



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

Citation: 2017 TMOB 115

Date of Decision: 2017-08-25

IN THE MATTER OF A SECTION 45 PROCEEDING

Cassels Brock & Blackwell LLP

Requesting Party

and

Pacific Sky Global Tradeworks Inc.

Registered Owner

TMA744,352 for SecurAdvantage

Registration

[1] At the request of Cassels Brock & Blackwell LLP (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the Trade-marks Act, RSC 1985, c T-13 (the Act) on August 20, 2015 to Pacific Sky Global Tradeworks Inc. (the Owner), the registered owner of registration No. TMA744,352 for the trade-mark SecurAdvantage (the Mark).

[2] The Mark is registered in association with the following goods:

Consumer and industrial safety products namely flashlights, flares, security and surveillance systems used in building, automotive and aviation applications. Software developed and integrated to provide digital video recording/playback software with zone-based motion detection; software capable of executing pre-programmed actions triggered by events namely motion detection, switches, temperature, and time/date; software capable of defining premise-automation devices namely lighting controls, motion sensors, irrigation systems, and high and low-voltage interfaces; software capable of defining and scheduling user-defined actions intended to control automation subsystems namely thermostats, lighting controls, irrigation controls, appliance controls, as well as high and low voltage interfaces; software capable of alerting to a distress, alarm or

preprogrammed event of premise security and automation systems via electronic methods namely email, SMS, telephone, pager, cell phone, loudspeakers, and high and low-power radio frequency transmitters. Electronic subsystems developed and integrated to enable premise security and automation namely lighting controls, motion sensors, irrigation systems, and high and low-voltage interfaces, contact switches, and security / automation controllers. Solar powered personal and premise safety warning and safety equipment namely lighting intended to illuminate walkways and structures; and motion and event activated lighting; lighting intended to provide visual warnings.

[3] The Mark is also registered in association with the following services:

Operation of an internet website providing information, and news in the field of security, video surveillance, premise automation, automotive safety and security, premise and safety and security. Operation of an internet website providing online sales of residential and commercial security systems and accessories, premise automation controllers, automation controls namely dimmers, switches, appliance controls; consulting and assessment services in the field of security and premise automation.

[4] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the goods and services specified in the registration at any time within the three-year period immediately preceding the date of the notice and, if not, the date when the trade-mark was last used and the reason for the absence of such use since that date. In this case, the relevant period for showing use is August 20, 2012 to August 20, 2015.

[5] The relevant definitions of “use” are set out in sections 4(1) and 4(2) of the Act as follows:

4(1) A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

4(2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[6] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in section 45 proceedings is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and

evidentiary overkill is not required [*Union Electric Supply Co Ltd v Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with each of the goods and services specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[7] In response to the Registrar's notice, the Owner furnished the affidavit of Adam Kupsta, sworn on October 19, 2015. Only the Requesting Party filed written representations, but both parties were represented at an oral hearing, held on July 5, 2017.

THE OWNER'S EVIDENCE

[8] In his affidavit, Mr. Kupsta identifies himself as "a binding officer" of the Owner. He states that the disclosures in his affidavit are intended to support the Owner's "use and justification" of the Mark. By way of documentation, he attaches various schedules to his affidavit, as set out below. I note that there is little context or explanation for the scheduled pages, which are generally left to speak for themselves.

[9] With respect to use of the Mark, Mr. Kupsta first states that an "Internet domain bearing the Trademark" was registered in 2006. In this respect, he attaches, as Schedule A to his affidavit, a chart under the heading "Details for securadvantage.com". The chart's particulars identify Mr. Kupsta as the "Account Holder" and "June 07, 2019" as the "Expiration Date".

[10] Mr. Kupsta further states that the "registered domain operates a publicly accessible information, product information and e-commerce website (www.secureadvantage.com) marketing select wares". He identifies the marketed wares as "home automation / security products and automobile security products". He also attaches, as Schedule B to his affidavit, a screenshot from the website. The Mark is displayed throughout the depicted webpage, for example, in the title bar, as the page heading and in the menu. The other menu items include "In the News", "Products" and "Shop". The Owner is named in the copyright notice.

