

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

8 June 2022 (*)

(EU trade mark – Revocation proceedings – Earlier EU word marks THINK DIFFERENT – No genuine use of the marks – Article 51(1)(a) of Regulation (EC) No 207/2009 (now Article 58(1)(a) of Regulation (EU) 2017/1001) – Obligation to state reasons – Right to be heard – Article 94(1) of Regulation 2017/1001)

In Cases T-26/21 to T-28/21,

Apple Inc., established in Cupertino, California (United States), represented by I. Junkar, I. Fowler, M. Petersenn and B. Lüthge, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by T. Frydendahl and A. Folliard-Monguiral, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO, intervener before the General Court, being

Swatch AG, established in Biel/Bienne (Switzerland), represented by P. González-Bueno Catalán de Ocón, lawyer,

THE GENERAL COURT (Sixth Chamber),

composed of A. Marcoulli, President, C. Iliopoulos (Rapporteur) and R. Norkus, Judges,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the written part of the procedure,

further to the hearing on 10 February 2022, during which observations were submitted by the parties on the possible joinder of Cases T-26/21 to T-28/21 for the purposes of the judgment,

gives the following

Judgment

Background to the dispute

- 1 By its three actions based on Article 263 TFEU, the applicant, Apple Inc., seeks the annulment of the decisions of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 4 November 2020 (Cases R 2011/2018-4, R 2012/2018-4 and R 2013/2018-4) ('the contested decisions').

First contested mark (Case T-26/21)

- 2 On 7 November 1997, the applicant filed an application for registration of a trade mark with EUIPO, pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark

(OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended, itself replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)).

3 Registration as a mark was sought for the word sign THINK DIFFERENT.

4 The goods in respect of which registration was sought fall, inter alia, within Class 9 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: ‘Computers, computer terminals, keyboards, printers, display units, terminals; modems; disc drives; computer peripherals; communications equipment; facsimile machines, answering machines, telephone-based information retrieval systems; adapters, adapter cards, connectors and drivers; blank computer storage media, computer programs, operating systems, computer hardware, software and firmware; computer memory devices; data recordings; cameras; fonts, typefaces, type designs and symbols, all recorded electronically or embodied in computer software; chips, discs and tapes bearing or for recording computer programs and software; random access memory, read only memory; solid state memory apparatus; electronic communication equipment and instruments; telecommunications apparatus and instruments; computer and electronic games; related computer equipment for use therewith; multimedia products comprising or for use with any of the aforesaid goods; interactive products comprising or for use with any of the aforesaid goods; parts and fittings for all the aforesaid goods’.

5 The trade mark application was published in *Community Trade Marks Bulletin* No 8/1999 of 8 February 1999. On 6 September 1999, the word sign THINK DIFFERENT was registered as an EU trade mark under number 671321.

Second contested mark (Case T-27/21)

6 On 9 June 1998, the applicant filed an application for registration of an EU trade mark with EUIPO, pursuant to Regulation No 40/94.

7 Registration as a mark was sought for the word sign THINK DIFFERENT.

8 The goods in respect of which the registration was sought fall, inter alia, within Class 9 of the Nice Agreement and correspond to the following description: ‘Computers, computer terminals, keyboards, printers, display units, terminals; modems; disc drives; computer peripherals; communications equipment; facsimile machines, answering machines, telephone-based information retrieval systems; adapters, adapter cards, connectors and drivers; blank computer storage media, computer programs, operating systems, computer hardware, software and firmware; computer memory devices; data recordings; cameras; fonts, typefaces, type designs and symbols, all recorded electronically or embodied in computer software; chips, discs and tapes bearing or for recording computer programs and software; random access memory, read only memory; solid state memory apparatus; electronic communication equipment and instruments; telecommunications apparatus and instruments; computer and electronic games; related computer equipment for use therewith, and electronic manuals sold therewith; multimedia products comprising or for use with any of the aforesaid goods; interactive products comprising or for use with any of the aforesaid goods; parts and fittings for all the aforesaid goods’.

9 The trade mark application was published in *Community Trade Marks Bulletin* No 33/1999 of 26 April 1999. On 18 November 1999, the word sign THINK DIFFERENT was registered as an EU trade mark under number 845461.

Third contested mark (Case T-28/21)

10 On 29 April 2005, the applicant filed an application for registration of an EU trade mark with EUIPO, pursuant to Regulation No 40/94.

11 Registration as a mark was sought for the word sign THINK DIFFERENT.

- 12 The goods in respect of which the registration was sought fall, inter alia, within Class 9 of the Nice Agreement and correspond to the following description: ‘Computers, computer terminals, keyboards, printers, display units, terminals; modems; disc drives; computer peripherals; communications equipment; facsimile machines, answering machines, telephone-based information retrieval systems; adapters, adapter cards, connectors and drivers; blank computer storage media, computer programs, operating systems, computer hardware, software and firmware; computer memory devices; data recordings; cameras; fonts, typefaces, type designs and symbols, all recorded electronically or embodied in computer software; chips, discs and tapes bearing or for recording computer programs and software; random access memory, read only memory; solid state memory apparatus; electronic communication equipment and instruments; telecommunications apparatus and instruments; computer and electronic games; related computer equipment for use therewith, and electronic manuals sold therewith; multimedia products comprising or for use with any of the aforesaid goods; interactive products comprising or for use with any of the aforesaid goods; parts and fittings for all the aforesaid goods’.
- 13 The trade mark application was published in *Community Trade Marks Bulletin* No 42/2005 of 17 October 2005. On 8 May 2006, the word sign THINK DIFFERENT was registered as an EU trade mark under number 4415063.

