



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

Citation: 2010 TMOB 45
Date of Decision: 2010-04-06

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Advance Magazine Publishers Inc. against
registration No. TMA611,414 for the trade-mark
GLAMOUR SECRETS in the name of Glamour Secrets
Developments Ltd.**

[1] On June 30, 2008, at the request of Advance Magazine Publishers Inc. (the Requesting Party), the Registrar issued the notice prescribed by s. 45 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act) to Glamour Secrets Developments Ltd. (the Registrant), the registered owner of registration No. TMA611,414 for the trade-mark GLAMOUR SECRETS (the Mark). The Mark is registered in association with the following services: operation of a retail store dealing in hair, skin, beauty care and cosmetic products, supplies and accessories (the Services).

[2] Section 45 requires the registered owner of a trade-mark to show whether the mark has been used in Canada in association with each of the wares and services listed in the registration at any time during the three years preceding the date of the notice, in this case between June 30, 2005 and June 30, 2008 (the Time Period). If the mark has not been used during that time period then the registered owner is required to indicate the date on which it was last used and the reason why it has not been used since that date. The onus on a registered owner under s. 45 is not a heavy one [*Austin Nichols & Co. v. Cinnabon, Inc.* (1998), 82 C.P.R. (3d) 513 (F.C.A.)].

[3] Use of a trade-mark in association with services is defined as follows in s. 4(2) of the Act: A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[4] In response to the s. 45 notice, the Registrant filed an affidavit of Joseph Bellotti.

[5] Only the Registrant filed a written argument but an oral hearing was held at which both parties were represented.

[6] Mr. Bellotti has been the Registrant's President since March 20, 2003. He attests that the Registrant licenses the Mark to Glamour Secrets Western Ltd. and Glamour Secrets Canada Ltd. (collectively the Licensees); Mr. Bellotti is also the President of the Licensees. The Licensees enter into franchise agreements with third parties (the Sublicensees) pursuant to which the Sublicensees use the Mark in association with the Services. Mr. Bellotti attests that his duties as President of the Licensees include the administration of all aspects of the Services branded with the Mark and that accordingly he has personal knowledge of the use of the Mark in Canada by the Licensees and the Sublicensees.

[7] Mr. Bellotti clearly states that the Registrant maintains care and control of the nature and quality of the Services provided in association with the Mark pursuant to the license agreements and franchise agreements entered into by the Licensees and Sublicensees. He does not provide copies of the various agreements but he does inform us of various provisions of each, such as that the license agreements provide that the Registrant has the exclusive right to use or grant rights to use the Mark, that the Licensees are required to ensure that Sublicensees comply with their obligations under their respective sublicenses, that the Registrant is entitled to inspect any documents pertaining to the Services, and that the sublicense agreements give the Registrant via the Licensees control over various details of the Services, as well as the right to audit the Subfranchisees' financial statements and pre-approval with respect to all advertising material.

[8] Mr. Bellotti attests that the Mark has been used in Canada in association with the Services during the Time Period and then provides various materials in support of such statement, including the following: copies of photographs of signage bearing the Mark displayed by Sublicensees at their places of business during the Time Period; the gross annual revenue

earned by Sublicensees during the Time Period; representative invoices dated within the Time Period that display the Mark at the top; printouts of pages from the Internet showing how the Mark was displayed at www.glamoursecrets.com during the Time Period; and advertisements for the Services circulated during the Time Period that display the Mark. These materials show that the Registrant and/or its Sublicensees used the Mark in association with the Services in Canada during the Time Period.

[9] At the oral hearing, the Requesting Party dissected the Registrant's evidence and pointed to various flaws that it perceived to exist in the evidence. The Requesting Party submitted that the evidence was fraught with hearsay and that the hearsay could not be distinguished from Mr. Bellotti's personal knowledge. For example, it expressed the concern that Mr. Bellotti did not reveal how he obtained the various materials from the Sublicensees or who took the actual photographs that he submitted. It is true that s. 45 evidence is not subject to cross-examination, but I see no reason to disregard any of the evidence that is before me or to accord it reduced weight. After all, Mr. Bellotti did swear that he has personal knowledge of the use of the Mark by the Sublicensees and it seems evident that Mr. Bellotti, as President of the Registrant and Licensees, would have had access to all of the materials and facts to which he attested.

[10] The Requesting Party also submitted that any use of the Mark could not be deemed to be that of the Registrant pursuant to s. 50 of the Act. I disagree. Copies of license agreements need not be filed and Mr. Bellotti's evidence more than satisfies the requirements for successfully claiming the benefit of s. 50 in s. 45 proceedings (see *3082833 Nova Scotia Company v. Lang Michener LLP and Registrar of Trade-marks* 2009 FC 928 and *Sim & McBurney v. LeSage Inc.* (1996), 67 C.P.R. (3d) 571 (T.M.O.B.)). The Sublicensees' use of the Mark is therefore deemed to be that of the Registrant pursuant to s. 50.

[11] To conclude, I find that the evidence, when given a fair reading and when considered as a whole, is sufficient to show use of the Mark in Canada in association with the Services by the Registrant during the Time Period. 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.

Jill W. Bradbury
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office