[11] The text of the webpage introduces the "SecurAdvantage{tm} brand" as a "revolutionary new approach at redefining transportation and personal safety". The text also describes

SecurAdvantage products generally, in terms of quality and manufacture. Three specific products are identified and depicted at the top of the webpage: a “SecurAdvantage 5-IN-1 Rescue Flashlight”, a “SecurAdvantage 360 Light” and a “SecurAdvantage 3-IN-1 Road Side Flare”. Otherwise, the webpage invites the reader to “visit our online catalog”.

[12] Mr. Kupsta next states that the Mark is printed on registered goods “marketed and sold” by the Owner, and on invoices. He states that “Marking examples” include a “hosted security and surveillance platform [SCHEDULE C]” and “select consumer and industrial safety products as per trademark claims [SCHEDULE D]”. In this respect, he also states that the website “provides product information and consultative content”.

[13] No additional context is provided for the two referenced schedules. However, I note that Schedule C consists of two screenshots. The first shows a browser window with an empty address bar and “SecurAdvantage{tm} – Console” in the title bar. The depicted window displays a chart titled “Console - Running - v1.28.1”, with rows of numerical data for two “Monitors”, identified as “Front-SE” and “Back-NE”. The second screenshot is titled “Front-SE” and shows a driveway scene above a chart with numerical data and various video and alarm controls.

[14] Schedule D consists of two product photographs. The products are identified on their respective packages as a “5 IN 1 RESCUE FLASHLIGHT” and a “360° LIGHT”. The “360° LIGHT” is further described on its package as a “Super-bright LED Flashlight”. The Mark is printed in a stylized font on the handle of each product (in a URL) and at the top of each package.

[15] Finally, Mr. Kupsta confirms that the Owner’s products include a “variety of consumer and industrial safety products: Flashlights; Flares; Security / Surveillance Systems” and he attests that the Mark “has been used in commercial sale and support of such products within the last three years.” He states that examples of “transactions involving sale of goods and services branded as the Trademark are included” and, in this respect, attaches images of two invoices as Schedules E and F to his affidavit. Each invoice is dated within the relevant period, is addressed from the Owner to a Canadian purchaser, and shows prices in Canadian dollars, with tax.

[16] The Schedule E invoice has the headings “Project Title: SecurAdvantage Whole Home Security Monitoring” and “Project Description: Supply, install cameras, sensors, provide monitoring service”. The invoiced items consist of the following, in various quantities:

- SACM24105 SecurAdvantage WideView IP Camera;
- SACM24103 SecurAdvantage NightView IP Camera;
- SAINSTALL Installation / Configuration; and
- SAONLINE SecurAdvantage Online (monthly).

[17] The Schedule F invoice is for multiple units of the following items:

- PSI08CO23 SecurAdvantage 5-IN-1 Rescue Flashlight / Flare; and
- PSI08C25 SecurAdvantage 360 Light.

[18] I note that none of the aforementioned schedules is marked as an exhibit to Mr. Kupsta’s affidavit or endorsed by the notary public who administered the oath. However, the body of the affidavit and the scheduled pages are consecutively numbered together, from “Page 1 of 8” to “Page 8 of 8”. Moreover, the individual schedules are labelled “SCHEDULE A” through “SCHEDULE F”, while the notations “[SCHEDULE A]”, “[SCHEDULE B]” etc. appear after various passages in the affidavit, as outlined above.

PRELIMINARY MATTER—ADMISSIBILITY OF EXHIBITS

[19] As a preliminary matter, the Requesting Party submits that the Schedules to the Kupsta affidavit are inadmissible owing to the lack of endorsement. In this respect, in its written representations, the Requesting Party submits that affidavits in summary cancellation proceedings “must adhere to specific technical requirements in the interests of the due administration of justice and to avoid reliance upon inadmissible hearsay”, particularly as the affiant’s statements are not subject to cross-examination. Specifically, although the affidavit was both sworn and filed with the Registrar on the same day, the Requesting Party questions whether the furnished schedules were available at the time of swearing or whether “some other purported Schedule evidence” was presented to the notary public instead.

