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Ottawa / Hull, Canada  
K1A 0C9

**JAN 15 1988**

*Votre reference Your file*

Messrs. Sim & McBurney  
Suite 701  
330 University Avenue  
Toronto, Ontario  
M5G 1R7

4177-5

*Notre reference Our file*

471,645

Gentlemen:

RE: SECTION 44 PROCEEDINGS

Registration Nos.: TMA 268,638 and TMA 269,648

Trade Marks: ADS and ADS Design

At the request of Messrs. Smart & Biggar, acting on behalf of Applied Digital Data Systems Inc., the Registrar issued two (2) Section 44 notices dated June 21 and July 17, 1985 respectively, to Auto Dealers Systems Inc., the registered owner of the above referenced trade mark registrations.

The marks ADS and ADS Design were registered on April 30 and May 28, 1982 respectively, for use in association with computer software. The corporate name of the registrant company was changed to 421281 Ontario Limited by Articles of Amendment - under the Ontario Business Corporations Act - dated September 20, 1984. The marks were subsequently assigned to Ads Computer Services Inc., on May 1, 1985. The assignment was recorded on the register on July 11, 1986.

Because of the similarity in all essential respects, these two cases are hereby processed simultaneously.

In response to the Registrar's notices, the registrant furnished the affidavits of its Vice-President of Marketing and Operations, Mr. Bruce Amson along with Exhibits A through K thereto. Further to the filing of this evidence, the requesting party filed a written submission to which the registrant did not respond, preferring to await the Registrar's decision based on the evidence furnished.

In its written submission, the requesting party criticizes the evidence filed as follows:

- 1 - "The affidavit does not show that the registrant is selling computer software under the trade marks ADS and ADS Design in the normal course of trade",
- 2 - "The registrant has filed no evidence showing use of its trade marks on the actual wares themselves or on the packages in which computer programs are distributed, nor has it shown use in any manner that would give notice of the association between the trade marks and the wares", and
- 3 - "Exhibits A and G of Mr. Amson's affidavit show the registrant's design trade mark as covered by registration No. 269,648. Although other exhibits show the word ADS in a design form, such design form is different from that covered by the registration".

It must be stated from the outset, that I am at a loss to understand the full import of the requesting party's arguments. If it is arguing that there can be no use because there is no sale of wares established, then I must refer to Section 2 of the Act which reads as follows:



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"trade mark means

(a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others." (emphasis mine)

In the present case, it is quite clear from the licensing agreement filed as exhibit 13 that the registrant is licensing its customers to use its ADS computer software or parts thereof in the administration of their automobile dealerships. It is obviously using its trade marks to distinguish its computer software from that of others.

It is true that the evidence does not establish that the marks are featured on the wares themselves or on their packaging, but it seems clear to me that the association between the marks and the wares is obvious to any licensee who enters into an agreement with the registrant and adopts his computer software to manage its accounting, parts inventory control payroll, leasing, management reports, customer follow-up traffic control, parts invoicing, vehicle control, contract preparations or any part thereof. I am therefore satisfied that use of the marks has been shown within the meaning of Section 4(1) of the Act.

As to the deviation in the use of the design mark - TMA 269,648 - as evidenced by most of the promotional material filed in exhibit, I do not believe that it can be considered as substantial. The distinctive features of this mark consist of the word ADS and the stylized form in which the three letters are reproduced. The fact that the letter "D" has been lowered somewhat does not detract from the mark's general characteristics. When compared side by side the mark as registered and the mark as used do not appear as two different marks but as the same mark where the letter "D" is printed out of line to increase the mark's visibility. This variation is not apt to deceive the consuming public in any way.

Therefore, by reason of the evidence filed in these proceedings, I have concluded that both subject trade marks are in use in Canada, within the meaning of the Act and, that consequently their registration ought to be maintained as they presently appear on the register.

Registrations TMA 268,638 and TMA 269,648 will be maintained accordingly, in compliance with the provisions of subsection 44(5) of the Trade Marks Act.

Yours truly,

J. P. D' Aoust  
Senior Hearing Officer  
for REGISTRAR OF TRADE MARKS

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c.c. Messrs. Smart & Biggar  
P.O. Box 2999, Station D  
Ottawa, Ontario.  
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(Your ref.: (8096-18))