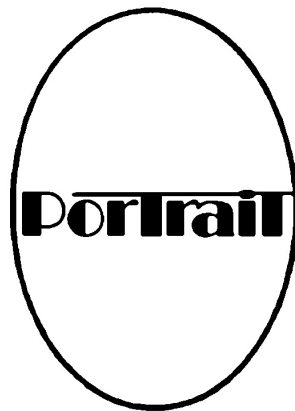


SECTION 45 PROCEEDINGS
TRADE-MARK: PORTRAIT & DESIGN
REGISTRATION NO.: TMA 332,596

On September 4, 1997, at the request of Messrs. Marks & Clerk, the Registrar forwarded a Section 45 notice to Exotique Fragrances Inc., the registered owner of the above-referenced trade-mark registration.

The trade-mark PORTRAIT & Design (shown below) is registered for use in association with the following wares: (1) perfumes, bath oils, shampoos, body and hand lotions, creams, and powders, hair spray net, shaving lotions, and soaps.



In response to the notice the registrant furnished the affidavit of Frank Daigle, together with exhibits. The requesting party alone filed a written argument. An oral hearing has not been requested in this case.

I have considered the evidence furnished, and I must agree with the requesting party that it fails to show use of the trade-mark as registered during the relevant period in association with any of the registered wares.

Although Mr. Daigle has alleged that the trade-mark has been used during the relevant period, this consists of a bare allegation of use. The evidence furnished does not support

such allegation of use.

Although Mr. Daigle has submitted an invoice dated April 6, 1995 stating that it showed sales of PORTRAIT perfumes, as stated by the requesting party, it is unclear whether the trade-mark as registered was associated with such wares at the time of their transfer. On the invoice, the product is described as "PORTRAIT 60 ML".

I note that the sample packaging for a 60 ml. container provided in evidence as part of exhibit A-1 shows the word PORTRAIT used as follows:

Such use does not constitute use of the trade-mark as registered which is as follows:



The use of the word PORTRAIT by itself in the mark as used is, in my opinion, a major deviation from the trade-mark as registered in view of the omission of the oval design,

which is a major component of the registered trade-mark. Further the use of “OBSEST par/by Portrait” also consists of use of a trade-mark that is substantially different from the trade-mark as registered. Accordingly, I conclude that the use shown on such packaging does not constitute use of the present registered trade-mark.

Mr. Daigle has not provided any evidence of further sales having been made during the relevant period. I note that at paragraph 8 of his affidavit he has indicated that the use of the trade-mark has represented for eight (8) years 100% of the “chiffres d’affaires” of the company, however, there is no clear evidence that any use that occurred was of products bearing the trade-mark as registered. To that effect I note that the sample container bearing the words “Spray Net” and “Portrait of Polo” submitted as part of exhibit A-1 also does not bear the trade-mark as registered. Concerning the third sample furnished as exhibit A-1, it refers to “spray net” and it bears the words “Portrait de Oscar de la Renta” in an oval design; although arguably the mark shown thereon could be considered use of the registered trade-mark, the evidence fails to show any use of such product having occurred during the relevant period or at any time. Consequently I conclude that the evidence fails to show use of the trade-mark as registered during the relevant period or at any time.

Mr. Daigle has stated that since 1995 the registrant has temporarily ceased the use of the trade-mark, however, as I have found that the evidence completely fails to show any use at all of the trade-mark as registered, I am not prepared to consider “1995” as the date the trade-mark was last in use. Rather, in circumstances where use has not been shown, I generally consider the date of registration of the trade-mark to be the date the trade-mark was last in use. The present trade-mark was registered on October 2, 1987.

Consequently, I conclude that at the date of the notice, the trade-mark had not been in use for approximately ten (10) years.

Mr. Daigle has only provided the reason for the absence of use of the trade-mark since the year 1995 and it is clear that the absence of use since such time has not been due to circumstances outside the control of the registrant. Rather, the registrant in this case

chose, for marketing reasons, to set aside the present trade-mark in order to use other trade-marks such as “Parfums François Des Aigles” and “Clone Collection”.

Concerning the registrant’s intention to resume use of the present trade-mark, the evidence completely fails to show that the registrant had taken any steps prior to the date of the notice in order to resume use of the trade-mark. The fact that the registrant is now planning to recommence use is not sufficient to maintain the registration.

Accordingly, I conclude that as use has not been shown and as the absence of use has not been due to special circumstances excusing the absence of use of the trade-mark, the trade-mark registration ought to be expunged.

Registration No. TMA332,596 will be expunged in accordance with the provisions of Section 45(5) of the Trade-marks Act.

DATED AT HULL, QUEBEC THIS 22nd DAY OF February, 1999.

D. Savard
Senior Hearing Officer
Section 45