



## TRADE MARKS ACT 1995

### DECISION OF A DELEGATE OF THE REGISTRAR OF TRADE MARKS WITH REASONS

Re: Opposition by Red Hat Inc to registration of trade mark application 777001(9,14,16,30) - **SLOUCH HAT and device** - filed in the name of Mary-Ann Martinek.

#### Background

The applicant, Ms Mary-Ann Martinek, applied for registration of the following trade mark on 28 October 1998:



**SLOUCH HAT**

The goods covered by the application are:

**Class: 9** Apparatus for recording, transmission or reproduction of sound or images, films, videos, cassettes, CD-ROMs, computer programs, holograms; none of the foregoing having as their subject matter or being representations of slouch hats

**Class: 14** Precious metals and their alloys and goods in precious metals or coated therewith; jewellery, brooches, cuff links; tie pins; none of the foregoing being in the shape of or bearing representations of slouch hats

**Class: 16** Printed matter; photographs; pens, pencils, stationery, decalcomanias, stencils, artists' materials; cards, calendars, modelling materials; none of the foregoing being representations of or having as their subject matter slouch hats

**Class: 30** Preparations made from cereals, bread, biscuits, cakes, pastry, confectionery, chocolates, noodles, almond confectionery; none of the foregoing being made in the shape of slouch hats

The application is opposed by Red Hat Inc, a company located in North Carolina in the United States of America. The opponent is the owner of a number of registered trade marks. However, it relies specifically on registered trade mark 750587:



750587 is registered in the following classes:

**Class: 9** Computer software, including computer programs for operating systems, system administration, and computer communications; administration and instructional materials provided therewith as a unit

**Class: 42** The provision of consultation services in the field of computer software

The opponent has a number of other registered trade marks which incorporate the words "Red Hat" and/or the device set out above. These registrations cover classes 9, 41, and 42.

The matter came before me as a delegate of the Registrar of Trade Marks 6 February 2002 in Melbourne. Ms Martinek appeared for herself. Mr Geoffrey Levy of Griffith Hack appeared on behalf of the opponent.

### **Grounds of opposition and proposed orders**

The notice of opposition set out 12 grounds. At the hearing, those grounds were reduced in number to four, relying on sections 44, 60, 42 and 59 of the *Trade Marks Act 1995*. Further, the opponent indicated at the hearing that it did not oppose the application in relation to classes 14, 16 and 30. The end result is that the opponent only contests the application as it covers class 9 goods. The opponent opposes all the claimed goods in that class, but has a particular concern with the phrase "computer programs" as this encompasses goods for which it already has registration. During the course of submissions the opponent proposed a number of orders in the alternative, namely:

- registration of all of the class 9 goods of the opposed application be refused; or
- registration of the class 9 goods of the opposed application, consisting of "computer programs, cassettes and CD-ROMS" be refused; or

- the class 9 specification of goods be amended so that the reference to "computer programs" be limited by the addition of the words "excluding computer programs for operating systems, system administration and computer communications".

### **Evidentiary and Procedural Matters**

The opponent filed and served the following evidence in support:

<b>Name</b>	<b>Date</b>	<b>Exhibits</b>
Eytan Epstein	15 May 2001	
Mark White	24 May 2001	
Russell Hodge	23 May 2001	
Brett Harris	23 May 2001	
Geoffrey Philip Levy	24 May 2001	GPL A-F
Geoffrey Philip Levy	16 November 2001	GPL G
Russell Hodge	23 November 2001	

The applicant filed and served her own statutory declaration dated 18 January 2002 as her evidence in answer.

No evidence in reply was filed.

At the hearing, during the course of submissions, it became apparent that one of the opponent's arguments rested on the failure of Ms Martinek to have an intention to use the trade mark for certain computer products. At that time, I inquired of Ms Martinek as to whether she had filed any evidence in relation to this. I also informed Ms Martinek that, in appropriate circumstances, leave could be granted to adduce further evidence. Ms Martinek declined to seek leave at the time of the hearing. By way of letters dated 7 and 12 February 2002, Ms Martinek sought leave to file further evidence. The letters also contained submissions that had not been made at the hearing, and documents relating to opponent's trade marks.

