



# Canadian Intellectual Property Office

## **THE REGISTRAR OF TRADEMARKS**

**Citation:** 2023 TMOB 082

**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:** TMA544,985 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. TMA544,985 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:

- (1) Balms, oils, creams and lotions for skin care and massage; pre-recorded compact discs not containing computer software; sporting bags; footwear, namely, bicycle shoes.

- (2) Balms, oils, creams and lotions for skin care and massage; and sporting bags.
  - (3) Bicycle shoes.
  - (4) Pre-recorded compact discs featuring music or physical fitness instruction.
  - (5) Sports drinks, namely, fruit based drinks and bottled water.
- (Collectively, the Goods).

Services:

- (1) Providing facilities for physical fitness and exercising activities on stationary exercise bicycles and weight training equipment (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 O.

[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. TMA491,404 for the trademark SPINNING. A separate decision will issue for registration No. TMA491,404.

### **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 “balms, oils, creams and lotions for skin care and massage”, “sporting bags” and “sports drinks, namely, fruit based drinks and bottled water”.

[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.

- (1) ...pre-recorded compact discs not containing computer software; ...footwear, namely, bicycle shoes.
- (3) Bicycle shoes.

(4) Pre-recorded compact discs featuring music or physical fitness instruction.

### **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].
- 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 certain goods associated with the Mark, for instance specifics on the “commercial exercise bike line” and the “home bike product line” [para 15]. 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. 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)].

### **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 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 with respect to sales invoices provided by Mr. Baudhuin, as will be discussed later on in my decision.

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

### ***The Remaining Goods***

#### Bicycle shoes

[21] Mr. Baudhuin asserts that bicycle shoes have been available for purchase in Canada through the Website where the Mark is displayed prominently, including on the cart webpage. He explains that customers make purchases from the Website by adding desired items to their cart before checking out [para 18].

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

- Exhibit C: screenshot of a web capture of the cart webpage of the Website, taken from the online web archive the Wayback Machine [para 18].
- Exhibit D: printouts of web captures of the Website taken from the Wayback Machine to show bicycle shoes available for viewing and purchase by Canadians during the relevant period [para 19]. I note that the printouts depict SIDI branded cycling shoes, including “Men’s SIDI® BUVEL MTN Yellow Shoes”.
- Exhibit E: redacted invoices issued by the Owner during the relevant period and provided as representative of sales invoices of bicycle shoes to Canadian consumers through the Website. Mr. Baudhuin specifically states that these include “the Men’s SIDI® BUVEL MTN Yellow Shoes” [para 20]. I note that there are three exhibited invoices referencing items described, as the case may be, as “Buvel MTN M YLW/BLK 46”, “Buvel MTN M YLW/BLK 44.5” or “Buvel MTN W PNK/WHT 38”.

[23] I will not discuss at length the Requesting Party's representations that the exhibited invoices "raise many questions about the genuine nature of the alleged transactions". For one thing, in my opinion, this contention is based on an improper dissection of the evidence. In addition, considering the evidence as a whole, I accept that the invoices demonstrate sales of bicycle shoes by the Owner to Canadian consumers in the normal course of trade during the relevant period. That said, it remains to be decided whether the evidence shows use of the Mark in association with bicycle shoes.

[24] The Requesting Party submits that none of the bicycle shoes depicted in the exhibited web captures are SPINNING branded bicycle shoes. It further submits that the Mark does not appear in association with the goods listed in the exhibited invoices. Since the Mark appears at the very top of the exhibited invoices, the Requesting Party also submits that there is no evidence to conclude that the exhibited invoices accompanied the goods at the time of transfer. Finally, the Requesting Party submits that the Owner merely operates an online retail store from the Website where the word SPINNING appears in places.

[25] The Owner does not dispute the absence of evidence for concluding that the exhibited invoices accompanied the bicycle shoes at the time of transfer. Also, it emerged from the hearing that the Owner does not dispute that the bicycle shoes depicted in the exhibited web captures are third-party bicycle shoes.

[26] Nonetheless, the Owner submits that its evidence establishes use of the Mark in association with bicycle shoes during the relevant period. In this regard, the Owner relies on the display of the Mark on the Website in close proximity to bicycle shoes, as well as on the cart webpage. It submits that at the time of purchasing bicycle shoes through the Website, consumers would have viewed the Mark and associated the Mark with the goods at the time of transfer.

[27] 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).

[28] 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 bicycle shoes, 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 SIDI or Buvel. At most, the display of the Mark on the Website could be considered use in association with online retail sale services for bicycle shoes.

[29] 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 “bicycle shoes”. 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.