[20] At the hearing, the Requesting Party drew attention to the Registrar’s decisions in *Modern Warehouse Imports Inc v Sanginesi*, 2017 TMOB 18, 2017 CarswellNat 576, and *Smart & Biggar v Terfloth Trade Marks Ltd*, 2014 TMOB 158, 2014 CarswellNat 4069: in those cases, the Registrar disregarded certain documents on the basis that they were neither identified nor explained in the accompanying affidavit or statutory declaration. The Requesting Party submits that a similar conclusion should be reached in the present case.

[21] Notwithstanding the Requesting Party’s submissions, it has been established that technical deficiencies in evidence should not stop a party from successfully responding to a section 45 notice where the evidence provided could be sufficient to show use [see *Baume & Mercier SA v Brown* (1985), 4 CPR (3d) 96 (FCTD)]. For example, the Registrar has accepted exhibited evidence that was not properly endorsed where the exhibited evidence was clearly identified and explained in the body of the affidavit [see, for example, *Borden & Elliot v Raphaël Inc* (2001), 16 CPR (4th) 96 (TMOB)].

[22] In the present case, notations in the form “[SCHEDULE A]” appear after various passages in Mr. Kupsta’s affidavit, and the images in each similarly-labelled schedule appear to illustrate the corresponding passage. As noted above, Mr. Kupsta provides little context or explanation for the scheduled exhibits. Nonetheless, I find that the scheduled pages have been sufficiently identified and explained in his affidavit to be admitted in this proceeding. In this respect, the Kupsta affidavit is distinguishable from the affidavit and statutory declaration furnished in *Modern Warehouse* and *Terfloth*, which appear to have contained no reference whatsoever to any accompanying documents.

[23] In view of the foregoing, I find that the scheduled pages accompanying the Kupsta affidavit are admissible as exhibit evidence in this proceeding.

ANALYSIS

[24] The Requesting Party submits that the evidence in this case is insufficient to demonstrate use of the Mark in association with any of the registered goods or services. In this respect, the Requesting Party suggests that various gaps in the evidence, including “equivocation” in the Kupsta affidavit, amount to a “complete failure” to furnish the required evidence.

[25] For its part, the Owner takes the position that the Kupsta affidavit provides an appropriate level of detail to demonstrate “real” use of the trade-mark, using information and documents that are realistically available, without divulging company trade secrets or compromising customers’ privacy. The Owner suggests that the Requesting Party is, essentially, dissecting the evidence with an overly technical and overly demanding approach. At the oral hearing, the Owner also questioned the Requesting Party’s motives in initiating the present proceeding.

[26] At the outset, I note that section 45 is limited in scope: its purpose is to provide a simple and expeditious procedure for removing “deadwood” from the register. It has also been established that section 45 proceedings are not intended to resolve disputes or to determine rights as between parties with competing commercial interests [see *Meredith & Finlayson v Canada (Registrar of Trade Marks)* (1991), 40 CPR (3d) 409 (FCA)]. Accordingly, once a section 45 notice has issued, a requesting party’s motivation for requesting the section 45 notice is irrelevant. The only matter to be resolved is whether the furnished evidence is sufficient to maintain the registration.

[27] In this respect, although evidentiary overkill is not required and representative evidence is permitted, a registered owner must still establish a *prima facie* case of use of the trade-mark in association with each of the goods and services specified in the registration [*Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184, 90 CPR (4th) 428]. In other words, the Registrar must be able to “rely on an inference from proven facts rather than on speculation” to satisfy every element required by the Act [*Diamant Elinor*, *ibid* at paragraph 11; see also *Smart & Biggar v Curb*, 2009 FC 47, 72 CPR (4th) 176 at paragraph 20].