On 4 March 2002, I wrote to the parties and informed them as follows:

- I was prepared to consider the application for leave to serve further evidence, however, I would not do so unless Ms Martinek provided a list of the further evidence on which she wished to rely within 7 days;
- that list would then be provided to the opponent, and the opponent would be entitled to make submissions regarding the granting of leave; and
- I was only prepared to allow into evidence materials or documents which had been in existence as at the date of hearing and which tended to show that Ms Martinek had used, or had an intention to use, the applied for trade mark in relation to class 9 goods.

I also indicated that I was not prepared to allow into evidence the further material relating to the opponent's trade marks. Finally, I indicated that I would not take into account any material in the letters of 7 and 12 February 2002 which amounted to submissions that could have been made at the hearing. I did this on the basis that ample time and opportunity had been provided to Ms Martinek during the evidentiary process and at the hearing for her to file evidence and make submissions. In the circumstances, it would have been unfair on the opponent to deny them the opportunity to respond to the submissions or evidence. It is not in the public interest to delay the determination of proceedings to allow in submissions and evidence that should have been made at, or filed well before, the hearing.

In the end, Ms Martinek has not pursued her application for leave and no further evidence was provided. Accordingly, I will determine the matter on the basis of evidence filed prior to, and submissions made at, the hearing which was conducted on 6 February 2002.

## **Findings**

### **Section 44**

Section 44 says:

#### **Identical etc. trade marks**

- (1) Subject to subsections (3) and (4), an application for the registration of a trade mark (*applicant's trade mark*) in respect of goods (*applicant's goods*) must be rejected if:
  - (a) the applicant's trade mark is substantially identical with, or deceptively similar to:

- (i) a trade mark registered by another person in respect of similar goods or closely related services; or
- (ii) a trade mark whose registration in respect of similar goods or closely related services is being sought by another person; and
- (b) the priority date for the registration of the applicant's trade mark in respect of the applicant's goods is not earlier than the priority date for the registration of the other trade mark in respect of the similar goods or closely related services.

Note 1: For *deceptively similar* see section 10.

Note 2: For *similar goods* see subsection 14(1).

Note 3: For *priority date* see section 12.

Note 4: The regulations may provide that an application must also be rejected if the trade mark is substantially identical with, or deceptively similar to, a protected international trade mark or a trade mark for which there is a request to extend international registration to Australia: see Part 17A.

- (2) Subject to subsections (3) and (4), an application for the registration of a trade mark (*applicant's trade mark*) in respect of services (*applicant's services*) must be rejected if:
- (a) it is substantially identical with, or deceptively similar to:
    - (i) a trade mark registered by another person in respect of similar services or closely related goods; or
    - (ii) a trade mark whose registration in respect of similar services or closely related goods is being sought by another person; and
  - (b) the priority date for the registration of the applicant's trade mark in respect of the applicant's services is not earlier than the priority date for the registration of the other trade mark in respect of the similar services or closely related goods.

Note 1: For *deceptively similar* see section 10.

Note 2: For *similar services* see subsection 14(2).

Note 3: For *priority date* see section 12.

Note 4: The regulations may provide that an application must also be rejected if the trade mark is substantially identical with, or deceptively similar to, a protected international trade mark or a trade mark for which there is a request to extend international registration to Australia: see Part 17A.

- (3) If the Registrar in either case is satisfied:
- (a) that there has been honest concurrent use of the 2 trade marks; or
  - (b) that, because of other circumstances, it is proper to do so;
- the Registrar may accept the application for the registration of the applicant's trade mark subject to any conditions or limitations that the Registrar thinks fit to impose. If the applicant's trade mark has been used only in a particular area, the limitations may include that the use of the trade mark is to be restricted to that particular area.

Note: For *limitations* see section 6.

- (4) If the Registrar in either case is satisfied that the applicant, or the applicant and the predecessor in title of the applicant, have continuously used the applicant's trade mark for a period:
- (a) beginning before the priority date for the registration of the other trade mark in respect of:
    - (i) the similar goods or closely related services; or
    - (ii) the similar services or closely related goods; and
  - (b) ending on the priority date for the registration of the applicant's trade mark;
- the Registrar may not reject the application because of the existence of the other trade mark.

Note 1: An authorised use of the trade mark by a person is taken to be a use of the trade mark by the owner of the trade mark (see subsection 7(3)).

Note 2: For *predecessor in title* see section 6.

Note 3: For *priority date* see section 12.

The opponent does not assert that the applied for trade mark is substantially identical to 750587. This is a reasonable concession, and I do not disagree with it.

