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BETWEEN:  
 SILHOUETTE PRODUCTS LIMITED.....PLAINTIFF;  
 AND  
 PRODON INDUSTRIES LTD. ....DEFENDANT.

*Trade marks—Infringement—Trade mark related to wares it is used with—Confusing trade marks—Trade mark invalid because not distinctive—Validity of registration of trade mark—Abandonment of trade mark—Identification of wares carrying trade mark as those*

of trade mark owner—*Trade Marks Act, S. of C. 1952-53, c. 203, ss. 2(f), 6, 7(b) and (c), 18, 19 and 20.*

*Practice—Amendment of pleadings during trial—Rule 119 of General Rules and Orders.*

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From prior to 1939 until 1953 one Olve Matilda Grunsky of Toronto, carrying on business as Mondo Trading Company, was the sole Canadian importer of beauty preparations and other similar goods manufactured in Germany by one Hans Schwarzkopf. In addition Mondo Trading Company sold during the war years and thereafter a line of similar goods manufactured by it. All of the said goods were sold in Canada under a trade mark described as "the silhouette of a woman's head" and which was registered by Hans Schwarzkopf in 1938 in respect of "hair treating preparations and devices". Mondo Trading Company also used the trade name "Silhouette Products Reg'd" in association with the said products.

In 1953 the plaintiff was incorporated by agreement between Mondo Trading Company and Hans Schwarzkopf and it took over the business carried on under the name, Silhouette Products Reg'd. and among the assets transferred to it was the registered trade mark, until then owned by Hans Schwarzkopf, consisting of a woman's head in black, and the registered word mark "Silhouette". The plaintiff has continued the business previously carried on by Mondo Trading Company under the name, Silhouette Products Reg'd., and has consistently used the silhouette of a woman's head on the products it sells in Canada, both those manufactured by itself and those manufactured in Germany by Hans Schwarzkopf.

Since 1960 the defendant has manufactured and sold a hair spray under a label on which there is depicted the silhouette in black of a woman's head in profile. The evidence established that this label was designed for the defendant without any knowledge of the plaintiff's trade mark and without the products or business of the plaintiff in mind and that the silhouette used by the defendant is a reproduction of the head of the wife of the defendant's president.

The plaintiff brought this action for infringement of its trade mark rights and for breach by the defendant of s. 7(b) of the *Trade Marks Act*.

*Held:* That when a trade mark is so closely related to the wares in respect of which it is used as the human head is to wares used for the care of the hair, it cannot be said that the use of two or more such trade marks in association with such wares would be likely to lead to the conclusion that such wares are all manufactured or sold by the same person.

- 2 That the use of a silhouette of a head in the same area as the plaintiff's trade mark would not lead to the inference that the wares associated with both marks were manufactured or sold by the same person unless the silhouette alleged to be confusing was so similar in appearance to the plaintiff's mark that one would be likely to be mistaken for the other.
3. That a reproduction of a human head, closely related, as in this case, to the wares used for the care of the hair, is *prima facie* non-distinctive.
4. That the plaintiff's registered trade mark is invalid because it was not distinctive at the time these proceedings were commenced, as required by s. 18(1)(b) of the *Trade Marks Act*.

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5. That the registration of the plaintiff's trade mark is invalid, by virtue of s. 18(1)(c) of the *Trade Marks Act* because it has been abandoned, the evidence being that the particular silhouette which is registered as a trade mark, i.e., the silhouette of a man's head, has never been used in Canada by the plaintiff or its predecessors in title.
6. That because each of the labels used by the plaintiff on its products carries one or more trade names or marks in addition to its trade mark of the silhouette of a woman's head, any identification in the eyes of the public of wares so marked as being those of the plaintiff because of the presence of the silhouette thereon is somewhat diluted or attenuated.
7. That the use by the defendant of a silhouette of a woman's head in connection with wares having to do with the care of the hair when the plaintiff is already using a silhouette of a woman's head in connection with such wares does not necessarily establish a breach of s. 7(b) of the *Trade Marks Act*, and, in fact, the plaintiff has failed to establish a breach of that section of the Act on the part of the defendant because in this case the silhouettes used by the plaintiff and defendant are different and the labels used and the advertising done by them are quite different.
8. That the action is dismissed.

ACTION for infringement of rights in a registered trade mark.

The action was tried by the Honourable Mr. Justice Noël at Ottawa.

