

KELLOG COMPANY,  
Opposer,

INTER PARTES CASE NO. 3079

OPPOSITION TO:

Application Serial No. 49280  
Filed : September 28, 1982  
Applicant : Metro Biscuit  
Corporation  
Trademark : TIGER & DEVICE  
Used on : Biscuits

- versus -

METRO BISCUITS CORPORATION,  
Respondent-Applicant.

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DECISION NO. 89-23 (TM)

March 30, 1989

#### DECISION

For action is a Notice of Opposition filed by the Opposer On May 6, 1988 against the Application Serial No. 49280 for the trademark "TIGER & DEVICE" for biscuit filed by the herein Respondent-Applicant on September 28, 1982 . Opposer is a foreign corporation organized and existing under the laws of the State of Delaware, with principal office address at One Kellogg Square, Battle Creek, Michigan 49016-3599, U.S.A., while Respondent-Applicant is a domestic corporation, with address at Mercedes Avenue, B. San Miguel, Pasig, Metro Manila, Philippines.

The Notice of Opposition alleged that the Opposer is the owner of the trademarks "TONY THE TIGER AND DESIGN" and "TONY JR. AND DESIGN" previously used in the Philippines in connection with corn flakes and frosties, etc.

On September 15, 1988, a Notice to Answer with attached copy of the Notice of Opposition was sent to Respondent-Applicant by registered mail with return card. Despite due notice, Respondent-Applicant failed to file its Answer within the reglementary period. Thus, on November 18, 1988, this Bureau upon motion of the Opposer issued Order No. 88-521 declaring Respondent-Applicant in default and allowed Opposer to present its evidence ex-parte on January 12, 1989 at 2:00 P.M.

Adduced as Opposer`s evidence are documentary exhibits marked as Exhibits "A" to "HH-3", inclusive of their submarkings.

A side-by-side comparison between Respondent`s "TIGER & DEVICE" mark as shown in the opposed trademark Application Serial No. 49280 (Exh. "H") and the attached labels, drawings and facsimiles (Exhs. "H-1" to "H-3") and Opposer`s registered "TIGER" marks as shown in the various certificate of registration (Exhs."C" to "AA") and box container

packaging's of the products (Exhs. "BB" to "GG") readily show well high identity between the two marks. In addition, the kind of goods on which the two contending marks are used are also similar.

Opposer was the first to adopt and use the trademark "TONY THE TIGER AND DESIGN" locally and abroad. In 1950, a Philippine company called Connell Brothers imported from the United Kingdom products of Kellogg Company, including frosted flakes bearing the mark "TIGER & DEVICE" (Exh. "A"). Comparatively, Respondent-Applicant first used the mark "TIGER & DEVICE" only on September 28, 1972 (Exh. "HH"). In the case of *Asari Yoko Co., Ltd. v. Kee Boc* L-14086, January 20, 1961; 1 SCRA 1, the Supreme Court held that the first user of the trademark in the Philippines, by importation of commodities bearing the trademark in question is entitled to the right to use the same to the exclusion of others, and that modern trade and commerce demands that depredation on legitimate trademarks of non-metrical should not be continued.

Trademark "TONY THE TIGER & DEVICE" is being used and registered in at least forty (40) countries in the world among them being the United States of America, South Korea, Taiwan, Australia, Israel, Greece, Finland, West Germany, Brazil and Israel. The same mark was widely promoted and advertized through packaging materials and advertisements of Kellogg's frosted flakes and other related products (Exhs. "BB" to "GG"). Claiming the worldwide success of the Kelloggs Company's "TIGER" marks, Mr. Haefner, Assistant Secretary of Opposer, alleged in his Affidavit some sales and advertising data which read:

"In the United States, annual advertising support attributable to the frosted flakes brand and the Tiger figure has increased steadily from greater than US\$10 million in 1983 to greater than US\$ 25 million in 1987. In the United Kingdom, the frostiest product is the third most popular in the ready-to-eat category with total sales (by weight) increasing from greater than 16 million in 1968 to greater than 19 million kilos in 1987.

Although the overall South American cereal market is much smaller, the success of the Zucaritas and Sucrillos products which feature "TIGER" figure have been outstanding with the foregoing findings, Respondent-Applicant may not register the mark "TIGER & DEVICE" pursuant to Section 4(d) of Republic Act 166, as amended, which reads:

"Sec. 4(d) Consists of or compromises a mark or tradename which so resembles a mark or trade-name registered in the Philippines or a mark or trade-name previously used in the Philippines by another and not abandoned, as to be likely, when applied to or used in connection with goods, business or services of the applicant, to cause confusion or mistake or to deceive purchasers."

Moreover, the failure of Respondent-Applicant to file an Answer and lift the Order of Default despite notice is indicative of Opposer's lack of interest in pursuing its applicant; hence he is deemed to have abandoned the same.

WHEREFORE, premises considered, the herein Notice of Opposition is SUSTAINED. Accordingly, this Bureau REJECTS Application Serial No. 49280 filed by Respondent-Applicant on September 28, 1982.

Let the records of this case be remanded to the Application, Issuance & Publication Division for appropriate action in accordance with this Decision.

SO ORDERED.

IGNACIO S. SAPALO  
Director