



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

Citation: 2016 TMOB 108
Date of Decision: 2016-07-05

IN THE MATTER OF AN OPPOSITION

Wonderful Citrus LLC

Opponent

and

Sunkist Growers, Inc.

Applicant

1,606,601 for
THE ULTIMATE DIET DRINK

Application

I Background

[1] On December 13, 2012, the Applicant filed an application for the trade-mark THE ULTIMATE DIET DRINK. The application is based upon proposed use in Canada and it covers “fresh lemons and lemon water” and “educational services outlining the benefits of lemons and lemon water”.

[2] The application for the Mark was advertised for opposition purposes in the *Trade-marks Journal* on July 2, 2014. On September 2, 2014, the Opponent’s predecessor-in-title (Paramount Citrus LLC) opposed the application for the Mark by filing a statement of opposition, as required under section 38 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act).

[3] The grounds of opposition are: (i) the application does not conform to the requirements of sections 30(e), 30(h) and 30(i) of the Act; (ii) the Mark is not registrable under section 12(1)(d) of the Act, as it is confusing with the Opponent’s registered trade-mark ULTIMATE (registration

no. TMA398,518), which covers “fresh fruit”; iv) the Applicant is not the person entitled to registration of the Mark under section 16(3)(a) of the Act in view of the Opponent’s (or its predecessor-in-title’s) prior use of the trade-mark ULTIMATE in association with the aforementioned goods; and (v) the Mark is not distinctive within the meaning of section 2 of the Act.

[4] A counter-statement denying all of the allegations set out in the statement of opposition was filed by the Applicant on November 4, 2014.

[5] As evidence in support of its opposition, the Opponent filed a certified copy of its registration, as well as the affidavit of Craig B. Cooper, sworn March 2, 2015 (the Cooper affidavit). Mr. Cooper was not cross-examined. As evidence in support of its application, the Applicant filed the affidavit of Barbara Gallagher, sworn June 17, 2015 (the Gallagher affidavit). Ms. Gallagher was not cross-examined.

[6] Both parties filed a written argument and attended a hearing.

II Onus

[7] 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 [*John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

III Analysis

Grounds of Opposition Withdrawn

[8] At the hearing, the Opponent withdrew the grounds of opposition based upon sections 30(e) and 30(h) of the Act, as set out in paragraphs 1.1 and 1.2 of the Statement of Opposition. I will therefore not be addressing those grounds of opposition in my decision.

[9] In addition, the Opponent indicated that it is only maintaining the ground of opposition based upon section 30(e) of the Act as set out in paragraph 1.3 of the statement of opposition in relation to “lemon water”. I will therefore assess that ground of opposition with respect to “lemon water” only.

Analysis of Remaining Grounds of Opposition

Non-conformity - Section 30(e)

[10] The Opponent has pleaded that contrary to section 30(e) of the Act, the Applicant did not intend to use the Mark in association with the goods and services set out in the application. As mentioned above, the Opponent indicated at the hearing that it is only maintaining this ground of opposition insofar as it relates to “lemon water”.

[11] Section 30(e) of the Act requires an applicant to make a statement that it, either by itself or through a licensee intends to use the applied for trade-mark in Canada. The application contains such a statement. It therefore formally complies with section 30(e) of the Act. In view of this, I must go on to consider whether anything in the evidence puts compliance with this section into issue.

[12] As pointed out in *Tune Masters v Mr P's Mastertune Ignition Services Ltd* (1986), 10 CPR (3d) 84 at 89 (TMOB), “it is difficult for an opponent to prove an allegation of non-use by an applicant, the relevant facts being readily available to the applicant”. While these comments related to a ground of opposition based on section 30(b) of the Act, they are equally applicable to a ground of opposition based on section 30(e) [*105272 Canada Inc v Grands Moulins de Paris, Société Anonyme* (1990), 31 CPR (3d) 79 (TMOB)]. Thus, to the extent that an applicant has easier access to the facts, the burden of proof on the opponent in relation to a ground of opposition based on the failure to respect of section 30(e) is less onerous [*Tune Masters, supra*].