*Gordon W. Ford, Q.C.* and *David M. Rogers* for plaintiff.

*Donald F. Sim, Q.C.* and *Weldon F. Green* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

NOËL J. now (April 7, 1965) delivered the following judgment:

This is an action for infringement by the defendant of the plaintiff's rights in a registered trade mark and for breach by the defendant of section 7(b) of the *Trade Marks Act* by directing public attention to its wares and business in such a way as to cause or be likely to cause confusion between its wares and business and the wares and business of the plaintiff.

The registered trade mark upon which the plaintiff bases its infringement claim was registered originally on January 21, 1938, as No. N.S. 10081 in the name of Hans Schwarzkopf, Kommanditgesellschaft, of Berlin-Tempelhof,

Alboinstr. 36-42, for a mark described as “The silhouette of a woman’s head” in respect of “Hair Treating Preparations and Devices”. The trade mark as registered is here reproduced as follows:

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(One is immediately struck by the fact that the trade mark is in fact a silhouette of a man’s head and not, as described in the registration, of a woman’s head.) Subsequently, an application was made to the Registrar to change the registration from the name “Hans Schwarzkopf, Kommanditgesellschaft” to “Hans Schwarzkopf”, it appearing that the owner of the trade mark is a kommanditgesellschaft (i.e., some sort of a partnership with a form of limited liability) but that the word “Kommanditgesellschaft” does not form part of its name. On January 4, 1940, a notation was placed on the Register, reading “Evidence has been submitted establishing that the correct name of the proprietor of this trade mark at the time of registration was Hans Schwarzkopf”.

For some years prior to the outbreak of war in 1939, Hans Schwarzkopf sold beauty preparations and toilet preparations (including shampoo and hair treatments, oil treatments, spray treatments) to Olive Matilda Grunsky, of Toronto, Ontario, carrying on business under the name “Mondo Trading Company”, who re-sold such goods in Canada. The goods so purchased, as well as literature, letterheads, etc., received by the Mondo Trading Company during that period from Hans Schwarzkopf, had imprinted somewhere on it the following silhouette:



During the period from 1936 to 1939, Mondo Trading Company imported such goods to the value of approximately

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\$30,000. For the purpose of dealing in such goods, the Mondo Trading Company adopted another trade name, "Silhouette Products Reg'd.", and it published literature and advertising to the trade, using that name in association with the silhouette that I have just reproduced. The larger part of the sales during that period was to professional hair-dressers and the remainder was to the retail trade. After the registration referred to above, Mondo Trading Company continued to use the silhouette as a trade mark. It had no licence agreement but it did have an agreement under which it was the sole Canadian importer from Hans Schwarzkopf. Upon the outbreak of war in 1939, Mondo Trading Company could no longer import from Hans Schwarzkopf and it therefore started to manufacture in Canada products of the same kind as some of those that it had been importing and it sold those products "right through the war and after the war years". The goods so sold were all marked with the silhouette of a woman's head reproduced above because, according to the manager of Mondo Trading Company, who gave evidence at the trial, "it was our only sign of distinction at that time".

By virtue of the *Trading with the Enemy Regulations*, enacted by the Governor-in-Council shortly after the outbreak of war under the *War Measures Act*, all property of Hans Schwarzkopf, who was an enemy alien, automatically vested in the Custodian of Enemy Property, who was the Secretary of State.

On August 20, 1940, Mrs. Grunsky applied under section 6 of *The Patents, Designs, Copyright and Trade Mark (Emergency) Order*, 1939, for an order that the rights in connection with the trade mark regulations referred to above be suspended for the duration of the war to such extent as to enable her "to use the said mark in connection with hair treating preparations and devices and wares similar thereto within the meaning of *The Unfair Competition Act*, 1932". (No copy of such emergency order presumably made under the *War Measures Act* being filed, the significance of the order sought does not therefore appear.) An order was made pursuant to this application with a restriction that the trade mark could only be used on products "of at least substantially as good quality as those on which the said trade mark has been used by the registrant."

From 1940 until 1950 or 1951, Mondo Trading Company manufactured products and sold them under the name "Silhouette Products Reg'd." in association with the Silhouette trade mark set out above and, during that period, it did everything possible, by way of demonstrations, advertising in trade papers, and so forth, to make the trade mark known to hairdressers in Canada. From 1940 to 1948, it sold about \$275,000 worth of such goods, about half to beauty parlours and one-half to retailers.