The registered goods

[28] In his affidavit, Mr. Kupsta asserts use of the Mark in association with certain registered goods, but the majority of the registered goods are not mentioned explicitly. Moreover, Mr. Kupsta does not correlate the registered goods to any of the products depicted or referenced in the schedules to his affidavit, leaving any such connections to be drawn by the Registrar.

Consumer and industrial safety products namely flashlights, flares

[29] In his affidavit, Mr. Kupsta makes a clear assertion of use of the Mark during the relevant period in association with the registered goods “consumer and industrial safety products namely flashlights, flares”. As noted above, Mr. Kupsta attests that the Mark “has been used in commercial sale” of such products “within the last three years”. He also provides invoices from the relevant period by way of example.

[30] In particular, the Schedule F invoice is for multiple units of a “SecurAdvantage 360 Light”; based on the package description at Schedule D, I accept that this product is a flashlight. The same invoice covers multiple units of a “SecurAdvantage 5-IN-1 Rescue Flashlight / Flare”, which I am prepared to accept as corresponding to the registered good “flares”.

[31] The Requesting Party submits that the evidence does not show the invoiced sales to be in the normal course of trade, as required by the Act. In this respect, the Requesting Party contends that the evidence neither describes the Owner’s normal course of trade nor provides any particulars, such as sales volumes or advertising figures, from which the Owner’s normal course of trade might be inferred.

[32] At the hearing, the Requesting Party further submitted that the Owner’s reliance on a single invoice to show sales in the normal course of trade creates “equivocation” that must be resolved against the Owner. In this respect, although not cited by the Requesting Party, I note the Federal Court’s comments in *Guido Berlucchi & C Srl v Brouillette Kosie Prince*, 2007 FC 245, 56 CPR (4th) 401: a registered owner who relies on a single sale is “playing with fire in the sense that he must provide sufficient information about the context of the sale to avoid creating doubts in the mind of the Registrar or the Court that could be construed against him” [at paragraph 20].

[33] Indeed, Mr. Kupsta does not explicitly state the nature or extent of the Owner’s trade. However, it is well-established that the evidence as a whole must be considered [see *Kvas Miller Everitt v Compute (Bridgend) Ltd* (2005), 47 CPR (4th) 209 (TMOB)]. Furthermore, evidence of a single sale can suffice to show a transfer in the normal course of trade, so long as the sale follows the pattern of a genuine commercial transaction and is not seen as being deliberately

manufactured or contrived to protect the registration of the trade-mark [see *Philip Morris Inc v Imperial Tobacco Ltd* (1987), 13 CPR (3d) 289 (FCTD)].

[34] In the present case, it can reasonably be inferred from the evidence as a whole that the Owner's business involves the direct retail sale of consumer and industrial security and safety products. The invoice at Schedule F is consistent with such a sale. Furthermore, it appears that multiple products were sold, with an invoice being issued and taxes collected from the sale. As such, the sale appears to follow the pattern of a genuine commercial transaction in the ordinary course of the Owner's business.

[35] In view of the foregoing, for the purposes of this proceeding, I accept that the invoiced goods were sold in the normal course of trade.

[36] However, in accordance with section 4 of the Act, a registered owner must also demonstrate that the Mark was associated with the goods at the time that property in or possession of the goods was transferred.

[37] In this respect, as noted by the Requesting Party, the Schedule D images of products bearing the Mark are undated. Additionally, Mr. Kupsta does not explicitly state that these images are representative of products and packaging from the relevant period. Nevertheless, I accept that the images constitute representative "marking examples" for the "360 Light" and "5-IN-1 Rescue Flashlight / Flare" sold during the relevant period, as reflected in the invoice at Schedule F. In this respect, based on a fair reading of the affidavit as a whole, I interpret Mr. Kupsta's statement that the Mark "is" printed on goods sold by the Owner as applying to the Owner's marking practices generally, including during the relevant period.

[38] As noted above, the Schedule D images show the Mark printed on packages containing a "360° LIGHT" (flashlight) and a "5 IN 1 RESCUE FLASHLIGHT" (flare) respectively. I therefore accept that the Mark was displayed on flashlights and flares at the time of transfer in the normal course of trade during the relevant period.