However, the opponent does assert that the relevant trade marks are deceptively similar. Where the traditional tests for substantial identity allowed me to place the trade marks side by side, this is not a test or technique that can be applied when deceptive similarity is being assessed. Rather, deceptive similarity requires me to determine the *impression* that is carried away from viewing the trade marks separately, and to then ask whether consumers might be confused regarding the origin of the products or services to which the trade marks are attached. This approach was set down by the High Court in cases such as *Shell Co of Australia Ltd v Esso Standard Oil (Aust) Ltd* (1963) 109 CLR 407, 415 per Windeyer J where he said:

On the question of deceptive similarity a different comparison must be made from that which is necessary when substantial identity is the question. The marks are not now to be looked at side by side. The issue is not abstract similarity, but deceptive similarity. Therefore the comparison is the familiar one of trade mark law. It is between, on the one hand, the impression based on recollection of the plaintiff's mark that persons of ordinary intelligence and memory would have; and, on the other hand, the impression that such persons would get from the defendant's television exhibitions.

and *Australian Woollen Mills Ltd v F.S. Walton & Co Ltd* (1937) 58 CLR 641 at 658 per Dixon and McTiernan JJ where their Honours said:

An attempt should be made to estimate the effect or impression produced on the mind of potential customers by the mark or device for which the protection of an injunction is sought. The impression or recollection which is carried away and retained is necessarily the basis of any mistaken belief that the challenged mark or device is the same. The effect of spoken description must be considered. If a mark is in fact or from its nature likely to be the source of some name or verbal description by which buyers will express their desire to have the goods, then similarities both of sound and of meaning may play an important part. The usual manner in which ordinary people behave must be the test of what confusion or deception may be expected. Potential buyers of goods are not to be credited with any high perception or habitual caution. On the other hand, exceptional carelessness or stupidity may be disregarded. The course of business and the way in which the particular class of goods are sold gives, it may be said, the setting, and the habits and observation of men considered in the mass affords the standard.

In the present case, I need to determine what impression each trade mark gives. To my mind, the applicant's trade mark:



**SLOUCH HAT**

evokes memories of ANZAC soldiers and the Australian military. It evokes images of history and valour. The lines which appear under the hat appear to me to be either the traditional chin strap, the outline of cheeks and a chin, or a combination of all these elements. However, the overriding impression is one of an ANZAC soldier and Australiana.

In relation to the opponent's trade mark:



my impression is one of a shadowy figure, perhaps a detective, from an American 1950s "detective" movie or comic strip. Mr Harris, whose declaration was filed on behalf of the opponent, confirms that this is his impression also. The shadow effect on the hat and face give me the impression that the figure is standing under a light, perhaps a streetlamp.

To my mind, these impressions are significantly different. In particular, the applicant's trade mark is expressive of an Australian identity, with a specific history. The opponent's trade mark evokes images of America and a genre of popular culture.

I do not agree with the opponent that the only, or predominant, recollection of each of the trade marks is of a person wearing a hat. The hats here convey a particular

meaning or theme - they are not superfluous elements that might be discarded with imperfect recollection. Rather, they are focal points of the respective trade marks. This is particularly true when the history and emotive nature of the slouch hat and the words "Slouch Hat", which form part of the applied for trade mark, are taken into account.

I do not believe that these findings are out of step with the general Australian consumer. Whilst younger members of society might not have an appreciation of the "detective" genre films and artwork that are suggested by the opponent's trade mark, I believe that even primary school children will have some cognisance of the symbolism which arises from and as the result of the applicant's trade mark. Certainly, this is reinforced annually in Australian culture due to Anzac Day and its parades.

Accordingly, and even if I were to accept the opponent's submission regarding the decision in *Jafferjee v Scarlett* (1937) 57 CLR 115, I am satisfied that the trade marks are not limited in their impression to "men wearing hats". Rather, they evoke men wearing hats engaged in very specific, very different endeavours. It is the endeavours which convey the essential impression of the trade marks.

On this basis, I do not believe that the applied for trade mark is deceptively similar to the opponent's trade mark. I am not satisfied that there is a real, tangible danger of deception or confusion occurring as required by the decision of the Full Federal Court in *Registrar of Trade Marks v Woolworths Ltd* (1999) 45 IPR 411 at 428. The imagery, particularly in the applicant's case, is too strong. The addition of the words "Slouch Hat" to the trade mark means that, in the Australian market, the imagery is clear and accurate. It is highly unlikely that the average Australian consumer would see the opponent's trade mark and think of a slouch hat. Conversely, it is difficult to conceive of a situation where the average Australian consumer would see the applicant's trade mark and see a detective.

