

SMART & BIGGAR RESPONSE TO CIPO REQUEST FOR COMMENTS
RE: PROPOSED MODERNIZATION
OF TRADE-MARKS ACT

June 2005

I. Introduction

As stated in the request for proposal:

“The maintenance of a modern and efficient trade-mark regime is a critical element of any modern marketplace framework.”

However, it is arguable that Canada has failed to maintain a modern trade-mark regime on a number of fronts. Canada’s trade-mark system has increasingly diverged from the systems of other industrialized nations, including our closest trading partners. Symbolic of the divergence is the use of the unique rendering of trade-mark (vs. trade mark or trademark) and exemplary thereof is the refusal to recognize non-traditional marks such as “sound marks.”

The enforcement of trade-mark rights in Canada has become more and more difficult in the last couple of decades. Significant problems facing rights holders include:

- The lack of sufficient protection for famous marks including the lack of any effective remedy against dilution;
- The strict bar against functionality in trade-marks;
- Limitations on use and registration in view of adoption of “official marks” by public authorities;
- The lack of effective criminal and border enforcement against counterfeit products; and
- The strict test applied to the granting of interlocutory injunctions and in particular the evidence required to establish irreparable harm.

It is submitted that the current Canadian regime, instead of enhancing “Canadians' competitiveness in the domestic and global market places”, is hindering them. Canada used to be viewed by many multi-national corporations as a country with a strong, progressive intellectual property and trade-mark regime, where their trade-mark rights could be relied upon and tested. However, it is feared that Canada is now viewed by many trade-mark owners as having an ineffective trade-mark regime. It is becoming increasingly expensive to enforce rights and the breadth of rights is often narrower than those available in other venues.

The international trade-mark community's perception of Canada's IP systems is perhaps exemplified by our continued inclusion on the United States Trade Representative (USTR) special 301 watch list in 2005 and the announcement of an out of cycle review thereby, due to Canada's lack of effective IP enforcement including in respect of counterfeit products.

It is submitted that reform of the Trade-marks Act is overdue and that any reform must recognize the realities of the global village in which we reside. Adoption of reforms required to create and perpetuate a modern and efficient trade-mark regime in Canada should be undertaken forthwith.

Comments on the specific reforms proposed by CIPO, as well comments on additional issues to be considered in any improvement legislation, are set out below.

II. The Madrid Protocol and Trade-mark Law Treaty

Section 30 (a) Nice Agreement on the Classification of Goods and Services

CIPO proposal: To amend paragraph 30 (a) of the Act to give the Registrar discretion to require goods and services to be classified in accordance with the Nice Agreement.

Smart & Biggar response:

If Canada implements Madrid, it should also adopt the Nice classification system even though such adoption is not mandatory under Madrid. Examiners already classify goods and services under the system for searching purposes. Accordingly, adoption of the classification system should not impose an undue burden on the Trade-marks Office. Moreover, the official adoption of Nice would provide harmony with the global trade-mark community and, in time, create efficiencies for the Trade-marks Office.

Two concerns relating to the adoption of the Nice classification system are: (1) that the adoption of Nice could result in examiners accepting broader definitions of goods/services in trade-mark applications, and (2) that the adoption of Nice may affect the assessment of confusion.

With respect to the first point, if Nice is adopted, it is submitted that CIPO should continue to require definitions of goods/services in ordinary commercial terms. Requiring such specificity is reasonable and adds significantly to the ability to assess the likelihood of confusion. However, as noted in the CIPO proposal, requiring specificity will not only require office actions in respect of many international applications, but will likely limit the breadth of Canadian originating applications abroad. Nevertheless, it is submitted that, at least initially, if Nice is

adopted, it should have no impact upon the degree of specificity required for definitions of goods/services in applications.

With respect to the second point, provided that the concluding words of subsections 6(2)-6(4) and the factors in Section 6(5) remain intact, the adoption of a classification system should have no impact upon the assessment of confusion. However, for greater certainty, specific wording could be included in the Trade-marks Act to stipulate that the adoption of the Nice classification system has no impact on the assessment of confusion.

Possible change to Canadian “use” requirements

CIPO proposal: To consider abolishing the requirement for “use” to obtain registration (as currently required under ss. 16(1) and ss 16(3)) and requiring demonstrations of use after registration at regular intervals.

