



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2025 TMOB 105

Date of Decision: 2025-05-12

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: N-Ear Inc.

Registered Owner: Frontrow Calypso, LLC

Registration: TMA785,894 for ADAPTO

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act), with respect to registration No. TMA785,894 for the trademark ADAPTO (the Mark).

[2] Following an amendment to the statement of goods early in the proceeding, the registration now covers the following goods:

Audio teaching systems comprised of speakers, amplifiers, transmitters, receivers and parts therefor used to improve acoustics and hearing and to amplify and clarify voices and thereby improve instruction for students with normal hearing, hearing impairment, and other disabilities (the Goods).

[3] For the reasons that follow, I conclude that the registration ought to be maintained.

PROCEEDING

[4] At the request of N-Ear Inc. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on January 24, 2024, to Frontrow Calypso, LLC (the Owner), the registered owner of the Mark.

[5] The notice required the Owner to show whether the Mark was used in Canada in association with each of the Goods at any time within the three year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is from January 24, 2021 to January 24, 2024.

[6] The relevant definition of “use” in the present case is set out in section 4 of the Act as follows:

4(1) A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

[7] In response to the Registrar’s notice, the Owner furnished the affidavit of Jens Holstebro, sworn in the United States on June 21, 2024, together with Exhibit A (the Holstebro Affidavit); and the affidavit of Michael S. Duchesneau, sworn on June 25, 2024, with Exhibits A and B (the Duchesneau Affidavit).

[8] Both parties filed written representations; no oral hearing was held.

EVIDENCE

The Holstebro Affidavit

[9] In his affidavit, Mr. Holstebro states that he was the Owner’s President from October 2005 to October 2022. His duties included managing

operations and overseeing sales. Since March 2024, Mr. Holstebro has been the Executive Vice President of Boxlight Inc., a wholly owned subsidiary of Boxlight Corporation (collectively referred to by him as Boxlight). He states that the Owner is a wholly owned subsidiary of Boxlight. He expressly attests that his affidavit is based on his personal knowledge and on information he obtained from the Owner's business records [paras 1 and 2].

[10] Mr. Holstebro states that the Owner is a California-based business with offices around the world, including Canada. He explains that the Owner designs, manufactures and sells worldwide network-based solutions that facilitate communication in classrooms and educational settings. The Owner's end customers are Canadian schools, education centers, electronics stores and organizations providing resources for individuals who are deaf or hard of hearing [paras 3 and 10].

[11] As a first example of the Owner's products sold in association with the Mark, Mr. Holstebro describes a product called "JUNO System" (Juno) as an all-in-one audio teaching system used to improve acoustics and hearing, and to amplify and clarify voices. He states that the Juno system wireless design allows for flexibility and ease of use in various classroom settings. According to Mr. Holstebro, the Juno system features, among others, the following components [para 5]:

- A three-speaker 2.1 stereo line array for 180° horizontal sound coverage;
- An amplifier for boosting the audio signal captured by the teacher's microphone;
- A transmitter to wirelessly transmit audio signals from the teacher's microphone; and
- A Bluetooth audio receiver that easily pairs with phones, tablets, and computers to play audio wirelessly from anywhere in the classroom.

[12] Another example of the Owner's products sold in association with the Mark is a product called the "PRO DIGITAL Audio Solution" (Pro Digital). Mr. Holstebro describes Pro Digital as an audio teaching system designed to improve acoustics and reduce teacher vocal fatigue. According to Mr. Holstebro, the main components of the Pro Digital system are [para 7]:

- Infrared speakers;
- An amplifier for boosting the audio signal captured by the teacher's microphone;
- A receiver; and
- An infrared transmitter.

[13] According to Mr. Holstebro, the Juno and Pro Digital audio teaching systems optimize sound quality in educational settings and enhance instruction and learning for all students, including those with hearing impairments and other disabilities [paras 5 and 7].

[14] Mr. Holstebro states that the Mark is displayed directly on the products which, he notes, can sometimes feature other trademarks [para 6]. In support, he reproduces in his affidavit three black and white photographs (two for Juno and one for Pro Digital). He asserts that these photographs are representative of the manner in which the Mark was displayed on all the Juno and Pro Digital audio teaching systems sold by the Owner in Canada during the relevant period. The first two photographs show two views of the same product (i.e. wide angle and close-up views). The third photograph shows an instruction label of what appears to be a different product or component. The photographs' copies are not clear or are too dark to make out the Mark.

[15] With respect to transfers of the Goods, Mr. Holstebro states that the Owner continuously sold Juno and Pro Digital audio teaching systems in

association with the Mark in Canada during the relevant period [para 9]. In support, he provides four invoices dated during the relevant period [Exhibit A to the Holstebro Affidavit], which he states are representative of the Owner's sales within its normal course of business. He explains that the Juno system is identified as "Juno with Bluetooth System" [para 10]. Although the "Ship-To" field is partially redacted, four different Canadian provinces are shown in the invoices. In addition to the invoices, Mr. Holstebro provides revenue figures from sales of each audio teaching system in Canada during the relevant period, totaling over CA\$ 3,800,000 [paras 10 and 11].

The Duchesneau Affidavit

[16] Mr. Duchesneau is a law clerk with the firm representing the Owner. His affidavit essentially introduces into evidence larger and clearer versions of the photographs reproduced in the Holstebro Affidavit. The Mark is displayed along with other trademarks in the product views [Exhibit A to the Duchesneau Affidavit] and in the instruction label [Exhibit B], as shown below.