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In 1951 Mondo Trading Company commenced importing from Hans Schwarzkopf in Germany again, and from 1951 to 1953 sold goods that it so imported as well as goods that it manufactured in Canada. The silhouette of a woman's head was used on the goods that it imported from Hans Schwarzkopf and sold as well as on the goods that it manufactured itself and sold. During this period, its sales increased and it expanded its advertising.

In 1953, pursuant to an agreement between Mondo Trading Company and Hans Schwarzkopf (the limited company), the plaintiff company was incorporated and took over the business that had been carried on under the name Silhouette Products Reg'd. The parties to the agreement had specifically agreed that, among the assets to be transferred to the plaintiff were "all trade marks and trade names presently held by Silhouette or held in trust for it by the Custodian of Enemy Property, including specifically . . . the Trade Mark consisting of a woman's head in black registered as trade mark No. 10566 and the Word Mark 'Silhouette' registered as Trade Mark No. 10081". (It appears, however, that the numbers used are inaccurate as the registration of the head is 10081 and that of Silhouette is 10566). This agreement was implemented by a formal agreement dated August 14, 1953, whereby Mondo Trading Company and "Schwarzkopf G.m.b.H." (meaning in German a company with limited liability) through their agents, purported to transfer to the plaintiff, among other things, the aforesaid trade marks.

Since its incorporation, the plaintiff has continued the business previously carried on by Mondo Trading Company under the name of Silhouette Products Reg'd. The business has been expanded and the advertising has been increased but the general character of the business is unchanged from the point of view of the issues in this case.

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The plaintiff has consistently used the silhouette of a woman's head set out above in connection with various word marks on the goods it sells in Canada whether manufactured by itself or by Hans Schwarzkopf in Germany. (It is of interest to note that the word "Schwarzkopf" is German for "black head", schwarz meaning black and kopf meaning head). Prior to its incorporation, Silhouette Products Reg'd. had used the silhouette with a circle around it but the plaintiff used it without the circle. The plaintiff uses the silhouette in connection with many different word marks, including "Schwarzkopf", and has sometimes used the head in a colour other than black.

A document dated March 21, 1955, recited that "Hans Schwarzkopf, formerly of 28 Martinstrasse, Vienna 18, and now of the City of Toronto, Ontario" was the registered owner of trade mark No. 39, N.S. 10566, registered in the Trade Marks Office on December 18, 1937, and that the plaintiff had acquired that trade mark "and the goodwill of the business carried on in Canada in association with the wares with which the said trade mark had been used" and purported to be an assignment from "the said Hans Schwarzkopf" to the plaintiff of the registered trade mark in question.

On April 26, 1956, the Custodian of Enemy Property relinquished any right or interest he might have in the aforesaid trade mark.

The defendant company has, since August, 1960, manufactured a hair spray, which it sells under a label, the front half of which is reproduced hereafter: *See p. 507.*

Without reviewing the evidence in detail, I hold that this label was designed for the defendant company without any thought or knowledge of the plaintiff's registered trade mark, or the silhouette of a woman's head used by the plaintiff, or the products or business of the plaintiff in the minds of those who designed it for the defendant. I am satisfied that the silhouette in this label is a reproduction of the head of the wife of the defendant's president and was employed, upon advice of a designer retained to prepare the label, to tie in with the fact that the lady was to participate actively in the launching of the new product, which was named "Lady Patricia" because the lady's first name was "Patricia".

**GIANT SIZE** ONLY **99¢**  
COMPARABLE VALUE \$2.00



# Firm Control

**HAIR SPRAY**  
*with lanolin*

**HOLDS HAIR STYLE  
NEATLY IN PLACE**

#### MONEY BACK GUARANTEE

Return partially used container to Prodon Industries Ltd. 30 Tangiers Rd. Downsview, Ontario for refund if not completely satisfied.  
"NO FINER HAIR SPRAY AT ANY PRICE!"

#### GARANTEE DE REMBOURSEMENT

Retournez le contenant déjà utilisé à Prodon Industries Ltd. 30 Tangiers Rd., Downsview, Ontario pour un remboursement si vous n'êtes pas entièrement satisfait.

