



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2025 TMOB 119

Date of Decision: 2025-06-02

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Lavery de Billy, LLP

Registered Owner: Spencer Xiong

Registration: TMA938,486 for ampersands

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. TMA938,486 for the trademark ampersands (the Mark).

[2] The Mark is registered for use in association with the following goods and services (the Goods and Services):

Goods

Photographic prints, and lithographic prints; Photographs; Pre-recorded optical discs containing digital photographs and digitally-encoded videos; Promotional items, namely, hats, casual clothing, stickers, bumper stickers, mouse pads, key chains, and pens.

Services

Photography and videography services; Photograph printing services;
Conversion of printed and developed photographs to digital formats;
Operating a website providing information in the field of photography and
videography services.

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

PROCEEDING

[4] At the request of Lavery de Billy, LLP (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on September 5, 2024, to Spencer Xiong (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 and Services 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 September 5, 2021 to September 5, 2024.

[6] The relevant definitions of “use” in the present case are 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.

4(2) A trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[7] Where the Owner does not show “use”, the registration is liable to be expunged or amended, unless there are special circumstances that excuse the absence of use.

[8] In response to the Registrar’s notice, the Owner furnished his own affidavit, sworn on October 30, 2024, together with Exhibits A to E.

[9] Neither party filed written representations or requested a hearing.

EVIDENCE AND ANALYSIS

[10] As a preliminary remark regarding the admissibility of evidence, I note that most of the exhibits attached to Mr. Xiong’s affidavit are unnotarized. However, taking into consideration the purpose and intent of section 45 and the fact that Mr. Xiong has referenced the exhibits in his affidavit, I accept them as part of the evidence [see *Borden & Elliot v Raphael Inc* (2001), 16 CPR (4th) 96 (TMOB); *MBM & Co v Belize Bicycle Canada Reg’d*, 2010 TMOB 141].

[11] Also as a preliminary remark, I note that while the Mark is registered as a word mark, the relevant exhibits to Mr. Xiong’s affidavit include the word “Ampersands” with the addition of the word “Studio” and the below reproduced composite trademarks (Logo 1 et Logo 2, collectively the Logos):



[12] The issue of whether display of the word “Ampersands” with the addition of the word “Studio” and the Logos amounts to display of the Mark as registered will be addressed further below.

Overview of the Owner's evidence

[13] In his six-paragraph affidavit, Mr. Xiong identifies himself as a photographer and states that the Mark has been continuously used in association with the some Goods and all the Services in Canada during the relevant period.

[14] In particular, with respect to the Goods, Mr. Xiong concedes non-use of the Mark in Canada in association with "lithographic prints", "pre-recorded optical discs containing digital photographs and digitally-encoded videos" and "promotional items, namely, hats, casual clothing, stickers, bumper stickers, mouse pads, key chains, and pens" [para 2]. As there is no evidence before me of special circumstances excusing non-use, the registration will be amended to delete these goods.

[15] With respect to the Goods for which use is claimed, namely "photographic prints" and "photographs" (the Claimed Goods), Mr. Xiong asserts that he provides photographic prints bearing the Mark, such as "thank you cards" (the Cards), to his customers. He also asserts that he provides large format prints and digital photographs, identified with the Mark in their file name [paras 2-3].

[16] With respect to the Services, Mr. Xiong states that all of them were associated either with the Mark or with "Ampersands Studio". In particular, Mr. Xiong states that he provides photography services, large format printing services and digital photos to his customers. Mr. Xiong also states that he operates a website at *ampersands.ca* which has been active since 2013, displays the Mark and provides information about photography and videography services [paras 2-3].

[17] In support, the following relevant exhibits are attached to Mr. Xiong's affidavit:

- Exhibit A is a close-up photograph of a couple's hands which Mr. Xiong states is a Card [para 2]. On the left side of the Card, I read "Thank you – Brittney & Anthony – Aug 12th 2022". Logo 2 appears on the right side of the Card.
- Exhibit B is a two-page document entitled "Agreement", which Mr. Xiong describes as an invoice [para 3]. Although the first page is partially redacted, it details "6 hour wedding day coverage with 1 photographer" as follows: "2hr couple shoot in High Park" and "4hr on day of wedding" and totals \$1,356.00. Under the heading "Location of photography" a Toronto address appears and the date of June 29, 2024 is indicated as "Wedding Date". Logo 2 is displayed on the top of the first page. The second page of the document is entitled "Terms and Conditions" and is signed by the Owner and a customer in March 2024. The Terms and Conditions establish that the Owner will send digital negatives in JPG format to his customers through an online link within eight weeks of the event date. They also establish that print orders require full payment in advance.
- Exhibit C is a screenshot showing a computer folder named "230114-Sabrina & Andrew's Wedding" containing several JPG files which names include "Ampersands Studio" and "230114".
- Exhibit D is a screenshot showing the "Portfolio" tab of the website. This screenshot displays Logo 1 on its top right side and simply shows images under the headings "Engagements", "Weddings" and "Details". The screenshot also includes tabs entitled "About", "Pricing" and "Contact".
- Exhibit E is a cropped image which Mr. Xiong states is a close-up from a large print [para 2]. The file name of the image appears underneath and includes "Ampersands Studio" and "220812".

