

IN THE MATTER OF AN OPPOSITION by L'Oréal, une société anonyme and Cosmair Canada Inc. to application No. 558,268 for the trade-mark ALLURE filed by J.D. Hunter Packaging Limited, and now standing in the name of Hunter Packaging Ltd.

On March 4, 1986, the applicant, J.D. Hunter Packaging Limited, filed an application to register the trade-mark ALLURE based upon proposed use of the trade-mark in Canada in association with "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". During the opposition proceeding, the applicant changed its name to Hunter Packaging Ltd.

The applicant's application was advertised for opposition purposes on April 1, 1987 and the opponents, L'Oréal, une société anonyme and Cosmair Canada Inc., filed a statement of opposition on August 31, 1987. In their statement of opposition, the opponents alleged that the applicant's trade-mark ALLURE is not registrable and not distinctive, and that the applicant is not the person entitled to its registration, in view of the registration, prior user and prior making known of the registered trade-mark ALLURELLE, registration No. 218,207, covering: "Préparations pour les soins, la beauté et l'entretien de la chevelure, lacques pour cheveux". According to the opponents, L'Oréal, une société anonyme, is the registered owner of the registered trade-mark ALLURELLE and Cosmair Canada Inc. is a registered user and the distributor in Canada. The opponents also alleged that the applicant's application is not in compliance with Sections 30(a), (e) and (i) of the Trade-marks Act.

The applicant served and filed a counter statement in which it denied the allegations set forth in the statement of opposition.

The opponents filed as their evidence a certified copy of registration No. 218,207 for the trade-mark ALLURELLE while the applicant submitted as its evidence the affidavit of Lorne H. Memory, dated March 7, 1989. The opponents requested and were granted an order to cross-examine Mr. Memory on his affidavit but did not proceed with the cross-examination.

Neither party submitted a written argument and an oral hearing was not conducted in respect of this opposition.

Apart from a certified copy of registration No. 218,207, the opponents have filed no evidence in support of their grounds of opposition in this proceeding. As a result, they have failed to meet the evidential burden upon them in respect of the Section 30 grounds of opposition, as well as the non-entitlement and non-distinctiveness grounds. I have therefore dismissed these grounds of opposition.

The only remaining ground of opposition for determination is that based on Section 12(1)(d) of the Trade-marks Act. With respect to the Section 12(1)(d) ground, the material date would appear to be as of the date of my decision (see Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks, (1991), 37 C.P.R. (3d) 413 (FCA) and Conde Nast Publications, Inc. v. The Canadian Federation of Independent Grocers, (1991), 37 C.P.R. (3d) 538 (TMOB)). Further, in determining whether there would be a reasonable likelihood of confusion between the trade-marks at issue, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in Section 6(5) of the Trade-marks Act. Further, the Registrar must bear in mind that the legal burden is on the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks at issue.

Both the applicant's trade-mark ALLURE and the opponents' trade-mark ALLURELLE are inherently distinctive as applied to the respective wares of the parties although, as pointed out by the hearing officer in Hunter Packaging Ltd. v. L.N.K. Manufacturing Agencies Inc., 40 C.P.R. (3d) 431 (TMOB), at page 433, the word "allure" does have a "vaguely laudatory connotation". No evidence has been adduced by the opponents that they have ever used the trade-mark ALLURELLE in Canada. On the other hand, the Memory affidavit establishes that the applicant's trade-mark ALLURE has become known in Canada in association with hotel amenities with sales since January of 1987 exceeding \$360,000. As a result, both the extent to which the trade-marks at issue have become known and the length of time that they have been in use favour the applicant in this opposition.

Registration No. 218,207 covers: "Péparations [sic.] pour les soins, la beauté et l'entretien de la chevelure, lacques pour cheveux" which are quite similar to the applicant's shampoos and conditioners, as well as bearing at least some similarity to the applicant's toilet preparations identified as body lotions, bath soap, wet soap, boxed soap and bubble bath. On the other hand, the applicant's shower caps, sewing kits, shoe shining mitts, razors and shaving kits bear little, if any, similarity to the opponents' wares. While the applicant's wares are identified as being limited to products "packaged as hotel amenities", the statement of wares covered in registration No. 218,207 is not restricted to any particular trade channel and could, therefore, be sold as hotel amenities.

The trade-marks at issue bear a fair degree of similarity both in appearance and in sounding although the marks do not suggest any ideas in common.

In his affidavit, Lorne H. Memory, Director of Sales and Marketing of the applicant, states that he is not aware of any enquiries or any complaints received by his company relating to confusion as to the source of the applicant's ALLURE hotel amenities and the opponents' ALLURELLE cosmetic products. However, there is no evidence that the opponents' trade-mark ALLURELLE has ever been used in Canada, thus minimizing the impact of the applicant's evidence that there have been no instances of actual confusion between the trade-marks at issue.

The test of confusion between trade-marks is one of first impression and imperfect recollection from the point of view of the average consumer of the wares of the parties. As a result, and having regard to the degree of resemblance between the trade-marks ALLURE and ALLURELLE, and considering the close similarity between the opponents' hair care products and the applicant's shampoos and conditioners, as well as the fair degree of similarity between the opponents' wares and the applicant's body lotions, bath soap, wet soap, boxed soap and bubble bath, I have concluded that the applicant has failed to meet the legal burden upon it in respect of the issue of confusion, bearing in mind that the opponents' registration covers the potential sale of their hair care products as hotel amenities. On the other hand, I do not consider that there would be any reasonable likelihood of confusion between the opponents' trade-mark ALLURELLE and the applicant's trade mark as applied to the remaining wares covered in the applicant's application. In this regard, I would note the finding of the Federal Court, Trial Division in respect of there being authority to render a split decision in Produits Ménagers Coronet Inc. v. Coronet-Werke Heinrich Schlerf GmbH, 10 C.P.R. (3d) 492.

In view of the above, I refuse the applicant's application in respect of: "Toilet preparations packaged as hotel amenities, namely, shampoos, conditioners, body lotions, bath soap, wet soap, boxed soap and bubble bath" and otherwise reject the opponent's opposition to registration of the applicant's application in view of the provisions of Section 38(8) of the Trade-marks Act in respect of the following wares: "shower caps, sewing kits, shoe shining mitts, razors, and shaving kits packaged as hotel amenities".

DATED AT HULL, QUEBEC THIS 30th DAY OF APRIL 1993.

G.W.Partington,
Chairman,
Trade Marks Opposition Board.