Pre-recorded compact discs not containing computer software; pre-recorded compact discs featuring music or physical fitness instruction

[30] Mr. Baudhuin asserts that the Mark is displayed on pre-recorded compact discs not containing computer software and that SPINNING branded pre-recorded compact discs not containing computer software are available for purchase and have been purchased in Canada, for example, through the Website [para 21].

[31] Mr. Baudhuin also asserts that the Mark is displayed on pre-recorded compact discs *and DVDs* featuring physical fitness instructions and that SPINNING branded pre-recorded compact discs/DVDs featuring physical fitness instruction are available for purchase and have been purchased in Canada, for example, through the Website [para 23].

[32] Finally, Mr. Baudhuin asserts that DVDs featuring physical fitness instruction were available during the relevant period by distribution together with indoor exercise bicycles sold in Canada through Canadian Tire, Fitness à Rabais, and Pop A Wheelie [para 26].



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

- Exhibit F: printouts of web captures of the Website, taken from the Wayback Machine, and provided to show various pre-recorded compact discs available for viewing and purchase by Canadians during the relevant period. Based on a fair reading of Mr. Baudhuin's statement, it appears that these web captures are provided as examples of SPINNING branded pre-recorded compact discs not containing computer software [para 22].
- Exhibit G: printouts of web captures of the Website, taken from the Wayback Machine, and provided to show various pre-recorded compact discs featuring music and DVDs featuring physical fitness instruction available for viewing and purchase by Canadians during the relevant period [para 24].
- Exhibit H: redacted invoices issued by the Owner during the relevant period and provided as representative of sales invoices of pre-recorded compact discs and DVDs featuring musical or physical fitness instruction [para 25].
- Exhibit I: an image of the cover of a DVD that Mr. Baudhuin asserts was distributed to consumer upon purchase of an indoor cycling bike from Canadian Tire during the relevant period [para 26].
- Exhibit J: redacted invoices issued by the Owner during the relevant period and provided as representative of sales invoices of SPINNING branded cycling bikes where DVDs featuring physical fitness instruction were distributed to consumers in Canada upon purchase of an indoor cycling bike from Canadian Tire [para 27].

[34] I wish to make the following remarks concerning the exhibits:

- Exhibit F: It is apparent that the pre-recorded compact discs depicted in the web captures are pre-recorded compact discs featuring music. Although some images appear to have been cut off, I can clearly see the Mark on some of the depicted CDs. In all cases, including when I cannot see the

Mark on the depicted CDs because the image is cut off, the Mark is referenced in the description below the depicted CD.

- Exhibit G: It is apparent that the goods depicted in the web captures are DVDs only.
- Exhibit H: The items listed in the first two invoices are mainly CDs, whereas the items listed in the remainder of the invoices are mainly DVDs.
- Exhibit I: The 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.
- Exhibit J: The invoices were issued to Canadian Tire with the invoiced items described as “SPIN® L5 Spin Bike”. In three invoices (0892264-IN, 0892856-IN, and 0896365-IN), the invoiced item is described “SPIN® L5 Spin Bike x 4DVDs”.

[35] I will discuss the parties’ representations for the goods “Pre-recorded compact discs not containing computer software; pre-recorded compact discs featuring music...” first, and for the goods “pre-recorded compact discs featuring ...fitness instruction” afterwards.

*Pre-recorded compact discs not containing computer software; pre-recorded compact discs featuring music*

[36] Once again, I find it unnecessary to discuss at length the Requesting Party’s representations that the evidence does not establish sales of pre-recorded computer discs in association with the Mark during the relevant period.

[37] For one thing, in my opinion, the Requesting Party’s representations are based on an improper dissection of the evidence. In addition, based on a fair reading of Mr. Baudhuin’s statements and supporting Exhibits F and H, I can reasonably infer from the evidence as a whole that pre-recorded compact discs featuring music were sold in Canada during the relevant period in association with the Mark.

[38] The Registrar has held that use of a trademark in association with a single item will not generally support use in association with multiple goods in a registration [see

*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA); *Diamant Elinor Inc, supra*, 2010 FC 1184]. Further, where use in association with a specific good could potentially support two goods in a registration, the more specific registration will be maintained over the more generalized [*Sharp Kabushiki Kaisha v 88766 Canada Inc.* (1997), 72 CPR (3d) 195 (FCTD) at paras 14-16; *88766 Canada Inc v Freedom Scientific BLV Group, LLC*, 2019 TMOB 129 at paras 30-31; *DLA Piper (Canada) LLP v Huer Foods Inc*, 2019 TMOB 62 at para 19].