Smart & Biggar response:

The CIPO proposal should be adopted.

The letter from the Trade-marks Office notes that “the Madrid Protocol and the TLT make no provision for any of the use-related information that Canada requires before registration...”. Further, Canadians are at a disadvantage as compared to foreign applicants since Canadians can only obtain a Canadian registration upon commencing use in Canada. In contrast, foreign applicants can obtain a Canadian registration provided there is a home registration and use in any Paris Convention country. The rights available to foreign applicants are provided pursuant to the Paris Convention and cannot be changed.

In addition, under the present Canadian system, if a registration is never challenged, it may remain on the register forever subject only to intermittent renewal. Requiring a minimal showing of use would likely maintain a relatively clean register and would prevent perpetual registration of marks never used in Canada by foreign registrants.

The Trade-marks Office is proposing that demonstration of use be required at regular intervals after registration. The Trade-marks Office notes that this would remove the inequity between foreign and domestic applicants, since owners of foreign registrations would be equally obliged to demonstrate use after registration. Further, efficiencies may be realized by removing the requirement for the filing of a declaration of use and the resultant repeated extensions of time often required.

In view of the above, it is submitted that a requirement for demonstrating use post registration is desirable. Requirements for demonstrating use, such as those

mandated in the US system, may be acceptable. Setting the interval to coincide with renewal periods should be considered.

Section 39(3)

CIPO proposal: That Section 39(3) of the Act be amended. If Canada joins Madrid, it will no longer be possible to withdraw an application from allowance after seven months to consider a missed request for an extension of time to file a Statement of Opposition.

Smart & Biggar response:

Smart & Biggar has no objection to this proposal.

Section 61

CIPO proposal: That Section 61 of the Act be amended “to include application of court decisions based on appeals of the decision of the Registrar relating to International Registrations rendered after procedures before the Trade-marks Office are terminated and affecting the protection of the mark.”

Smart & Biggar response:

Smart & Biggar has no objection to this proposal.

Section 40 - Division of Applications

CIPO proposal: That the Trade-marks Act be amended to include a “divisional” process to allow an application to be divided into two or more applications, each retaining the filing date and the benefit of a priority filing date.

Smart & Biggar response:

Smart & Biggar is in favour of the proposal.

If Canada adopts the Trade-mark Law Treaty (TMT), Canada will be obliged to provide for division of applications such that some wares/services in an application may be divided out to a separate application. Whether or not the TMT is implemented, it is submitted that Canada should provide for division of applications.

This recommendation for adoption of a divisional process is to be contrasted with divisional practice in Australia, which appears to allow for the division of marks,

per se (where for example, a mark incorporating both words and a design could be divided into two applications, one with a design and the other with the words). It is unclear how this would work in practice. For example, if a trade-mark is divided, it is not clear if each divided application would maintain the date of entitlement/priority.

Section 31(1)

CIPO proposal: That Section 31(1) be amended to delete the requirement for a certified copy of the corresponding foreign registration, where the application is based on registration in another country.

Smart & Biggar response:

Smart & Biggar has no objection to this amendment.

Section 46

CIPO proposal: That Section 46 be amended to provide for an initial renewal term of ten years.

Smart & Biggar response:

Smart & Biggar has no objection.

Sub-section 48(3)

CIPO proposal: That Sub-Section 48(3) be amended to include the TLT limitations on evidence required in support of a request to register a transfer.

Smart & Biggar response:

It is not clear what changes would be required pursuant to TLT in view of the discretion in the Registrar and current Canadian practise.

Section 65

CIPO proposal: That Section 65 be amended to include a provision allowing the Governor in Council to make regulations respecting Canada's adherence to International Treaties, similar to Section 12 of the *Patent Act*.

Smart & Biggar response:

Smart & Biggar has no objection to this proposed amendment.

Appointment of agents

CIPO proposal: That the *Trade-marks Act* be amended to provide for appointment of agents to cover all existing and future applications and/or registrations of an applicant.

Smart & Biggar response:

Smart & Biggar has no objection to this proposed amendment.

International exhibitions

CIPO proposal: That specific protection be provided for trade-marks associated with goods/services exhibited at officially recognized international exhibitions.