**TO KEEP HAIR IN PLACE:** Style hair with comb, then spray

**TO SET LASTING PIN CURLS:** Dampen hair, spray one section at a time, curl and pin up. When dry, comb out, arrange, respray lightly

**FOR QUICK SET:** Pin curl hair without moistening, spray, let dry, brush or comb out style and respray lightly

**DIRECTIONS:** Hold container upright, 10 inches from hair, press down valve, spray evenly

**CAUTION:** Do not use near fire or flame. Do not incinerate container or expose to heat. Keep spray out of eyes.

Net Weight 11 ozs.

**POUR GARDER LES CHEVEUX EN PLACE:** Placez les cheveux puis vaporisez

**POUR CREER UNE MISE EN PLUS DURABLE:** Mouillez la chevelure et vaporisez une section à la fois, enrroulez et épinglez. Laissez sécher, peignez, placez et vaporisez de nouveau

**POUR UNE MISE EN PLUS RAPIDE:** Faites des bouclette sans mouiller, vaporisez, laissez sécher, peignez, placez et vaporisez de nouveau.

**MODE D'EMPLOI:** Tenez le contenant droit, 10 pouces de la chevelure. Pressez le bouton et vaporisez uniformément

**PRECAUTION:** Ne vaporisez pas près d'une flamme. N'incinerez pas le contenant vide. Evitez que le jet atteigne la vue.

Poids Net 11 ozs.

**PRODON INDUSTRIES LTD.**  
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The defendant sells its product to drug wholesalers, drug chains and drug stores, to department stores, to food wholesalers and food chains, to variety stores such as Woolworths, Kresges, Metropolitan, Zellers and Beamish, and to miscellaneous wholesalers. They also sell a relatively small amount to "beauty" wholesalers. The defendant has been successful in developing a market for its product. In 1963, its sales of Lady Patricia hair spray amounted to \$1,400,000.

I now turn to the redress claimed by the plaintiff. As indicated at the commencement of this judgment, the plaintiff is only claiming relief in respect of infringement of its registered trade mark and under section 7(b) of the *Trade Marks Act*. The other claims in the Statement of Claim were abandoned during argument.

The allegation of infringement is contained in paragraph 5 of the Statement of Claim, which reads as follows:

5. The defendant has sold, distributed and advertised in association with the silhouette of a woman's head similar to and confusing with the plaintiff's trade mark, a hair spray, not being wares of or sold by the plaintiff and the defendant is continuing to do so.

This claim is apparently framed with reference to section 20 of the *Trade Marks Act*, which reads as follows:

20. The right of the owner of a registered trade mark to its exclusive use shall be deemed to be infringed by a person not entitled to its use under this Act who sells, distributes or advertises wares or services in association with a confusing trade mark or trade name, but no registration of a trade mark prevents a person from making

- (a) any bona fide use of his personal name as a trade name, or
- (b) any bona fide use, other than as a trade mark,
  - (i) of the geographical name of his place of business, or
  - (ii) of any accurate description of the character or quality of his wares or services,

in such a manner as is not likely to have the effect of depreciating the value of the goodwill attaching to the trade mark.

Section 20 must be read with section 6 of the *Trade Marks Act*, the relevant portion of which reads as follows:

6. (1) For the purposes of this Act a trade mark or trade name is confusing with another trade mark or trade name if the use of such first mentioned trade mark or trade name would cause confusion with such last mentioned trade mark or trade name in the manner and circumstances described in this section.

(2) The use of a trade mark causes confusion with another trade mark if the use of both trade marks in the same area would be likely to lead to the inference that the wares or services associated with such trade marks are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

...

(5) In determining whether trade marks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

- (a) the inherent distinctiveness of the trade marks or trade names and the extent to which they have become known;
- (b) the length of time the trade marks or trade names have been in use;
- (c) the nature of the wares, services or business;
- (d) the nature of the trade; and
- (e) the degree of resemblance between the trade marks or trade names in appearance or sound or in the ideas suggested by them.

To bring the claim within section 20 read with section 6, strictly speaking, the Statement of Claim should have alleged that the trade mark employed by the defendant, if it were employed in the same area as the registered trade mark, would be likely to lead to the inference that the wares associated with such trade marks are manufactured or sold by the same person. While this was not pleaded, this was, in effect, the issue to which both parties addressed their evidence and I therefore direct (under Rule 119 of the General Rules and Orders of this Court) that the pleadings be amended to raise the issue as to whether such an allegation is or is not established.

