

IN THE MATTER OF AN OPPOSITION by Le Groupe Ro-Na  
Dismat Inc. to application No. 630,040 for the trade-mark  
AMBIANCE Design filed by L.N.K. Manufacturing Agencies Inc.

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On April 20, 1989, L.N.K. Manufacturing Agencies Inc. filed an application to register the trade-mark AMBIANCE Design, a representation of which appears below, based upon proposed use of the trade-mark in Canada in association with "stationery, namely, scented writing paper and scented envelopes; drawer liners, potpourri, scented sachets, scented hangers".

The opponent, Le Groupe Ro-Na Dismat Inc., filed a statement of opposition on May 10, 1990.

As its first ground, the opponent alleged that the applicant's application is not in compliance with Section 30 of the Trade-marks Act in that, as of the applicant's filing date, the trade-mark had never been used by the applicant and, in the alternative, the applicant had abandoned its use of its mark. However, the applicant's application is based upon proposed use of the trade-mark AMBIANCE Design in Canada. As a result, the opponent's allegations do not support proper grounds of opposition under Section 30(e) of the Act and I have therefore dismissed these grounds.

As a further allegation under the Section 30 ground, the opponent alleged that it is false that the applicant could have been satisfied that it was entitled to use the trade-mark AMBIANCE Design in Canada. However, no evidence was furnished by the opponent in respect of the Section 30(i) ground of opposition. As a result, the opponent has failed to meet the evidential burden upon it in respect of this ground which I have likewise dismissed.

The remaining grounds of opposition are based on allegations of confusion between the applicant's trade-mark AMBIANCE Design and the opponent's trade-marks BOUTIQUE AMBIANCE & Design (registration Nos. 290,500 and 294,161) as registered and previously used and made known in Canada in association with "services de décoration intérieure" and "l'opération de boutiques offrant en vente divers produits servant à la décoration intérieure", as well as various

products relating to these services.

The applicant filed a counter statement in which it effectively denied the allegations set forth in the statement of opposition.

The opponent filed as its evidence the affidavit of Nicole Plamondon while the applicant failed to file either evidence or a statement, as required by Rule 44 of the Regulations, that it did not intend to adduce evidence in this opposition.

Both parties filed written arguments and neither party requested an oral hearing.

The opponent's grounds of opposition all turn on the issue of confusion between the applicant's trade-mark AMBIANCE Design and the opponent's registered trade-marks BOUTIQUE AMBIANCE & Design, registration Nos. 290,500 and 294,161. With respect to the ground of opposition based on Section 12(1)(d) of the Trade-marks Act, the material date would appear to be as of the date of my decision (see Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks, 37 C.P.R. (3d) 413 (FCA) and Conde Nast Publications, Inc. v. The Canadian Federation of Independent Grocers, 37 C.P.R. (3d) 538 (TMOB)). Further, the material dates with respect to the non-entitlement and non-distinctiveness grounds are respectively the applicant's filing date (April 20, 1989) and the date of opposition (May 10, 1990).

In determining whether there would be a reasonable likelihood of confusion between the trade-marks at issue, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in Section 6(5) of the Trade-marks Act. Further, the Registrar must bear in mind that the legal burden is on the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks at issue.

With respect to the inherent distinctiveness of the trade-marks at issue, the opponent's registered trade-marks BOUTIQUE AMBIANCE & Design as applied to the services covered in the opponent's registrations and the applicant's trade-mark AMBIANCE Design as applied to the wares covered in the present application are inherently distinctive.

The Plamondon affidavit establishes that the opponent's trade-marks BOUTIQUE AMBIANCE & Design have become known in Canada in association with interior decorating services and the operation of boutiques offering for sale various products used for interior

decoration. On the other hand, no evidence has been furnished by the applicant by way of affidavit of statutory declaration that it has commenced use of its trade-mark in Canada. As a result, I must conclude that the applicant's mark AMBIANCE Design has not become known to any extent in this country. Accordingly, both the extent to which the trade-marks at issue have become known and the length of time that the marks have been in use favour the opponent in this opposition.

The applicant's "stationery, namely, scented writing paper and scented envelopes; drawer liners, potpourri, scented sachets, scented hangers" differ from the services covered in the opponent's registrations, namely, "services de décoration intérieure" and "l'opération de boutiques offrant en vente divers produits servant à la décoration intérieure". However, I would expect that the applicant's drawer liners, potpourri, scented sachets and scented hangers might well be sold through the same type of retail outlet as the opponent's boutiques and could even be sold in the opponent's boutiques as part of the interior decorating service provided by the opponent. In any event, and if such is not the case, the burden was on the applicant to establish by way of evidence that the channels of trade associated with the specific wares of the applicant identified above and the opponent's services covered in the opponent's registrations would not overlap. On the other hand, I do not consider there to be any potential for overlap between the applicant's scented writing paper and scented envelopes and the opponent's services.

The only remaining criterion for consideration under s. 6(5) is the degree of resemblance between the trade-marks at issue in appearance, sounding and ideas suggested. In this regard, the applicant's trade-mark AMBIANCE Design and the opponent's BOUTIQUE AMBIANCE & Design trade-marks are very similar in appearance and in sounding, and bear some degree of similarity in the ideas suggested by them.

In view of the above, and having regard to the degree of resemblance between the trade-marks AMBIANCE Design and BOUTIQUE AMBIANCE & Design and the potential overlapping between the opponent's services and the applicant's "drawer liners, potpourri, scented sachets, scented hangers", I have concluded that the applicant has failed to meet the legal burden on it of establishing that there would be no reasonable likelihood of confusion between the trade-marks at issue. On the other hand, I do not consider that there would be any reasonable likelihood of confusion between the applicant's trade-mark AMBIANCE Design as applied to its "stationery, namely, scented writing paper and scented envelopes" and the opponent's marks. In this regard, I would note the finding of the Federal Court, Trial Division in respect of there being authority to render a split decision in Produits Ménagers Coronet Inc. v. Coronet-Werke Heinrich Schlerf GmbH,

10 C.P.R. (3d) 492.

In view of the above, I refuse the applicant's application in respect of: "drawer liners, potpourri, scented sachets, scented hangers" and otherwise reject the opponent's opposition to registration of the applicant's application in view of the provisions of Section 38(8) of the Trade-marks Act in respect of the following wares: "stationery, namely, scented writing paper and scented envelopes".

DATED AT HULL, QUEBEC THIS 29th DAY OF December, 1993.

G.W.Partington,  
Chairman,  
Trade Marks Opposition Board.