



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

Citation: 2010 TMOB 032
Date of Decision: 2010-03-23

**IN THE MATTER OF AN OPPOSITION
by Allan C. Stewart to application
No. 1,222,018 for the trade-mark [The
User] design in the name of Thomas
McIntosh and Emmanuel Madan**

The Pleadings

[1] On June 28, 2004, Thomas McIntosh and Emmanuel Madan (the Applicant) filed an application to register the trade-mark [THE USER] design, application number 1222018, as hereinafter illustrated:

[The User] (the Mark).

Subsequent to an office action issued by an examiner, the Applicant amended the description of the wares and services that now reads as follow:

Art installations (for exhibition in contemporary art festivals and galleries), namely, audiovisual exhibits incorporating a strong electronic component. Sound recordings documenting the audio component of the above-mentioned art installations (the Wares) and

Audiovisual performances (performed in contemporary art festivals and media/electronic art festivals) incorporating a strong electronic component (the Services).

[2] The application is based on use in Canada since October 20, 1998. The application was advertised on December 7, 2005 in the Trade-marks Journal for opposition purposes.

[3] Allan C. Stewart (the Opponent) filed a statement of opposition on February 3, 2006 which was forwarded on June 20, 2006 to the Applicant by the Registrar. On October 19, 2006 the Applicant filed a counter statement denying all grounds of opposition.

[4] The Opponent filed as its evidence the affidavit of Allan C. Stewart while the Applicant filed a joint statutory declaration signed by Thomas McIntosh and Emmanuel Madan. The Opponent filed a second affidavit of Mr. Stewart as his reply evidence. None of the deponents were cross-examined.

[5] Both parties filed written arguments and no oral hearing was held.

The Grounds of Opposition

[6] The grounds of opposition pleaded are:

1. The Application does not comply with the requirements of s. 30(i) of the *Trade-marks Act*, R.S.C. 1985 c. T-13 (the Act) in that the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in association with the Wares or Services since the Applicant knew of the Opponent's use of the Opponent's trade-mark;
2. Contrary to s. 30(b) of the Act, at the filing date of the application, the Applicant has not used the Mark alleged, or at all, or had subsequently abandoned the Mark;
3. The Mark is not registrable in view of s. 12(1)(d) of the Act because it is confusing with the Opponent's registered trade-mark USER, certificate of registration TMA606,963;
4. The Applicant is not the person entitled to registration of the Mark pursuant to the provisions of s. 16(1)(a) of the Act because at the date on which the Applicant or its predecessor in title allegedly first used the Mark, it was confusing with the Opponent's trade-mark USER previously used or made known in Canada by the Opponent in association with audio and audiovisual recordings and which was not abandoned at the date of advertisement of the Applicant's application;
5. The Applicant is not the person entitled to registration of the Mark pursuant to the provisions of s. 16(1)(c) of the Act because at the date on which the Applicant or its predecessor in title allegedly first used the Mark, it was confusing with the Opponent's trade-name USER previously used or made known in Canada by the Opponent in association with audio and audiovisual recordings and which was not abandoned at the date of advertisement of the Applicant's application;

6. Pursuant to s. 38(2)(d) and s. 2 of the Act, the Mark is not distinctive because it is not capable of distinguishing the Wares or Services from the wares or services of others, particularly the wares and services sold by the Opponent under the trade-mark USER, nor is it adapted to so distinguish them.

Burden of Proof in Trade-marks Opposition Proceedings

[7] The legal burden is upon the Applicant to show that its application complies with the provisions of the Act, but there is however an initial evidential onus on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. Once this initial onus is met, the Applicant has to prove, on a balance of probabilities, that the particular grounds of opposition should not prevent the registration of the Mark [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330; *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R. (3d) 293 and *Wrangler Apparel Corp. v. The Timberland Company*, [2005] F.C. 722].

Preliminary Remarks on the Evidence Filed

[8] I will comment, if need be, in more detail on certain portions of the evidence filed with respect to particular issues raised in this opposition. However at this stage it is appropriate to make the following general observations.

[9] Mr. Stewart is the Opponent. He is the registered owner of certificate of registration TMA606,963 and has filed an extract of the register. I checked the register and this registration is in good standing. It covers musical sound recordings (Opponent's wares) and live musical performances by a musical artist (Opponent's services). It has been registered on the basis of use in Canada since February 8, 1997 in association with the Opponent's wares and since November 14, 1997 in association with the Opponent's services.

