



OJON CORPORATION,
Opposer,

-versus-

MA. JOYCE B. DEL MORAL,
Respondent-Applicant.

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IPC No. 14-2011-00265
Opposition to:
Appln. Serial No. 4-2010-010412
Date Filed: 23 September 2010
TM: "OJON"

NOTICE OF DECISION

ANGARA ABELLO CONCEPCION REGALA AND CRUZ

Counsel for the Opposer
22/F ACCRALAW Tower
Second Avenue corner 30th Street
Crescent Park West, Bonifacio Global City
Taguig City

MA. JOYCE B. DEL MORAL

Respondent-Applicant
257 Col. Miguel Ver St.
Little Baguio, San Juan City

GREETINGS:

Please be informed that Decision No. 2013 - 136 dated July 19, 2013 (copy enclosed) was promulgated in the above entitled case.

Taguig City, July 19, 2013.

For the Director:

Edwin A. Dating
Atty. EDWIN DANILO A. DATING
Director III
Bureau of Legal Affairs



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Appln. Serial No. 4-2010-010412

Date Filed: 23 September 2010

Trademark: "OJON"

Decision No. 2013 - 136

DECISION

OJON CORPORATION ("Opposer"), is a corporation organized and existing under the laws of the State of Delaware with office address at 767 Fifth Avenue, New York, New York 10153, filed on 12 July 2011 an opposition to Trademark Application Serial No. 4-2010-010412. The application, filed by MA. JOYCE B. DEL MORAL ("Respondent-Applicant"), on 23 September 2010, covers the trademark "OJON" for use on goods under Class 03¹, specifically, bleaching preparations, deodorants for personal use, soaps, perfumery, essential oils, cosmetics, hair lotions and dentrifices.²

The Opposer relies on the following grounds to support its Opposition:

"4.1 Opposer is the true owner and rightful proprietor of the OJON Trademarks that are used on various goods in Classes 01, 03, 21, and 26 as well as on services in Class 44.

"4.2 Respondent-Applicant's application for the trademark 'OJON', which is identical to, or confusingly similar with, the well-known OJON Trademarks of Opposer and is used on identical or similar goods in Class 03 as that of the Opposer's marks, cannot be registered by virtue of the proscription in Section 123.1 (e) of the IP Code and relevant jurisprudence.

"4.3 Opposer's OJON Trademarks are internationally and locally well-known and are entitled to protection, specifically against the potential dilution that may be caused by Respondent-Applicant's unauthorized registration and use of the mark 'OJON'.

"4.4 Respondent-Applicant's application for the registration of the mark 'OJON' is evidently in bad faith as she knows or ought to have known the existence of the well-known mark 'OJON' owned by the Opposer.

¹ The Nice Classification of goods and services is for registering trademark and service marks, based on a multilateral treaty administered by the WIPO, called the Nice Agreement Concerning the International Classification of Goods and Services for Registration of Marks concluded in 1957.

² The application was published in the Intellectual Property Office Official Gazette, officially released for circulation.

"4.5 Respondent-Applicant's application for the mark 'OJON' is not an isolated case as she seemingly employs, in bad faith, a pattern of applying for the registration of other well-known marks to the detriment of the true and lawful owners thereof, causing irreparable injury thereby, and which amounts to Unfair Competition under Section 168.3 of the Intellectual Property Code. x x x

"DISCUSSION:

"5.1 Opposer, OJON CORPORATION, is the true owner and originator of the world famous OJON Trademarks. It sells various haircare and skincare products under the housemark 'OJON'. Ojon products are formulated in part by oil extracts from nuts harvested from the American palm tree, from which the name OJON was derived.

"5.2 The 'OJON' mark was first launched in the United States of America in December 2003 through the direct television shopping channel QVC and later introduced in Canada, UK, Japan, Germany, and Australia. It was first registered in Canada under Registration No. TMA637383 on 14 April 2005.

x x x

"5.4 At present, Ojon products are available in the U.S.A., Canada, United Kingdom, Italy, Germany, and Australia. They are sold through television shopping channels like QVC, The Shopping Channel (Canada) and TVSN (Australia). Ojon products are also sold in specialty retail stores such as Sephora and on-line through www.ojon.com and authorized on-line retailers such as www.QVC.com, www.Sephora.com and www.tvsn.com.au.