[39] Accordingly, I am satisfied that the aforementioned evidence demonstrates use of the Mark in association with the registered goods “pre-recorded compact discs featuring music”, but not the more general registration for “pre recorded compact discs not containing computer software”. In the absence of evidence demonstrating use of the Mark in association with “pre recorded compact discs not containing computer software” or special circumstances excusing such non-use, I conclude that these goods ought to be deleted.

*Pre-recorded compact discs featuring physical fitness instruction*

[40] As per my review of the evidence above, the web captures and invoices provided as Exhibits G and H to the affidavit of Mr. Baudhuin only pertain to DVDs featuring physical fitness instruction; they do not pertain to pre-recorded compact discs featuring physical fitness instruction.

[41] Accordingly, I conclude that Mr. Baudhuin’s evidence with respect to the use of the Mark in association with pre-recorded compact discs featuring physical fitness instruction amounts to nothing more than bare assertions of use of the type that was held unacceptable in *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA).

[42] Thus, the issue becomes whether the evidence purportedly showing use of the Mark in association with DVDs featuring fitness instruction may serve as evidence of use in association pre-recorded compact discs featuring physical fitness instruction, as contended by the Owner.

[43] I note that I clearly see the Mark on three of the DVDs depicted in the web captures, which are referenced as “Heart Racer”, “Johnny G Live” and “Maximum Results” DVDs [Exhibit G]. However, these specific DVDs are not listed on the sales invoices [Exhibit H]. The Owner submits that although it cannot be seen from the exhibited web capture 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”.

[44] As for the evidence pertaining to DVDs distributed to consumers upon purchase of an indoor cycling bike, I note the absence of a clear statement from Mr. Baudhuin to corollate the reference to “4DVDs” in three exhibited invoices [Exhibit J] to the SPINNING branded box containing four DVDs [Exhibit I].

[45] The Requesting Party’s representations with respect to the evidence pertaining to DVDs are two-pronged:

1. The Owner is attempting to preserve the registration for “pre-recorded compact discs featuring physical fitness instruction” by pointing to sales of different goods. A DVD is not a pre-recorded compact disc. 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.

[46] The Owner submits that although not identical to compact discs, DVDs are a technical evolution of the medium in which the ultimate physical fitness instructions 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:

57. 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

58. Similarly here, Mad Dogg's real goods are its SPINNING® music and physical fitness videos. Accordingly [...] the use of the SPINNING Mark in association with DVDs bearing or otherwise associated with the SPINNING Mark during the Relevant Period as evidence in the Baudhuin Affidavit should also be considered.

[47] 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 in the Owner's normal course of trade, as it would not change the outcome.

[48] 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 discs, i.e., compact discs, can encompass another type of discs, i.e. DVDs. I am not prepared to do so.

[49] 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 trademark 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.

[50] In the present case, the evidence does not *show* sales of pre-recorded compact discs featuring physical fitness instruction during the relevant period; the evidence shows sales of DVDs featuring physical fitness instruction purportedly associated with the Mark during the relevant period. Although compact discs and DVDs are recording media, the fact remains that a DVD is not a compact disc. Mr. Baudhuin does not provide evidence to show why DVDs should or could be considered identical to compact discs.

[51] 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 compact discs ...featuring physical fitness instruction". 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***

[52] Mr. Baudhuin asserts 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, offer and provide SPINNING branded physical fitness and exercising classes on stationary bicycles and weight training equipment at their facilities [para 28].

[53] Mr. Baudhuin states that the licensed health club facilities (Licensed Facilities) provide instruction and training to others by simulating an outdoor bicycle workout completed indoor on stationary bicycles. He states that the Licensed facilities use and display the Mark in the promotion and performance of these services [para 30]. He states that during the relevant period, there were at any time approximately 12 and in excess of 60 Licensed Facilities in Canada [para 29]. 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 31].

[54] Finally, Mr. Baudhuin asserts 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 32].

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

- Exhibit K: 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 28].
- Exhibit L: samples of display material featuring the Mark used by the Licensed Facilities during the relevant period in connection with the promotion and performance of instruction and training services, and sample receipts for these materials [para 30].

- Exhibit M: 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 31].
- Exhibit N: 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 [para 32].

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

1. While Mr. Baudhuin describes the license agreement as being a “facility” license for facilities offering bicycle and weight training equipment, the license agreement itself is expressly limited to use of the Mark for spin class programs on bikes and nothing else. The licensee is prohibited from using the Mark for anything other than a spin class (including weight training) or as the name of facility.
2. 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 spin classes during the relevant period.
3. 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 L; 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.
4. Mr. Baudhuin’s assertions concerning the “Find a Class Tool” and “Ride at Home” features of the Website refer to information and virtual services that are not covered by the registration.