Revocation proceedings

- 14 On 14 October 2016, the intervener, Swatch AG, filed with EUIPO three applications for revocation of the contested marks on the basis of Article 51(1)(a) of Regulation No 207/2009 (now Article 58(1)(a) of Regulation 2017/1001). In those three applications, it claimed that the contested marks had not been put to genuine use for the goods referred to in paragraph 4 above, as regards the first contested mark, in paragraph 8 above, as regards the second contested mark, and in paragraph 12 above, as regards the third contested mark (together, ‘the goods concerned’) for an uninterrupted period of five years.
- 15 On 24 March 2017, the applicant submitted evidence to establish genuine use of the contested marks, which consisted in particular of:
- a witness statement from the director of its legal department, dated 23 March 2017, containing information on the history of the undertaking, the launch of the advertising campaign entitled ‘THINK DIFFERENT’ in 1997, the awards received for that campaign as well as the advertising expenditure and sales figures from the years 1994 to 2016. That statement also included undated photographs of the labels affixed to the packaging of an iMac computer, which bear the contested marks;
 - an article from the website ‘www.macrumors.com’ and articles from the magazines *Forbes* (2012, 2015), *The Telegraph* (2012) and *Time* (2015) relating to the applicant;
 - articles appearing in the magazines *Wall Street Journal* (1998), *Forbes* (2011) and *Advertising Age* (1998), printouts from the websites of the Effie and Emmy Awards and photos taken from the book *Think different* (1998) containing information on the marketing campaign run under the contested marks;
 - numerous articles published between 1997 and 2016 containing information on the applicant and on the advertising campaign ‘THINK DIFFERENT’, ‘THINK DIFFERENT’ parodies and the Broadway musical comedy ‘Nerds’;
 - annual reports for 2009, 2010, 2013 and 2015.
- 16 On 31 May 2017, the intervener submitted observations on the evidence submitted by the applicant. The applicant responded to those observations on 31 October 2017.
- 17 On 16 March 2018, the intervener, with the aim of demonstrating the rather subordinate position of the contested marks on the packaging of an iMac desktop computer, produced several photographs of that packaging as a whole, including the label referred to in paragraph 15 above.

- 18 By decisions of 24 August 2018, the Cancellation Division revoked the contested marks in respect of all the goods concerned in Class 9, with effect from 14 October 2016.
- 19 On 17 October 2018, the applicant filed three notices of appeal with EUIPO, pursuant to Articles 66 to 71 of Regulation 2017/1001, against the three decisions of the Cancellation Division. On 21 December 2018, it submitted pleadings setting out the grounds of appeal, to which were attached additional evidence, including a witness statement from the director of its legal department, photographs of the packaging of an iMac desktop computer bearing the contested marks and a printout from its website containing a list of all iMac product numbers together with the date on which they were first placed on the market.
- 20 By the contested decisions, the Fourth Board of Appeal dismissed the appeals. In particular, first of all, it found that, the first contested mark having been registered on 6 September 1999, the second contested mark on 18 November 1999, the third contested mark on 8 May 2006 and the three applications for revocation having been filed on 14 October 2016, the applicant had to furnish proof of genuine use of those marks in the European Union during the five years preceding that date, that is to say, from 14 October 2011 to 13 October 2016. Next, it observed that the applicant distinguished two periods of use of the contested marks, namely, first, the use of the contested marks in a marketing campaign from 1997 to 2000 for iMac computers and, second, the use on the box packaging of iMac computers since 2009, and throughout the relevant period. With regard to the first period, it noted that the marketing campaign predated the relevant period by more than 10 years and could not therefore be taken into account. Moreover, the occasional use of the contested marks on the applicant's website during the relevant period to commemorate famous people or special events was an isolated and ephemeral use. With regard to the second period, the Board of Appeal, after having specified that the evidence submitted by the applicant related only to computers and computer peripherals in Class 9, found that proof of genuine use of the contested marks for those goods had not been provided, since the images provided showed use of the contested marks in a single place on the box packaging, in rather small script next to the list of technical specifications. It added that, in view of the highly technical nature of the goods concerned as well as the length of the text on the packaging of the iMac computers, written in small letters, the relevant public would perceive the elements 'think different' as a promotional message inviting it to think differently, in other words, to 'think outside the box'. Last, the Board of Appeal reached that conclusion without considering it necessary to assess whether the worldwide sales figures for iMac computers since 2009 were sufficient to demonstrate genuine use of the contested marks.

Forms of order sought

- 21 The applicant requests the Court to:
- annul the contested decisions;
 - order EUIPO and the intervener to pay the costs.
- 22 EUIPO and the intervener contend that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.

Law

- 23 After hearing the parties' views in that regard at the hearing, the Court decided that it was appropriate to join the present cases for the purposes of the judgment, in accordance with Article 68(1) of the Rules of Procedure of the General Court.

Scope of the dispute

24 At the hearing, the applicant conceded, in response to a question from the Court, that it had not put forward any argument or evidence concerning the part of the goods in Class 9 listed in paragraph 27 of the contested decisions, namely, for the first contested mark, ‘printers, facsimile machines, answering machines, telephone-based information retrieval systems; fonts, typefaces, type designs and symbols, all recorded electronically or embodied in computer software; chips, discs and tapes bearing or for recording computer programs and software; random access memory, read only memory; solid state memory apparatus; electronic communication equipment and instruments; telecommunications apparatus and instruments; computer and electronic games; related computer equipment for use therewith; multimedia products comprising or for use with any of the aforesaid goods; parts and fittings for all the aforesaid goods’ and, for the second and third contested marks, ‘printers; facsimile machines, answering machines, telephone-based information retrieval systems; fonts, typefaces, type designs and symbols, all recorded electronically or embodied in computer software; telecommunications apparatus and instruments; computer and electronic games; related computer equipment for use therewith, and electronic manuals sold therewith; multimedia products comprising or for use with any of the aforesaid goods; parts and fittings for all the aforesaid goods’. That concession was noted formally in the minutes of the hearing.

