

Ridout & Maybee
Suite 2300
101 Richmond Street West
Toronto; Ontario
M5H 2J7

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25 1985

Gentlemen:

RE: SECTION 44 PROCEEDINGS
Registration NO.: 229.948
Trade Mark: ORIENT EXPRESS

At the request of Ogilvy, Renault on behalf of Venice Simplon-Orient-Express Inc., the Registrar issued a Section 44 notice on September 30, 1983 to Orient Express Trading Company Ltd., the registered owner of the above referenced trade mark registration.

The trade mark ORIENT EXPRESS was registered on August 22, 1978 in association with:

"clothing, namely men's and ladies' jackets."

In response to said notice the registrant filed the affidavit of Robert M. Lee, its President.

Written submissions were filed by both parties.

Exhibit A to the Lee affidavit consists of samples of advertisements stated to have appeared in the New York Times. The trade mark ORIENT EXPRESS does not appear anywhere in the advertisements that relate to jackets. The one advertisement forming part of Exhibit A in which the trade mark ORIENT EXPRESS appears, refers to a variety of wares, but noticeably missing from such wares are those of the subject registration, namely "men's and ladies' jackets".

Since, as described above these advertisements bear no relation to the subject registration, Exhibit B which contains documents showing Canadian circulation of the New York Times, is irrelevant.

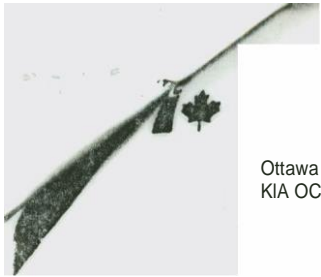
Exhibit E, is a certified public accountant's letter purporting to validate an attached sheet of mail order sales figures for jackets sold in Canada. Mr. Lee in his description of this Exhibit, describes the jackets sold as "ORIENT EXPRESS jackets". Nowhere in the Exhibit itself is it indicated that the jackets so sold, actually bore the trade mark ORIENT EXPRESS. In view of the fact that the registrant's corporate name contains the words "Orient Express" as the first two words, I find Mr. Lee's reference to "ORIENT EXPRESS jackets" decidedly ambiguous. In any event the sales documented in this Exhibit refer to transactions which occurred in 1978 and 1980. No figures are available for the years 1981, 1982 and 1983.

Exhibit F is of little relevance in this matter, since it consists of invoices of sales which took place in the United States.

Accordingly, there are very few facts available for proper consideration in coming to a conclusion of use, and regretfully what is available for consideration is of little assistance.

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Firstly, there is Mr. Lee's allegation that the mail orders from Canada (presumably occurring as a result of the advertisements for jackets, which advertisements as noted previously bore no relation to the subject trade mark) **were** filled with men's and ladies' jackets bearing the trade mark ORIENT EXPRESS. This allegation remains a bare and unsubstantiated assertion of use in face of the fact that the purported sales figures in Exhibit E are of no relevance to use of the trade mark ORIENT EXPRESS at the material time.

Secondly, sample labels and hang tags bearing the trade mark ORIENT EXPRESS are attached as Exhibit D to the Lee affidavit. These labels and hang tags are nowhere described as having been on jackets sent to Canada. I am therefore in agreement with the requesting party's submission that in view of the detail provided in some of the exhibits, the omission to identify these labels as having been on the goods sold in Canada in a glaring one which limits the consideration which can be given to this Exhibit as a showing of use of the subject trade mark.

Exhibit C is a letter from a person in Montreal dated **December 12, 1983**, stating that jackets bearing the trade mark ORIENT EXPRESS were purchased by him and delivered to him in Canada during **1982 and 1983**. In referring to this Exhibit, Mr. Lee states in his affidavit that he is **personally** acquainted with the purchaser, and that he, Mr. Lee delivered these goods personally to the purchaser in Canada. The registrant in its submissions would have the Registrar give Exhibit C as much evidentiary value as an invoice showing the delivery of goods to Canada. However in the absence of some kind of representative samples of invoices, even if I do look at this letter as one invoice it is insufficient to show use in the normal course of trade. (The Noshery Ltd. v. The Penthouse Motor Inc. Ltd. (1969). 61 C.P.R. 207 (Ont. H.C.); Molson Co., Ltd. v. Halter (1977), 28 C.P.R. (2d) 158 (F.C.T.D.)). The letter does not describe how the goods were purchased whether by mail order or purchased in the United States. Since the affiant has adduced evidence of sales in the U.S. to Canadian customers, the lack of information regarding the context of the sales of the jackets referred to in exhibit C, renders a conclusion on the balance of probabilities that use was in Canada impossible. Again, the written submissions of the registrant do not propose an interpretation of the ambiguities is the Lee affidavit that could assist me in coming to a conclusion of use; rather, the submissions tend to perpetuate the ambiguities.

In summary, I am unable to conclude, from the evidence filed, that on the balance of probabilities the subject trade mark **is** in use in Canada in the normal course of the registrant's trade and therefore its registration ought to be expunged from the register.

Accordingly, registration No. 229,948 will be expunged unless an appeal from this decision is initiated under the provisions of Section 56 of the Trade Marks Act within the prescribed time.

Yours truly,

Original signed by

J. PAUL D'AOUST

J. P. D'Aoust
Senior Hearing Officer
for REGISTRAR of TRADE MARKS

HS:s1-h16

c.c. Messrs. Ogilvy, Renault

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