Display of the Mark

[18] In considering whether the display of a trademark constitutes display of the trademark as registered, the question to be asked is whether the trademark was displayed in such a way that it did not lose its identity and remained recognizable, in spite of the differences between the form in which it was registered and the form in which it was used [*Canada (Registrar of Trade Marks) v Cie internationale pour l'informatique CII Honeywell Bull SA* (1985), 4 CPR (3d) 523 (FCA)]. In deciding this issue, one must look to see whether the dominant features of the registered trademark have been preserved [*Promafil Canada Ltée v Munsingwear Inc*, 1992 CanLII 12831, 44 CPR (3d) 59 (FCA); *Pizzaiolo Restaurants Inc v Les Restaurants La Pizzaiolle Inc*, 2016 FCA 265]. This is a question of fact to be determined on a case-by-case basis.

[19] In the present case, the Print and the JPG files include the word "Ampersands" with the addition of the word "Studio". I consider the word "Studio" to be descriptive when associated with the Claimed Goods and Services, such that the Mark does not lose its identity and remains recognizable despite the addition of the word "Studio". I therefore find the word "Ampersands" with the addition of the word "Studio" to be an acceptable variation of the Mark as registered.

[20] The screenshot of the website displays Logo 1 which includes the word "Ampersands" with the additional word "Studio" followed by a design element. The Card and the invoice display Logo 2 which includes the word "Ampersands" followed by the same design element and, in a second line below, the words "Photography Studio". In my view, display of the Logos amounts to display of the Mark as registered given that the word "Ampersands" is preserved and remains recognizable despite the additions

of the descriptive words “Studio” or “Photography Studio” and the design element.

Use of the Mark in association with the Claimed Goods

[21] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing “deadwood” from the register. While bare assertions of use will not suffice, all that is required is for evidence to supply facts from which a conclusion of use of the trademark in association with each of the goods may follow as a logical inference [per *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184; *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)].

[22] Although Mr. Xiong does not describe the normal course of his business, I am able to infer from the evidence that he operates a professional photograph studio under the name “Ampersands Photography Studio”. He acts as exclusive photographer at engagements and weddings ceremonies and promotes his studio services and related goods online. Mr. Xiong concludes an agreement with his customers who pay 50% of the total price upon signature in order to secure the services and related goods, then they pay the balance one month before the event. Within two months of the ceremony date, Mr. Xiong provides his customers with the photographs he took at the event in JPG format and/or in printed format [per *Diamant Elinor, supra*, at para 9].

[23] With respect to “photographic prints”, the Owner provides a Card for a wedding held during the relevant period and asserts that the Card was delivered in printed format. The Owner also provides a close-up image from a large print (the Print) which file name includes “220812”. Bearing in mind that the evidence must be read with a mind willing to understand [*Portage World-Wide, Inc v Croton Watch Co, Inc*, 2017 TMOB 96 at para 21] and in

the absence of any representations from the Requesting Party, I find it reasonable to conclude that these numbers are in YYMMDD format, such that August 12, 2022 is the date where the Print was produced or where the digital photograph was imported to the Owner's computer.

[24] The same conclusion applies, in my view, to the computer folder which name includes "230114", such that January 14, 2023 is the date where the computer folder was created and the JPG files listed therein were imported to the Owner's computer.

[25] In my view, the Card and the Print correlate with "photographic prints". As both display the Mark and are dated during the relevant period, they show how the Mark was associated with "photographic prints" during such period. Further, as the evidence includes photographs in a format other than printed (i.e. JPG format), I accept that the JPG files, once opened, showed photographs on the computer screens of the Owner's customers. As a result, I accept that the JPG files correlate with "photographs". In my view, the JPG files identified with the Mark show how the Mark was in any other manner associated with "photographs" during the relevant period, such that notice of association was given to the Owner's customers at the time of transfer of these JPG files.

[26] With respect to transfers of the Claimed Goods, I note that the first page of the sole invoice in evidence, does not detail any photograph-related good. Nevertheless, in view of the Owner's normal course of business and bearing in mind that drawing an inference is a matter of reasonably probable, logical deductions from the evidence [*Sim & McBurney v En Vogue Sculptured Nail Systems Inc*, 2021 FC 172 at para 15], I find it reasonable to conclude that the price detailed in the same page includes the provision of the photographs (printed and/or in JPG format) taken at the wedding photograph session detailed therein. Given that the evidence includes the

Card, the Print and JPG files all associated with the Mark and dated during the relevant period, I conclude that the Claimed Goods were transferred to the Canadian customers during such period.

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

Use of the Mark in association with the Services

[28] It is well established that bare assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings is low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trademark in association with *each* of the services specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[29] In the present case, the evidence establishes that the Mark was used in Canada by the Owner during the relevant period with some, but not all of the Services.

[30] The first page of the invoice displays the Mark in its top and details a wedding photograph session that took place in Toronto during the relevant period. I am therefore satisfied that the Owner has shown use of the Mark in the performance of “photography services” in Canada during such period [*Tint King of California Inc v Canada (Registrar of Trade Marks)*, 2006 FC 1440 at para 35].