25 Accordingly, it must be considered that, by its actions before the Court, the applicant calls into question the contested decisions only in so far as they dismiss the three actions in respect of the other goods in Class 9 which are listed in paragraph 26 of those contested decisions, namely, for the first contested mark, ‘computers, computer terminals, keyboards, display units, terminals; modems; disc drives; computer peripherals; communications equipment; adapters, adapter cards, connectors and drivers; blank computer storage media, computer programs, operating systems, computer hardware, software and firmware; computer memory devices; data recordings; cameras; chips, discs and tapes bearing or for recording computer programs and software; random access memory, read only memory; solid state memory apparatus; electronic communication equipment and instruments; interactive products comprising or for use with any of the aforesaid goods; parts and fittings for all the aforesaid goods’ and, for the second and third contested marks, ‘computers, computer terminals, keyboards, display units, terminals; modems; disc drives; computer peripherals; communications equipment; adapters, adapter cards, connectors and drivers; blank computer storage media, computer programs, operating systems, computer hardware, software and firmware; computer memory devices; data recordings; cameras; chips, discs and tapes bearing or for recording computer programs and software; random access memory, read only memory; solid state memory apparatus; electronic communication equipment and instruments; interactive products comprising or for use with any of the aforesaid goods; parts and fittings for all the aforesaid goods’.

Admissibility of evidence submitted for the first time before the Court

26 EUIPO and the intervener contend that the document submitted as Annex A.6 is inadmissible on the ground that it was produced for the first time before the Court. EUIPO states that the applicant had the opportunity to submit that evidence during the administrative procedure but did not do so.

27 While acknowledging that the document submitted as Annex A.6 had not been submitted during the administrative proceedings before EUIPO, the applicant has stated that that annex was nevertheless admissible since it was responding to a distortion of the facts by the Board of Appeal relating to the level of attention of the public and to the way in which the relevant goods were purchased. It cites in that regard the judgment of 12 September 2007, *Koipe v OHIM – Aceites del Sur (La Española)* (T-363/04, EU:T:2007:264, paragraphs 76 and 77).

28 It is apparent from the case-law that the purpose of actions brought before the General Court is to review the legality of decisions of the Boards of Appeal of EUIPO, as referred to in Article 72 of Regulation 2017/1001, with the result that it is not the Court’s function to review the facts in the light of documents which have been produced for the first time before it (see judgment of 27 February 2018, *Gramberg v EUIPO – Mahdavi Sabet (Case for a mobile phone)*, T-166/15, EU:T:2018:100, paragraph 17 and the case-law cited).

29 In the present case, the applicant submitted, in Annex A.6 to the applications, an expert report on the factual circumstances surrounding the purchase of IT products such as computers and, in particular,

iMac computers.

- 30 It is not disputed that the expert report submitted as Annex A.6 was produced for the first time before the Court, notwithstanding the fact that the applicant had the opportunity to produce such a report during the administrative procedure. It should be noted in particular that, since the Cancellation Division had indicated, in its decisions of 24 August 2018, that the contested marks were displayed on the packaging of iMac computers ‘in rather small characters’, it was for the applicant, where appropriate, if such had been its intention, to present, before the Board of Appeal, the arguments and documents capable of calling that assessment into question.
- 31 As regards the applicant’s argument based on the judgment of 12 September 2007, *La Española* (T-363/04, EU:T:2007:264, paragraphs 76 and 77), it must be stated that the circumstances of that case cannot be transposed to the present one. It is apparent from paragraphs 76 and 77 of that judgment that, first, in the contested decision in that case, the Board of Appeal had not provided any explanation in support of its analysis of practices in a given economic sector and, second, that the document produced before the Court, namely a ‘notarised statement authenticating a photographic dossier’, was intended to establish that that analysis of the practices in the sector was incorrect. By contrast, in the contested decisions in the present case, the Board of Appeal set out its reasons for considering that the use of the contested marks in a single place on the box packaging could not be regarded as genuine in the light of the characteristics of that use, in particular its size and location. Furthermore, in the present case, the expert report submitted as Annex A.6 relates to the factual circumstances surrounding the purchase of IT products such as computers, and, in particular, iMac computers. If the applicant considered such explanations to be necessary in order to assess the evidence adduced before the adjudicating bodies of EUIPO, it was for it to adduce such an expert report before those bodies. However, it is not for the Court to re-examine that evidence on the basis of information which the applicant did not provide to the adjudicating bodies of EUIPO in order to demonstrate genuine use of the contested marks.
- 32 Consequently, in the light of the case-law cited in paragraph 28 above, the document referred to must be rejected as inadmissible.