[17] I note that the product instruction label includes tips for best performance of the Pro Digital product. For example, under the heading “Teacher’s tips”, the label reads: “Your FrontRow Pro Digital has an energy-saving STANDBY mode”. The label also includes references to “secondary audio sources”, such as computers, TV, DVD or CD. In particular, it is indicated that the receiver will come out of STANDBY mode automatically when an audio source, connected to such receiver, is turned on.

REASONS FOR DECISION

[18] At the outset, I note that in its written representations, the Requesting Party notes that Mr. Holstebro does not detail the “exact relationship” between the Owner and the “Boxlight entities”. It adds “Interestingly, Mr. Holstebro does not provide any details regarding his position between October 2022 and March 2024” [Requesting Party’s written representations, para 8].

[19] Although the Requesting Party made no specific submissions with respect to the admissibility of the Holstebro Affidavit, to be clear, I do not find the level of detail concerning the Owner's relationship with the Boxlight entities to be problematic. Mr. Holstebro was the Owner's President for almost two years during the relevant period and he attests he had access to the Owner's records. As such, I have no reasons to doubt his sworn statements concerning his personal knowledge and I accept his evidence as being reliable evidence.

[20] The Requesting Party submits that the evidence does not show use of the Mark in association with the Goods. In this regard, it first notes that the Mark appears with third parties' trademarks on the products in evidence, referring specifically to the Bluetooth design (the Trademark Bluetooth) shown in the product view photographs. The Requesting Party submits that, as the Mark is only displayed in conjunction with third parties' trademarks, it is clearly not displayed to identify the source of the audio teaching systems, but rather to identify a feature or technology used with the audio teaching systems. According to the Requesting Party, to conclude that the Mark is used to distinguish the audio teaching systems from those of others would imply acceptance "that the [Trademark Bluetooth] is also being used to identify the source of the audio teaching system" [Requesting Party's written representations, paras 11, 16 and 18 to 22].

[21] In response, the Owner submits, and I agree, that the Requesting Party's submission that the Mark is not used as a source identifier is tied to the issue of distinctiveness, which is not a matter to be decided in a section 45 proceeding. In *United Grain Growers Ltd v Lang Michener*, 2001 FCA 66, the Federal Court noted at paragraph 14:

No words in section 45 direct the Registrar to re-examine whether the registered trade-mark is used for the purpose of distinguishing, or so as to distinguish, wares. Rather, the Registrar's duty under section 45 is only to

determine, with respect to the wares specified in the registration, whether the trade-mark, as it appears in the register, has been used in the three years prior to the request.

[22] In addition, in my view, the fact that the Juno audio teaching systems are designed to be used wireless and that one of their components is a Bluetooth audio receiver does not preclude the Mark from being associated with the audio teaching systems themselves (i.e. with more than one component operating together to produce a specific result). In this respect, the evidence shows that the Owner's audio teaching systems include several components, which together improve sound quality to enhance instruction and learning for all students.

[23] Further, the fact that the products in evidence also display third parties' trademarks in association with features or programs that work with the systems' components is irrelevant and does not preclude a finding of use. It is well established that multiple trademarks may be used at the same time [*AW Allen Ltd v Warner-Lambert Canada Inc* (1985), 6 CPR (3d) 270 (FCTD)].

[24] As noted above, what needs to be determined in this case is whether or not sufficient facts have been provided to permit me to conclude to use of the Mark as registered by the Owner in association with the Goods in Canada during the relevant period.

[25] In the present case, the Mark is displayed below a specific yellow-orange design element. In my view, such display amounts to display of the Mark as registered, given that the word "ADAPTO" is preserved and remains recognizable despite the addition of the design element [see *Canada (Registrar of Trade Marks) v Cie internationale pour l'informatique CII Honeywell Bull SA* (1985), 4 CPR (3d) 523 (FCA); and *Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB)].

[26] The Requesting Party submits that the Mark does not appear anywhere on the invoices [Requesting Party's written representations, para 12]. However, the Owner is not claiming notice of association through the invoices and Mr. Holstebro does not state that they accompanied the Juno and Pro Digital products at the time of delivery. As such, the invoices were furnished to show transfers of the Goods.

[27] Given that the Mark is displayed on the audio teaching systems themselves, and in view of my finding above that such display is acceptable, I am satisfied that notice of association was given to the purchasers at the time of delivery of the Goods.

[28] The Requesting Party submits that, as the Owner's audio teaching systems are identified or sold as Juno and Pro Digital, a consumer would associate these trademarks as identifying the source of the Goods [Requesting Party's written representations, para 17]. Nevertheless, there is nothing in the Act that precludes a trademark owner from using more than one trademark at the same time in association with the same goods [per *AW Allen Ltd, supra*].

[29] Lastly, the Requesting Party submits that none of the invoices show sales of Pro Digital products [Requesting Party's written representations, para 12]. However, Mr. Holstebro asserts that the invoices are representative [see *Oyen Wiggs Green & Mutala LLP v Atari Interactive, Inc*, 2018 TMOB 79 at para 25 for the well established principle that an affiant's statements are to be accepted at face value and must be accorded substantial credibility in a section 45 proceeding]. Moreover, Mr. Holstebro provides specific sales figures for the Pro Digital audio teaching systems. I am therefore satisfied that the Owner has sufficiently shown sales of the Goods within its normal course of trade.

[30] In view of all the above, I am satisfied that the Owner has demonstrated use of the Mark in association with the Goods within the meaning of sections 4(1) and 45 of the Act.

DISPOSITION

[31] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, and in compliance with the provisions of section 45 of the Act, the registration will be maintained.

Maria Ledezma
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Requesting Party: Stikeman Elliott S.E.N.C.R.L., SRL/LLP

For the Registered Owner: Smart & Biggar LP