"5.5 Opposer's OJON Trademarks embody the efficacy of Opposer's products. Opposer invested huge amounts of resources, creativity, and time to develop the identity and uniqueness of its products. To allow the registration of Respondent-Applicant's identical 'OJON' wordmark, a gradual whittling away or dilution of this unique identity will necessarily result. 'Uniqueness or singularity' is an essential trademark right and Opposer has the right to preserve and protect the same. In this case, Opposer has every right to defend its truthful ownership over the 'Ojon' trademark, notwithstanding the fact that Respondent-Applicant filed her application earlier than oppose in the Philippines.

x x x

"5.9 A mark is merely a symbol of existing goodwill. If a business has not yet been established, there can be no goodwill and nothing yet created for the 'mark' to represent or symbolize. Selection of a mark with only an intention to do business in the future does not establish 'trademark' use of that symbol sufficient for priority over another. Hence, as between Opposer's genuine use of the mark 'OJON' and Respondent-Applicant's earlier registration of the identical mark, Opposer's superior right over the mark must be upheld.

“6.1 An effortless side-by-side comparison of Opposer’s ‘OJON’ trademark and Respondent-Applicant’s ‘OJON’ mark, will show complete identity in all respects.

“6.2 By comparing both marks in plain view, it is certain that there is perfect similarity between the said marks. Hence, Respondent-Applicant’s unlawful adoption of the same ‘OJON’ workmark would likely mislead anyone to believe that her mark is no different from Opposer’s OJON Trademarks which are well-known and exclusively with Opposer’s Class 03 goods, among others.

“6.3 A trademark is designed to identify the user. But it should be so distinctive and sufficiently original as to enable those who come into contract with it to recognize instantly the identity of the user. It must be affirmative and definite, significant and distinctive, capable to indicate origin. In this case, Respondent-Applicant purposely appropriated and employed without Opposer’s knowledge and consent, the latter’s mark ‘OJON’.

x x x

“6.5 It has been stated that when a manufacturer prepares to package his product, he has before him a boundless choice of words, phrases, colors and symbols sufficient to distinguish his product from the others. In this case, what are the chances of Respondent-Applicant inadvertently choosing the same word ‘OJON’ that are the trademarks of Opposer, thought the field of her selection was too broad. The inevitable conclusion is that it was done deliberately, maliciously and in bad faith.

“6.6 It is truly difficult to understand why, of the millions of terms and combinations of letters available, Respondent-Applicant had to choose exactly the same mark as that of the Opposer, if there was no intent to take advantage of the goodwill of Opposer’s OJON Trademarks. Further proof of Respondent-Applicant’s intent to deceive and mislead the average or ordinary purchaser is the fact that the registration for Respondent-Applicant’s ‘OJON’ mark is sought to cover identical and/or related Class 03 goods.

“6.7 If Respondent-Applicant’s application for the mark ‘OJON’ will be allowed, and it covers the same set of Class 03 goods, it will falsely suggest a connection with the Opposer and would inevitably cause the buying public to confuse the Respondent-Applicant’s goods as originating from the Opposer.

x x x

“7.1 As the owner and rightful proprietor of the internationally well-known OJON Trademarks, Opposer has caused the filing of numerous trademark applications, and has in fact obtained seventy-five (75) registrations for its OJON Trademarks covering various Classes of goods and services. In addition, Opposer has eleven (11) pending applications covering various classes in different jurisdictions. x x x

“7.3 In the Philippines, Opposer has also applied for the registration of its OJON Trademarks. x x x

"7.4 Section 123.1 (e) of the Intellectual Property Code prohibits the registration of a mark which is identical or confusingly similar to a well-known trademark in the same class. Clearly, being the legitimate owner of the well-known OJON Trademarks, Opposer has the right to prevent Respondent-Applicant from the latter's unlawful appropriation thereof.