Substance

- 33 In support of the actions, the applicant puts forward two pleas, the first alleging infringement of Article 58(1)(a) of Regulation 2017/1001, read in conjunction with Article 18 of the same regulation, the second alleging infringement of Article 94(1) of Regulation 2017/1001.
- 34 Given the date on which the applications for revocation at issue were filed, namely 14 October 2016, which is decisive for the purposes of identifying the substantive law applicable, the present dispute is governed by the substantive provisions of Regulation No 207/2009 (see, to that effect, judgments of 6 June 2019, *Deichmann v EUIPO*, C-223/18 P, not published, EU:C:2019:471, paragraph 2, and of 3 July 2019, *Viridis Pharmaceutical v EUIPO*, C-668/17 P, EU:C:2019:557, paragraph 3). Furthermore, in so far as, according to settled case-law, procedural rules are generally held to apply on the date on which they enter into force (see judgment of 11 December 2012, *Commission v Spain*, C-610/10, EU:C:2012:781, paragraph 45 and the case-law cited), the dispute is governed by the procedural provisions of Regulation 2017/1001. In addition, having regard to the fact that the actions before the Board of Appeal were brought after 1 October 2017 – on 17 October 2018 – it follows from Article 82(2)(j) of Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation 2017/1001 and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018 L 104, p. 1) that it is the procedural provisions of Title V of Delegated Regulation 2018/625, in particular Article 26(1), that applied to the appeal procedure before the Board of Appeal.
- 35 Consequently, in the present case, so far as concerns the substantive rules, the references made by the Board of Appeal in the contested decisions and by the parties in their written pleadings to Article 18 and to Article 58(1)(a) of Regulation 2017/1001 must be understood as referring to Article 15 and Article 51(1)(a) of Regulation No 207/2009, the content of which is identical.

Second plea in law, alleging infringement of Article 94(1) of Regulation 2017/1001

36 The second plea raised by the applicant is divided into two parts, the first alleging infringement of the right to be heard, the second alleging breach of the obligation to state reasons.

– *First part of the second plea, alleging infringement of the right to be heard*

37 The applicant complains that the Board of Appeal infringed its right to be heard by basing the three contested decisions on arguments and evidence on which it had not had an opportunity to comment. In that regard, it criticises, in particular, the Board of Appeal for not having allowed it the opportunity to comment on photographs of how iMac computers appear in shops, produced for the first time by the intervener in its observations in reply to the appeal of 9 May 2019, or on the factual circumstances of the process for purchasing iMac computers.

38 EUIPO and the intervener dispute those arguments.

39 The second sentence of Article 94(1) of Regulation 2017/1001 provides that decisions of EUIPO are to be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.

40 That provision constitutes a specific application of the general principle of respect for the rights of the defence, enshrined, moreover, in Article 41(2)(a) of the Charter of Fundamental Rights of the European Union, according to which a person whose interests are affected by a decision of a public authority must be given the opportunity effectively to make his or her point of view known.

41 The right to be heard extends to all the factual and legal material which forms the basis for the decision, but not to the final position which the authority intends to adopt. That right does not require that, before taking a final position on the assessment of the evidence submitted by a party, the Board of Appeal of EUIPO must offer that party a further opportunity to comment on that evidence (see judgment of 4 March 2020, *Tulliallan Burlington v EUIPO*, C-155/18 P to C-158/18 P, EU:C:2020:151, paragraph 94 and the case-law cited).

42 In the present case, it must be held that, contrary to what the applicant claims, the Board of Appeal did not rely on evidence produced by the intervener for the first time in its observations in reply to the appeal of 9 May 2019. It is apparent from paragraphs 5 and 31 of the contested decisions that the Board of Appeal took into account the photographs of how iMac computers appear in shops submitted by the intervener in the context of the observations of 16 March 2018 before the Cancellation Division referred to in paragraph 17 above. Consequently, the applicant had the opportunity to submit its observations on those photographs before the Board of Appeal.

43 As regards the applicant's criticism of the Board of Appeal for not having invited it to submit observations on the factual circumstances of the process for purchasing iMac computers, it is worth pointing out that that fact was raised by the intervener in its observations of 9 May 2019 in reply to the appeal and, in particular, to the applicant's statement of grounds of appeal dated 21 December 2018.

44 In accordance with the procedure laid down in Delegated Regulation 2018/625, after the submission of observations in response to the other party in the proceedings, the applicant had the opportunity to request authorisation from the Board of Appeal to submit a reply on those observations, including on any new evidence submitted.

45 In the present case, it is sufficient to note that, following receipt of the observations of 9 May 2019, the applicant did not request authorisation to submit a reply, as a means available to it in order to submit its observations on the new arguments and the new evidence adduced by the intervener in its response.

46 In those circumstances, no infringement of the right to be heard can be found in this case (see, to that effect, judgment of 16 June 2021, *Fidia farmaceutici v EUIPO – Ioulia and Irene Tseti Pharmaceutical Laboratories (HYAL)*, T-215/20, not published, EU:T:2021:371, paragraphs 88 and 89).

47 It follows that the first part of the second plea must be rejected.

– *Second part of the second plea, alleging breach of the obligation to state reasons*

48 The applicant claims that the three contested decisions were vitiated by an inadequate statement of reasons in three respects. The Board of Appeal failed (i) to explain, in paragraph 31 of those decisions, why consumers would probably not examine the packaging of iMac computers and their technical specifications, (ii) to give reasons, in paragraph 32 of those decisions, for the failure to take into account the perception of the non-English-speaking public, and (iii) to set out, in paragraph 33 of those decisions, the reasons why evidence showing the immense level of recognition of the term ‘think different’ should be disregarded, and why the word elements of the contested marks contained ‘nothing more than [a] promotional promise’.