The plaintiff's registered trade mark (silhouette of a man's head) and the woman's head on the defendant's label are silhouettes of heads within the first sense given by the Shorter Oxford English Dictionary to the word "silhouette", viz.

1. A portrait obtained by tracing the outline of a profile, head, or figure, and filling in the whole in black; an outline portrait cut out of black paper; a figure or picture drawn or printed in solid black . . .

Apart, however, from each of them being a silhouette of a head of a human being, the two marks do not appear to have anything in common. One is of a man, the other is of a woman. In addition, the physical characteristics of the two heads are quite different.

Unless, therefore, one concludes that the use of any silhouette of a head of a human being in the same area where the registered trade mark is used would be likely to lead to the conclusion that the wares associated with both marks are manufactured or sold by the same person, there is no basis for a finding of infringement in this case. While such a broad effect might be given to the use of some part of the human anatomy as a trade mark if it were being used in relation to wares that had no possible association with the

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part of the anatomy employed as the mark, in my view, no such conclusion can be drawn when the mark chosen is so closely related to the wares in relation to which it is used as the human head is related to wares used for the care of the hair. Quite apart from the evidence in this case, judicial knowledge can be taken of the fact that a reproduction of the human head is commonly used to indicate wares or services related to the care of the hair. Assuming the validity of the registered trade mark, I am of the view that the use of a silhouette of a head in the same area as the registered trade mark would not lead to the inference that the wares associated with both marks were manufactured or sold by the same person unless the silhouette alleged to be confusing was so similar in appearance to the registered silhouette that one would be likely to be mistaken for the other. In my view, there is no possibility of the Lady Patricia silhouette employed by the defendant being mistaken for the silhouette of a man that is the subject matter of the registered trade mark.

The other defence to the claim for infringement is that the registration of the trade mark is invalid. Section 19 of the *Trade Marks Act* defines the exclusive right conferred on the owner by the registration of a trade mark. That section reads as follows:

19. Subject to sections 21, 31 and 65, the registration of a trade mark in respect of any wares or services, unless shown to be invalid, gives to the owner the exclusive right to the use throughout Canada of such trade mark in respect of such wares or services.

As may be seen, the exclusive right does not subsist if the registered trade mark is "shown to be invalid." Whether a registration of a trade mark is invalid depends on section 18, which reads as follows:

18. (1) The registration of a trade mark is invalid if

- (a) the trade mark was not registrable at the date of registration;
- (b) the trade mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced;

or

- (c) the trade mark has been abandoned;

and subject to section 17, it is invalid if the applicant for registration was not the person entitled to secure the registration.

(2) No registration of a trade mark that had been so used in Canada by the registrant or his predecessor in title as to have become distinctive at the date of registration shall be held invalid merely on the ground that evidence of such distinctiveness was not submitted to the competent authority or tribunal before the grant of such registration.

There are several questions in my mind as to the validity of this registration, some of which were urged by the defendant. I propose only to refer to two of them, namely, that the trade mark was not "distinctive" at the time these proceedings were commenced and that it has been abandoned.

The word distinctive, in this context, is defined by section 2(f) of the *Trade Marks Act*, which reads as follows:  
2. In this Act,

...  
(f) "distinctive" in relation to a trade mark means a trade mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so as to distinguish them;

The registered trade mark—i.e., the silhouette of a man's head—has, on the evidence, never been used in Canada by the plaintiff or its predecessors in title and does not therefore "actually distinguish" wares or services in association with which it is used. Moreover, I am of opinion that a reproduction of a human head, closely related such as here to the wares used for the care of the hair, is *prima facie* non-distinctive. Evidence would therefore be required to establish that it actually serves to distinguish the wares of the plaintiff from those of another and there is no such evidence here. I am therefore of opinion that the registered trade mark is invalid because it was not distinctive at the time these proceedings were commenced as required by section 18(1)(b) of the *Trade Marks Act*.

I am further of opinion that the registration is invalid, by virtue of section 18(1)(c), because it has been abandoned. The evidence is clear that the particular silhouette which is registered as a trade mark—that is the silhouette of a man's head—has never been used in Canada by the plaintiff or its predecessors in title.

In the circumstances, I do not find it necessary to examine the other attacks on, or doubts concerning, the validity of the registration and the validity of the plaintiff's title thereto.