"7.5 As early as December 2003, Opposer started, and continues to use, the OJON Trademarks on a wide variety of haircare products such as, but not limited to, shampoo, conditioner, moistures mist, smoothing cream, volumizing foam and cream, styling spray, thickening spray, gloss hair spray, dry cleansing spray, hair serum, hair treatment, and hair mask.

"7.6 From 2007 to 2010, Opposer has spent more than US \$8,500,000.00 for advertising and promotional expenses alone. x x x

"7.7 Over the years, the quality of Opposer's products has been recognized consistently in international and local publications. Among the prestigious awards and recognitions garnered by Opposer for its Ojon products are as follows: x x x

"7.9 Based on the foregoing, it is clear that the OJON Trademarks have acquired substantial goodwill and reputation over the years, elevating them to the level of well-known and world-famous marks as a result of advertising/promotional activities, coupled with the continuous use by Opposer of the said marks. Hence, the registration of the trademark 'OJON' in the name of Respondent-Applicant would cause incalculable damage to the Opposer's reputation and general business standing.

"7.10 Respondent-Applicant's use of the trademark 'OJON' undoubtedly diminishes the distinctiveness and dilutes the goodwill associated with Opposer's OJON Trademarks which have become distinctive in relation to, and practically synonymous with, the haircare offered by Opposer all over the world.

"7.11 Dilution results when use of a mark by others generates awareness that the mark no longer signifies anything unique, singular or particular, but instead may (or does) denominate several varying items from varying sources. In short, when use of the same or similar marks by others has caused a mark to become less distinctive than before, it has been diluted.

"7.12 The Respondent-Applicant's use of Opposer's OJON Trademarks to identify the former's products in Class 03 raises the possibility that Opposer's mark will lose its ability to serve as a unique identifier of the Opposer's goods and services in other classes aside from Opposer's Class 03 goods. In the same manner, Opposer's reputation and commercial value will be diminished because the public will associate the lack of quality or prestige in Respondent-Applicant's alleged goods with Opposer's Class 03 goods.

"7.13 Opposer's internationally and locally well-known OJON Trademarks are highly distinctive and this distinctiveness is protected under our laws, specifically under Paragraph (e) of Section 123.1 of the IP Code as restated under Section 147.2 of the same

Code. Taking these provisions into consideration, Respondent-Applicant's unauthorized registration of Opposer's OJON Trademarks, must therefore be stopped as it clearly diminishes the 'selling power' that the distinctive OJON Trademarks have engendered for Opposer's goods and services in the mind of the consuming public. For similar reasons, economic harm to Opposer's business and prestige will inevitably result from Respondent-applicant's replication of the OJON Trademarks on the latter's alleged local products.

"8.1 Nowadays, in the light of so much and very fast advances in every aspect of human endeavour, foremost among them the means of communications and display of data, hence, reducing acceptability of excuses or alibis to nil, for practical and well-advised reasons, it is incumbent upon everybody who desires to make use of a particular mark, and/to seek registration of such mark in the IPO to first resort to intensive/extensive researches on the mark being desired for use or registration in the IPO.

"8.2 Filing an application for the registration, or the successful registration, of the OJON Trademarks in different Trademark Offices worldwide serves as a constructive notice to the whole world of such fact. In this case, Opposer's ownership of the OJON Trademarks, as well as the status of its various trademark applications and registrations of all the marks are verifiable just by checking the respective online databases of the Trademark Registries in each jurisdiction.

"8.3 While our Trademark laws and regulations are silent with respect to bad faith filing, guidance may be found from the relevant provision in the Danish Trade Marks Act, which explains the meaning of 'bad faith', to the effect that 'the applicant at the date of the filing had, or should have had, knowledge of the foreign trade mark'. Based on our jurisprudence, 'bad faith' does not connote bad judgment or negligence; it imports dishonest purpose or some moral obliquity and conscious doing of wrong; it means breach of unknown duty through some motive or interest or will; it partakes of the nature of fraud.