49 EUIPO and the intervener dispute that line of argument.

50 It should be recalled that the obligation to state reasons, an obligation incumbent on the Board of Appeal and which follows inter alia from Article 94(1) of Regulation 2017/1001, has the dual purpose of enabling interested parties to know the purported justification for the measure taken so as to be able to defend their rights and of enabling the Courts of the European Union to exercise their jurisdiction to review the legality of the decision (see judgment of 19 December 2019, *Currency One v EUIPO – Cinkciarz.pl (CINKCIARZ)*, T-501/18, EU:T:2019:879, paragraph 67 and the case-law cited).

51 The obligation to state reasons is an essential procedural requirement which must be distinguished from the question whether the reasons given are correct, the latter being a matter going to the substantive legality of the contested measure. The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds are vitiated by errors, the latter will vitiate the substantive legality of the decision, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect (see judgments of 22 September 2016, *Pensa Pharma v EUIPO*, C-442/15 P, not published, EU:C:2016:720, paragraph 35 and the case-law cited, and of 14 July 2017, *Sata v EUIPO (4600)*, T-214/16, not published, EU:T:2017:501, paragraph 59 and the case-law cited). It follows that complaints and arguments intended to deny that the measure at issue is well founded are irrelevant in the context of a plea alleging the lack or inadequacy of a statement of reasons (see, to that effect, judgment of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d’agglomération du Douaisis v Commission*, T-267/08 and T-279/08, EU:T:2011:209, paragraph 45 and the case-law cited).

52 In the present case, contrary to what the applicant claims, the contested decisions set out clearly the reasons why the Board of Appeal considered that the evidence submitted did not enable genuine use ‘as a trade mark’ to be established during the relevant period.

53 The applicant’s criticisms set out in paragraph 48 above concerning the explanations that the Board of Appeal allegedly failed to provide as part of the reasoning contained in paragraphs 31 to 33 of the contested decisions overlap with the criticisms concerning the merits of that reasoning, which will be analysed in the examination of the first plea below. No breach of the obligation to state reasons can therefore be found in that regard.

54 It follows that, contrary to what the applicant claims, the Board of Appeal stated to the requisite legal standard, in the contested decisions, the reasons as to the question whether the applicant had adduced proof of genuine use of the contested marks.

55 The second part of the second plea must therefore be rejected, as must, therefore, the second plea in its entirety.

First plea in law, alleging infringement of Article 51(1)(a) of Regulation No 207/2009, read in conjunction with Article 15 of the same regulation

56 By this plea, the applicant claims, first, that the Board of Appeal failed to take due account of the level of attention of the relevant public or of the significance of the visual inspection of the packaging of iMac computers and of their technical specifications at the time of their purchase. Second, the Board of Appeal erred in holding, in paragraph 32 of the contested decisions, that the applicant had provided sales figures relating to the use of the contested marks only for certain Member States of the European

Union, namely the United Kingdom, Finland, Denmark and Germany. Third, the applicant disputes the Board of Appeal's finding that it was for the applicant to demonstrate that the contested marks were used in isolation and affixed to a particular place on the goods or their packaging and in large print. In so doing, the Board of Appeal, according to the applicant, introduced new criteria for proving genuine use not provided for either by Regulation No 207/2009 or by the case-law.

57 EUIPO and the intervener dispute all the applicant's arguments.

58 Under Article 51(1)(a) of Regulation No 207/2009, the rights of the proprietor of the EU trade mark are to be declared to be revoked, on application to EUIPO or on the basis of a counterclaim in infringement proceedings, if, within a continuous period of five years, the trade mark has not been put to genuine use in the European Union in connection with the goods or services in respect of which it is registered, and there are no proper reasons for lack of use.

59 In the present case, the first contested mark was registered on 6 September 1999, the second contested mark was registered on 18 November 1999, the third contested mark was registered on 8 May 2006 and the applications for revocation were filed on 14 October 2016. Consequently, since the contested marks had been registered for more than five years at the time when those applications were filed, the applicant had to prove genuine use of those marks in connection with the goods concerned during the five years preceding that latter date, namely from 14 October 2011 to 13 October 2016.

60 In proceedings for the revocation of a mark, it is, in principle, for the proprietor of the mark to establish genuine use of that mark (see judgment of 23 January 2019, *Klement v EUIPO*, C-698/17 P, not published, EU:C:2019:48, paragraph 57 and the case-law cited).

61 In that regard, it is apparent from the case-law that there is genuine use of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark (see judgment of 8 July 2004, *Sunrider v OHIM – Espadafor Caba (VITAFRUIT)*, T-203/02, EU:T:2004:225, paragraph 39 and the case-law cited).

62 In interpreting the concept of genuine use, account must be taken of the fact that the rationale for the requirement that the earlier mark must have been put to genuine use is not to assess commercial success or to review the economic strategy of an undertaking, nor is it intended to restrict trade mark protection to the case where large-scale commercial use has been made of the marks (see judgment of 8 July 2004, *MFE Marienfelde v OHIM – Vétoquinol (HIPOVITON)*, T-334/01, EU:T:2004:223, paragraph 32 and the case-law cited).

63 When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the products or services protected by the mark, the nature of those products or services, the characteristics of the market and the scale and frequency of use of the mark (see judgment of 8 July 2004, *VITAFRUIT*, T-203/02, EU:T:2004:225, paragraph 40 and the case-law cited).

64 To examine whether an earlier trade mark has been put to genuine use, an overall assessment must be carried out, which takes into account all the relevant factors of the particular case (see judgment of 8 July 2004, *VITAFRUIT*, T-203/02, EU:T:2004:225, paragraph 42 and the case-law cited).

65 Genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but has to be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (see judgment of 15 September 2011, *centrotherm Clean Solutions v OHIM – Centrotherm Systemtechnik (CENTROTHERM)*, T-427/09, EU:T:2011:480, paragraph 30 and the case-law cited).