[31] As for “videography services”, I note that Mr. Xiong refers to the one and only invoice in evidence to support his statement of use of the Mark in

association with both photography and videography services. However, as the first page of the invoice exclusively refers to a photograph session, it only shows performance of photography services [per *John Labatt, supra*]. In addition, nothing in the evidence allows me to conclude to the advertising or provision of “videography services” in Canada during the relevant period. The Terms and Conditions only refer to printed or digital photographs; the screenshot of the Owner’s website contains no references to video or videography services. As such, Mr. Xiong’s statement that the Mark was used in association with “videography services” amounts to a mere assertion of use, rather than a statement of fact showing use [per *Plough, supra*].

[32] Mr. Xiong states that he provided photograph printing services to his customers and furnishes the Card and the Print which are both associated with the Mark and dated during the relevant period. As use of a trademark on a finished product can serve to support use in association with services performed in relation to such goods, I accept that “photograph printing services” in association with the Mark were, at a minimum, advertised in Canada during the relevant period [see *Lidl Stiftung & Co KG v Thornbury Grandview Farms Ltd* (2005), 48 CPR (4th) 147 at para 17; and *Anderson Instrument Co v 3402983 Canada Inc*, 2015 TMOB 98 at para 19]. Further, as Mr. Xiong also furnishes the Terms and Conditions, signed during the relevant period and establishing the provision of printed photographs upon full payment, I also accept that the Owner was, at least, willing and able to provide “photograph printing services” to potential Canadian customers during the relevant period [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (TMOB)].

[33] With respect to “operating a website”, in general, given the display of the Mark on the website, the top-level domain for Canada and Mr. Xiong’s statement that his website has been active since 2013, I accept that such

website bore the Mark, was directed to Canadians and in operation during the relevant period. In particular, with respect to the provision of information in the field of photography services through the website, although the screenshot in evidence does not show the way in which such information was provided, in view of the Owner's normal course of business, I am prepared to accept that such information was provided in the "Details" and/or in the "About" and "Pricing" webpages. All in all, I find the evidence as a whole sufficient to demonstrate that the Owner has shown use of the Mark in association with "operating a website providing information in the field of photography services" in Canada during the relevant period.

[34] I come to a different conclusion with respect to the advertising or provision of "information in the field of videography services" through the Owner's website. The screenshot does not include any information and the evidence is completely silent as to any video-related good or service.

[35] As for "conversion of printed and developed photographs to digital formats" services, Mr. Xiong's statement is that he "deliver[s] digital photos to [his] clients labeled with the 'Ampersands' file name" [para 3], and he provides a screenshot showing several JPG files in support. However, I find this evidence insufficient to conclude to the performance of conversion of printed and developed photographs to digital formats services.

[36] First, nothing in the screenshot indicates that the JPG files are the result of conversion to digital format or that such files were originally printed and developed photographs. Further, the evidence does not detail the Owner's photograph process, nor does it make any reference to scanning or format change. Absent additional evidence, I am not prepared to accept that the JPG files were printed and developed photographs subsequently converted to digital format, as opposed to being originally created in digital format. A conclusion that the JPG files in evidence were converted to digital

format would be, in my view, impermissible speculation rather than inference from proven facts [see *Diamant Elinor, supra*, at para 11; and *Smart & Biggar v Curb*, 2009 FC 47 at para 20].

[37] Moreover, as the sole screenshot from the Owner's website does not include any information or reference to photograph format conversion, the advertising of "conversion of printed and developed photographs to digital formats" services is not shown in evidence either.

[38] As such, the evidence does not allow me to conclude that the Owner advertised or provided conversion of printed and developed photographs to digital formats to Canadian customers during the relevant period.

[39] For all the above reasons, I am satisfied that the Owner has demonstrated use of the Mark in association with "photography services", "photograph printing services" and "operating a website providing information in the field of photography services" within the meaning of sections 4(2) and 45 of the Act.

[40] In contrast, I find the evidence to be insufficient to demonstrate use of the Mark in association with "videography services", "conversion of printed and developed photographs to digital formats" and "operating a website providing information in the field of videography services". As there is no evidence before me of special circumstances excusing non-use, these services will be deleted from the registration.

DISPOSITION

[41] 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 amended to delete the following goods and services:

Goods

- (1) [...], and lithographic prints; [...]; Pre-recorded optical discs containing digital photographs and digitally-encoded videos; Promotional items, namely, hats, casual clothing, stickers, bumper stickers, mouse pads, key chains, and pens.

Services

- (1) [...] and videography [...]; [...] Conversion of printed and developed photographs to digital formats; [...] and videography [...].

[42] The amended statement of goods and services will read as follows:

Goods

- (1) Photographic prints; photographs.

Services

- (1) Photography services; photograph printing services; operating a website providing information in the field of photography services.

Maria Ledezma
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

No hearing held

AGENTS OF RECORD

For the Requesting Party: Lavery de Billy, LLP

For the Registered Owner: No agent appointed