captures of the Website, taken from the online web archive the Wayback Machine. Mr. Baudhuin states that these show various representative SPINNING branded indoor cycling bikes available for purchase by Canadian consumers during the relevant period, “for instance the SPINNER® L5 SPIN® Indoor Cycling Bike” [para 21].
- Exhibit G: redacted invoices issued by the Owner during the relevant period and provided as representative sales invoices of SPINNING branded stationary exercise bicycles to Canadian consumers [para 22].

[25] I wish to make some remarks concerning the exhibits.

[26] First, there is no reference to the Mark in the items listed in the invoices provided as Exhibits C and G. The bikes listed in the sales invoices at Exhibit C are described as “SPIN® L5 Bike” or “SPIN® L5 Spin Bike” and those listed in the sales invoices at Exhibit G are described as “SPINNER® A3 Spin Bike” or “SPIN® L1 Spin Bike”.

[27] Furthermore, it appears that Exhibit D consists of screen captures of the Website. The Requesting Party rightly pointed out that the bike linked to the close up image referenced by Mr. Baudhuin, which is shown below, is identified as “L5 Connected SPIN® Bike”.



[28] The above image is also shown (i) on the first screenshot from the website of Fitness à Rabais, where it is linked to the “L3 Connected SPIN® Bike” [Exhibit E]; and (ii) on the screen capture of the Website dated January 26, 2021, where it is linked the “L5 Connected SPIN® Bike” [Exhibit F].

[29] The Requesting Party devoted a significant portion of its written and oral representations to argue that the evidence does not establish use of the Mark in association with stationary exercise bicycles during the relevant period. In summary, the Requesting Party’s submissions are two-pronged:

1. Any bikes that might have been sold by Canadian Tire or other third parties during the relevant period were not associated with the Mark. They were sold in association with other trademarks of the Owner, namely SPIN L5, SPINNER L5, SPINNER A3 SPIN and SPIN L1 SPIN.
2. The Owner did not sell bikes in association with the Mark during the relevant period. It might have sold a cadence sensor displaying the Mark as an optional accessory that consumers may decide to attach to their bikes. Further, Mr. Baudhuin does not state that the cadence sensor is always affixed to the bike and there is no evidence that such is the case in the normal course of trade.

[30] It is not necessary to discuss the second prong of the Requesting Party’s representations as I find that evidence other than the display of the Mark on the cadence sensor is sufficient to establish use of the Mark in the normal course of trade.

[31] Indeed, as rightly submitted by the Owner, the Mark appears on the frame of the “SPINNER® A3” bike pictured in the home bike product line chapter of the Brochure (page 99), as shown below.



[32] As indicated previously, Mr. Baudhuin states at paragraph 15 of his affidavit that the Brochure has been distributed in Canada since 2017 and remained in use during the entire relevant period.

[33] Furthermore, the first item listed on invoice #0870780-IN dated January 11, 2019, included in Exhibit G is described as “Spinner® A3 Spin Bike” along the item number “10-001”. This item number is the same as the item number indicated in the Brochure along the specifics for the “Spinner® A3” bike.

[34] In view of the above, I find that the evidence satisfactorily establishes use of the Mark, within the meaning of sections 4(1) and 45 of the Act, in association with “stationary exercise bicycles”.

Weight training equipment

[35] Mr. Baudhuin asserts that weight training equipment has been available for purchase in Canada through the Website where the Mark is displayed prominently, including on the cart web page. He explains that customers make purchases from the Website by adding desired items to their cart before checking out [para 23].

[36] In support of his assertions, Mr. Baudhuin attaches the following exhibits to his affidavit:

- Exhibit H: screenshot of a web capture of the cart webpage of the Website, taken from the Wayback Machine [para 23].