66 In the assessment of the evidence of genuine use of a mark, each piece of evidence is not to be analysed separately, but together, in order to determine the most likely and coherent significance. Thus,

even if the probative value of an item of evidence is limited to the extent that, individually, it does not show with certainty whether, and how, the goods concerned were placed on the market, and that item of evidence is therefore not in itself decisive, it may nevertheless be taken into account in the overall assessment as to whether the use of the contested mark is genuine. That is the case, for example, when that item of evidence is accompanied by other evidence (see judgment of 30 January 2020, *Grupo Textil Brownie v EUIPO – The Guide Association (BROWNIE)*, T-598/18, EU:T:2020:22, paragraph 51 and the case-law cited).

67 It is in the light of those principles that the arguments put forward by the applicant must be examined.

– *The level of attention of the relevant public, the purchasing process and the significance of the technical specifications of the goods at issue*

68 The applicant complains that the Board of Appeal did not take into account the high level of attention of the relevant public when assessing whether the contested marks had been put to genuine use. In particular, it claims that the Board of Appeal disregarded the case-law according to which consumers pay a high level of attention when purchasing durable and highly technical goods and, at the same time, closely inspect their technical specifications. The Board of Appeal thus concluded, wrongly, that the relevant public would carelessly overlook the top part of the packaging of iMac computers displaying their specifications.

69 Furthermore, according to the applicant, the Board of Appeal failed to take into account the fact that computers and computer accessories in Class 9 are often sold ‘as seen’ on the shelves of department or specialist stores, where consumers have the opportunity to inspect their packaging visually before purchasing them. It adds that, in those stores, in a typical configuration, those goods are sold on a self-service basis, as the new photographs in the application show, and in that case consumers rely primarily on the original packaging.

70 EUIPO and the intervener dispute that line of argument.

71 As regards the level of attention of the relevant public, it must be pointed out at the outset that the parties do not dispute that computers and computer accessories in Class 9 are highly technical and innovative goods, as the Board of Appeal noted in paragraph 33 of the contested decisions. Nor is it disputed that the consumer will display a high level of attention when purchasing such goods.

72 It is important to note, however, that, even if the Board of Appeal did not consider the high level of attention of the relevant public for personal computers and computer accessories in Class 9, that cannot have any bearing on the conclusion set out in paragraph 31 of the contested decisions according to which the contested marks accounted for only a rather insignificant space next to the barcode. In any event, the applicant has not demonstrated that such consideration would have led the Board of Appeal to find that the consumer would examine the packaging in any detail and that he or she would pay particular attention to the contested marks.

73 As regards the process of purchasing the goods at issue, it should first be noted that, in certain cases, computers and computer accessories in Class 9 may indeed be sold on a self-service basis to consumers, displayed on shelves. Next, in other cases, as the intervener points out, they are stored in a place which is not directly accessible to the public (for example, in their packaging or in a storeroom). Consumers may, however, try out the display models that are presented without their packaging on the table and consult the technical sheets placed next to each product. Last, those goods may also be purchased online, on the basis of information appearing in special catalogues or on the internet.

74 The applicant’s argument that consumers are always able to inspect the labels affixed to iMac computers visually before purchasing them cannot be accepted without a ruling on the admissibility of the new photographs set out in the application.

75 It is also appropriate to reject the applicant’s argument based on the judgments of 23 September 2011, *NEC Display Solutions Europe v OHIM – C More Entertainment (see more)* (T-501/08, not published, EU:T:2011:527, paragraph 53), and of 2 December 2020, *inMusic Brands v EUIPO – Equipson (Marq)* (T-687/19, not published, EU:T:2020:582, paragraph 98). After all, that case-law, relating to the

importance to be attached to the visual and phonetic similarities of the signs at issue in the assessment of the likelihood of confusion, is not relevant to the examination of the genuine use of the contested marks.

– *The sales figures for iMac desktop computers throughout the European Union*

76 The applicant complains, in essence, that the Board of Appeal erred in finding that the sales figures for iMac desktop computers provided by the applicant related only to certain Member States of the European Union, namely the United Kingdom, Finland, Denmark and Germany. It claims to have sold more than four million iMac computers under the mark THINK DIFFERENT during the relevant period throughout the European Union, as is allegedly proved by the witness statement of the director of its legal department, dated 23 March 2017.

77 In that regard, it must be borne in mind that, according to settled case-law, in order to assess the evidential value of a document, it is necessary to verify the likelihood and the accuracy of the information which that document contains. It is necessary to take account of, inter alia, the origin of the document, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable (see judgment of 8 May 2017, *Les Éclaires v EUIPO – L'éclaireur International (L'ECLAIREUR)*, T-680/15, not published, EU:T:2017:320, paragraph 72 and the case-law cited; see also, to that effect, judgment of 16 December 2008, *Deichmann-Schuhe v OHIM – Design for Woman (DEITECH)*, T-86/07, not published, EU:T:2008:577, paragraph 47 and the case-law cited).

78 In the present case, as EUIPO correctly submits, the witness statement was drawn up by the director of the applicant's legal department and therefore cannot have the same reliability and credibility as a statement from a third party or a person who is independent of the company in question. Accordingly, that statement is insufficient in itself and merely provides an indication which must be confirmed by further probative evidence (see, to that effect, judgment of 21 September 2017, *Repsol YPF v EUIPO – Basic (BASIC)*, T-609/15, EU:T:2017:640, paragraph 64 and the case-law cited).

