

IN THE MATTER OF AN OPPOSITION  
by Hunter Packaging Ltd. to  
application No. 610,563 for the  
trade-mark ALLURE filed by  
L.N.K. Manufacturing Agencies Inc.

On July 4, 1988, the applicant, L.N.K. Manufacturing Agencies Inc., filed an application to register the trade-mark ALLURE based on proposed use in Canada with the following wares:

scented drawer liners, potpourri, sachets,  
room deodorizers, lingerie bags and hosiery  
bags.

The effective filing date of the application, however, was December 12, 1988, the date when the application fee was filed. The application was advertised for opposition purposes on December 14, 1988.

The opponent, Hunter Packaging Ltd., filed a statement of opposition on April 14, 1989, a copy of which was forwarded to the applicant on May 1, 1989. The grounds of opposition include, among others, that the applicant is not the person entitled to registration pursuant to Section 16(3)(b) of the Trade-marks Act because, as of the applicant's filing date (December 12, 1988), the applied for trade-mark was confusing with the opponent's trade-mark ALLURE for which an application (S.N. 558,268) had previously been filed for the following wares:

toilet preparations packaged as hotel amenities,  
namely, shampoos, conditioners, body lotions, bath  
soap, wet soap, boxed soap, shower caps, bubble  
bath, sewing kits, shoe shining mitts, razors, and  
shaving kits.

The applicant filed and served a counter statement. As its evidence, the opponent filed the affidavits of Lorne H. Memory and Grace Sun. The applicant did not file evidence. Neither party filed a written argument and no oral hearing was conducted.

As for the opponent's ground of prior entitlement, the Sun affidavit introduces into evidence a certified copy of the opponent's application S.N. 558,268. That certified copy establishes that the opponent's application was filed on March 4, 1986, well prior to the applicant's filing date, and that the opponent's application was pending as of the applicant's advertisement date. Thus, the opponent has met the burdens on it imposed by Sections 16(3)(b) and 16(4) of the Act.

In view of the above, the ground of prior entitlement remains to be decided on the issue of confusion between the marks of the parties. In this regard, the onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the marks. Furthermore, the material time for considering the circumstances respecting this issue is as of the applicant's filing date in accordance with the clear wording of Section 16(3) of the Act. Finally, in applying the test for confusion set forth in Section 6(2) of the Act, consideration is to be given to all of the surrounding circumstances including those specifically set forth in Section 6(5) of the Act.

Both marks are inherently distinctive although the word "allure" does have a vaguely laudatory connotation. Thus, neither mark can be said to be inherently strong. Since there is no evidence from the applicant, I must conclude that its mark had not

become known at all in Canada. As of the applicant's filing date, the opponent had sales of approximately \$400,000 of its ALLURE products to various hotel chains. Thus, I can conclude that the opponent's mark had become known at least to a minor extent.

The length of time the marks have been in use favors the opponent but this is not a significant circumstance in this case. The wares of the parties are not the same but there may be a potential connection between them. Mr. Memory, in his affidavit, states that the opponent may expand its line of hotel amenities in the future to include such items as potpourris, scented sachets, scented drawer liners and room deodorizers. Thus, since the applicant's statement of wares is not restricted to any particular trade, it is possible that the applicant's trade could include the sale of its products as hotel amenities.

The marks of the parties are identical in all respects.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. In view of my conclusions above, and particularly in view of the identity between the marks, the potential connection between the wares and trades of the parties and the applicant's apparent lack of interest in this proceeding, I am left in a state of doubt as to whether the marks at issue are confusing. Since the onus or legal burden is on the applicant, I must resolve that doubt against it. Consequently, the ground of prior entitlement is successful and the remaining grounds need not be considered.

In view of the above, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 31st DAY OF December, 1991.

David J. Martin,  
Member,  
Trade Marks Opposition Board.