[39] In view of the foregoing, I am satisfied that the Owner has demonstrated use of the Mark in association with "consumer and industrial safety products namely flashlights, flares" within the meaning of sections 4 and 45 of the Act.

Security and surveillance systems

[40] In his affidavit, Mr. Kupsta also makes a clear assertion of use of the Mark in association with “Security / Surveillance Systems”. Again, he attests that the Mark was used in the commercial sale of such products during the relevant period. Furthermore, one of the invoices he provides in support covers several units each of a “SecurAdvantage WideView IP Camera” and a “SecurAdvantage NightView IP Camera”. Together, these products would appear to correspond to the registered good “security and surveillance systems”.

[41] However, the evidence does not include an image of such products.

[42] As noted above, other “consumer and industrial safety products” are depicted in Schedule D. However, in the absence of a sworn statement from Mr. Kupsta, I am not prepared to accept those images as also representing the manner in which “security and surveillance systems” were branded during the relevant period. In this respect, Mr. Kupsta draws a distinction between “marking examples” for “hosted security and surveillance platform [SCHEDULE C]” and “select consumer and industrial safety products as per trademark claims [SCHEDULE D]”. Given this distinction, and the nature of the goods, I am not prepared to infer that “security and surveillance systems” were branded in the same manner as the select products depicted at Schedule D. Rather, the reasonable inference is that the Owner is relying on Schedule C to show use of the Mark in association with “security and surveillance systems”.

[43] However, the screenshots at Schedule C do not show the Mark on the goods or on their packaging. Nor do these screenshots show how the Mark would otherwise be associated with such goods at the time of their delivery or transfer. Although the depicted screens might represent software that forms part of a security and surveillance camera system, there is no indication that such screens had been displayed to customers *at the time software goods were transferred* (as discussed below).

[44] Similarly, although the screenshots might demonstrate how the Mark was displayed in the performance or advertising of the “monitoring service” referenced in the Schedule E invoice, display of a trade-mark in that manner, in performing or advertising a service, does not meet the requirements of the Act for showing use in association with related *goods*.

[45] With respect to display of the Mark on the Schedule E invoice itself, although the invoice does not specifically reference any “systems”, I note that the Mark is displayed as part of the product description for each model of IP camera. However, regardless of whether such narrow product descriptions can suffice to associate the Mark with complete “systems”, generally, display of a trade-mark on an invoice can only constitute use within the meaning of the Act if the invoice accompanied the goods at the time of their transfer to the customer [see *Gordon A MacEachern Ltd v National Rubber Co Ltd* (1963), 41 CPR 149 (Ex Ct); and *Riches, McKenzie & Herbert v Pepper King Ltd* (2000), 8 CPR (4th) 471 (FCTD)]. In the present case, Mr. Kupsta’s affidavit does not indicate at what point in time the invoice was delivered, in relation to the order, performance and delivery of the invoiced goods and services. Accordingly, in the absence of further details, I am not prepared to infer that the invoice was delivered to the customer at the point in time when property in or possession of the goods was transferred.

[46] At the hearing, the Owner submitted that a business selling security and surveillance systems is inherently limited in its ability to demonstrate use of its trade-marks, because of the confidentiality concerns surrounding such sales. However, it should have been a simple matter for the Owner to provide, for example, a representative image of a branded IP camera, without revealing any confidential information such as the locations where such cameras have been installed.

[47] Under the circumstances, in the absence of further factual particulars, Mr. Kupsta’s broad statements that the Mark “is printed, prominently visible and marketed on wares claimed as per trademark registration” and “encompasses products marketed by the Corporation including ... Security / Surveillance Systems” amount to a mere assertion of use of the Mark in association with “security and surveillance systems”, rather than facts *showing* use.

[48] In view of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with “security and surveillance systems” within the meaning of sections 4 and 45 of the Act.