[10] He describes himself as an independent recording artist, creating musical sound recordings and giving live musical performances. He provides a list of the musical recordings he released between 1996 and 2004. Those sound recordings are available for purchase by Canadian consumers on various websites. Some of the songs have been featured in music videos broadcasted on Canadian television by MuchMusic.

[11] He provides a copy of a royalty statement from SOCAN(Society of Composers, Authors and Music Publishers of Canada) showing the royalties earned from the airing of these musical videos. However they are minimal. To evidence the sale of the Applicant's musical recordings, Mr. Stewart filed copies of online music sales account, showing particulars of some sales on various online music distribution sites such as Napster, Apple iTunes, MusiMatch, iTunes-Canada and others. Again the sales are minimal and only cover the years 1997, 2006 and 2007.

[12] I note that there is no evidence of use of the Opponent's trade-mark USER in association with the Opponent's services. A simple allegation of use as found in paragraph 5 of Mr. Stewart's affidavit dated November 17, 2006 is not sufficient to conclude that there has been use of the trade-mark USER in association with live musical performances by a musical artist.

[13] He claims to have become aware of the Applicant's use of the Mark in or around 2004 and copies of exchange of correspondence between the parties' attorneys in the United States are attached to his affidavit. As the facts and exhibits relate to events that took place in the United States I do not think they are relevant to this opposition, except for the portion relating to a Canadian registration discussed hereinafter.

[14] Mr. Madan and Mr. McIntosh are the members of the partnership identified as the Applicant. They filed a joint statutory declaration. They are alleging that they started using the Mark in 1996 which would be approximately at the same time that the Opponent began using its trade-mark USER. I wish to point out that the validity of the Opponent's trade-mark registration is not at issue in these proceedings.

[15] The Applicant admits in paragraph 7 of the joint statutory declaration that their works have been the subject of sound recordings but they claim that it constitutes one aspect of multimedia works. The deponents allege that they create artistic installations with a heavy concentration based on a live performance and that their shows cannot be the subject of a musical tour as understood in its general sense because each live performance necessitates a long preparation.

[16] The Applicant creates two distinct types of artistic works. One consists of recordings of sounds generated by programming printers. The Applicant filed a recording of such work

available on CD as well as a DVD of their shows. The rhythm is created by the sound of dot matrix printers. The other original work is the use of an abandoned building, known in Montreal as Silo number 5, as a musical instrument called “Silophone”. The Applicant’s artistic performances have been the subject of reviews in Canadian newspapers such as The Globe & Mail and the Montreal Gazette. I am ignoring any other references as the magazines or newspapers containing those reviews are not well known to the average Canadian consumer such that I could take judicial notice of their circulation in Canada. This also applies to the foreign publications filed [see *Northern Telecom Ltd. c. Nortel Communications Inc.*, (1987) 15 C.P.R. (3d) 540, *Milliken & Co. v. Keystones Industries (1970) Ltd.*, 12 C.P.R. (3d) 166, at 168 and *Carling O’Keefe Breweries of Canada Ltd. v. Anheuser-Busch, Inc.*, 4C.P.R. (3d) 216, at 224)].

[17] The Applicant has provided evidence of live artistic performances as well as sales of its CDs in Canada. As mentioned in one attorney’s letter (exhibit F to Mr. Stewart’s affidavit) the Applicant can be best described as a sound art group.

[18] A great portion of the Applicant’s evidence is aimed at demonstrating the difference in the sound recordings and thus the difference in the parties’ channels of trade. I will address this argument later on.

[19] It is with this background that I will now assess the grounds of opposition pleaded.

Ground of Opposition Based on s. 30(i) of the Act

[20] Section 30(i) of the Act requires a statement from the Applicant that it is satisfied that it is entitled to use the trade-mark applied for in Canada in association with the wares and services described in the application. The Applicant has provided that statement in its application. A s. 30(i) ground of opposition should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant [*Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 at 155].

