



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2011 TMOB 211
Date of Decision: 2011-11-03

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Pacific Western Brewing Company Ltd.
against registration No. TMA528,477 for the trade-mark
MYTHOS & Design in the name of Mythos Brewery S.A.**

[1] At the request of Pacific Western Brewing Company Ltd. (the Requesting Party), the Registrar of Trade-marks issued a notice under s. 45 of the *Trade-marks Act* R.S.C. 1985, c. T-13 (the Act) on June 22, 2009 to Mythos Brewery S.A. (the Registrant), the registered owner of registration No. TMA528,477 for the trade-mark MYTHOS & Design (the Mark), shown here:



[2] In accordance with Rule 28 of the *Trade-marks Regulations*, the Mark is lined for colour and colour is claimed as a feature, as follows: "The colours green, red and gold are claimed as

features of the trade-mark. All the wording in the trade-mark is in the colour gold with the exception of the words Northern Greece Breweries which is in the colour black.”

[3] The Mark is registered for use in association with “beer” (the Wares).

[4] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares specified in the registration 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 between June 22, 2006 and June 22, 2009 (the Relevant Period).

[5] The relevant definition of “use” in association with wares is set out in s. 4(1) of the Act:

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

[6] It is well established that the purpose and scope of s. 45 of the Act is to provide a simple, summary and expeditious procedure for removing “deadwood” from the register and as such, the evidentiary threshold that the registered owner must meet is quite low. As stated by Mr. Justice Russell in *Performance Apparel Corp. v. Uvex Toko Canada Ltd.* (2004), 31 C.P.R. (4th) 270 (F.C.) at 282:

[...] We know that the purpose of s. 45 proceedings is to clean up the "dead wood" on the register. We know that the mere assertion by the owner that the trade mark is in use is not sufficient and that the owner must “show” how, when and where it is being used. We need sufficient evidence to be able to form an opinion under s. 45 and apply that provision. At the same time, we need to maintain a sense of proportion and avoid evidentiary overkill. We also know that the type of evidence required will vary somewhat from case to case, depending upon a range of factors such as the trade-mark owners’ business and merchandising practices.

[7] In response to the Registrar's notice, the Registrant filed the affidavit of Anna Simantira, Marketing Senior Brand Manager of the Registrant (the Affiant), sworn on January 12, 2010. Both parties filed written representations; an oral hearing was not requested.

[8] The Affiant states that the Registrant is the second largest brewery in Greece, best known for its MYTHOS brand beer, brewed at the company's production plant in Thessaloniki, Greece since 1997. The beer is sold in Greece and is exported internationally, including to Canada, and is available in bottles and cans. The Registrant's normal course of trade in Canada is to sell the beer to consumers through liquor distributors such as the Liquor Control Board of Ontario and the Alberta Gaming and Liquor Commission.

[9] In support of the Registrant's assertion of use of the Mark, the Affiant provides sales data by province for 2006 to 2008, attesting that the Registrant sold 24 x 330ml bottle cases of MYTHOS brand beer in Canada in the following quantities: 2006 – 7,900; 2007 – 13,376; and 2008 – 11,768. In addition, the Affiant provides sales figures by province; I note, for example, that total sales in Canada were well over \$100,000 in each of 2007 and 2008.

[10] The Affiant also provides representative invoices, all of which are dated within the Relevant Period, at Exhibits B and F. The Exhibit B invoices bear identical invoice and shipment dates and both sets of invoices demonstrate sales to distributors in the normal course of trade in Canada. I note that the Mark (in black and white with other minor variations) appears prominently in the centre of each invoice directly below the product description; each invoice only bears one product listing, namely, for MYTHOS brand beer.

[11] The Requesting Party submits that the mark on the invoices does not provide the necessary association between the subject Mark and the wares, as use of a trade-mark on an invoice does not necessarily mean that the mark is associated with any of the particular items listed thereon. In any event, the Requesting Party notes that in addition to appearing in black and white (i.e., absent the colour as claimed in the registration), the octagon background and the words TRADITIONAL and HELLENIC LAGER BEER do not appear, and it submits that these deviations from the Mark as registered are significant such that the dominant features have not been maintained.

[12] With respect to the first submission, as noted above, only one item (MYHTOS brand beer) appears on each invoice, and the Mark appears prominently in the middle of the invoice. The requisite association can thus be inferred, as this is not a case where several products appear on an invoice, making it unclear whether the mark is associated with any particular item. As for the submissions regarding deviation, I agree with the Registrant that the dominant features of the Mark as registered, in particular the stylized word MYTHOS on a circle background, the unicorn crest and the grain sheaf, have been preserved. Furthermore, a claim to colour in a registration does not necessarily make colour a dominant feature of a mark [*Novopharm v. Novo Nordisk A/S* (2005) 43 C.P.R. 4th 305 (T.M.O.B.)], and while there are minor visual differences between the Mark as registered and the Mark as used, I conclude that these minor variations would not mislead an unaware purchaser [see *Unilever Canada Ltd. v. G.H. Wood & Wyant Inc.* (1997), 75 C.P.R. (3d) 533 (T.M.O.B.)].

[13] In any event, also provided at Exhibit C are representative photos of labels and bottle caps bearing variations of the Mark used during the Relevant Period. An example of the Mark as it appeared (in colour) on a beer can label is reproduced below (in greyscale):



[14] Notwithstanding the deviations from the Mark as registered, I note that in addition to the colours of the label being generally consistent with the colour claim, again, the dominant features of the Mark as registered are maintained; accordingly, I would come to the same conclusion as above that these variations would not mislead an unaware purchaser.

[15] In view of the above, I am satisfied that the Registrant has evidenced use of the Mark in association with the Wares within the meaning of s. 45 and s. 4(1) of the Act during the Relevant Period.

[16] Accordingly, pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will be maintained in compliance with the provisions of s. 45 of the Act.

P. Heidi Sprung
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office