

KRAFT FOODS SCHWEIZ HOLDING AG	}	IPC NO. 14-2004-00095
Opposer	}	Opposition to:
	}	Appln. Ser. No. 4-1997-123464
	}	Date Filed: May 20, 1997
-versus-	}	
	}	TM: "MILCOW"
PT ULTRA PRIMA PANGAN MAKMUR,	}	
Respondent-Applicant.	}	Decision No. 2006-04
x-----x		

DECISION

Before us is an Opposition filed by KRAFT FOODS SCHWEIZ HOLDING AG a corporation duly organized and existing under the laws of Switzerland, with address at Bellerivestrasse 203, CH-8008 Zurich, Switzerland against the application filed on August 12, 1997 by PT ULTRA PRIMA PANGAN MAKMUR with address JL Daan Mogot Km 16, RT003/07, Semanan Kalideres, Jakarta Barat, Indonesia bearing serial no. 4-1997-123464 for the registration of the mark "MILCOW" used for coffee, tea, cocoa, sugar, rice, bread, biscuits, candy, cookies, taffy made of sticky rice, coconut milk and palm sugar, steamed cake, ice cream, edible ice, honey, yeast, powder for making bread, salt mustard, pepper, vinegar, spices, glucose, vanilla, cooking spices, bottled tea drink, bottled coffee drink, chips made of flour flavored with fish or shrimp under Class 30 of the international classification of goods, which application was published for opposition in the Official Gazette on June 7, 2004, page no. 206, Volume VII, No. 1.

Accordingly, the Opposer relied on the following grounds for opposition:

- "1.0 Opposer is the owner of the mark "MILKA" which is the subject of a trademark registration in the Philippines bearing Registration No. 54191 issued on February 3, 1993 covering International Class 30 for the goods "cocoa, chocolate, chocolate products, pastry, confectionary and bakery products, sugar confectionary". Opposer has used; and continues to use its mark extensively in local commerce;
- "1.1 In addition to the above-named trademark registration, Opposer also has a trademark registration in Switzerland, Reg. No. 258133 on May 17, 1952, upon which the Philippine registration is based;
- "1.2 Registration of the mark "MILCOW" in the name of respondent-applicant would violate the pertinent provision of Republic Act 8293 (Intellectual Property Code), hereunder quoted as follows:

"Sec. 123. Registrability. - 123.1 A mark cannot be registered if it;

- (d) Is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of:
 - (i) The same goods or services, or
 - (ii) Closely related goods or services, or
 - (iii) If it nearly resembles such a mark as to be likely to deceive or cause confusion;

- (e) Is identical with, or confusingly similar to, or constitutes a translation of a mark which is considered by the competent authority of the Philippines to be well-known internationally and in the Philippines, whether or not it is registered here, as being already the mark of a person other than the applicant for registration, and used for identical or similar goods or services: Provided, That in determining whether a mark is well-known, account shall be taken of the knowledge in the Philippines which has been obtained as a result of the promotion of the mark.”

Opposer’s trademark registration in the Philippines covers the same class of goods as that of the respondent-applicant’s.

Moreover, respondent-applicant’s mark MILCOW closely resembles Opposer’s duly registered mark MILKA. This gives rise to a confusing similarity between the two marks, which will cause confusion, and even deception among the consuming public as to the origin of respondent-applicant’s goods, to the prejudice of Opposer.

- “1.3 Opposer’s trademark “MILKA” should be afforded the protection under the law given to well-known trademarks and duly registered trademarks, therefore, should be given preference and priority over and against respondent-applicant’s mark MILCOW which is clearly just a copy of Opposer’s well-known trademark MILKA.
- “1.4 Respondent-Applicant’s mark MILCOW is a flagrant and veritable imitation of Opposer’s well-known trademark MILKA that would likely cause confusion, mistake and deception to the buying public. Confusion between Opposer’s and respondent-applicant’s respective business and products as well as dilution and loss of distinctiveness of Opposer’s trademark are inevitable, especially as Opposer always uses a cow with the MILKA products, which is also protected as a trademark.
- “1.5 Opposer’s trademark has acquired goodwill in various jurisdictions. Obviously, respondent-applicant is merely riding on the popularity and goodwill of Opposer’s trademark. Thus, Opposer’s right under the provisions of IP Code and the Paris Convention on the Protection of Industrial Property must be protected.

A Notice to Answer dated September 9, 2004 was issued by this Office requiring the Respondent-Applicant to file its Answer within fifteen (15) days from receipt. In Order No. 2005-633 dated August 24, 2005, Respondent-Applicant was declared IN DEFAULT for failure to file its Answer within the reglementary period.