- Exhibit I: printouts of web captures of the Website taken from the Wayback Machine to show weight training equipment available for purchase and purchased by Canadian consumers during the relevant period [para 24]. I note that the printouts depict a rack for medicine balls, SPIN FITNESS branded medicine balls, and UGI branded medicine balls. I also note a reference to UGI as a trademark of the Owner in copyright notices appearing on certain printouts.
- Exhibit J: a redacted invoice issued by the Owner during the relevant period and provided as representative of sales invoices of SPINNING branded weight training equipment to Canadian consumers during the relevant period [para 25]. I note that two items listed in the invoice are described as “SPIN FITNESS® Dual Grip Med Ball”, but I do not see any clear reference to a rack for medicine balls. I also note that one of the items is described “CAMELBACK® Podium BLK 21 oz”. To the extent that CAMELBACK is not one of the Owner’s trademarks listed in the copyright notices, I find it reasonable to infer that it is a third-party mark.

[37] The Requesting Party submits that none of the items depicted in the exhibited web captures or listed in the invoices are SPINNING branded equipment. It further submits that the Owner merely operates an online retail store from the Website where the word SPINNING appears in places.

[38] As for the Owner, it submits that the exhibited web captures show the Mark displayed on the Website in close proximity to medicine balls and racks, as well as on the cart webpage. Accordingly, at the time of purchasing weight training equipment through the Website, consumers would have viewed the Mark and associated the Mark with the goods at the time of transfer.

[39] At the hearing, the Owner referenced the decision *GNR Travel Centre Ltd v CWI, Inc*, 2023 FC 2 as supporting its position. However, after the hearing I confirmed that the decision is currently under appeal (Appeal Court File No. A-26-23).

[40] In this case, I am not convinced that the display of the Mark on the Website may serve as evidence of use in association with weight training equipment, pursuant to section 4(1) of the Act. Indeed, given the evidence provided by the Owner, it is reasonable to conclude that the required notice of association *at the time of transfer of the goods* was between another trademark than the Mark, such as SPIN FITNESS, UGI or CAMELBACK. At most, the display of the Mark on the Website could be considered use in association with online retail sale services for weight training equipment.

[41] Accordingly, I find that the Owner has failed to provide evidence establishing use of the Mark, within the meaning of sections 4(1) and 45 of the Act, in association with “weight training equipment”. Since the affidavit does not put forward special circumstances to justify the absence of use, I conclude that these goods ought to be deleted from the registration.

Clothing

[42] The evidence provided by Mr. Baudhuin purports to show use of the Mark during the relevant period in association with “clothing namely men's and women's athletic clothing in the nature of sports and leisure clothing, namely T-shirts, sweatshirts, shorts, and jackets, socks”.

[43] Mr. Baudhuin asserts that the Mark is displayed on many styles of SPINNING branded clothing goods sold by the Owner, for example sports and leisure clothing. Mr. Baudhuin also asserts that SPINNING branded clothing goods were available and purchased in Canada on the Website during the relevant period. He lists T-shirts, sweatshirts, shorts, jacket, and socks as examples of SPINNING branded clothing [para 26].

[44] In support of his assertions, Mr. Baudhuin attaches the following exhibits to his affidavit:

- Exhibit K to O: printouts of web captures of the Website during the relevant period, taken from the Wayback Machine, for men's and women's T-shirts, sweatshirts, athletic shorts, jackets and socks [para 26]. I note that the

exhibited screen captures show T-shirts, sweatshirts, shorts, jackets, and socks branded with the Mark. In some cases, the Mark is also identified in the description of the clothing item.

- Exhibit P: redacted invoices issued by the Owner during the relevant period and provided as representative sales invoices of “various” SPINNING-branded clothing to Canadian consumers during the relevant period [para 27].

[45] The Requesting Party submits that Mr. Baudhuin does not state that Exhibits K to O are examples of clothing items sold during the relevant period, nor does he link any of these clothing items to those referenced in the invoices. It further submits that none of the invoices appears to refer to an item of clothing associated with the Mark.

[46] The Owner submits that the Requesting Party takes the approach of improperly dissecting the evidence. In that regard, it submits that there is clear evidence of use of the Mark in association with T-shirts, sweatshirts, shorts, jacket, and socks during the relevant period by both use of the Mark on the goods and the display of the Mark on the Website in close proximity to the goods so as to create the required notice of association at the time of transfer of the goods.