79 In that regard, it should be noted that, according to the witness statement of 23 March 2017, more than four million iMac computers under the mark THINK DIFFERENT were actually sold throughout the European Union during the relevant period. Those sales figures contained in the witness statement are not, however, confirmed by any further probative evidence. Indeed, the annual reports for the years 2009, 2010, 2013 and 2015, attached to the witness statement of 23 March 2017, contain only information on the net worldwide sales of iMac computers. They do not provide any details as to the sales figures of iMac computers in the European Union.

80 Accordingly, it is appropriate to reject the applicant's complaint that the Board of Appeal wrongly failed to take into account the sales figures of iMac computers throughout the European Union, put forward in the witness statement of 23 March 2017.

– *The application of incorrect and inadequate criteria of genuine use of the contested marks*

81 In essence, the applicant criticises the Board of Appeal for having examined the evidence relating to the genuine use of the contested marks in respect of the goods concerned based on incorrect criteria.

82 In the first place, the applicant claims that, contrary to the Board of Appeal's reasoning, the joint use of multiple trade marks on the packaging of iMac desktop computers cannot, in itself, undermine the function of the contested marks as a means of identifying the goods concerned. In its view, the contested marks were used jointly, but autonomously, with the other marks affixed to the packaging of iMac computers in so far as they were set clearly apart from the other marks on the packaging and at sufficient distance from the nearest mark, namely Macintosh.

83 In the second place, the applicant criticises the Board of Appeal for having taken into account, in its assessment of the genuine nature of the use of the contested marks, new criteria, contrary to established case-law. According to the applicant, there is no case-law requiring it to be demonstrated that the contested marks have been affixed to a particular place on the packaging of the product concerned and that they appear in large letters. In support of its argument, it relies on the judgments of 27 September

2007, *La Mer Technology v OHIM – Laboratoires Goëmar (LA MER)* (T-418/03, not published, EU:T:2007:299, paragraph 83); of 30 November 2009, *Esber v OHIM – Coloris Global Coloring Concept (COLORIS)* (T-353/07, not published, EU:T:2009:475, paragraph 49); and of 15 December 2016, *Aldi v EUIPO – Cantina Tollo (ALDIANO)* (T-391/15, not published, EU:T:2016:741, paragraphs 29 to 31).

- 84 In the third place, the applicant disputes the Board of Appeal's assessment that the contested marks will be understood by the relevant public as a 'promotional message'. From a legal point of view, it submits, on the one hand, that the reasoning in paragraphs 32 and 33 of the contested decisions is confusing in that it does not make it clear why the placement of the contested marks near the mark 'Macintosh' would cause them to be perceived as a promotional message. On the other hand, in revocation proceedings for lack of genuine use of a registered trade mark, it is not possible to find an absolute ground for refusal, such as lack of distinctive character. From a factual point of view, the applicant submits, first, that the Board of Appeal's conclusion as to the distinctiveness of the contested marks was contradicted by a body of evidence, in particular the witness statement of the director of its legal department attesting to the great success of the 'THINK DIFFERENT' advertising campaign, but also by numerous press articles showing that, after the launch of that campaign in 1997, the contested marks had quickly become associated with the applicant's image. Second, according to the applicant, the fact that there is a dispute between the intervener and itself, concerning trade marks other than those at issue, is indicative of the distinctiveness of the contested marks.
- 85 EUIPO and the intervener dispute that line of argument.
- 86 First, as regards the use of the contested marks jointly with other word elements, the Board of Appeal noted, in paragraph 32 of the contested decisions, that the contested marks were not used on the packaging on their own, but in conjunction with the word 'macintosh', the trade mark used to designate the personal computers manufactured by the applicant, which was later shortened to the word 'mac'. It also stated that the expression 'think different', combined with the term 'macintosh', would be understood by the relevant public as a promotional message inviting it to think differently.
- 87 It is true, as is apparent from the case-law relied on by the applicant, that there is no precept in the EU trade mark system that obliges its proprietor to prove the use of its earlier mark on its own, independently of any other mark or any other sign. Therefore, the case could arise where two or more trade marks are used jointly and autonomously, with or without the name of the manufacturer's company (see, to that effect, judgments of 8 December 2005, *Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH)*, T-29/04, EU:T:2005:438, paragraphs 33 and 34; of 14 December 2011, *Völkl v OHIM – Marker Völkl (VÖLKL)*, T-504/09, EU:T:2011:739, paragraph 100; and of 6 November 2014, *Popp and Zech v OHIM – Müller-Boré & Partner (MB)*, T-463/12, not published, EU:T:2014:935, paragraph 43). Thus, as the applicant has argued, the joint use of another mark with the contested marks cannot, in itself, undermine the function of that other mark as a means of identifying the goods concerned.
- 88 However, a registered trade mark that is used in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1) of Regulation No 207/2009 (see, by analogy, judgment of 18 April 2013, *Colloseum Holding*, C-12/12, EU:C:2013:253, paragraph 35).
- 89 In the present case, it should be noted that, contrary to what the applicant claims, the Board of Appeal did not base its conclusions as to the lack of genuine use of the contested marks solely on the finding of the presence of the word mark Macintosh on the packaging of iMac computers next to the contested marks.
- 90 On the contrary, as is apparent from paragraphs 20 and 30 to 33 of the contested decisions, the main ground on which the Board of Appeal based its conclusion is that some of the evidence produced by the applicant to that end falls outside the relevant period and that the images produced by the applicant show the contested marks in a single place on the box packaging and that that use alone could not be regarded as genuine in the light of the characteristics of that use, in particular its size and location.