Software

[49] In his affidavit, Mr. Kupsta does not specify the Owner's normal course of trade for software. In particular, he does not describe how the Owner's software goods are transferred to customers or how the Mark is associated with such software at the time of transfer. The only statement Mr. Kupsta makes that appears to address the transfer of branded software is his statement that "[m]arking examples include hosted security and surveillance platform [SCHEDULE C]".

[50] Given the inherent difficulty in associating a trade-mark with a good that is not a physical object, the type of evidence that will suffice to show a trade-mark's association with hosted software will vary from case to case. Nevertheless, the evidence must still demonstrate that the trade-mark was associated with the hosted software goods *at the time of transfer*.

[51] In this respect, in his affidavit, Mr. Kupsta does not state how access to any hosted software was sold during the relevant period. Furthermore, the only invoice entry relating to online access is the "SecurAdvantage Online (monthly)" entry in the invoice at Schedule E. However, based on the invoice's headings, this entry appears to be for a "monitoring service" rather than hosted software. If the monitoring service included, for example, a software licence, then that is not stated in Mr. Kupsta's affidavit.

[52] Moreover, although Schedule C appears to show the Mark displayed on a computer screen as a software program is running, this image does not reveal how notice of the Mark's association with the software goods was given to the customer at the time of sale, or otherwise at the time of transfer of the software to the customer in the normal course of trade.

[53] In any event, in his affidavit, Mr. Kupsta does not describe the "capabilities" of the depicted software or otherwise correlate the images at Schedule C to any of the specific types of software listed in the registration.

[54] In view of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with any of the registered "software..." goods within the meaning of sections 4 and 45 of the Act.

Electronic subsystems

[55] In his affidavit, Mr. Kupsta does not address the registered goods category “electronic subsystems developed and integrated to enable premise security and automation”, nor any of the specific goods listed under that category, namely “lighting controls, motion sensors, irrigation systems, and high and low-voltage interfaces, contact switches, and security / automation controllers”.

[56] Indeed, in his affidavit, Mr. Kupsta gives no indication that the “home automation / security products” and “wares claimed as per trademark registration” sold during the relevant period included anything other than “flashlights”, “flares” and “security / surveillance systems”.

[57] At the hearing, the Owner submitted that the “security / surveillance systems” would have *incorporated* the electronic subsystem goods. However, that explanation is absent from Mr. Kupsta’s affidavit.

[58] At most, the description “Supply, install...sensors” in the invoice at Schedule E might lead to the inference that some form of sensors were incorporated into the IP camera system; however, there is no indication that the sensors were “motion sensors”, as opposed to sensors of a different type, such as heat sensors or light sensors.

[59] In any event, the Kupsta affidavit does not show the Mark displayed in association with “motion sensors” or with any of the other specific electronic subsystems listed in the registration, either within a complete premise security system or otherwise.

[60] In summary, I am not satisfied that the Owner has demonstrated use of the Mark in association with “electronic subsystems developed and integrated to enable premise security and automation namely lighting controls, motion sensors, irrigation systems, and high and low-voltage interfaces, contact switches, and security / automation controllers” within the meaning of sections 4 and 45 of the Act.

Lighting

[61] Mr. Kupsta's affidavit is silent as regards "solar powered personal and premise safety warning and safety equipment namely lighting intended to illuminate walkways and structures; and motion and event activated lighting; lighting intended to provide visual warnings". There is no evidence of the Mark being displayed on, or otherwise associated with, lighting products matching any of those descriptions. Nor is there any evidence of such specific lighting goods being sold or otherwise transferred in Canada during the relevant period. I am therefore not satisfied that the Owner has demonstrated use of the Mark in association with the registered "lighting" goods within the meaning of sections 4 and 45 of the Act.

The registered services

[62] To demonstrate use of the Mark in association with the various registered services, the Owner appears to rely on its evidence in respect of the website at *www.securadvantage.com*. In his affidavit, Mr. Kupsta refers to this website as a "publicly accessible information, product information and e-commerce website", and provides a screenshot from the site in support.