As I have found that the marks are not deceptively similar, there is no need for me to consider whether there is an overlap or similarity between the respective parties' goods and/or services.

This ground fails.

## Section 60

Section 60 says:

### Trade mark similar to trade mark that has acquired a reputation in Australia

The registration of a trade mark in respect of particular goods or services may be opposed on the ground that:

- (a) it is substantially identical with, or deceptively similar to, a trade mark that, before the priority date for the registration of the first-mentioned trade mark in respect of those goods or services, had acquired a reputation in Australia; and
- (b) because of the reputation of that other trade mark, the use of the first-mentioned trade mark would be likely to deceive or cause confusion.

Note 1: For *deceptively similar* see section 10.

Note 2: For *priority date* see section 12.

I have already found that the applied for trade mark is neither substantially identical nor deceptively similar to the opponent's registered trade mark. The same reasoning applies in relation to the first limb of s.60. Accordingly, s.60 cannot be made out. Therefore, there is no reason for me to consider the second limb relating to reputation at the date of application.

This ground also fails.

## Section 42

Section 42(b) states that an application must be rejected if use of the applied for trade mark would be contrary to law. The opponent asserts that use of the applied for trade mark would constitute a contravention of s.9 of the *Fair Trading Act 1999 (Vic)* in that it would constitute misleading and deceptive conduct by the applicant in trade or commerce. Further, the opponent submits that the use would also amount to the common law tort of passing off.

While the Registrar is obliged to take potential breaches such as these into account, the ground of opposition can only be made out where the Registrar is satisfied that the

law *would* be breached. It is not sufficient to establish that the law *might* or *may* be breached. In the present case, the evidence which the opponent has placed before me does not satisfy me that the allegation of passing off *would* be made out, or that the misleading and deceptive conduct provisions *would* be contravened. Specifically, given my comments relating to the lack of deceptive similarity, I am not satisfied that the impressions or confusions on which Messrs Epstein, White, Harris and Hodge rely *would* arise. Nor am I satisfied, despite the assertions of the deponents, that the mere inclusion of a hat in a logo or the word "hat" in a trade mark is sufficient to establish the necessary contraventions of the law. My findings in relation to the evidence and the assertions are as follows:

- Mr Epstein is the National IT Manager for Griffith Hack, the solicitors of the opponent. Mr Epstein states that he is familiar with the opponent and its products. He believes that, if the applicant's trade mark was used on computer software, he would think that the software was a "takeoff" of the opponent's software. He comes to this conclusion on the basis that "there is no other software which has as its symbol the face of a person wearing a hat" and "the word HAT when used in relation to software is inextricably interlinked with software produced by [the opponent]" (paragraph 4).
- Mr White is the Vice-President and General Manager of Red Hat Asia Pacific Pty Limited, a wholly owned subsidiary of the opponent. Mr White states that, in his opinion, "the use of a logo consisting of the face of a man wearing a hat in connection with computer software, even if there were differences between the that logo and [the opponent's logo], would be bound to lead to confusion...because the two logos would convey essentially the same idea" (paragraphs 6 and 7)
- Mr Hodge is the Technical Director of Multicom Consulting Pty Limited. Mr Hodge states that his employer is an independent consulting service to professional companies seeking to expand or develop their IT systems. He has knowledge of the opponent's product and a recollection of its "logo". He states that if he "saw a logo consisting of a man's face and a hat used in association with software, [he] would assume a connection with [the opponent's] software" (paragraph 4). Further, he is "not aware of any other software which uses the word HAT as an identifier or that uses a hat or the face of a man wearing a hat as its logo" (paragraph 4). Finally, he states that he believes that if he the applicant's

trade mark "was used in association with software in shades of black and white...[he] would assume an association with [the opponent's] software because the idea of the two marks is essentially the same, namely that of a man's face wearing a hat" (paragraph 5).

- Mr Harris is a Data Systems Specialist who is aware of the opponent, its software and its "logos". His recollection of the logo is that it gives "the impression of a spy or a private detective of the Dick Tracey kind" and that the logo consists of "a hat pulled down low over the brow of a man's head" (paragraph 4). He is not aware of any other software which is associated with the word HAT or a logo of the kind used by the opponent. He also states that if he saw a logo consisting of "a man wearing a hat used in connection with software, [he] would consider that there was likely to be some kind of connection between that software and [the opponent] because of the unusual nature of [the opponent's] logo" (paragraph 5). He states that he has seen the applicant's trade mark and considers that there is a degree of resemblance between that logo and the opponent's logo. This would lead him to wonder if there was a connection between software carrying the applied for trade mark and the opponent. If the software was operating system software, he would have little doubt that there was a connection.