[57] To best explain the first prong of the Requesting Party’s submissions, I find it useful to reproduce the following excerpts of its written representations:

60. At paragraph 28, Mr. Baudhuin takes pains to describe the license agreement as being for a “health club **facility**” if the health club **facility**” meets certain requirements.



He described the license as being the “Official SPINNING **facility** license agreement”. He states that upon being licensed the facility is licensed to use the Trademark with “physical fitness and exercising classes on stationary exercises bicycles and **weight training equipment.**”

61. In contrast to this evidence, the actual license agreement at Exhibit K notes:

- a) the Registrant is merely the creator of a spin class program for stationary bikes (the “Program”): Recital A;
- b) the licensee is prohibited from using the Trademark for their *facility*: Recital A;
- c) the licensee is prohibited from using the Trademark for any service other than a *stationary bike* program, which would include a prohibition on any weight-training program; Recital C and Article 1.1.; and
- e) (*sic*) the Registrant exercises no control over the character or quality of the licensee’s facility, only over the spin class program – and only the requiring that the spin instructor be certified and that a specific bike be used: Articles 1.3(a) and 1.5(a).

62. Moreover, there is no evidence that the Registrant, through a licensee, has ever used the Trademark for “providing a facility...” The Trademark appears to be licensed for offering and performing a spin class program on a specific kind of stationary bike. It is not licensed for any program for bicycles and weight training.

[58] The Owner submits that the Requesting Party’s contention concerning inconsistencies between Mr. Baudhuin’s testimony and the license agreement is based on a narrow interpretation of the Services. In that regard, the Owner submits [para 68 of its written representations]:

...In particular, the Requesting Party’s interpretation of “providing facilities” only considers Mad Dogg’s Official SPINNING® facilities as a whole (e.g. “a health club facility”). The definition of “facilities” is more expansive than this and can include specific equipment and services which, based on a liberal interpretation, would include the SPINNING Services.

[59] In addition, the Owner disputes the Requesting Party’s contention that the terms of the licensed agreement prohibit Licensed Facilities from using the Mark with any service other than a stationary bike program. In that regard, the Owner submits that the SPINNING Program is defined in the License Agreement as an “exercise program... which is used with the Spinner® stationary exercise bike”; there is nothing in the license agreement that limits the SPINNING Program exclusively to exercise undertaken on stationary exercise bike. Finally, the Owner also submits that since the Spinner®

stationary exercise bike incorporates a “weighted flywheel”, the bicycle itself may constitute “weight training program”.

[60] It is well established that “services” are to be interpreted broadly in section 45 proceedings [*Renaud Cointreau & Co v Cordon Bleu International Ltd* (2000), 11 CPR (4th) 95 (FCTD), aff’d 2002 FCA 11 *Live! Holdings LLC v Oyen Wiggs Green & Mutala LLP*, 2019 FC 1042, aff’d 2020 FCA 120]. Services may include incidental or ancillary services [*Heenan Blaikie LLP v Sports Authority Michigan Inc*, 2011 FC 273; *Société Nationale des Chemins de Fer Français SNCF v Venice Simplon-Orient-Express* (2000), 9 CPR (4th) 443 (FCTD)]. So long as members of the public receive a benefit from the activity in question, it is a service [*Miller Thomson LLP v Hilton Worldwide Holding LLP*, 2020 FCA 134].

[61] Applying these principles to this case, I agree with the Owner that the Requesting Party’s representations are based on a narrow interpretation of the term “facility” in the Services. As the Registrar may take judicial notice of dictionary definitions [*Shapiro Cohen LLP v Proa*, 2017 TMOB 162 at para 44], I note that the *Canadian Oxford Dictionary* (2 ed.) defines “facility” as “the physical means, equipment, resources and opportunity to do something”.

[62] Also, 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.

[63] 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.

[64] Finally, I 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.

[65] 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 L] 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].

[66] 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 facilities for physical fitness and exercising activities on stationary exercise bicycles and weight training equipment".

[67] 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 the Services.

### **DISPOSITION**

[68] 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:

Goods:

- (1) Balms, oils, creams and lotions for skin care and massage; pre-recorded compact discs not containing computer software; sporting bags; footwear, namely, bicycle shoes.

- (2) Balms, oils, creams and lotions for skin care and massage; and sporting bags.
- (3) Bicycle shoes.
- (4) ... or physical fitness instruction.
- (5) Sports drinks, namely, fruit based drinks and bottled water.

[69] The amended registration will be as follows:

Goods:

- (4) Pre-recorded compact discs featuring music.

Services:

- (1) Providing facilities for physical fitness and exercising activities on stationary exercise bicycles and weight training equipment.

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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