[47] Based on a fair reading of Mr. Baudhuin’s statements as a whole, I accept the exhibited screen captures as evidence depicting SPINNING branded T-shirts, sweatshirts, shorts, jackets, and socks as they appeared during the relevant period. The issue becomes whether the evidence also establishes transfers of these goods in the normal course of trade.

[48] The Requesting Party rightly points out that Mr. Baudhuin does not link any of the clothing items at issue with the items referenced in the invoices and that there is no reference to the Mark in the descriptions of the invoiced items.

[49] It is not for the Registrar to speculate as to the nature of the goods sold [*Fraser Milner Casgrain LLP v Fabric Life Ltd*, 2014 TMOB 135 at para 13; *Wrangler Apparel Corp v Pacific Rim Sportswear Co* (2000), 10 CPR (4th) 568 at para 12 (TMOB)].

However, as I indicated before, reasonable inferences can be made from the evidence provided.

[50] In this case, there are clear references to t-shirts and shorts in descriptions of items listed on invoices, but no clear reference to sweatshirts, jackets or socks. Thus, I accept the invoices as sufficient evidence to establish the transfer of SPINNING branded t-shirts and shorts during the relevant period.

[51] In view of the above, I find that the evidence satisfactorily establishes use of the Mark, within the meaning of sections 4(1) and 45 of the Act, in association with “t-shirts” and “shorts” only. Further, the affidavit does not put forward special circumstances to justify the absence of use of the Mark in Canada in association “sweatshirts”, “jackets” and “socks”.

[52] Accordingly, I conclude that the goods “sweatshirts”, “jackets” and “socks” ought to be deleted from the registration.

Pre-recorded video cassettes

[53] The evidence purportedly showing use of the Mark in association with pre-recorded video cassettes is found at paragraphs 39 to 41 of the affidavit under the heading “Pre-recorded video cassettes, which are now in the form of DVDs”.

[54] Mr. Baudhuin asserts that the Mark is displayed on DVDs and that SPINNING branded DVDs are available for purchase and have been purchased, for example, through the Website [para 39].

[55] In support of his assertions, Mr. Baudhuin attaches the following exhibits to his affidavit:

- Exhibit X: printouts of web captures of the Website, taken from the Wayback Machine, showing various DVDs featuring physical fitness instruction available for viewing and purchase during the relevant period [para 40].
- Exhibit Y: redacted invoices issued by the Owner during the relevant period and provided as representative sales invoices of DVDs featuring physical

fitness instruction to Canadian consumers during the relevant period
[para 41].

[56] I note that I clearly see the Mark on three of the depicted DVDs, which are referenced as “Heart Racer”, “Johnny G Live” and “Maximum Results” DVDs. However, these specific DVDs are not listed on the exhibited sales invoices. The Owner submits that although it cannot be seen from the web captures because the image is cut off, the depicted DVD referenced as “Cardio Spin”, which is listed on the exhibited invoices, displays the Mark similarly to the “Heart Racer” DVD. The Owner also submits that invoice No. 0878141-IN shows the sale of the DVD “Spinning Ireland Road Tour”.

[57] The Requesting Party’s representations concerning the evidence are two-pronged:

1. The Owner is attempting to preserve the registration for “pre-recorded video cassettes” by pointing to sales of different goods. A DVD is not a pre-recorded cassette. The Owner did not offer any evidence as to how or why these goods should or could be considered identical or interchangeable for the purpose of section 45 of the Act.
2. There is no statement that any DVD sales occurred during the relevant period in Canada with DVDs bearing the Mark.

[58] The Owner submits that although not identical to pre-recorded cassettes, DVDs are a technical evolution of the medium in which the ultimate videos are delivered. In this respect, the Owner seeks to draw an analogy between the present case and *Specialty Software Inc v Bewatec Kommunikationstechnik GMBH*, 2016 FC 223 [*Specialty*], as per the following excerpt of its written representations:

74. The present matter is similar to the situation in *Specialty Software Inc v Bewatec Kommunikationstechnik GMBH*, 2016 FC 223 wherein the Federal Court found that the registrant had used certain software goods despite an evolution in the means in which they had previously been delivered:

Even though Specialty used to sell its software on disks – which are obviously tangible and easily identified as wares – it was always really selling a license to use the software, which is an intangible good.

