

EVIDENCE SUMMARY SHEET s44(3)(a)

Honest Concurrent Use

Application Number: 1699395

Application Filing Date: 3 June 2015

Citation(s): Filing date:

1042361 16 February 2005

Evidence Summary

Comment on the following:

1. Degree of likely confusion:

Relatively high

2. Has confusion occurred:

Applicant was not aware of the existence of the cited mark

3. Honesty of concurrent use:

Mark was conceived prior to the filing of the cited mark. I am satisfied that the adoption and use has been honest. The evidence does not meet the criteria for prior use.

4. Extent of use prior to filing (duration, area, volume, etc):

The words SUPASHOCK were first used in 2003 (as per submissions) and the logo (present application) was first used in 2004 (sale to Porsche). The use has been continuous in Australia as well as a number of other jurisdictions. Use has been for 'suspension solutions' which includes the goods claimed. Sales figures for 2015 was close to [REDACTED]. Market share is [REDACTED] of the high end motor racing market and also features as a bespoke aftermarket solution such as 4wd's, mining vehicles and as after market products for passenger vehicles. Advertising figures for the 6 months prior at Jan 2016 was approximately [REDACTED]. It is noted that this is not prior to the filing date. Advertising is prevalent in a variety of mediums such as via the internet, newspapers, tv, radio and social media.

5. Relative inconvenience to respective parties:

Inconvenience to the applicant would be very high as they have significant investment in their brand for some 12 years. The cited proprietor is obviously inconvenienced as they have contacted the applicant regarding their use of SUPASHOCK.

Examiner's Recommendation s44(3)(a)	<input checked="" type="checkbox"/> Not applied
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Examiner's Reasons:

I am satisfied that the applicant has been using the mark for a significant period of time. Their mark appears to be very well known, in particular, in the racing car industry. Most of the use demonstrated is very recent however and there is a lack of sales volume which makes it difficult to ascertain their market exposure for the time prior to filing. Use is also not in declaratory form.

S44(3)(a) could be applied under the following conditions:

44(3)(a) can not be applied at present. With some more detail regarding sales figures and business activity prior to filing I may be able to reconsider and apply the honest concurrent use provisions. The use will also need to be in declaratory form.

Examiner : Lachlan Freemantle

Date: 25 February 2016

REMINDERS:

- **Add Endorsement**
- **Send "ss44 Letter(s)" to cited owner(s) [except where there is no Australian address for service]**
- **Acceptance (or any conditional offer of) under the provisions of subsection 44(3)(a) / Regulation 4.15A(3)(a) should be discussed with your Team Leader**