Mr Epstein believes that any software carrying a *hat* device or including that word in the trade mark is likely to be seen as a "takeoff" of the opponent's software. I am not sure what Mr Epstein means by "takeoff". To my mind, the word "takeoff" means an implication that there is some similarity between products or that this is, perhaps, an alternative or parody version of a well-known product. Whether this amounts to misleading or deceptive conduct or passing off will depend on the facts and circumstances. There must be a reasonable likelihood of deception, or suggestion that the product is in some way manufactured, endorsed or otherwise passed off as the goods of the injured party. I am not satisfied that Mr Epstein's evidence rises to the level of showing that this has, or will, occur.

Mr White's opinion is based on his impression of the trade marks. He believes that the impression is merely one of a man wearing a hat. For the reasons I have already given, I do not agree with this approach. Accordingly, I am not satisfied that Mr

White's opinion *would* establish the likelihood of a breach of the relevant laws. Parts of Mr Hodge's evidence suffers the same difficulty.

Mr Hodge suggests that any use by rival manufacturers of a "hat logo" or the word "hat" in the trade mark *would* lead to deception or confusion. I am not satisfied that this is correct as a general assertion, and I do not accept it. It may be that with further evidence the assertion could be proved correct. However, in the present case, it is unsupported. As such, it does not satisfy me that the relevant laws *would* be contravened.

Finally, Mr Harris asserts that he would be deceived only if the trade mark was applied to computer operating software. For other software, Mr Harris states that he would merely wonder if there was a connection. Mere wonderment does not necessarily rise to the level required to satisfy s.42(b). Accordingly, I am not satisfied that this is sufficient to make out the ground. In relation to computer operating software, any potential deception should be avoided if the applicant takes up the opportunity to amend her application in the manner I have described later in this decision.

On balance, I am not satisfied that the totality of the evidence is sufficient to establish that the relevant laws *would* be contravened.

Accordingly, this ground must also fail.

## **Section 59**

Section 59 provides:

### **Applicant not intending to use trade mark**

The registration of a trade mark may be opposed on the ground that the applicant does not intend:

- (a) to use, or authorise the use of, the trade mark in Australia; or
- (b) to assign the trade mark to a body corporate for use by the body corporate in Australia;

in relation to the goods and/or services specified in the application.

Note: For *applicant* see section 6.

The opponent makes two submissions in relation to this section - termed the "narrow submission" and the "broad submission".

The "narrow submission" relies on statements by Ms Martinek in two letters. In the first letter, dated 1 September 2000, the applicant states that she does "*not intend to produce computer operating systems or train people in its (sic) use*". On 1 November 2000, the applicant wrote to Griffith Hack and stated, "*I must again reinforce to you so that you may inform your client and so that I may present this letter at the hearing, I do not produce programs for operating systems*".

The reliance of the opponent on these letters was not opposed by Ms Martinek. Any privilege that might have existed in the letters was expressly waived at the hearing. As such, I am satisfied that the letters amount to an admission by Ms Martinek that she does not intend to use the trade mark in relation to computer operating systems or training people in the use of operating systems. However, in this sense, Ms Martinek means operating systems which are designed to allow a computer to start-up and operate - programs such as those identified by well known trade marks such as Windows NT, Unix and Linux to which Mr Epstein refers (paragraph 4). She does not mean software programs generally.

Accordingly, insofar as computer operating systems and related training are concerned, I am satisfied that the ground is made out. Therefore, the registration should, at least, limit the registration so as to exclude "operating system programs for computers" in class 9.

The opponent has submitted that the exclusion should also include computer programs for "system administration and computer communications". I do not believe that these goods were covered by Ms Martinek's admissions, and I have not been shown any evidence which means that these products might reasonably fall within the definition of an "operating system". However, I do accept that Ms Martinek's evidence tends to show that she has an intention to use trade mark only on computer products which fall within the entertainment and educational field. Ms Martinek had the opportunity to rebut the assertion made by the opponent in relation to "system administration and

computer communications" at the hearing, but she declined to do so. This was despite my specific invitation to raise and discuss the computer related goods on which she intended to use the trade mark for. This was also material that could have been enumerated in the further evidence that I have already discussed. Therefore, in the absence of any submission or evidence to the contrary, I am satisfied that presumption of registrability and intention to use the trade mark in relation to "system administration and computer communications" has been displaced, and these goods should be excluded from the registration.