Specialty did not actually sell the software itself; it sold an entitlement to obtain access to it by way of licenses. The disks merely represented the means by which the transfer of the goods occurred. The real goods were, and are, the licenses

75. Similarly here, Mad Dogg's real goods are its SPINNING® videos. Accordingly, the evidence of use of the SPINNING Mark in association with Madd Dogg's DVDs should be sufficient to maintain the pre-recorded video cassette goods.

[59] I do not consider it necessary to decide whether the evidence as a whole is sufficient to establish a *prima facie* case of use of the Mark in association with DVDs as it would not change the outcome.

[60] Indeed, in my opinion, an analogy cannot be drawn between this case and the *Specialty* decision where it was found that the availability of data or software only through an Internet browser can meet the requirement of showing a transfer of the registered goods "computer software programs", despite no software being installed *per se* on a customer's computer. The Owner is essentially asking me to extrapolate from the *Specialty* case that registration for a particular type of technological format, i.e., pre-recorded cassettes, can encompass a newer format, i.e., DVDs. I am not prepared to do so.

[61] I rather find the present case to be analogous to *Sim & McBurney v Disques Vogue SA*, 2002 CarswellNat 4958 (TMOB) where it was found that use of a trademark in association with compact discs did not support the registration for phonograph records. In reaching this conclusion, Sr. Hearing Officer Savard commented as follows:

9 As for the first point raised by the requesting party, it is true that the evidence makes no reference to "phonograph records." What the evidence shows is use of the trade-mark in association with recording media called compact discs. The requesting party submits that the Registrar has no authority to amend the wares from "phonographs records" "*disques de phonographes*" to "compact discs".

[...]

11 The person who represented the owner at the hearing admitted that the evidence does not refer to "phonograph discs" ("*disques de phonographe*") but does refer to "sound recording media" ("*supports phonographiques*"), including compact discs. She said that even though there have been developments in the area of sound recording media, the wares remain sound recording media ("*supports phonographiques*.")

[...]

13 In my opinion, although "phonograph discs" and "compact discs" are sound recording media ("*supports phonographiques*"), the fact remains that phonograph discs are not compact discs. The two wares are different and distinct. [...]

[...]

15 [The affiant] made no reference to phonograph discs, and no information was provided as to whether the owner had used the trade-mark at any time in association with phonograph discs.

16 Moreover, he provides no information about the reason for which the trade-mark is not used in association with phonograph discs. He does not say that this is because of the technological developments in the sound recording field, and he provides no information on whether the compact disc has completely supplanted the phonograph disc as a sound recording medium. In my opinion, [the affiant] is in the best position to inform the registrar (*sic*) about the non-use of the trade-mark in association with phonograph discs, and he provided no details on the subject.

[62] In the present case, the evidence does not show sales of pre-recorded cassettes during the relevant period; the evidence shows sales of DVDs purportedly associated with the Mark during the relevant period. Although pre-recorded cassettes and DVDs are recording media, the fact remains that a DVD is not a pre-recorded cassette. Mr. Baudhuin does not make any references to pre-recorded video cassettes in his affidavit. In addition, Mr. Baudhuin: (a) does not provide any information as to whether the Owner had used the Mark at any time in association with pre-recorded video cassettes; (b) does not explain why the trademark is not used in association with pre-recorded cassettes; and (c) does not provide evidence to show why DVDs should or could be considered identical to pre-recorded cassettes.

[63] Accordingly, I find that the Owner has failed to provide evidence establishing use of the Mark, within the meaning of sections 4(1) and 45 of the Act, in association with "pre-recorded video cassettes". Since the affidavit does not put forward special circumstances to justify the absence of use, I conclude that these goods ought to be deleted from the registration.

