

IN THE MATTER OF AN OPPOSITION
by Major Video Canada, Inc. to
application No. 614,952 for the
trade-mark MEGA VIDEO filed by
The Movie Stop Inc.

On September 9, 1988, the applicant, The Movie Stop Inc., filed an application to register the trade-mark MEGA VIDEO based on proposed use in Canada with the following wares:

video tapes, recorded and blank, television sets, video recorders, video cameras, tripods, popcorn

and with the following services:

operation of a retail store for the sale and rental of video tapes, and the sale of television sets, video recorders, video camera tripods and popcorn.

The application was amended to include a disclaimer to the word VIDEO and was subsequently advertised for opposition purposes on April 19, 1989.

The opponent, Major Video Canada Inc., filed a statement of opposition on May 19, 1989, a copy of which was forwarded to the applicant on June 9, 1989. The grounds of opposition include, among others, that the applied for trade-mark is not distinctive in view of the opponent's use of its trade-mark MAJOR VIDEO in association with the following services:

operation of a rental store, namely renting pre-recorded video cassettes, video cameras and recorders; operation of a retail store selling confectionary, namely popcorn, potato chips; soft drinks, namely carbonated beverages; video recorder accessories, namely head cleaners, connecting cables, adapters.

The applicant filed and served a counter statement. As its evidence, the opponent filed the affidavit of Victor Knox. The applicant did not file evidence. Both parties filed a written argument but no oral hearing was conducted.

As for the ground of non-distinctiveness, the material time for considering the circumstances is as of the filing of the opposition. Furthermore, the onus or legal burden is on the applicant to show that its trade-mark is adapted to distinguish or actually distinguishes its wares and services from the services of the opponent throughout Canada. Finally, a determination of the issue of confusion between the marks of the parties effectively decides the issue of distinctiveness in this case. In applying the test for confusion set forth in Section 6(2) of the Trade-marks Act, it is useful to consider the circumstances set forth in Section 6(5) of the Act.

Both the mark MEGA VIDEO and the mark MAJOR VIDEO are inherently distinctive although neither is inherently strong in relation to the wares and services involved. The applicant having failed to file evidence, I must conclude that its mark had not become known at all in Canada as of the filing of the opposition. Although the Knox affidavit lacks detail and precision, I am able to conclude that the opponent had made some use of its mark in southern Ontario as of the material time.

The length of time the marks have been in use favors the opponent. The services of the applicant are virtually identical to those of the opponent, namely the operation

of a video rental store. The applicant's proposed wares are of the type that would, or could, be sold or rented through such an outlet. Consequently, the trades of the parties would appear to be similar, if not identical.

As for Section 6(5)(e) of the Act, the marks of the parties bear at least some visual and phonetic similarity. Both marks comprise two words, the first in each case being a two syllable word commencing with the letter M and the second in each case being the word VIDEO. There is a slightly greater degree of resemblance between the marks in the ideas suggested. The prefix "mega-" means "great" or "large" which is similar to the meaning of the word "major" in the context of the opponent's mark.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. I have also considered that the present application is based on proposed use, that the applicant has not evidenced any use of its mark and that consequently it would appear to be a relatively easy matter for the applicant to select a different mark. In view of my conclusions above, and particularly in view of the similarity in the wares, services and trades of the parties and the fact that there is at least some resemblance between the two marks, I find that the applicant has failed to satisfy the onus on it to show that its mark is not confusing with the opponent's mark. It therefore also follows that the applicant has failed to satisfy the onus on it to show that its mark is distinctive. The ground of non-distinctiveness is therefore successful and the remaining grounds need not be considered.

In view of the above, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 31st DAY OF May, 1991.

David J. Martin,
Member,
Trade Marks Opposition Board.