[21] The Opponent is taking the position that the Applicant was fully aware of the Opponent’s rights in the trade-mark USER as per the exchange of correspondence from the parties’ respective attorneys in the United States in April, May and June 2004, which is prior to the filing date of this application. There is reference to a Canadian registration in an email, sent on June

25, 2004 by the Opponent's U.S. attorney to the Applicant's counterpart (see exhibit 6 to Mr. Stewart's affidavit of November 17, 2006). However I do not see the filing of the present application as an act of bad faith on the Applicant's part. The differences in the type of sound recordings and its musical live performances could have lead the Applicant to believe that it was satisfied to use the Mark in Canada in association with the Wares and Services. The first ground of opposition is therefore dismissed.

Registrability of the Mark

[22] The relevant date for the analysis of the ground of opposition based on s. 12(1)(d) of the Act is the date of the Registrar's decision [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 at 424].

[23] The test to determine if there is a likelihood of confusion is set out in s. 6(2) of the Act and I must take into consideration all the relevant surrounding circumstances, including those listed in s. 6(5) of the Act: the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known; the length of time the trade-marks or trade-names have been in use; the nature of the wares, services, or business; the nature of the trade; and the degree of resemblance between the trade-marks or trade-names in appearance, or sound or in the ideas suggested by them. I refer to the decision of the Supreme Court of Canada in *Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 for an analysis of those criteria.

[24] The Opponent's trade-mark USER is inherently distinctive when used in association with the Opponent's wares and services. The same is true for the Mark.

[25] The degree of distinctiveness of a trade-mark may be enhanced through use in Canada. As indicated earlier there is very little evidence of use of the Opponent's trade-mark USER in association with musical sound recordings (sales of 6 CDs in 1997) and no evidence of use in association with live musical performances.

[26] The Applicant filed samples of sound recordings on CDs. The sales report filed as exhibit 13 to the joint statutory declaration shows very limited sales of the Applicant's sound recordings for the years 2002 to 2004 inclusive and no information on the Applicant's sales between 1997 and 2001 inclusive. The Applicant has won some awards in Canada and Europe for its sound

recording entitled “Symphonie pour imprimantes matricielles”. Reference is made to exhibit 2 to the joint statutory declaration for a complete list of those awards. Press reviews of the Applicant’s works wherein reference is made to the Mark were filed as exhibit 3 to the joint statutory declaration. As mentioned previously I consider only those published in the *Globe & Mail* and the *Montreal Gazette* to have some circulation in Canada. I do not have any circulation figures for the other magazines or newspapers identified in the joint statutory declaration.

[27] From this evidence I conclude that the first criterion slightly favours the Applicant.

[28] The Applicant acknowledges that it was only in 1999 that it had the opportunity to record sound tracks associated with their shows and multimedia events. There is no evidence of sales of those recordings prior to 2002 (see exhibit 13 to the joint statutory declaration). There is evidence of use of the Mark in association with the Services in Canada as early as October 1998 (see exhibit 2 to the joint statutory declaration).

[29] Given the token sales of the Opponent’s wares in 1997, I do not consider this factor to be important in so far as the Wares are concerned. As for the Services, this factor favours the Applicant.

[30] The Applicant takes the position that the parties’ respective wares and services are completely different. However when assessing the likelihood of confusion under s. 12(1)(d) of the Act I must compare the wares and services as defined in the application with the Opponent’s wares and services as described in its certificate of registration [see *Mr. Submarine Ltd. v. Amandista Investments Ltd.* (1987), 19 C.P.R. (3d) 3 at 10-11; *Henkel Kommanditgesellschaft v. Super Dragon* (1986), 12 C.P.R. (3d) 110 at 112 and *Miss Universe Inc. v. Dale Bohna* (1994), 58 C.P.R. (3d) 381 at 390-392].

[31] The Applicant is arguing that the Opponent’s musical recordings fall in the category of rock music and more particularly “hard rock” while the Applicant’s sound recordings are secondary in nature being a component of multimedia work. The Applicant uses computer technology. Those recordings would be classified as electronic or numerical art. Consequently the targeted consumers, the markets and the distribution networks would be different than those associated with the Opponent’s type of musical recordings.

[32] To substantiate their respective position, the parties filed extracts of various websites where in some of them the parties' respective CDs are listed under different musical categories (exhibit 12 to the joint statutory declaration) while in others there is no distinction based on musical categories. They simply list the CDs under the artist's name. In some instances the Applicant's CDs appear under the name USER or THE USER together with the Opponent's musical recordings.