- 91 It follows that the Board of Appeal in no way called into question the case-law on the possibility of joint use of multiple trade marks cited in paragraph 87 above.
- 92 Second, as regards the requirements linked to the positioning and size of the contested marks on the packaging, it is apparent from the case-law cited in paragraph 61 above that genuine use of a mark can be found only where that mark is used to guarantee the identity of the origin of the goods or services for which it was registered.
- 93 In the present case, as the photographs of the iMac computer packaging in the file illustrate, the word elements ‘think different’ do not appear on the labels affixed to the box packaging in a way which particularly draws the consumer’s attention. On the contrary, as the Board of Appeal correctly pointed out in paragraph 30 of the contested decisions, those word elements are placed under the technical specifications of the iMac computers, and just above the barcode in a relatively small character size. That expression is, moreover, accompanied by the word ‘macintosh’ of the same size and written in the same font.
- 94 It must therefore be concluded that the way in which the contested marks are used on iMac computer packaging does not ground the conclusion that they have been used as trade marks, that is to say, in accordance with their essential function of giving an indication of the commercial origin of the goods concerned.
- 95 Furthermore, the case-law cited by the applicant in support of its line of argument is irrelevant to the present case, since it relates to factual circumstances which are different from those of the case at hand. In the judgment of 27 September 2007, *LA MER* (T-418/03, not published, EU:T:2007:299, paragraph 83), the Court, after having found that the mark LABORATOIRE DE LA MER appeared underneath the graphic representation of the product, concluded that a minute inspection of the packaging of the goods made it possible to read clearly the trade mark concerned. By contrast, in the present cases, the expression ‘think different’ of the contested marks appears simply after a long list describing the technical specifications of the iMac product. In addition, it should be noted that the judgment of 30 November 2009, *COLORIS* (T-353/07, not published, EU:T:2009:475) arose out of a context different from that of the present case, in that the term ‘coloris’, appearing on the labels to be affixed to metallic cans for colorants, was significantly larger than that of the other word elements. Last, unlike the present case, in the judgment of 15 December 2016, *ALDIANO* (T-391/15, not published, EU:T:2016:741, paragraph 31), the earlier mark, which also constituted the applicant’s company name, was affixed to the packaging of the alcoholic beverages at issue. Moreover, the factual context of those three cases was different from that of the present case, in so far as it concerned products which were very different from the technological products in the present case, namely cosmetics, paint products and alcoholic beverages, sold in different shops and for a substantially lower amount.
- 96 Third, as regards the assessment of the distinctive character of the contested marks, the Board of Appeal found, in paragraph 32 of the contested decisions, that those marks, combined with the Macintosh mark, would be understood as a promotional message inviting consumers to think differently, in other words, to ‘think outside the box’. In paragraph 33 of those contested decisions, it stated that the inherent distinctiveness of the contested marks and hence its ability to perform the essential function of a mark – that of identifying the origin of the goods concerned – must be considered to be rather weak, which renders it even less plausible that English-speaking consumers will attribute to it a trade mark function.
- 97 As a preliminary point, it should be borne in mind that, in revocation proceedings for lack of genuine use, the Board of Appeal’s finding as to the distinctive character of the contested marks has no bearing on the question whether, in the present case, the applicant has in fact adduced proof that the contested marks have been used in accordance with their essential function, which, according to the case-law, is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him or her, without any possibility of confusion, to distinguish the goods or services from others which have another origin (see judgment of 8 June 2017, *W. F. Gözze Frottierweberei and Gözze*, C-689/15, EU:C:2017:434, paragraph 41 and the case-law cited).

- 98 In any event, in the first place, in so far as the applicant criticises the Board of Appeal for having concluded that the contested marks were devoid of any distinctive character, it must be held that that argument is based on a misreading of the contested decisions. As EUIPO correctly points out, the Board of Appeal expressly stated, in paragraph 33 of those decisions, that the inherent distinctiveness of the words ‘think different’ was ‘rather weak’.
- 99 It follows that the Board of Appeal did not deny the words ‘think different’ any distinctive character, but attributed to them a rather weak distinctive character.
- 100 In the second place, and contrary to what the applicant claims, the Board of Appeal’s conclusion as to the distinctiveness of the contested marks is not contradicted by a body of evidence aimed at proving that they have been put to genuine use. It is true that, among the items of evidence of genuine use filed with EUIPO are numerous press articles noting the success of the advertising campaign entitled ‘THINK DIFFERENT’ at the time of its launch in 1997. However, it must be pointed out, as the Board of Appeal noted in paragraphs 19 and 20 of the contested decisions, that those press articles predate the relevant period by over 10 years.
- 101 In the third place, as regards the applicant’s argument alleging the existence of a dispute between the parties concerning a trade mark other than that which is the subject of the present action, it must be noted, as the applicant itself acknowledges, that that argument, which seeks to demonstrate the distinctiveness of the contested marks, is irrelevant in revocation proceedings for lack of genuine use of the contested marks brought pursuant to Article 58(1)(a) of Regulation No 207/2009.
- 102 In the light of all the foregoing considerations, the first plea in law must be rejected and, consequently, the actions must be dismissed in their entirety.

Costs

- 103 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings.
- 104 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by EUIPO and the intervener.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

- 1. Joins Cases T-26/21 to T-28/21 for the purposes of the judgment;**
- 2. Dismisses the actions;**
- 3. Orders Apple Inc. to pay the costs.**

Marcoulli

Iliopoulos

Norkus

Delivered in open court in Luxembourg on 8 June 2022.

E. Coulon

S. Papasavvas

* Language of the case: English.