Smart & Biggar response:

This proposal presumably flows from Article 3(a)(vii) of the Trademark Law Treaty. Specific wording would have to be considered before commenting further.

Section 7 of Regulations

CIPO proposal: That the requirements in Section 7 of the Trade-marks Regulations (namely the requirement that correspondence respecting a registered trade-mark include the application number or the trade-mark and the requirement that correspondence respecting an application include the trade-mark) be removed.

Smart & Biggar response:

Smart & Biggar has no objection.

Section 25 of Regulations

CIPO proposal: That Section 25 of the Trade-mark Regulations be amended to set out requirements for filing date as in TLT Article 5.

Smart & Biggar response:

Smart & Biggar has no objection.

Section 27 and 28(2) of Regulations

CIPO proposal: That Sections 27 and 28(2) of the Regulations be amended so that drawings lined for colour will no longer be required. Description of colours will be acceptable and trade-marks may be filed in color.

Smart & Biggar response:

The current trade-mark Regulations do not require that drawings be lined for color. In any event, Smart & Biggar has no objection to the proposed amendment. However, it is submitted that applications filed claiming colour as a feature of a trade-mark should be required to include a specific definition of the colour using one of the available scales (Pantone number, etc.) or, perhaps by frequency.

Such specificity may be important for effective searching and for assessing the likelihood of confusion. The particular shade of colour may be a significant issue. For example, in the recent UK *Whiskas* passing off case, the plaintiff's purple packaging was seen to be a different shade of purple from the defendant's packaging. Even though both labels/packages were arguably purple, the shades of purple were held to be distinguishable.

Section 48 of the Regulations

CIPO proposal: That Section 48 of the Regulations be amended to be consistent with Section 48(3) of the Act. The amendment will include limitations on evidence to be required in support of a request to register a transfer.

Smart & Biggar response:

The specific wording would have to be considered.

Section 27 of the Regulations

CIPO proposal: That Section 27 of the Regulations be amended so that drawings would have to be accepted in a square of 8x8 cm.

Smart & Biggar response:

Smart & Biggar has no objection to this amendment.

III. Trade-mark Improvements

Proposed use certification marks

CIPO proposal: That the Trade-marks Act be amended to permit the filing of certification mark applications on a proposed use basis.

Smart & Biggar response:

Smart & Biggar is in favour of the CIPO proposal.

Currently under the *Trade-marks Act*, a certification mark application cannot be based upon proposed use. There does not appear to be any compelling reason to maintain this restriction.

Accordingly, it is submitted that an amendment allowing certification mark applications to be based upon proposed use is desirable.

Remove limitations on the transfer of associated trade-marks

CIPO proposal: That the association provisions be deleted from the Trade-marks Act.

Smart & Biggar response:

Smart & Biggar is in favour of the CIPO proposal.

The association provisions are paternalistic and inconsistent with legislation and practice in most other countries.

Filing consent to overcome Office objection based on confusion

CIPO proposal: That consent between parties should be statutorily recognized as one of the circumstances in Section 6(5) for assessing the likelihood of confusion.

Smart & Biggar response:

Smart & Biggar is in favour of the CIPO proposal.

The proposal stipulates that a consent document would be considered as one of the factors to assess confusion. In other words, examiners will continue to maintain discretion to determine whether or not marks are confusing. However, if Section 6(5) is amended to include specific reference to letters of consent, examiners may be more inclined to give weight to letters of consent.

Harmonized standard for claiming priority

CIPO proposal: That Section 34(1)(b) be amended to replace “in that country” with “in a country of the Union”.

Smart & Biggar response:

Smart & Biggar is in favour of the CIPO proposal.

This change will allow an applicant to claim priority from an application where the priority application was filed in any country of the Union, and where applicant is a resident or citizen of any country of the Union (or has a real and effective industrial or commercial establishment in a country of the Union). The change will remove the requirement that the applicant be a resident, or citizen (or have a real or effective commercial or industrial establishment) in the same country where the priority application was filed.

The current provision is inconsistent with the Paris Convention and the practice in Australia, the United Kingdom and the European Community.

For the reasons noted above, the provision should be amended as proposed.

IV Additional Trade-mark Improvements

Non-Traditional trade-marks

CIPO proposal/request: The Trade-marks Office has requested comments relating to whether or not marks consisting of sound, motion, animation, holograms, scent, taste, or color, *per se*, should be registrable.