The Services

[64] I will deal with the evidence for the services "Providing training and instruction to others by simulating an outdoor bicycle workout completed indoors on stationary

bicycles” first, and with the evidence for the services “Exercise training in health club facilities, namely personal, video and booklet instruction” afterwards.

Providing training and instruction to others by simulating an outdoor bicycle workout completed indoors on stationary bicycles

[65] According to Mr. Baudhuin’s statements, these services are offered and provided in Canada in association with the Mark through licensed health club facilities, and through the Website.

[66] As regards to the services provided through licensed health club facilities, Mr. Baudhuin explains that the Owner will license a health club facility as an “Official SPINNING facility” if the health club facility meets certain requirements set out by the Owner. Once licensed by the Owner, the health club facilities may advertise, and provide SPINNING branded indoor exercise cycling classes at their facilities [para 34].

[67] Mr. Baudhuin states that the licensed health club facilities (Licensed Facilities) use and display the Mark in the promotion and performance of the services [para 36]. He states that during the relevant period, there were at any time approximately 12 and in excess of 60 Licensed Facilities in Canada [para 35]. Mr. Baudhuin also explains that the Website contains a “Find a Class” tool that allows Canadians to search for Licensed Facilities by city or postal code [para 37].

[68] In support of his assertions, Mr. Baudhuin attaches the following exhibits to his affidavit:

- Exhibit T: copy of a redacted license agreement signed with a health club facility during the relevant period and provided as representative of license agreements with health club facilities in Canada during the relevant period [para 34].
- Exhibit U: samples of display material featuring the Mark used by the Licensed Facilities during the relevant period in connection with the promotion and performance of the services, and sample receipts for these materials [para 36].

- Exhibit V: printout from the Website showing the “Find a Class” tool for Canada and provided as representative of the “Find a Class” tool available on the Website during the relevant period [para 37].

[69] With respect to the services provided through the Website, Mr. Baudhuin states that the Owner offers virtual classes of indoor cycling to Canadians within their homes. He explains that the Website displays the Mark in association with in-home virtual classes under a “Ride at Home” page [para 38]. Mr. Baudhuin attaches as Exhibit W to his affidavit screenshots of web captures of the Website, taken from the Wayback Machine, showing the “Ride at Home” option available on the Website during the relevant period are provided by Mr. Baudhuin.

[70] The Requesting Party submits that neither the evidence concerning the Licensed Facilities nor the evidence concerning the “Ride-at-Home” feature on the Website establishes use of the Mark in association with the services.

[71] The Requesting Party’s submissions with respect to the evidence concerning the Licensed Facilities are two-pronged:

1. While Mr. Baudhuin states that licenses were in place during the relevant period, he does not state that any licensee was conducting or ready to conduct indoor exercise cycling classes during the relevant period.
2. There is no evidence that any licensee ever displayed the Mark during the relevant period because: (a) no photograph showing display of the Mark is included in Exhibit U; and (b) Mr. Baudhuin cannot have personal knowledge of any display of the Mark in Canada by the licensees since there is no evidence that he has ever been to Canada.

[72] I disagree with the Requesting Party’s contention that the evidence does not establish the performance of the services by the Licensed Facilities. Indeed, given Mr. Baudhuin’s statements that the Licensed Facilities provide the services in Canada and that there were between 12 and in excess of 60 Licensed Facilities during the

relevant period, it is only logical to conclude that the services were performed by Licensed Facilities during the relevant period.

[73] I also disagree with the Requesting Party's contention that Mr. Baudhuin's evidence concerning the display of the Mark by the Licensed Facilities must be disregarded.

[74] Indeed, it is well established that, given the summary nature of section 45 proceedings, "concerns with respect to the hearsay nature of evidence can go to weight, rather than admissibility" [*Eva Gabor International Ltd v 1459243 Ontario Inc*, 2011 FC 18 at para 18]. In this case, since Mr. Baudhuin is the co-founder, owner and Chief Executive Officer of the Owner, I accept that he would have knowledge of the activities of the Licensed Facilities in Canada. Thus, I accept his statements with respect to the samples of display material featuring the Mark [Exhibit U] at face value [for similar conclusions, see *FCA US LLC v Pentastar Transportation Ltd*, 2018 TMOB 80 at para 20, *aff'd* 2019 FC 745; *Eveready Battery Company, Inc v Les Outillages King Canada Inc*, 2016 TMOB 178 at paras 12-13].

