



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

Citation: 2010 TMOB 136
Date of Decision: 2010-08-17

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Schock Metal America Inc. against
registration No. TMA555,878 for the trade-mark
SCHOCK & Design in the name of Schock GmbH**

[1] On August 20, 2008, at the request of Schock Metal America Inc. (the “Requesting Party”), the Registrar forwarded a notice under s. 45 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the “Act”) to Schock GmbH, (the “Registrant”) the registered owner of the trade-mark SCHOCK & Design as illustrated hereinafter:

S C H O C K ◀ (the “Mark”).

The triangle design in the Mark is coloured red. Colour is claimed as a feature of the Mark.

[2] The Mark is registered for use in association with the following wares:

Sanitary installations, namely bathtubs, shower troughs, washbasins, toilets, bidets, sanitary mirrors and parts therefor; furniture, namely kitchen and bathroom furniture as well as parts therefor; building materials and supplies, namely counter tops, work tops, kitchen sinks, mirrors, panel materials for interior construction namely wall panels, ceiling panels and floor panels, prefabricated walls and roofs namely prefabricated wall and roof framing and prefabricated wall and roof components with finished surfaces, non-metal doors, non-metal windows, awnings, blinds, roof gutters; shaped sections made of plastic, metal and/or wooden materials, used in the production of windows, furniture parts and floor skirting boards; and winter garden enclosures namely greenhouses and enclosed gazebos and parts therefore (the Wares).

[3] Such notice requires the Registrant to show whether the Mark has been used in Canada in association with each of the Wares listed on the registration 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 use since that date. The relevant period in this case is any time from August 20, 2005 to August 20, 2008 (the “relevant period”).

[4] In response to the notice, the affidavit of Joseph Preuß has been furnished together with exhibits A to J. The parties filed written submissions but did not request an oral hearing.

[5] Section 45 proceedings are simple, expeditious and serve the purpose of clearing the register of “deadwood”; as such the threshold test is quite low [see *Smith Lyons v. Vertag Investments Ltd.* (2000), 7 C.P.R. (4th) 557].

[6] A simple allegation of use of the Mark is not sufficient to evidence its use in association with the Wares within the meaning of s. 4(1) of the Act. There is no need to overkill the file with evidence establishing such use of the Mark. However any ambiguity in the evidence filed shall be interpreted against the owner of the Mark [See *Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1980) 53 C.P.R. (4th) 62].

[7] I therefore have to determine if I am satisfied that the evidence to be described hereinafter enables me to conclude that the Mark has been used in association with each of the Wares in Canada during the relevant period.

[8] Mr. Preuß is the Registrant’s managing director since November 2006. He is responsible for matters relating to the Registrant’s trade-marks. He states that the facts and information contained in his affidavit are known to him personally or were obtained from the Registrant’s files and records to which he has access.

[9] He states that the Registrant is a leading manufacturer of sinks and basins of composite materials. Those products are sold in association with various brand names, but also bear the Mark on labels, products and packaging.

[10] He alleges that the products sold by the Registrant are produced and shipped by itself directly to Canadian customers. Those products are sold to kitchen and bathroom contractors

for installation by those contractors. They are also sold to appliance and remodeling retailers, for subsequent sale to consumers.

[11] He alleges that the Mark was used in Canada in association with the Wares by the Registrant during the relevant period. By itself, this constitutes a bald assertion of use of the Mark and without any additional evidence of use, within the meaning of s. 4(1) of the Act, it would not be sufficient to maintain the registration of the Mark on the register in association with the Wares [see *Plough, op. cit.*].

[12] I shall reproduce paragraph 6 of his affidavit:

6. With respect to the wares “Sanitary installations, namely bathtubs, shower troughs, washbasins, toilets, bidets, sanitary mirrors and parts therefore” and “building materials and supplies, namely counter tops, work tops, kitchen sinks, mirrors, panel materials for interior construction namely wall panels, ceiling panels and floor panels, prefabricated walls and roofs namely prefabricated wall and roof framing and prefabricated wall and roof components with finished surfaces, non-metal doors, non-metal windows, awnings, blinds, roof gutters”, Schock has, for many years, sold washbasins, kitchen sinks, taps, and accessories to customers in Canada.

Nowhere in this paragraph or elsewhere in his affidavit is there a reference to: “furniture, namely kitchen and bathroom furniture as well as parts therefor; shaped sections made of plastic, metal and/or wooden materials, used in the production of windows, furniture parts and floor skirting boards; and winter garden enclosures namely greenhouses and enclosed gazebos and parts therefor”. Accordingly, the registration will be amended to delete at least those wares. There is no allegation in the affidavit to excuse the non-use of the Mark during the relevant period in association with any of those wares.

[13] Mr. Preuß states that the “Schock products”, an expression not defined in his affidavit, sold during the relevant period are packaged in boxes bearing a label identifying the name and description of the product, its brand name (GOURMET as an example), its product code, and the Mark. He filed samples of such labels.

[14] The labels filed as Exhibit A to his affidavit do bear the Mark, except for the colour claim as the labels are reproduced in black and white. The information appearing on them is written in a foreign language; in view of the Registrant’s country of origin, I presume it is

written in German. Mr. Preuß does specify that kitchen sinks and washbasins are sold in packaging bearing those labels.

[15] Mr. Preuß states that those labels are representative labels that are affixed to the cartons used for the shipping of all Schock products. However he does not specify which of the Wares are included in the expression “Schock products”. Therefore, except for kitchen sinks and washbasins, it is impossible to determine which of the Wares are packaged in boxes bearing those labels.

[16] He filed as Exhibit B a copy of a photograph illustrating the label, Exhibit A, affixed to a box. Even though the photograph was taken after the relevant period he attests that it represents the appearance and placement of the labels on “Schock products” sold in Canada during the relevant period. Because of the ambiguity of the expression “Schock products” I can only assume that the labels are affixed to the boxes containing kitchen sinks and washbasins.

[17] He states that the “Schock products” are shipped along with a maintenance manual explaining to consumers how best to maintain the product purchased. He filed as Exhibit C a copy of such manual that was included with kitchen sinks and washbasins shipped to Canadian customers during the relevant period. A kitchen sink is illustrated on the cover page of the manual. The Mark, as registered, also appears on the cover page of the manual.

[18] To illustrate the sale of kitchen sinks and washbasins in Canada bearing the Mark during the relevant period, Mr. Preuß has filed copies of purchase orders, invoices, packing slips and shipping documents (Exhibits D to J inclusive). Those documents were issued during the relevant period and establish the sale by the Registrant to Canadian customers of kitchen sinks, washbasins and strainer bowls.

[19] Mr. Preuß concludes his affidavit by stating that all of the above proves, that the Mark has been used in Canada in association with the Wares during the relevant period. This is a conclusion in law and I shall disregard such statement.

[20] The evidence filed leads me to conclude that there has been use of the Mark in Canada during the relevant period by the Registrant in association with only kitchen sinks and washbasins. There is also reference to “strainer bowls” in exhibits D (purchase order) and E

and G (invoices) but such product is not part of the Wares. It may very well be an accessory to kitchen sinks but I do not consider such ware as building materials and supplies as described in the registration. Therefore the evidence of use of the Mark in association with “strainer bowls” is of no assistance to the Registrant in this case.

Disposition

[21] Pursuant to the authority delegated to me under s. 63(3) of the Act, registration TMA555,878 for the Mark will be amended to delete all the wares except for the following:

Sanitary installations, namely washbasins; building materials and supplies,
namely kitchen sinks.

in compliance with the provisions of s. 45 of the Act.

Jean Carrière
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office