Smart & Biggar response:

It is submitted that anything that serves the purpose of distinguishing the wares or services of one party from those of another should be registrable as a trade-mark, provided it can be accurately represented on the register.

Colour

Colour *per se* should be registrable to the extent it is distinctive. However, the Act should define what is meant by “colour *per se*.” Presumably, an example would be pink insulation. It is not possible to show all of the different forms that insulation may take. However, it should be possible for an owner to protect any indicia that actually distinguish its wares or services.

The registration of colour *per se* may be more of a restraint on trade than a “typical” registration. Accordingly, colour *per se* should only be registered upon a showing of distinctiveness. The description of the registered colour should require the filing of a colour sample and a definition according to one of the defined scales to facilitate searching and assessing the likelihood of confusion.

Sound and Animation

Sound marks are recognized and registrable in many countries, including the United States, Australia and recently, the EU. In Canada, applications for sound marks are being refused on the basis that the marks do not constitute “Trade-marks” under the current definition. The definition should be amended.

Depending on the nature of the sound, an accurate representation may be made in a number of ways including through notations on a bar and staff, or linking to a file containing a sample of the sound accessible over the internet.

With respect to animation and motion, companies are increasingly using animation/motion marks to distinguish their products or services from those of others. The increased use of animation/motion marks is due to advancing digital communication. Further, while in many cases, the distinctive elements of animation or film sequences may be evident from a single frame, a particular motion or sequence may be distinctive. Alternatively, applications for animation or motion marks could require representation of the mark through a limited number of still frames formatted to fit the on the Register and a description identifying distinctive indicia. The filing of a complete sample should also be required. The Register could link to a file containing the sample of the animation if the owner is willing to make it available on the internet.

Since restraint of trade is unlikely to be an issue, there should be no need to prove distinctiveness of sounds or animation.

Scent and taste

It may be difficult to accurately describe or depict scent and taste on the register. Accordingly, it may not be practical to permit scent and taste marks to be registered at this time.

Definition of “trade-mark”

The primary problem with the current definition of “trade-mark” in Section 2 of the Act is that a “trade-mark” is defined as a “mark” which has been interpreted by the Trade-marks Office as something that, **when used**, must be visually depicted. Therefore, while a sound can be visually depicted, because it is not visually depicted **when used**, the Trade-marks Office does not consider that it is registrable.

There does not appear to be any compelling reason to distinguish between marks that are depicted visually when used from marks that are not depicted visually when used. If something serves to distinguish one party’s wares or services from those of another, it should be registrable. It is therefore submitted that the definition of “trade-mark” in the Trade-marks Act should be amended to include “anything” that is used, or could be used, to distinguish the wares or services of one party from those of another. Further, in view of the foregoing, s. 12 (1) should be amended to preclude registration of any trade-mark that cannot be accurately depicted on the Register, possibly subject to (a) definition by regulation and (b) colour *per se* being subject to s. 12 (2).

This does not require any amendment to the definition of “use” in Section 4.

Acquired distinctiveness

The assessment of descriptiveness and acquired distinctiveness for non-traditional marks should be no different than for traditional trade-marks.

Section 12(1)(b) and the “When Sounded Test”

CIPO proposal: That an exception be added to the paragraph 12(1)(b) “when sounded” test for design marks that include clearly descriptive words.

Smart & Biggar response:

Smart & Biggar is in favour of the proposal.

It is respectfully submitted that the current Practice Notice concerning the “When Sounded Test” under Section 12(1)(b) is arguably inconsistent with established case law. If a design portion of a mark is inherently registrable, then the mark as a whole should not be considered to be clearly descriptive. It is therefore submitted that amendment of Section 12 is required to clarify that clearly descriptive wording in a design mark, does not render the mark as a whole unregistrable so long as the design is distinctive or inherently registerable.

Administrative error

CIPO proposal: That the Trade-marks Act be amended to allow the registrar to vary or rescind certain decisions (including advertisement and allowance) in certain limited circumstances where it is clear that an administrative error was made.

Smart & Biggar response:

Smart & Biggar has no objection to the proposal.

