



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2010 TMOB 195
Date of Decision: 2010-11-22

**IN THE MATTER OF AN
OPPOSITION by Drive
Trademark Holdings LP to
application No. 1,244,367 for the
trade-mark FINANCING YOUR
DRIVE in the name of Chrysler
LLC**

FILE RECORD

[1] On January 21, 2005, DailmerChrysler Services AG filed an application to register the trade-mark FINANCING YOUR DRIVE, based on proposed use in Canada, in association with

financial and insurance services for dealers and customers of automobiles, namely, automobile insurance and lease, hire purchase and purchase financing agreements.

[2] The subject application was advertised for opposition purposes in the *Trade-marks Journal* issue dated September 20, 2006 and opposed by Drive Trademark Holdings LP on February 20, 2007. The Registrar forwarded a copy of the statement of opposition to the applicant on March 13, 2007 as required by s.38(5) of the *Trade-marks Act*, R.S.C. 1985, c. T-13. The applicant responded by filing and serving a counter statement generally denying the allegations in the statement of opposition. During the course of this proceeding, the application was assigned from DailmerChrysler Services AG to Chrysler LLC, the current applicant of record.

[3] The opponent's evidence consists of the affidavit of Jeannine Summers. The applicant's evidence consists of the affidavit of Lynda M. Palmer. The opponent's evidence in reply consists of a second affidavit of Jeannine Summers. Both parties filed a written argument; however, neither party requested an oral hearing in response to the Board's notice dated October 22, 2009.

OPPONENT'S EVIDENCE

Jeannine Summers

[4] Ms. Summers identifies herself as a paralegal with the firm representing the opponent. She conducted various on-line searches for (i) dictionary definitions of the noun "drive," (ii) instances of use of the phrase "financing your drive," (both searches done on February 1, 2008) and (iii) the opponent's web-site (searched on February 5, 2008).

APPLICANT'S EVIDENCE

Lynda Palmer

[5] Ms. Palmer identifies herself as a trade-marks searcher with the firm representing the applicant. She conducted a search of the trade-marks register for marks "composed of DRIVE in association with financial services . . ." The results of her search are attached *en liasse*, consisting of 22 registrations and 5 applications standing in the names of various third parties.

OPPONENT'S REPLY EVIDENCE

Jeannine Summers

[6] Ms. Summers' second affidavit consists of the results of her online search "for web pages that, for each trade-mark listed in Ms. Palmer's Affidavit, include the trade-mark and part or all of the owner name." Twelve of the marks cited by Ms. Palmer failed to appear in Ms. Summers' search.

STATEMENT OF OPPOSITION

[7] Various grounds of opposition are alleged in the statement of opposition. However, in paragraph 21 of its written argument, the opponent states that it “will only be pursuing” three of the grounds of opposition. It is not clear whether the opponent is indicating that only three grounds are to be argued in the written argument, or whether the opponent is withdrawing the other grounds of opposition not addressed in its written argument. To err on the side of assurance, I have assumed that the opponent intended to indicate the former.

[8] I agree with the applicant’s submissions in its written argument that the opponent has failed to meet the evidential onus on the opponent with respect to the majority of the grounds of opposition pleaded. Further, in my view the grounds of opposition alleging non-entitlement and non-distinctiveness need not be considered because the opponent has failed to establish any meaningful use of its trade-marks or trade-name relied on in the statement of opposition, or any meaningful use of third party marks. Accordingly, the opponent has failed to meet its evidential onus in respect of those grounds as well. In my view, only two grounds of opposition, both addressed by the opponent in its written argument, are in issue, namely:

(i) the applied for mark FINANCE YOUR DRIVE is not registrable, pursuant to s.12(1)(b) of the *Trade-marks Act*, because the mark is clearly descriptive of the character or quality of the applicant’s services,

(ii) the applied for mark FINANCE YOUR DRIVE is not registrable, pursuant to s.12(1)(c) of the *Act*, because the mark is the name of the services in connection with which it is proposed to be used.

DISCUSSION OF GROUNDS OF OPPOSITION

[9] With respect to the first ground, above, I agree with the tests to be applied and the material time as set out by the opponent in paragraphs 22 – 27 of its written argument. That is, the material time with respect to s.12(1)(b) is the date of filing the application, and the test is whether the mark is easy to understand, self-evident or plain as a matter of first impression. In my view, the average consumer will understand, as a matter of first impression, that the mark FINANCE YOUR DRIVE implies that the applicant’s services

have something to do with financial services relating to the general expenses of having access to a car for personal use, or to assist in meeting the expenses of driving an automobile from one particular location to another location. However, as noted by the applicant in its written argument, the applicant's services relate to financing the purchase (or lease) of a car rather than to financing any other of the myriad expenses incurred in the operation of a vehicle over a period of time. In my view, the applied for mark FINANCE YOUR DRIVE is highly suggestive of financial services associated with car ownership, but the phrase is also rather vague and non-specific. Thus, the applied for mark is not clearly descriptive of the applicant's services. The ground of opposition pursuant to s.12(1)(b) is therefore rejected.

[10] With respect to the second ground, it was incumbent on the opponent to evidence that the term "finance your drive" was accepted in the English language to mean the services specified in the subject application. Thus, as a starting point, the opponent would have to establish that the word "drive," as a noun, is synonymous with the words "automobile" or "car" or "vehicle," or that the phrase "finance your drive" is generally understood to mean the financial services specified in the subject application. The evidence of record does not, on a balance of probabilities, sufficiently support any of the above premises. Accordingly, the ground of opposition pursuant to s.12(1)(c) is rejected.

DISPOSITION

[11] In view of the foregoing, the opposition is rejected. This decision has been made pursuant to a delegation of authority under s.63(3) of the *Trade-marks Act*.

Myer Herzig
Member
Trade-marks Opposition Board