Under the "broader" submission, the opponent states that the applicant's class 9 specifications are effectively, misconceived and inappropriate. It does so on the basis that the applied for goods imply that Ms Martinek will be involved in the manufacture of apparatus which in turn are used in the manufacture of images, films, videos, cassettes, CD-ROMS, and holograms. On the other hand, it appears from the evidence that Ms Martinek intends to apply her trade mark to "finished" products rather than manufacture the actual storage media or machinery - for example, Ms Martinek will produce images on paper and film, moving pictures on film and video tapes, sound recordings on cassettes, software on CD-ROMS and holograms. Accordingly, it may be appropriate that the application be amended to read, in relation to class 9:

Pre-recorded media for storage, transmission or reproduction of sound and/or images including films, videos, cassettes, compact discs and CD-ROMS; holograms; computer programs and/or software, excluding computer programs for operating systems, system administration and computer communications; none of the foregoing having as their subject matter or being representations of slouch hats.

The opponent has also submitted that the applicant's use of the applied for trade mark will not be trade mark use when used in relation to stored images or sounds. In this respect, the opponent says that the applicant will use the applied for trade mark to indicate the author or subject matter of the works. I see nothing in the evidence to suggest that the use of applied for trade mark will be limited in this way. On the contrary, my impression from the evidence is that the trade mark will be used to show who produces the goods, rather than who the author is. This is sufficient to amount to trade mark use.

Finally, the opponent submits that the applicant has changed the device used on her website from the applied for trade mark to a different device. In the opponent's submission, this evinces an intention by the applicant not to use the applied for trade mark. I do not agree. It may be that the applicant wishes to use a number of different trade marks. The removal of the applied for trade mark from a site does not necessarily mean that the applicant does not intend to revert to the original trade mark once this opposition is determined. In the absence of a statement by Ms Martinek that she has abandoned the applied for trade mark, I am not willing to find that she has no intention to use it. Section 33 operates to the extent that there is a presumption of registrability - in this sense, a presumption that the applicant does have the requisite intention to use the applied for trade mark. That presumption has not been displaced here.

In summary therefore, I am satisfied that the applicant does not intend to use the applied for trade mark in relation to "computer programs for operating systems, system administration or computer communications" nor apparatus for use in or the actual manufacture of storage media. So far as these items are concerned, the ground of opposition is made out.

### **Determination**

In the circumstances, I find that the grounds of opposition which rely on ss.42, 44 and 60 fail. The ground of opposition which relies on s.59 is made out to a limited extent, but only in relation to the class 9 goods. I will allow the applicant a period of one month from the date of this decision in which to amend her application in relation to the class 9 goods to read:

Pre-recorded media for storage, transmission or reproduction of sound and/or images including films, videos, cassettes, compact discs; holograms; computer programs and/or software, excluding computer programs for operating systems, system administration and computer communications; none of the foregoing having as their subject matter or being representations of slouch hats.

If, at the expiry of one month from the date of this decision, the specified amendment has been sought, any required fees have been paid and no Notice of Appeal has been served on the Registrar, the application may proceed to registration in relation to all the classes. However, if the applicant does not request the amendment within one

month, the s.59 ground will be made out and the application for class 9 goods refused. In that case, and subject to the payment of the necessary fees and the service of any Notice of Appeal on the Registrar, the application may proceed to registration in relation to classes 14, 16 and 30 only. Such registration should not occur prior to the expiry of one month from the date of this decision.

### **Costs**

At the hearing, the opponent indicated that it would not seek an order for costs, even if its opposition was successful. However, when Ms Martinek sought leave to file further evidence, I indicated to the parties that I would not hold the opponent to the position it took at the hearing. I did this on the basis that significant, additional work might have been required by the opponent to deal with the further evidence. In the end, no further evidence was received. However, the opponent did provide further submissions on the leave issue which would have given rise to additional costs.

In the circumstances, I make no order as to costs at this stage. However, I will hear the parties on the question of costs if the request is properly made pursuant to Regulation 21.12 of the *Trade Marks Regulations 1995*.

Geoffrey Purvis-Smith  
Hearing Officer  
Trade Marks Hearings  
12 April 2002