

SECTION 45 PROCEEDINGS
TRADE-MARK: FARMHAND
REGISTRATION NO.: TMA 322,387

On October 16, 1996 at the request of AGCO Corporation, the Registrar forwarded a Section 45 notice to Agristar Computer Services Ltd., the registered owner of the above-referenced trade-mark registration.

The trade-mark FARMHAND is registered for use in association with the following wares:

Technical manuals, brochures, periodicals, computer software, computer programs and stored data accessible by computer software, all for the assistance of farmers and the agricultural supply industry.

In response to the Registrar's notice, the registrant furnished a statutory declaration of Sam Fialkow dated January 10, 1997. The requesting party filed a written argument after which the registrant forwarded a second statutory declaration of Sam Fialkow to the Trade-marks Office. The Trade-marks Office ultimately returned such second statutory declaration to the registrant as the registrant failed to request a retroactive extension of time for the filing of such declaration. The registrant did file a written argument but an oral hearing has not been requested in this proceeding.

Having considered the evidence furnished, I conclude that it fails to show use of FARMHAND as a trade-mark in association with any wares during the relevant period, namely between October 16, 1993 and October 16, 1996.

In his first declaration, Mr. Fialkow, the President of the registrant, states that the trade-mark FARMHAND has been in use in various ways over the years. For example, he says that FARMHAND has been in use in radio, t.v. and print media advertising, at trade fair exhibits and in seminars, and that it is prominently displayed as part of the signage at the registrant's present location and is "featured on all of the brochures and letterhead". He also says that FARMHAND literature has been mailed on a regular basis to prospects and clients throughout North America. He also advises that the wares or merchandises under the trade-mark FARMHAND include all the wares listed in the registration. However, he has not attached any exhibits showing how his company uses the mark.

The requesting party submits that Mr. Fialkow's January 10, 1997 statutory declaration fails to show use of the mark as required under Sections 4 and 45 of the Trade-marks Act and I must agree. In particular, the failure to show use of the trade-mark is fatal to the registrant's case.

Subsection 4(1) of the Trade-marks Act sets out the requirements for use of a mark in association with wares. In order to meet such requirements, the registrant must show both a transfer of the registered wares in the normal course of trade and that the mark was associated with the wares at the time of transfer such that notice of the association was

given to the purchaser. It is not possible for me to conclude on the basis of the declaration that the use that Mr. Fialkow has attested to is in fact use of the mark in association with the registered wares in accordance with Section 4 of the Trade-marks Act.

The written argument filed by the registrant largely comprises statements that are not supported by the evidence in these proceedings, namely the first Fialkow declaration. Consideration cannot be given to facts that are not in evidence.

It is possible that the registrant may in fact have been using the mark during the relevant time period but it has failed to show such use in a statutory declaration or affidavit as required by Section 45. Accordingly, I am obliged to order the expungement of the registration.

Registration No. TMA 322,387 will be expunged in compliance with the provisions of Subsection 45(5) of the Trade-marks Act.

DATED AT TORONTO, ONTARIO THIS 16th DAY OF FEBRUARY, 1999.

Jill W. Bradbury
Hearing Officer
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