"8.4 A search of the word 'OJON' through the use of the Google search engine will immediately reveal the Opposer's Official website, i.e., www.ojon.com, which is displayed at the top of the search results list. Obviously, being a foreign and distinct word, the 'OJON' mark could not have been possibly coined by Respondent-applicant on her own.

"8.5 Interestingly, the unauthorized trademark application was employed by Respondent-Applicant not only with respect to Opposer's well-known OJON Trademarks but also with respect to other famous trademarks as well, leading to the conclusion that Respondent-Applicant is engaging in a pattern of illegally filing applications for the registration of trademarks, which are not in any way, owned by her.

“9.1 A search at the online trademarks database of this Honorable Office reveals several other marks, in addition to the mark ‘OJON’ which have been filed by Respondent-Applicant. x x x

“9.2 Informal searches at the U.S Patent and Trademark Office (‘USPTO’) and the Office for Harmonization in the Internal Market (‘OHIM’) online databases, will reveal that most of the trademarks applied for registration by Respondent-Applicant with the IPO are owned by various foreign legal entities, which are unrelated to Respondent-Applicant. x x x

“9.3 Upon informal inquiry by Opposer, it was informed that Respondent-Applicant never filed the requisite Declaration of Actual Use or Affidavit of Use with respect to the marks which she has applied for registration and/or which are already registered in her name. In an e-mail message dated 16 June 2011 from an officer of the Bureau of Trademarks of the IPO, this fact was confirmed. It appears that Respondent-Applicant never actually used the marks applied for or registered in her name.

x x x

“9.5 It has been held that failure of the applicant, when challenged in an opposition proceeding, to produce any document supportive of an intent to use is sufficient to prove the lack of bona fide intent to use. For Respondent-Applicant to invoke ‘good faith’, she must present sufficient and proper documentation contemporaneous with the applications, of realistic plans to go forward to use the marks. At present, Respondent-Applicant filed thirty-four (34) trademark applications covering similar goods in Class 25. Respondent-Applicant cannot reasonably claim that she intends to use all the thirty-four (34) marks by herself. The only logical inference from her actions is that these applications were only maliciously filed to the prejudice of the real and rightful foreign trademark owners. Respondent-applicant’s failure to comply with maintenance requirements on some of the applications confirms this inference.”

The Opposer submitted the following pieces of evidence:

1. Exhibit “A” - Notarized and legalized Special Power of Attorney;
2. Exhibit “B” - Verification and Certification against Forum Shopping;
3. Exhibit “C” - Notarized and Legalized Secretary’s Certificate;
4. Exhibit “D” and Annexes - Notarized and Legalized Affidavit of Rita Odin, Vice President and Trademark counsel of Opposer;
5. Exhibit “E” - Print out of an extract from Opposer’s website on Ojon story;
6. Exhibit “F” - Print-out from IPO on-line database of Opposer’s OJON mark under Application No. 4-2011-004317;
7. Exhibit “G” - Print-out from IPO on-line database of Opposer’s OJON mark under Application No. 4-2010-010412;
8. Exhibit “H” - Certificate of Registration No. 3,1713,869 for OJON in U.S.A.;
9. Exhibit “I” - Certificate of Registration No. 3,173,875 for OJON in U.S.A.;
10. Exhibit “J” - Certificate of Registration No. 3,212,393 for OJON in U.S.A.;
11. Exhibit “K” - Certificate of Registration No. 3,164,351 for OJON in U.S.A.;

12. Exhibit "L" - Certificate of Registration No. 08005909 for OJON in Malaysia;
13. Exhibit "M" - Certificate of Registration No. 4990656 for OJON in Japan;
14. Exhibit "N" - Certificate of Registration No. 004613113 for OJON in European Community;
15. Exhibit "O" - Certificate of Registration No. 1142085 for OJON in Australia; and,
16. Exhibit "P" to "BBB" - List of trademark applications of Respondent-Applicant, in addition to the mark OJON in the online trademarks database of IPOPHl;