[75] Moreover, I agree with the Owner that the display of the Mark on the "Find a Class" tool page of the Website during the relevant period amounts to use in the advertising of the services available and ready to be performed by Licensed Facilities.

[76] Accordingly, I am satisfied that the evidence with respect to the Licensed Facilities satisfactorily establishes use of the Mark, within the meaning of sections 4(2) and 45 of the Act, in association with "Providing training and instruction to others by simulating an outdoor bicycle workout completed indoors on stationary bicycles".

[77] In view of my finding, it is not necessary to decide whether the Owner may rely on the "Ride-at-Home" feature on the Website as evidence of use of the Mark in association with these services.

Exercise training in health club facilities, namely personal, video and booklet instruction

[78] For ease of reference, I will discuss in turn the evidence and parties' representations for the "personal instruction", "video instruction" and "booklet instruction" part of the registered services.

Personal instruction

[79] Mr. Baudhuin asserts, with supporting exhibits, that the Owner provides personal exercise training in health club facilities through the Certification Program, more particularly through in-person events for the certification of instructors, and through the certified instructors. However, I find it is not necessary to discuss the parties' representations as to whether this evidence establishes use of the Mark in association with personal exercise training in health club facilities.

[80] Indeed, unlike goods, the Registrar has previously held that "in certain cases, statements of services contain overlapping and redundant terms in the sense that the performance of one service would necessarily imply the performance of another" [*Gowling Lafleur Henderson LLP v Key Publishers Co*, 2010 TMOB 7 at para 15; see also *Provent Holdings Ltd v Star Island Entertainment, LLC*, 2014 TMOB 178 at para 22; *GMAX World Realty Inc v RE/MAX, LLC*, 2015 TMOB 148 at para 69].

[81] With this principle in mind, in view of the nature and extent of the Owner's activities, I find reasonable to conclude that "Exercise training in health club facilities, namely personal... instruction" encompasses the registered services "Providing training and instruction to others by simulating an outdoor bicycle workout completed indoors on stationary bicycles". Having found that the latter services ought to be maintained in the registration, I find that "Exercise training in health club facilities, namely personal... instruction" ought to be maintained in the registration.

Video instruction

[82] In support of his assertion that the Owner provides exercise training in health club facilities by way of video instruction, Mr. Baudhuin explains that DVDs featuring

physical fitness instructions were available throughout the relevant period by distribution together with indoor cycling bikes sold to health club facilities [para 32].

[83] Mr. Baudhuin attaches as Exhibit R to his affidavit an image of the cover of a DVD that he asserts was distributed to health club facilities upon purchase of indoor cycling bikes during the relevant period. I note that the exhibited cover, which displays the Mark, appears to be the cover of a box containing four DVDs for “Ultimate Energy”, “Train and Tone”, “Turn and Burn” and “Maximum Results” bicycle rides.

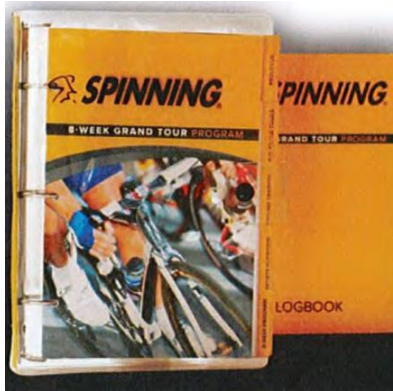
[84] The Requesting Party submits that the evidence does not show that DVDs were distributed to health club facilities during the relevant period or that the DVDs were seen by anyone.

[85] Even if I accept Mr. Baudhuin’s statement that DVDs were distributed to health club facilities during the relevant period at face value, he does not provide any information as to whether or how the DVDs were used by the health club facilities. Thus, I find the evidence insufficient to conclude that the Mark was used in the performance or advertising of the services.