[63] The Requesting Party submits that this website is not operated by the Owner. In this respect, the Requesting Party notes Mr. Kupsta's statement that the "registered domain" operates the website. Since Schedule A identifies the "Account Holder" for that domain as Mr. Kupsta, the Requesting Party submits that the website is operated by Mr. Kupsta personally, and not by the Owner.

[64] However, based on a fair reading of the affidavit as a whole, I find it reasonable to infer that Mr. Kupsta is referenced in the domain registration particulars in his capacity as an agent or officer of the Owner. In this respect, I note that Mr. Kupsta identifies himself in the affidavit as a "binding officer" of the Owner and states that the disclosures in the affidavit are intended to support the *Owner's* use of the Mark. Indeed, it is the Owner's name that appears on the exhibited webpage.

[65] In any event, the Owner was not required to furnish registration particulars for the internet domain through which it performed the registered services, and I am not prepared to draw a negative inference against the Owner for it having done so.

[66] At the hearing, the Requesting Party further submitted that, since Mr. Kupsta's statements regarding the *www.securadvantage.com* website are in the present tense, such statements cannot purport to address the manner in which the Mark was used during the relevant period. In this respect, the Requesting Party also notes that the website screenshot at Schedule B is undated.

[67] However, although Mr. Kupsta could have been more precise in his affidavit, use of the present tense must be considered with the evidence as a whole [see *Smart & Biggar v Anthony Tesselaar Plants Pty Ltd*, 2010 TMOB 120, 2010 CarswellNat 3520; *Cassels Brock & Blackwell LLP v Sweet Creations Inc*, 2015 TMOB 27, 132 CPR (4th) 473]. Read in context, nothing in the evidence is inconsistent with the interpretation that Mr. Kupsta's statements about the *www.securadvantage.com* website are applicable to the relevant period. Accordingly, it is reasonable to conclude that his "present tense" statements are with respect to the basic nature of the website in general, including during the relevant period. In view of the foregoing, regardless of when the screenshot at Schedule B was taken, I am prepared to accept the image as being representative of the general manner in which the Mark was displayed on the website *during* the relevant period.

[68] The real question with respect to the registered services is whether the evidence shows the Mark displayed in the performance or advertising of the specific services listed in the registration.

Operation of an internet website providing information and news

[69] In his affidavit, Mr. Kupsta describes *www.securadvantage.com*, in part, as an "information" website. However, he does not specify whether such information includes "information, and news in the field of security, video surveillance, premise automation, automotive safety and security, premise ... safety and security", as set out in the registration.

[70] The webpage screenshot at Schedule B does not show that type of information and news. Although the text of the webpage defines the SecurAdvantage brand in terms of “transportation and personal safety”, the actual information shown on the webpage is general information on the quality and composition of the Owner’s *products*. This text does not inform or update readers on “safety” or “security”. Nor does it even mention “video surveillance” or “premise automation”. Thus, it appears that the information provided via the website is merely “product information”, which is not one of the fields listed in the registration.

[71] I note that, in his affidavit, Mr. Kupsta describes *www.securadvantage.com* as both an “information” website and a “product information” website. Therefore, it may well be that additional information can be obtained through one of the links on the exhibited webpage. However, the Owner did not furnish any further webpages or other documents to show the nature and field of any such additional information. In the absence of further details from Mr. Kupsta, any inferences in that respect would be speculative.

[72] I also note that information in the nature of video surveillance data is depicted in the Schedule C screenshots of a “hosted security and surveillance platform”. However, there is no indication that such information is provided *through a website*. Rather, the blank address bar and the reference to a running console version suggest that the Schedule C screenshots depict *software*. In the circumstances, it is not necessary to consider whether such video surveillance data could be considered “information, and news in the field of security, video surveillance...”, so as to come within the registered statement of services.

[73] In view of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered service “operation of an internet website providing information, and news in the field of security, video surveillance, premise automation, automotive safety and security, premise and safety and security” within the meaning of sections 4 and 45 of the Act.

