

IN THE MATTER OF AN OPPOSITION  
by Noxell (Canada) Corporation  
to application serial No. 631,725  
for the mark CG & Design  
filed by Waltraud Greif and Stan Czolowski trading as  
Griffin Jewelry Design

On May 11, 1989, Griffin Jewelry Design, a partnership, filed an application to register the mark CG & Design, shown below, for the wares jewelry, based on use of the mark in Canada since April 14, 1989.

The mark was advertised for opposition purposes on January 17, 1990, and opposed by Noxell (Canada) Corporation on January 25, 1990. A copy of the statement of opposition was subsequently forwarded to the applicant on February 15, 1990.

Included among the grounds of opposition is that the applicant is not the person entitled to registration, pursuant to Sections 16(3) (a) [sic] (the reference should be to 16(1) (a)) and 38(2) (c) of the Trade-marks Act. The allegation is that, at the material date April 14, 1989, the applied for mark was confusing with one, or more, of the opponent's marks, listed below, used by the opponent prior to the material date.

<u>Trade-mark</u>	<u>Regn. No.</u>	<u>Wares</u>
C G	138,734	various cosmetics
	279,862	various cosmetics

CG & Design(1)

	282,553	various cosmetics
CG & Design(2)		
COVER GIRL	284,893	various items of jewelry, and fragrances

The applicant filed, and served, a counter statement in which the applicant generally denied the grounds of opposition, and argued that the applied for mark does not resemble any of the opponent's marks.

Only the opponent filed evidence, namely, the affidavit of Kenneth C. Sharpley, senior V.P. of Marketing for the opponent company. Mr. Sharpley was not cross-examined on his affidavit. Both parties filed written arguments. An oral hearing was not conducted.

Mr. Sharpley's evidence is that the opponent sells cosmetics such as eye shadow, make-up remover pads, make-up, blush, perfume, eye cream, mascara, and lipstick under its mark COVER GIRL. The letter combination CG "is commonly used in conjunction with the trade-mark COVER GIRL ... CG is often imprinted directly onto containers in which COVER GIRL products are sold or on related items such as brushes." The exhibits attached to Mr. Sharpley's affidavit illustrate dual use of the marks COVER GIRL and CG & Design(2) (regn No. 282,553) on packaging and containers for the opponent's cosmetics. Sales of COVER GIRL products exceeded \$30 million from 1970 to 1980, and exceeded \$177 million in the period 1980 to 1990. Over \$20 million was spent on advertising COVER GIRL products in the period 1980 to 1990. The opponent could have been more specific regarding how frequently the mark CG, in its three variations, is used together with the mark COVER GIRL. Nevertheless, I am prepared to infer, on a fair reading of Mr.

Sharpley's affidavit, and without the benefit of cross-examination, that the opponent's mark CG & Design(2) has been the opponent's preferred format for its CG marks since about 1983, and that its mark CG & Design(2) was widely known for cosmetic products at the material date April 14, 1989. The opponent also sold gold plated necklaces under the mark COVER GIRL from 1982 to 1985, however, there is no indication of the extent of such sales.

As mentioned earlier, the opponent alleges that the applicant is not entitled to registration because at the applicant's alleged date of first use of the mark, namely April 14, 1989, the applied for mark CG & Design, for jewelry, was confusing with the opponent's mark CG & Design(2) previously used by the opponent for cosmetics. In this regard, the opponent has established the statutory requirements set out in Sections 16 and 17 to show use of the mark CG & Design(2) prior to April 14, 1989, and non-abandonment of its mark at the date of advertisement of the applied for mark.

In considering the issue of confusion between the applied for mark and the opponent's mark CG & Design(2), I am to have regard to all the surrounding circumstances, including those specifically enumerated in Section 6(5). The legal burden is on the applicant to establish that there would be no reasonable likelihood of confusion between the applied for mark CG & Design and the opponent's mark CG & Design(2), at the material date April 14, 1989. I am satisfied that the opponent has met its evidential burden to adduce sufficient evidence which, if believed, would support its allegation that the marks in issue are confusing. The presence of a legal burden on the applicant means that if a determinate conclusion cannot be reached after all the evidence is in, then the issue must be decided against the applicant - see Joseph E. Seagram & Sons v. Seagram Real Estate Ltd. (1984), 3 C.P.R.(3d) 325 at pp. 329-30 (TMOB).

Both parties' marks owe their inherent distinctiveness, for the most part, to the interlocking arrangement of the letter components C and G. The letter components C and G do not, by themselves, contribute much to the inherent distinctiveness of the mark - see GSW Ltd. v. Great West Steel Industries Ltd. (1975), 22 C.P.R.(2d) 154 (F.C.T.D.). The applicant's mark would not have been known to any extent at the material date. As discussed above, I infer from Mr. Sharpley's unchallenged evidence that the opponent's mark CG & Design(2) was widely known to the public at the material date.

The opponent's mark CG & Design(2) has been in extensive use since about 1983. Accordingly, length of time in use favours the opponent. As a surrounding circumstance, the fact that the opponent has used other marks comprised of the letter combination CG, since about 1962, also favours the opponent.

The nature of the parties' wares, namely jewelry and cosmetics, are intrinsically different. However, "the fact that the wares are dissimilar is not conclusive of the issue of confusion" particularly where, as here, the opponent's mark has achieved a significant reputation and is therefore entitled to a broad range of protection - see Polysar Ltd. v. Gesco Distributing Ltd. (1985), 6 C.P.R.(3d) 289 at 296 (F.C.T.D.). I cannot accept the opponent's submission that, as a general principle, jewelry, cosmetics and personal care items are all part of the "fashion industry", although the principle would apply to such wares sold under "designer" or "signature" marks - see S.C. Johnson & Son, Inc. v. Esprit De Corp. (1986), 13 C.P.R.(3d) 235 (F.C.T.D.). In the instant case, the fact that the opponent has actually sold jewelry under its mark COVER GIRL underscores the potential for jewelry and cosmetics to be associated with a single source. In view of the foregoing, and in the absence of evidence to the contrary, I assume that there is potential for at least some overlap in the parties' channels of trade if the opponent resumed

selling jewelry - in this regard, see Polysar, above, at p. 297.

As for the degree of resemblance between the marks in issue, the applicant has essentially appropriated the whole of the opponent's mark CG & Design(2), and has added fairly non-distinctive matter.

Considering the above, I am left in a state of doubt whether, at material date April 14, 1989, the public would have assumed that the applicant's jewelry was approved, licensed, or sponsored by the opponent. Accordingly, I find that the applicant has not met the legal burden on it to establish that, as a matter of first impression and imperfect recollection, there would be no reasonable likelihood of confusion between the applied for mark and the opponent's mark CG & Design(2) - see Glen-Warren Productions Ltd. v. Gertex Hosiery Ltd. (1990), 29 C.P.R. (3d) 7 at 12 (F.C.T.D.).

In view of the above, the opponent succeeds on its ground of opposition alleging that the applicant is not entitled to register the applied for mark, and I need not consider the remaining grounds.

Accordingly, the applicant's application is refused.

DATED AT HULL, QUEBEC, THIS 30th DAY OF April, 1993.

Myer Herzig,  
Member,  
Trade-marks Opposition Board