Subsequently, considering that this case was undergoing presentation of evidence ex-parte for opposer and was mandatorily covered by the summary rules per section 11 (pertaining to “Effect on Pending Cases”) of Office Order No. 79, this Office issued Order No. 2005-884 directing the Opposer to complete its evidence.

Thereafter, on November 9, 2005 Opposer filed its Compliance and Submission of ex-Parte Evidence as well as its Supplemental Compliance and Submission of Ex-Parte Evidence on November 22, 2005.

The main issue to be resolved in this case is:

WHETHER OR NOT THE RESPONDENT-APPLICANT'S MARK "MILCOW" IS IDENTICAL OR CONFUSINGLY SIMILAR TO THE OPPOSER'S MARK "MILKA"

The law governing the instant opposition case is Republic Act 8293, otherwise known as the "Intellectual Property Code of the Philippines" considering that the application was filed during the affectivity of the said statute.

Section 123.1 (d) of Republic Act No. 8293 explicitly provides that:

"Section 123. Registrability 123.1 A mark cannot be registered if it:

x x x x

(d) Is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of:

- (i) The same goods or services, or*
- (ii) Closely related goods or services, or*
- (iii) if it nearly resembles such a mark as to be likely to deceive or cause confusion."*

From the above-cited provision of the Code, it is crystal clear that a mark cannot be registered if it is identical with or confusingly similar to a registered mark belonging to a different proprietor and used on closely related goods or services.

After a careful examination of the records and the evidence presented, this Office finds that the simultaneous use of Opposer's mark "MILKA" and respondents' use of the "MILCOW" mark results in the likelihood of confusion.

First, the two marks are phonetically and aurally the same. "MILCOW" when read and pronounced sounds almost the same as "MILKA". Both marks have two syllables and have the same first syllable, "ML". Although there are differences in the second syllable, however, when pronounced the syllables "COW" and "KA" have similar sound. Over-all, both marks give a similar aural and phonetic impression. In the case of McDonald's vs. LC Big Mak, GR No. 143993, the Supreme Court cited:

"Courts will consider more the aural and visual impressions created by the marks in the public mind, giving little weight to factors like prices, quality sales outlets and market segments."

Second, the competing marks are used on similar and closely related goods. Opposer's mark "MILKA" deals with goods under Class 30 for the goods "cocoa, chocolate, chocolate products, pastry confectionary and bakery products, sugar confectionery", while Respondent-Applicant's mark "MILCOW" is also classified under Class 30 for coffee, tea, cocoa, sugar, rice, bread, biscuits, candy, cookies, taffy made of sticky rice, coconut milk and palm sugar, steamed cake, ice cream, edible ice, honey, yeast, powder for making bread, salt mustard, pepper, vinegar, spices, glucose, vanilla, cooking spices, bottled tea drink, bottled coffee drink, chips made of flour flavored with fish or shrimp. From the enumeration of the goods of the parties, there is not much explanation needed to determine that the parties' goods are similar and closely related.

Finally, this Office takes notice of the fact that Respondent-Applicant was declared in default in accordance with the Rules and Regulations on Inter Partes Proceedings for its failure to file the Answer within the reglementary period (Order No. 2005-633, dated August 24, 2005). Neither did Respondent-Applicant file any motion to lift the order of default, hence, it can be presumed that it has lost interest to the mark "MILCOW" and acquiesced to Opposer's allegations and demands.

Thus, in the case of *DELBROS HOTEL CORPORATION vs. INTERMEDIATE APPELLATE COURT, G.R. NO. L-72566. APRIL 12, 1988*, the Supreme Court stated:

“Fundamentally, default order are taken on the legal presumption that in failing to file an answer, the defendant does not oppose the allegations and relief demanded in the complaint.

WHEREFORE, premises considered, the Notice of Opposition is, as it is, hereby *SUSTAINED*. Consequently, Application Serial No. 4-1997-123464 for the mark “MILCOW” classified under Class 30 for coffee, tea, cocoa, sugar, rice, bread, biscuits, candy, cookies, taffy made of sticky rice, coconut milk and palm sugar, steamed cake, ice cream, edible ice, honey, yeast, powder for making bread, salt mustard, pepper, vinegar, spices, glucose, vanilla, cooking spices, bottled tea drink, bottled coffee drink, chips made of flour flavored with fish or shrimp filed on August 12, 1997 by PT ULTRA PRIMA OANGAN MAKMUR is hereby *REJECTED*.

Let the filewrapper of “MILCOW” subject matter of the above-entitled case be forwarded to the Administrative, Financial and Human Resource Development Services Bureau (AFHRDSB) for appropriate action in accordance with this Decision with a copy to be furnished the Bureau of Trademarks (BOT) for information and to update its records.

SO ORDERED.

Makati City, January 26, 2006.

ESTRELLITA BELTRAN-ABELARDO
Director, Bureau of Legal Affairs
Intellectual Property Office