[33] The Opponent could well decide to change its style of music. He is not limited by his registration to certain styles of the musical recordings.

[34] From all this evidence I draw the following conclusions. If I compare what has been identified in the Wares as "sound recordings documenting the audio component of the above-mentioned art installations" with the Opponent's wares identified as "musical sound recordings", there is definitively an overlap. As for the Services and the Opponent's services of live musical performances by a musical artist, they also overlap. The fact that the Opponent's services are performed by an artist while the Services are described as "an audiovisual performance incorporating a strong electronic component" is not sufficient to distinguish them in a trade-mark sense. The type of musical performance might be different but still the Applicant is using various sounds as an integral part of their performances. I may add that there is nothing in the Opponent's registration to prevent it from performing its works in a contemporary art festival and/or media/electronic art festival. Finally the Opponent's wares described in the registration are not limited to rock or hard rock types of musical recordings.

[35] The nature of the parties' wares and services and the nature of their trade favour the Opponent in so far as "sound recordings documenting the audio component of the above-mentioned art installations" and "audiovisual performances (performed in contemporary art festivals and media/electronic art festivals) incorporating a strong electronic component" are concerned. Those factors do however favour the Applicant when considering the wares identified as "art installations (for exhibition in contemporary art festivals and galleries), namely audiovisual exhibits incorporating a strong electronic component" as those wares do not overlap with the Opponent's wares.

[36] The degree of resemblance is the most important factor when assessing the likelihood of confusion between two trade-marks [see *Beverley Bedding & Upholstery Co. v. Regal Bedding & Upholstering Ltd.* (1980), 47 C.P.R. (2d) 145 at para. 28].

[37] The most distinctive component of the parties' respective trade-marks is the word "user". The Applicant is arguing that the marks do not resemble each other visually as well as with respect to their respective meanings. The Applicant alleges that the symbols "[" and "]" in the Mark are symbols used in the field of computer search and constitute also a graphic portion of the Mark that would serve to distinguish the Mark from the Opponent's trade-mark USER. The Applicant suggests that the Opponent's trade-mark USER refers implicitly to drug use and the culture of drug consumption. The Applicant is referring to the content of some of the Opponent's CDs to support this point. However the Opponent's CDs are not part of the evidence in this file. Moreover, the fact that the brackets symbols would be part of the computer technology culture has not been proven. Therefore there is no evidence in the record to support the Applicant's contention that there is a difference in the meanings of the parties' respective trade-marks.

[38] The Applicant is also arguing that the Opponent uses the same stylized version of the word "user" on its CDs. However the comparison to be made under s. 6(5)(e) of the Act is between the Mark and the Opponent's trade-mark as registered which is a word mark. The difference in the font or style used by the parties would not be a determining factor under s. 12(1)(d) of the Act.

[39] As an additional surrounding circumstance the Applicant is arguing the absence of confusion despite the concurrent use of the marks between 1998 and 2006. On the other hand the Opponent is alleging a case of actual confusion wherein a fan contacted him to acquire one of the Applicant's albums under the mistaken belief that the work originated from the Opponent. Moreover the Opponent is alleging that some websites list sound recordings of both parties under the heading "user". With respect to the confusion in the mind of a fan as alleged by the Opponent, I consider such evidence to be inadmissible hearsay evidence.

[40] I mentioned previously that there is no evidence of use of the Opponent's trade-mark USER in association with the Opponent's services and the sales of both parties' wares are minimal over the relevant period of time. This would explain the absence of actual cases of

confusion being brought to the Applicant's attention. However there remains the evidence that some websites index the parties' sound recordings under the same heading namely "user" which is likely to lead to some confusion.

[41] From this analysis I conclude that the Applicant failed to discharge its legal burden to prove, on a balance of probabilities, that there is no likelihood of confusion between the Mark and the Opponent's trade-mark USER when the Mark is used in association with sound recordings documenting the audio component of art installations and the services of audiovisual performances (performed in contemporary art festivals and media/electronic art festivals) incorporating a strong electronic component. As for the wares described as "art installations (for exhibition in contemporary art festivals and galleries), namely, audiovisual exhibits incorporating a strong electronic component", I conclude that the Applicant has met its legal onus.

