



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2011 TMOB 181
Date of Decision: 2011-10-05

**IN THE MATTER OF AN OPPOSITION
by Al Whan trading as Happy Daze to
application No. 1,324,449 for the trade-
mark HAPPY DAYS Design in the name
of CBS Studios Inc.**

[1] On November 16, 2006, CBS Studios Inc. (the Applicant) filed an application to register the trade-mark HAPPY DAYS Design (the Mark). The application is based upon proposed use of the Mark in Canada in association with greeting cards; notebooks; paper stationery, namely, writing paper, note pads; stickers; calendars. The Mark is shown below:



[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of August 22, 2007.

[3] On October 9, 2007, Al Whan trading as Happy Daze (the Opponent) filed a statement of opposition. In response to an office letter, a revised statement of opposition was filed on November 8, 2007. The revised statement of opposition pleaded a single ground of opposition, namely that the Mark is confusing with the trade-mark HAPPY DAZE that is the subject of registration No. TMA661,785, contrary to s. 12(1)(d) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act).

[4] The Applicant filed and served a counter statement in which it denied the Opponent's allegations.

[5] In support of its opposition, the Opponent filed the affidavit of Al Whan. Mr. Whan was cross-examined on his affidavit and a copy of the transcript of cross-examination forms part of the record.

[6] In support of its application, the Applicant filed affidavits of Mallory Levitt, Glenda O'Brien and Jane Griffith.

[7] Both parties filed written arguments and an oral hearing was held.

Onus and Material Date

[8] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Limited v. The Molson Companies Limited* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.) at 298].

[9] The material date with respect to a ground of opposition based on s. 12(1)(d) is the date of my decision [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks* (1991), 37 C.P.R. (3d) 413 (F.C.A.)].

[10] An opponent's initial onus is met with respect to a s. 12(1)(d) ground of opposition if the registration relied upon is in good standing as of the date of the opposition decision. The Registrar has discretion to check the register in order to confirm the existence of the registration

relied upon by an opponent [see *Quaker Oats of Canada Ltd./La Compagnie Quaker Oats du Canada Ltée v. Menu Foods Ltd.* (1986), 11 C.P.R. (3d) 410 (T.M.O.B.)]. I have exercised that discretion and confirm that registration No. TMA661,785 was expunged on January 22, 2010. Accordingly, the Opponent has not met its initial burden, with the result that the sole ground of opposition is dismissed.

[11] I note that the Opponent stated in the covering letter to its written argument that it protests the expungement of registration No. TMA661,785. However, the expungement proceeding is not the subject of the present proceeding and the Opponent's proper recourse in that regard would have been to the Federal Court.

Disposition

[12] Pursuant to the authority delegated to me under s. 63(3) of the Act, I reject the opposition, pursuant to s. 38(8) of the Act.

Jill W. Bradbury
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office