Operation of an internet website providing online sales

[74] With respect to the registered service “operation of an internet website providing online sales of ...”, the question is whether the evidence demonstrates the specific sales fields listed in

the registration , namely “residential and commercial security systems and accessories” and “premise automation controllers, automation controls namely dimmers, switches, appliance controls”.

[75] As noted above, in his affidavit, Mr. Kupsta describes the website at *www.securadvantage.com*, in part, as an “e-commerce” website marketing “select wares home automation / security products and automobile security products”. However, he does not state whether these “products” include the particular “security systems and accessories” or “automation controllers, automation controls” specified in the registered list of services.

[76] With respect to “security systems and accessories”, although Mr. Kupsta does attest that “Security / Surveillance Systems” were sold under the Mark during the relevant period, he does not specify whether such sales were made *through the website*. Indeed, since he states that the website markets “select” goods, and the only goods named or shown on the exhibited webpage are flashlights and flares, it is difficult to infer that the Owner’s “Security / Surveillance Systems” are also marketed through the website, rather than through *other* channels.

[77] As for the flashlight and flare goods shown on the exhibited webpage, they appear to be marketed as individual, stand-alone products. Accordingly, in the absence of further particulars, I am not satisfied that such goods, in themselves, constitute “systems” or “accessories” or otherwise come within the registered statement of services.

[78] Again, it may be that the *www.securadvantage.com* website offers additional products for sale through a link shown on the exhibited webpage, for example, the “Shop” or “Products” menu items, or through the “online catalog”. However, the Owner furnished no further webpages or other documents to show any additional products available for sale through the website.

[79] Accordingly, I am not satisfied that the Owner has demonstrated use of the Mark in association with the “operation of an internet website providing online sales of residential and commercial security systems and accessories, premise automation controllers, automation controls namely dimmers, switches, appliance controls” within the meaning of sections 4 and 45 of the Act.

Consulting and assessment services in the field of security and premise automation

[80] With respect to the registered service “consulting and assessment services in the field of security and premise automation”, Mr. Kupsta does not identify such services in his affidavit.

[81] Although Mr. Kupsta mentions the provision of “product information and consultative content” through the *www.securadvantage.com* website, this reference appears to be in respect of the Owner’s product marketing, rather than the provision of the registered services. There is no indication that the “consultative content” extends beyond website content on product selection *per se* and into the field of “consulting and assessment” on “security” or “premise automation”. In the absence of further particulars from Mr. Kupsta, any inferences in that respect would be speculative.

[82] At the oral hearing, the Owner submitted that it cannot demonstrate its consulting and assessment services, because such services are confidential. However, a registered owner is not required to furnish any particular kind of evidence in response to a section 45 notice. The evidence can be in the form of documentation, but it can also be through clear sworn statements. Furthermore, as the Requesting Party noted at the hearing, non-essential information can be redacted to preserve confidentiality. Accordingly, it should have been possible for the Owner to provide some evidence demonstrating how the Mark was displayed in the performance or advertising of consulting and assessment services during the relevant period, without identifying clients or divulging confidential details.

[83] In view of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with “consulting and assessment services in the field of security and premise automation” within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[84] In the present case, I am only satisfied that the Owner has demonstrated use of the Mark in association with “consumer and industrial safety products namely flashlights, flares” within the meaning of sections 4 and 45 of the Act.

[85] As the Owner furnished no evidence of special circumstances excusing non-use of the Mark in association with the remaining goods and services, the registration will be amended accordingly.

[86] In view of all of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with section 45 of the Act, the registration will be amended to delete all of the services and all of the goods except for “consumer and industrial safety products namely flashlights, flares”.

[87] The amended statement of goods will read as follows:

Consumer and industrial safety products namely flashlights, flares.

Oksana Osadchuk
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE 2017-07-05

APPEARANCES

Adam Kupsta

FOR THE REGISTERED OWNER

Stephen I. Selznick

FOR THE REQUESTING PARTY

AGENTS OF RECORD

No Agent Appointed

FOR THE REGISTERED OWNER

Cassels Brock & Blackwell LLP

FOR THE REQUESTING PARTY