[42] I wish to reiterate that I am fully aware of the fact that the parties may create different types of sound recordings but this is not the appropriate test to apply when determining if a trade-mark is registrable under s. 12(1)(d) of the Act. The Marks are almost identical in sound, visually and in their meanings as the main portion of the Mark, the word "user", is the Opponent's trade-mark. The Wares do include sound recordings which are covered by the Opponent's registration and there is an overlap in the type of services. The live performances might differ and target different audiences but the general class of services remains the same.

[43] For all these reasons I maintain in part the third ground of opposition.

Ground of Opposition Based on s. 30(b) of the Act

[44] The relevant date to analyse this ground of opposition is the filing date of the application [see *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R. (3d) 293 and *Georgia-Pacific Corp. v. Scott Paper Ltd.*, 3 C.P.R. (3d) 469]. The Opponent has an evidential burden when alleging non-compliance with the provisions of s. 30(b) of the Act but it has been characterized as a light one. Moreover the Opponent can rely on the evidence filed by the Applicant itself [see *York Barbell Holdings Ltd. v. ICON Health & Fitness, Inc.* (2001), 13 C.P.R. (4th) 156]. However such evidence must raise serious doubts on the accuracy of the statements made by the Applicant

in its application. [See *Tune Masters v. Mr. P's Mastertune Ignition Services Ltd.* (1986) 10 C.P.R. (3d) 84, *Labatt Brewing Co. v. Molson Breweries, a Partnership* (1996), 68 C.P.R. (3d) 216 and *Williams Telecommunications Corp. v. William Tell Ltd.*, (1999) 4 C.P.R. (4th) 107].

[45] The application is based on use of the Mark in association with the Wares and Services since October 28, 1998. In the joint statutory declaration the deponents state that the Applicant were given the opportunity in 1999 to record the sound tracks of their performances and to distribute them in the form of CDs and vinyl discs [see para. 24 of the joint statutory declaration]. In fact in paragraph 25 of their statutory declaration, they allege that the work entitled "Symphony #1 for dot matrix printers", in the form of a mini CD was commercialized in 1999. Therefore there is a clear contradiction between the date of first use alleged in the application for the wares defined as "sound recordings documenting the audio component of the above-mentioned art installations" and the actual date of first use as defined in s. 4(1) of the Act. In so far as the other wares and the Services are concerned, there is no evidence in the record to support such ground of opposition.

[46] Consequently, this ground of opposition is maintained in part only in so far as the wares described as "sound recordings documenting the audio component of the above-mentioned art installations" are concerned.

Grounds of Opposition based on s. 16 of the Act

[47] The fourth and fifth grounds of opposition are based on prior use or making known in Canada of the Opponent's trade-mark and trade-name USER in association with audio and audiovisual recordings. Since the Opponent was partly successful under s. 30(b) of the Act, the relevant date with respect to the wares described as "sound recordings documenting the audio component of the above-mentioned art installations" will be the filing date of the application (June 28, 2004), while for the other wares and the Services it will be the date of first use alleged in the application (October 28, 1998) [see *American Cyanamid Co. v. Record Chemical Co. Inc.* (1972), 6 C.P.R. (2d) 278; *Everything for a Dollar Store (Canada) Inc. v. Dollar Plus Bargain Centre Ltd.* (1998), 86 C.P.R. (3d) 269 and s.16(1) of the Act]. Moreover the Opponent must show that it had not abandoned such use at the advertisement date of the application (December 7, 2005) [see s.16(5) of the Act].

[48] There must be clear evidence of use of the Opponent's trade-mark or trade-name USER in association with audio and audiovisual recordings within the meaning of s. 4(1) of the Act, namely evidence of transfer of property of those wares bearing the trade-mark. There is evidence that the Opponent's CDs are available for sale on the Internet. However such evidence does meet the requirements of s. 4(1) of the Act. The combination of the allegation of sales of audio recordings in association with the trade-mark USER combined with the sales reports, filed as exhibits B and F to Mr. Stewart's affidavit dated November 2, 2007, could constitute proper evidence of use of the Mark. However none of these exhibits show that the sales took place in Canada. Moreover the sales report exhibit B, goes back to 1997 while exhibit F provides an account for the sales that occurred in 2006 and 2007, well after the relevant date. I have no evidence of continuous prior use of the Opponent's trade-mark or trade-name USER in association with audio recordings before December 7, 2005 (the date of advertisement of the application).