Service on the Registrar

CIPO proposal: That Section 56 be modified to require the Registrar to be served with all appeals to the Federal Court of Canada, and subsequent appeals to the Federal Court of Appeal and the Supreme Court of Canada.

Smart & Biggar response:

Smart & Biggar has no objection to this proposal.

V. Other Recommended Amendments

In addition to the amendments raised by CIPO, Smart & Biggar submits consideration should be given to the following possible amendments.

Section 4(2)

In sub-section 4(2), the word “used” is included in the definition of “used.” The sub-section should be amended to avoid the circular definition and to clarify whether or not advertising alone is sufficient to constitute “use” in association with services (or whether performance or availability of the services in Canada is also required).

Section 5

The basis for “made known” under section 5 should be broadened to include other activities or factors that could determine whether or not a mark has a reputation in Canada (such as, for example, through word of mouth, transactions by Canadians outside of Canada, activities on the Internet, etc.).

Section 6

Protection of well-known trade-marks is mandated by article *6bis* of the Paris convention and article 16 of TRIPS. It is submitted that Canada has fallen behind in its compliance with these international obligations. It is submitted that section 6(5) of the Trade-marks Act does not fully comply with the spirit of the Paris Convention or TRIPS.

Subject to the Supreme Court of Canada's decisions in the *Clicquot* and *Barbie's* cases (to be heard later this year), consideration should be given to amending the definition of confusion to give more weight to famous trade-marks.

Section 7

Subject to the Supreme Court of Canada's decision in the *Lego* case, consideration should be given to amending section 7 to clearly limit its application to matters involving the clear exercise of federal power so as to avoid constitutional issues. In any event, it is submitted that Section 7(e) should be removed, since it has been found to be unconstitutional.

Section 9

Consideration should be given to amending Section 9(1)(n)(ii) and (iii). For ease of reference, marks obtained pursuant to those provisions will be referred to as "official marks".

Definition of "public authority"

Adding a definition of "public authority" in a definition section, either as part of Section 9 or in Section 2, should be considered.

Adding mechanism to cancel official marks

A mechanism for "cancelling" official marks should be provided. Rights in official marks are acquired under the Act through advertisement in the Trade-marks Journal. Official marks are not registered and are therefore not on the register. Accordingly, it is not possible to expunge official marks and this submission will therefore refer to "cancelling" or "cancelling the effect" of official marks.

Currently, there is no specific statutory mechanism for opposing or cancelling the effect of an official mark. However, they are subject to judicial review applications and declaratory actions in the courts. It is submitted that specific

administrative procedures should be available for challenging rights in official marks.

At the least, there should be a mechanism for third parties to cancel the effect of an official mark if the mark has not been used for a period of time. Accordingly, it is submitted that a new provision, similar to Section 45, should be added to the Act requiring the owner of an official mark, if challenged, to provide evidence that it has “used” its mark as defined by Section 4 within the preceding three years.

In addition, consideration should be given to amending s. 9(1)(n) in view of the following incongruities:

- (a) the words “adopted” and “used” appear in sub-sections 9(1)(n)(i) and (iii) but not (ii)

- (b) sub-section 9(1)(n)(i) specifies “adopted **or** used” while 9(1)(n)(iii) specifies “adopted **and** used.”

Renewal

Given the significant rights obtained through official marks, it would be appropriate for owners to have to re-publish or otherwise renew their rights periodically. This would also reduce deadwood.

Sections 12(2) and 13(2)

Subject to what the Supreme Court may say in the *Lego* case, the *Act* should be amended so that it is clear that actual distinctiveness pursuant to subsection 12(2) or section 13 may trump inherent functionality. In other words, it should be clarified that a “trade-mark” may be inherently functional so long as it has acquired the requisite secondary meaning. A trade-mark that has become distinctive in fact should be enforceable against third parties. However, the right to enforce such a mark must be limited to prevent a perpetual patent type monopoly in functional features. It is submitted that the limitation of section 13(2) is a reasonable limitation in that regard. Accordingly, it is recommended that such a limitation be extended to cover any functional trade-mark. The same principle would extend to paragraph 7(b).

Section 20

Section 20 should be amended to clarify that advertising *per se* may constitute infringement. In other words, section 20 should be amended to clarify that there may be infringement without section 4 “use.”