I now turn to the matter of "passing off" and to section 7(b) of the *Trade Marks Act* which together with section 7(c) is supplementary to the common law action for "passing off" so far as concerns "passing off" by substitution of wares by imitating a trade mark used in association with wares. This section reads as follows:

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7. No person shall

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- ...  
(b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

The plaintiff's claim under this provision is based on the fact that it had, for several years, been selling in Canada wares related to the care of the hair using the silhouette of a woman's head (reproduced by itself above), together with numerous different words also used as trade marks at the time when the defendant commenced to sell its hair spray using a label, the front panel of which is reproduced above, on which there appears a silhouette of a woman's head. It is clear on the evidence, and I so find, that the defendant did not have in mind the plaintiff's business or wares in adopting the label in question. In these circumstances, the question is whether the sale by the defendant of its hair spray constitutes an act whereby it directed public attention to its wares in such a way as to be likely to cause confusion between its wares and the wares of the plaintiff. Moreover, the matter should be resolved bearing in mind that there is no evidence of actual confusion.

The plaintiff's claim under section 7(b) depends upon

- (a) a finding that the public, prior to the use of a silhouette or black head by the defendant, identified the wares as being of a particular manufacture by the silhouette or black head placed on each article sold, and
- (b) a finding that the defendant, by using its label, including the silhouette on it, on its wares, has directed public attention to them in such a way as to likely cause confusion between its wares and those of the plaintiff in the sense that members of the public would probably be caused thereby to think that the defendant's wares are wares identified in their minds by the plaintiff's silhouette.

In the first place, although the evidence discloses that the plaintiff has sold and sells a substantial amount of goods in Canada and has spent and spends substantial sums on advertising those goods in Canada and that, therefore, the silhouette or black head can be taken to identify in the eyes of the public the wares so marked as being of a particular

manufacture, such an identification is somewhat diluted or attenuated by the fact that each of the plaintiff's labels carries one or more trade names or marks in addition to the silhouette. An examination of the folder of labels filed by the plaintiff (Exhibit 18) illustrates what I mean. The very first label shown has at the top the word "Schwarzkopf" and across the centre the word "Lecitol" and each of these words is much more prominent and uses much more space than the silhouette of the woman's head. Moreover, there is no evidence that the "treatment for dry hair" sold under this label is identified in the minds of the public by the silhouette rather than by the word "Schwarzkopf" or the word "Lecitol", or both those words. A similar comment may be made with reference to each of the other labels filed by the plaintiff. If those members of the public who know the plaintiff's wares (a large portion of whom are hairdressers who are, presumably, reasonably well acquainted with hair dressing wares) know them as being wares of Schwarzkopf, or of Silhouette Products Ltd., or by reference to a special name such as "Lecitol", then there is going to be much less identification (if any) in the minds of the public of the wares of the defendant by means of the silhouette or the black head.

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That claim under section 7(b) must, however, in my view, fail on a further ground. Indeed, even if it is assumed that the public does identify the wares by the silhouette of a woman's head as being of a particular manufacture, the defendant has not directed public attention to its wares in such a way as to be likely to cause confusion between its wares and the plaintiff's wares.

In dealing with this aspect of the claim under section 7(b), it is to be emphasized that the plaintiff's claim under section 7(b) is based on its actual use of a silhouette of a woman's head as a trade mark and not upon its registered trade mark, which, it will be recalled, is a silhouette of a man's head. Nevertheless, while they are both silhouettes of women's heads, in my view, the two silhouettes in question—that of the defendant and that of the plaintiff—are quite different in appearance.

The mere use by the defendant of a silhouette of a woman's head in connection with wares having to do with the care of the hair when the plaintiff is already using a

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silhouette of a woman's head in connection with wares having to do with the care of the hair does not, in my view, necessarily establish a breach of section 7(b). The matter is always a question of fact to be determined in accordance with the circumstances of each case. If the plaintiff used its silhouette of a woman unassociated with any other identifying mark or name and the defendant did likewise, this might have been likely to cause confusion even though the women's heads were quite different. If the defendant imitated, on its label and other literature, the material appearing on the plaintiff's label and other literature with the plaintiff's silhouette, that might have been likely to cause confusion, even though the women's heads were quite different. If the defendant used a silhouette that was the same as or very similar to, the plaintiff's silhouette, whether it is used with other different identifying marks or names, that might have been likely to cause confusion. Here however, the silhouettes are different and the labels and advertising generally are quite different.

I am of opinion that the plaintiff has not established a breach of section 7(b).

The action is dismissed with costs.