[86] In view of the above, I am not satisfied that the evidence establishes use of the Mark, within the meaning of sections 4(2) and 45 of the Act, in association with “Exercise training in health club facilities, namely... video... instruction”. Since the affidavit does not put forward special circumstances to justify the absence of use, I conclude that these services ought to be deleted from the registration.

Booklet instruction

[87] In support of his assertion that the Owner provides exercise training in health club facilities by way of booklet instruction, Mr. Baudhuin attaches as Exhibit S to his affidavit what he describes as “printouts of a Spinning® 8-Week Grand Tour Program including a printed manual” [para 33]. The exhibited printouts depict the following image:



[88] The Requesting Party submits that Mr. Baudhuin does not state that the exhibited manual was distributed in Canada, nor used during the relevant period.

[89] While the Owner submits that the exhibited printouts show the provision of booklet instruction exercise training in health club facilities, it made no submissions as to why the exhibited printouts constitute use of the Mark in the advertising or performance of the services. However, the Owner submits that the marketing materials for the in-person certification events, attached as Exhibit Q to Mr. Baudhuin's affidavit, reference a manual included in the cost of the in-person certification events. It therefore submits that the use of the Mark in association with the advertising of in-person certification events also support the use of the Mark in association with booklet instruction.

[90] As regards to Exhibit S, although not specifically stated by Mr. Baudhuin, I can fairly conclude that the printouts are web captures of the Website, taken from the Wayback Machine, during the relevant period. As shown above, the depicted manual, which is akin to a booklet, displays the Mark. That said, the information provided on the web captures indicates that the training "...will be accomplished with the safety and comfort of your own home". In my view, the exhibited printouts do not show use of the Mark in advertising or performance of the booklet instruction exercise training *in health club facilities*. At most, they show that a manual, akin to a booklet, for an at-home exercise training program was available for sale in Canada during the relevant period.

[91] It remains to be decided whether the reference to a manual in the marketing materials for the in-person certification events may also serve as evidence of use of the Mark for booklet instruction exercise training in health club facilities.

[92] Notwithstanding the light burden resting on the Owner, I am reluctant to accept that such is the case on the sole basis of the Owner's argument. For one thing, I am left to speculate as to the contents of this manual and its role in the in-person certification events. In addition, Mr. Baudhuin made no reference to the provision of "booklet instruction" in conjunction with the provision of in-person instruction. Mr. Baudhuin is in the best position to inform the Registrar with respect to the provision of booklet instruction.

[93] In view of the above, I am not satisfied that the evidence establishes use of the Mark, within the meaning of sections 4(2) and 45 of the Act, in association with "Exercise training in health club facilities, namely... booklet instruction". Since the affidavit does not put forward special circumstances to justify the absence of use, I conclude that these services ought to be deleted from the registration.

DISPOSITION

[94] In view of all of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, the registration will be amended to delete the following goods and services:

Goods:

(1) ... and weight training equipment, ..., sweatshirts, sweat pants, polo shirts, ..., sports coats and jackets, socks, sweatbands, and warmup suits, nutritional supplements, namely vitamin supplements, mineral supplements, and energy providing food supplements, pre-recorded video and audio cassettes.

Services:

(1) ... ,video and booklet

[95] The amended registration will be as follows:

Goods:

Exercise equipment, namely stationary exercise bicycles, clothing, namely men's and women's athletic clothing in the nature of sports and leisure clothing, namely T-shirts, shorts.

Services:

(1) Exercise training in health club facilities, namely personal instruction. (2) Providing training and instruction to others by simulating an outdoor bicycle workout completed indoors on stationary bicycles.

Céline Tremblay
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: 2023-03-02

APPEARANCES

For the Requesting Party: Kevin Sartorio

For the Registered Owner: Brandon Evenson

AGENTS OF RECORD

For the Requesting Party: Gowling WLG (Canada) LLP

For the Registered Owner: Borden Ladner Gervais LLP