Section 22

While it appears that the intent in adopting section 22 included providing complete dilution type protection to well-known marks, Canadian courts have narrowly construed the provision such that it arguably does not provide an effective means for famous trade-mark owners to protect their rights. There is arguably no protection, for example, to prevent blurring type dilution (as opposed to tarnishment). Amending section 22 to clarify protection against all forms of dilution would go a long way to remedying that situation.

It is also submitted that Section 22 be amended to eliminate the requirement that only registered marks can benefit. It is also suggested that Section 22 be amended to protect against activities other than Section 4 “use”. Obviously, consideration of all aspects of the issue will be required to try and arrive at an effective regime appropriately balancing the rights of all involved. Nevertheless, it is submitted that this is an important issue that should be dealt with forthwith.

Section 32(2)

Territorial registrations should be permitted, not merely pursuant to subsection 32(2). This would permit a more flexible resolution of some trade-mark disputes. In other words, it is submitted that consideration be given to amending the Trade-marks Act to permit the same trade-mark to be registered in the names of different owners in different regions of Canada, where, for example, pre-existing common-law rights may exist in a limited geographical area. In such a case, the limited geographical area could be carved out of a federal registration. Such a resolution to disputes would appear to be consistent with U.S. practice/law.

Section 31 Trade-mark Regulations

Section 31(d) of the Trade-mark Regulations prohibits amending an application from one not alleging use or making known in Canada to one alleging such use or making known. In view of the Effigi decision, this prohibition no longer seems warranted. It is submitted, therefore, that either (a) such an amendment should be permitted “where the evidence proves that the change is justified by the facts”, or (b) Section 31(d) should be repealed.

Anti-counterfeiting Provisions

Provisions should be added to the *Act* making it a criminal offence to deal in products bearing counterfeit trade-marks. While provisions currently exist in the criminal code (S.406-414), the provisions are out-dated and raise many difficulties with enforcement. The problems include the *mens rea* requirement

under the only section specifically directed against distribution of counterfeit products (S.408 (a) see *R.v. Ferjo* (1994), 58 C.P.R. (3d) 223 (Ont. C.A.)) and the lack of any provision making it an offence to import such products. Further, practical issues in respect of federal/provincial jurisdiction arise in respect of prosecution. The problems with the provisions result in them seldom being used by law enforcement or prosecutors, the tendency being to instead proceed under the criminal offence in the *Copyright Act*, even in cases where the offence primarily relates to counterfeiting trade-marks. The lack of effective anti-counterfeiting provisions is the primary reason that Canada has been placed on the United States Trade Representatives “special 301 watch list” and raises issues in respect of compliance with GATT TRIPS and NAFTA.

It is recommended that the *Act* be amended to provide for both criminal and administrative offences, as well as efficient administrative procedures for seizure, forfeiture and destruction of counterfeit products. In addition, provisions should be included providing for *ex officio* seizures by the Canadian Border Service Agency (CBSA) of counterfeit products being at the border. At a minimum, it is recommended that a section similar in scope to Section 42 of the *Copyright Act* be added to the *Trade-marks Act*.

Importation

Whether or not criminal provisions are added to the *Act*, the sections dealing with importation should be amended. As matters stand, the sections are seldom used due to the need for a court order prior to CBSA stopping counterfeit products at the border. There are very few circumstances where sufficient information is available in order to obtain a court order prior to products passing through customs. Further, due to the current provisions in the *Trade-marks Act* and the lack of any law making it a criminal offence to import counterfeit products, CBSA will not make *ex officio* seizures. Even when products are detained by CBSA, they generally leave it to the RCMP to proceed with charges, seizure and forfeiture. An efficient administrative system is clearly required. Accordingly, it is recommended that the *Act* be amended to provide for an administrative system facilitating the seizure of counterfeit products including filing of registrations with and provision of information to CBSA by rights holders and that CBSA be mandated to inspect for and seize counterfeit products

Newfoundland

Newfoundland registrations should be subject to the same renewal and expungement requirements as any other registration. This might require a renegotiation of the agreement with Newfoundland.

VI. Conclusion

As will be plain from the foregoing, it is the opinion of Smart & Biggar that significant amendment to the *Trade-marks Act* is required and steps in that regard should be taken as soon as possible.

If any further input is desired, please contact:

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