This Bureau issued and served upon the Respondent-Applicant a Notice to Answer on 28 July 2011. Respondent-Applicant however, did not file an answer. Thus, acting upon Opposer's Motion to Declare Respondent-Applicant in Default, this Bureau in Order No. 2012-503 dated 28 March 2012 declared Respondent-Applicant in default, submitting this instant case for decision

Should the Respondent-Applicant be allowed to register the trademark OJON?

The contending marks are obviously identical without any substantial difference in their font style and manner of display. Moreover, the Respondent-Applicant uses its mark on goods that are similar or closely related to the Opposer's, particularly bleaching preparations, essential oils, cosmetics, hair lotions and dentrifices which flow on the same channels of trade and both falling under Class 03. Thus, it is likely that the consumers will have the impression that these goods or products originate from a single source or origin. The confusion or mistake would subsist not only on the purchaser's perception of goods but on the origin thereof as held by the Supreme Court, to wit:³

Callman notes two types of confusion. The first is the confusion of goods in which event the ordinarily prudent purchaser would be induced to purchase one product in the belief that he was purchasing the other. In which case, defendant's goods are then bought as the plaintiff's and the poorer quality of the former reflects adversely on the plaintiff's reputation. The other is the confusion of business. Hence, though the goods of the parties are different, the defendant's product is such as might reasonably be assumed to originate with the plaintiff and the public would then be deceived either into that belief or into belief that there is some connection between the plaintiff and defendant which, in fact does not exist.

The public interest, therefore, requires that the two marks, identical to or closely resembling each other and used on the same and closely related goods, but utilized by different proprietors should not be allowed to co-exist. Confusion, mistake, deception, and even fraud, should be prevented. It is emphasized that the function of trademark is to point out distinctly the origin or ownership of the goods to which it is affixed; to secure to him, who has been instrumental in bringing into the market a superior article of merchandise, the fruit of his industry and skill; to assure the public that they are procuring the genuine article; to prevent

³ Converse Rubber Corporation v. Universal Rubber Products Inc., et al., G.R. No. L-27906, 08 Jan. 1987.

fraud and imposition; and to protect the manufacturer against substitution and sale of an inferior and different article as his product.⁴

It is stressed that the Philippines implemented the TRIPS Agreement when the IP Code took into force and effect on 01 January 1998. Art. 15 of the TRIPS Agreement reads:

Section 2: Trademarks
Article 15
Protectable subject Matter

1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words, including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.
2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provision of the Paris Convention (1967).
3. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.
4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.
5. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.

Article 16 (1) of the TRIPS Agreement states:

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

⁴ Pribhdas J. Mirpuri v. Court of Appeals, G.R. No. 114508, 19 Nov. 1999.

Significantly, Sec. 121.1 of the IP Code adopted the definition of the mark under the old Law on Trademarks (Rep. Act No. 166), to wit:

121.1. "Mark" means any visible sign capable of distinguishing the goods (trademark) or services (service mark) of an enterprise and shall include a stamped or marked container of goods; (Sec. 38, R.A. No. 166a)

Sec. 122 of the IP Code states:

Sec. 122. How Marks are Acquired. – The rights in a mark shall be acquired through registration made validly in accordance with the provisions of this law. (Sec. 2-A, R.A. No. 166a)

There is nothing in Sec. 122 which says that registration confers ownership of the mark. What the provision speaks of is that the rights in a mark shall be acquired through registration, which must be made validly in accordance with the provisions of the law.

