



## Non-use revocation action against STEAM for “beer” unsuccessful

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### EUROPEAN UNION

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- The Board of Appeal partly revoked the mark STEAM, but found that the mark had been put to genuine use for “beer; alcoholic beer”
- The General Court confirmed the decision, finding that the affixing of a mark to transport packaging is generally sufficient to prove genuine use
- An accumulation of items of evidence may allow the necessary facts to be established

Privatbrauerei Eichbaum GmbH & Co KG (‘Eichbaum’) sought the revocation for non-use of the EU word mark STEAM, owned by Anchor Brewing Company LLC (‘Anchor’) and covering “beer; alcoholic beer; non-alcoholic beer; alcohol-reduced beer; malt beer; malt beverages” in Class 32. The application was rejected in its entirety by the Cancellation Division of the EUIPO. The Board of Appeal of the EUIPO upheld the appeal against the Cancellation Division’s decision in part and revoked the contested mark in respect of “non-alcoholic beer; alcohol-reduced beer; malt beer; malt beverages”, but confirmed the decision in part as the mark had been put to genuine use for “beer; alcoholic beer”. The action against this decision was dismissed by the General Court in [Case T-609/21](#) (14 September 2022).

### Background

Anchor sought the registration of the word mark STEAM for “beer; alcoholic beer; non-alcoholic beer; alcohol-reduced beer; malt beer; malt beverages”; the mark was registered in 2009 and duly renewed thereafter. In 2018 Eichbaum filed an application for revocation of the mark on the ground of non-use with regard to all of these goods based on Article 58(1)(a) of Regulation 2017/1001. Anchor presented numerous exhibits as evidence of genuine use of the mark between 2013 and 2018, including:

- an affidavit signed by its CEO;
- invoices, images, printouts and screenshots mentioning ‘steam beer’:



- declarations by distributors in relation to the use of 'steam beer' or 'anchor steam beer' on the back of packaging from the European Union, which included the United Kingdom at the time.

The Board of Appeal argued that the evidence consisting of photographs of cardboard transport cases showing the inscription 'steam beer' on one side of those cases could demonstrate the use of the contested mark as a trademark. Similarly, the inscription 'steam beer' could be seen all along the distribution chain and in retail outlets and supermarkets. Taken together, these materials sufficiently established genuine use for "beer; alcoholic beer". However, the board upheld the application for revocation for the remaining goods ("non-alcoholic beer; alcohol-reduced beer; malt beer; malt beverages"), because the proven use did not cover all the commercial variations of similar goods, but merely goods in coherent categories or sub-categories; "non-alcoholic beer; alcohol-reduced beer; malt beer; malt beverages" belonged, in essence, to a different category.

### General Court decision

The General Court dismissed the action and confirmed the decision of the Board of Appeal. First, it argued that the affixing of a mark to transport packaging is generally sufficient to prove genuine use - referring to the decision in *PICCOLOMINI* ([Case T-20/15](#)), according to which the genuine use of a trademark could be made either on the goods at issue or on their packaging - and that the wholesalers for Anchor's goods who were in contact with the transport boxes were also part of the relevant public. The sign STEAM BEER was clearly visible on the front face of the transport cases containing the bottles of beer.

Second, the court confirmed the board's assessment that the evidence provided proved genuine use, after examining the case on the merits and applying the accepted standards (see *Ansul* (Case C-40/01, Paragraphs 37 and 43); *VITAFRUIT* (Case T-203/02), Paragraphs 40 and 42). Even if each of the items of evidence presented, taken individually, would be insufficient to constitute proof of the accuracy of those facts (see *HUSKY* ([Case T-287/13](#)), Paragraph 66), the proof of use was sufficient when considering that an accumulation of items of evidence may allow the necessary facts to be established. In particular, the statements from third-party companies and the declaration of the CEO were sufficient, at least when assessing the accumulation of items in connection with the various other items presented.

Further, the court confirmed the board's finding that the other element 'beer' did not alter the distinctive character of the mark STEAM, as the term 'beer' is purely descriptive. Therefore, 'beer' could not, as a matter of law, alter the distinctive character of STEAM; after all, STEAM was placed above 'beer' on the packaging's logo and, therefore, 'steam beer' would not be perceived as a combined term. In addition, the presence of the figurative sign ANCHOR STEAM BEER on the side of the transport case had no influence on the perception of the sign STEAM BEER on the front of that case.

Finally, the court rejected the argument that 'steam beer' describes a type of beer. The purpose of the revocation proceedings was not to reassess the distinctiveness of the contested mark. Moreover, Eichbaum had not demonstrated a descriptive use; rather, the evidence showed use in a distinctive manner when taking into account the tangible representation of the sign STEAM BEER on the transport cases. Although the affixing of the ® symbol to STEAM was not determinant when it came to assessing whether the sign was distinctive, it could be considered as another argument in the assessment.

### Comment

The decision shows that, although the threshold to prove genuine use in revocation proceedings (or in opposition proceedings after the non-use defence has been raised) is quite high, it is manageable with a comprehensive combination of evidence - in particular, declarations and statements from the trademark proprietor (which have lesser probative value) and third parties (which have a higher value), together with accompanying reference materials from the relevant timeframe corroborating these statements. As a basic principle, such evidence must be filed within the first deadline, but here the Cancellation Division allowed the submission of documents later on, as they did not introduce any new elements, but merely supplemented or corroborated the evidence and information given in previous submissions following criticism by the applicant for cancellation. While the core argument on the merits that 'beer' is a purely descriptive element and does not alter the distinctive character of STEAM BEER is obvious, there remains a grey area as to whether such element may even have an impact on the distinctive character of the sign depending on the overall impression (for the likelihood of confusion assessment, compare the decisions in *BLUMARINE* (Case C-343/14 P, Paragraphs 38 and following) and *ALLMAX Nutrition* (Case T-35/21, Paragraphs 85 and following)).

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