[49] As for use of the Opponent's trade-mark or trade-name USER in association with audiovisual recordings, the Opponent refers to the fact that two videos were broadcasted on either several video sites on the Internet or on television in Canada. Such portion of the evidence constitutes inadmissible hearsay evidence. Moreover there is no evidence that those videos were actually sold in the market place in Canada. I conclude that there is no evidence of use of the trade-mark or trade-name USER in association with audiovisual recordings within the meaning of s. 4(1) of the Act.

[50] The Opponent is alleging under those grounds of opposition that the trade-mark and trade-name USER were made known in Canada at the relevant date in association with audio and audio visual recordings.

[51] The expression "made known in Canada" is defined in s. 5 of the Act. The first condition to be met is that the mark must be used in a country of the Union other than Canada. Secondly the wares must be distributed in association with the mark in Canada or advertised in any printed publication in Canada in the ordinary course of commerce among potential dealers in or users of the wares; or radio broadcasts ordinary received in Canada by potential dealers in or users of the wares. Finally the mark has to become well known in Canada by reason of the distribution or

advertising of the wares. I have no evidence of use of the Opponent's trade-mark or trade-name in a country of the Union, as defined in the Act, other than Canada. There is no evidence of advertising of the Opponent's musical recordings in printed publications. Even if I were to consider the evidence that the audio recordings of the Opponent are available for purchase on various Internet websites as proper evidence of advertising within the meaning of s. 5 of the Act, the evidence summarized above falls short of proving that the Opponent's trade-mark and trade-name USER were well known in Canada in association with the Opponent's wares or services at the relevant date.

[52] The Opponent having failed to meet its initial onus, the fourth and fifth grounds of opposition are dismissed.

Distinctiveness

[53] The relevant date with respect to this ground of opposition is the filing date of the statement of opposition [see *Andres Wines Ltd. and E & J Gallo Winery* (1975), 25 C.P.R. (2d) 126 at 130 and *Metro-Goldwyn-Meyer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317]. The Opponent has to prove that its trade-mark USER had become sufficiently known at that date to negate any distinctiveness of the Mark [*Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 at 58]. Once this burden is met, the Applicant has a legal onus to show, on a balance of probabilities, that the Mark is not likely to create confusion with the Opponent's trade-mark USER and that it is adapted to distinguish or actually distinguishes the Wares and Services from the Opponent's wares and services throughout Canada [see *Muffin Houses Incorporated v. The Muffin House Bakery Ltd.* (1985), 4 C.P.R. (3d) 272].

[54] The Opponent's evidence summarized under the other grounds of opposition, especially under entitlement (s. 16 of the Act) and registrability (s. 12(1)(d) of the Act) does not enable me to conclude that the Opponent's trade-mark USER was sufficiently known in Canada on February 3, 2006 to negate any distinctiveness of the Mark. Exhibit B to Mr. Stewart's affidavit dated November 2, 2007 refers to only 6 sales made in 1997. Exhibit F to the same affidavit is a sales report going back to May 31, 2006 which is subsequent to the relevant date. The number of sales made in 1997 combined with the absence of evidence of further sales between 1997 and

December 2005 leads me to conclude that the Opponent has failed to meet its initial evidential burden. Consequently the last ground of opposition is also dismissed.

Conclusion

[55] Pursuant to the authority delegated to me under s. 63(3) of the Act, I refuse the application with respect to the following:

Wares: sound recordings documenting the audio component of the above-mentioned art installations;

Services: audiovisual performances (performed in contemporary art festivals and media/electronic art festivals) incorporating a strong electronic component.

and reject the opposition in so far as the following wares are concerned:

art installations (for exhibition in contemporary art festivals and galleries), namely, audiovisual exhibits incorporating a strong electronic component.

pursuant to s.38(8) of the Act [see *Produits Ménagers Coronet Inc. v. Coronet Werke Heinrich Scherf GmbH* (1986), 10 C.P.R. (3d) 482].

Jean Carrière
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office