Corollarily, Sec. 138 of the IP Code provides:

Sec. 138. Certificates of Registration. – A certificate of registration of a mark shall be prima facie evidence of the validity of the registration, the registrant's ownership of the mark, and the registrant's exclusive right to use the same in connection with the goods or services and those that are related thereto specified in the certificate. (Emphasis supplied)

Clearly, it is not the application or the registration that confers ownership of a mark, but it is ownership of the mark that confers the right to registration. While the country's legal regime on trademarks shifted to a registration system, it is not the intention of the legislators not to recognize the preservation of existing rights of trademark owners at the time the IP Code took into effect.⁵ The registration system is not to be used in committing or perpetrating an unjust and unfair claim. A trademark is an industrial property and the owner thereof has property rights over it. The privilege of being issued a registration for its exclusive use, therefore, should be based on the concept of ownership. The IP Code implements the TRIPS Agreement and therefore, the idea of "registered owner" does not mean that ownership is established by mere registration but that registration establishes merely a presumptive right of ownership. That presumption of ownership yields to superior evidence of actual and real ownership of the trademark and to the TRIPS Agreement requirement that no existing prior rights shall be prejudiced. In *Berris v. Norvy Abyadang*⁶, the Supreme Court held:

The ownership of a trademark is acquired by its registration and its actual use by the manufacturer or distributor of the goods made available to the purchasing public. Section 122 of R.A. No. 8293 provides that the rights in a mark shall be acquired by means if its valid registration with the IPO. A certificate of registration of a mark, once issued,

⁵ See Section 236 of the IP Code.

⁶ G.R. No. 183404, 13 October 2010.

constitutes prima facie evidence of the validity of the registration, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the same in connection with the goods or services and those that are related thereto specified in the certificate. R.A. No. 8293, however, requires the applicant for registration or the registrant to file a declaration of actual use (DAU) of the mark, with evidence to that effect, within three (3) years from the filing of the application for registration; otherwise, the application shall be refused or the mark shall be removed from the register. In other words, the prima facie presumption brought about by the registration of a mark may be challenged and overcome, in an appropriate action, by proof of the nullity of the registration or of non-use of the mark, except when excused.⁷ Moreover, the presumption may likewise be defeated by evidence of prior use by another person, i.e., it will controvert a claim of legal appropriation or of ownership based on registration by a subsequent user. This is because a trademark is a creation of use and belongs to one who first used it in trade or commerce.

In this instance, the Opposer proved that it is the owner of the contested mark. It has submitted evidence relating to the origin of its OJON trademark and its family of OJON trademarks long before the filing of the Respondent-Applicant's trademark application. Among the pieces of evidence are the affidavit of its witness⁸, history of its OJON trademarks⁹, registrations in various countries¹⁰ and application for the OJON mark in the Philippines.¹¹

In contrast, the Respondent-Applicant despite the opportunity given, failed to explain how she arrived at using the mark OJON as she failed to file a Verified Answer. The mark OJON is unique and highly distinctive with respect to the goods it is attached with. It is incredible for the Respondent-Applicant to have come up with the same mark practically for similar goods by pure coincidence.

Succinctly, the field from which a person may select a trademark is practically unlimited. As in all other cases of colorable imitations, the unanswered riddle is why, of the millions of terms and combination of letters and designs available, the Respondent-Applicant had to come up with a mark identical or so closely similar to another's mark if there was no intent to take advantage of the goodwill generated by the other mark.¹²

The intellectual property system was established to recognize creativity and give incentives to innovations. Similarly, the trademark registration system seeks to reward entrepreneurs and individuals who through their own innovations were able to distinguish their goods or services by a visible sign that distinctly points out the origin and ownership of such goods or services.

WHEREFORE, premises considered, the instant Opposition to Trademark Application No. 4-2010-010412 is hereby SUSTAINED. Let the filewrapper of the subject trademark

⁸ Exhibit "D" of Opposer.

⁹ Exhibit "E" of Opposer.

¹⁰ Exhibits "H" to "O" of Opposer.

¹¹ Exhibits "F" & "G" of Opposer.

¹² American Wire & Cable Company v. Director of Patents, G.R. No. L-26557, 18 February 1970.

application be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 19 July 2013.


Atty. NATHANIEL S. AREVALO
Director IV, Bureau of Legal Affairs