[13] The Opponent can meet its initial burden under section 30(e) by reference not only to its own evidence but also to the Applicant’s evidence [*Labatt Brewing Company Limited v Molson Breweries, a Partnership* (1996), 68 CPR (3d) 216 (FCTD)]. However, the Opponent may only successfully rely upon the Applicant’s evidence to meet its initial burden if the Opponent shows

that the Applicant's evidence puts into issue the claims set forth in the Applicant's application [*Corporativo de Marcas GJB, SA de CV v Bacardi & Company Ltd* 2014 FC 323 at paras 30-38 (CanLII); *Garbo Group Inc v Glamour Secrets Pro Inc*, 2016 TMOB 59 (CanLII) at para 48].

[14] At the hearing, the Opponent indicated that it is relying on the Gallagher affidavit to meet its initial burden in respect of this ground of opposition. Ms. Gallagher is a law clerk employed by the agent for the Applicant [para 1]. On April 25, 2015, she accessed the Canadian trade-mark database and printed copies of a number of registrations and applications for marks containing the term ULTIMATE [para 2; Exhibits A1 to A28]. One of these applications included the Applicant's application for the Mark [Exhibit A8]. Between June 8, 2015 and June 16, 2015, Ms. Gallagher went on to conduct internet searches for websites associated with the trade-marks set out in Exhibits A1 to A28 and she attached print-outs from some of those websites as Exhibits B1 to B17 of her affidavit [para 3]. It is Exhibit B4 which the Opponent relies upon in respect of its section 30(e) ground.

[15] Exhibit B5 consists of two printouts from the Applicant's website, featuring the Mark. It is unclear whether the website is Canadian. The first print-out features a body of text below the Mark that suggests taking the "Ultimate Diet Drink Break" and enjoying a "tall, cool glass of water flavored with the juice of one Sunkist lemon". The second print-out is entitled "Sunkist Citrus Fruit Uses and Information" and begins with the phrase "What I Want...Sunkist Lemons & Water The Ultimate Diet Drink".

[16] The Opponent submits that these materials show that the Applicant intends to use the Mark only for fresh lemons that can be added to a glass of water and not for "lemon water", *per se*.

[17] I do not consider this evidence to be sufficient for the Opponent to meet its initial evidential burden in respect of this ground of opposition. First, it post-dates the material date for assessing this ground. Second, the application for the Mark is based upon proposed use in Canada and it is unclear whether the website is Canadian. Thus, it may or may not accurately reflect what the Applicant's plans might be for use of its Mark in Canada. Third, as the Applicant has pointed out, the mere fact that the Opponent includes instructions on its website for how

consumers can make their own “lemon water” does not necessarily mean that the Applicant itself does not intend to sell such a product.

[18] Accordingly, this ground of opposition is rejected.

Non-conformity – Section 30(i)

[19] Where an applicant has provided the statement required by section 30(i), a ground of opposition based upon this section should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant [*Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. Mere knowledge of the existence of an opponent’s trade-mark does not in and of itself support an allegation that an applicant could not have been satisfied of its entitlement to use the Mark [*Woot, Inc v WootRestaruants Inc Les Restaurants Woot Inc* 2012 TMOB 197 (CanLII)]. The application for the Mark contains the requisite statement and there is no evidence that this is an exceptional case.

[20] Accordingly, this ground is also rejected.

Registrability - Section 12(1)(d)

[21] The Opponent has pleaded that the Mark is not registrable because it is confusing with its registered trade-mark ULTIMATE (registration No. TMA398,518) for “fresh fruit”.

[22] The material date to assess a section 12(1)(d) ground of opposition is the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)].

[23] I have exercised my discretion to check the register to confirm that the Opponent’s registration is extant [*Quaker Oats Co of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore met its initial burden with respect to this ground and the Applicant must establish on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent’s ULTIMATE trade-mark.

Test for Confusion

[24] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that 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 goods or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class.

[25] The test is to be applied as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the Mark in association with the Applicant's services at a time when he or she has no more than an imperfect recollection of the Opponent's ULTIMATE trade-mark and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot Ponsardin v Boutiques Clicquot Ltée*, 2006 SCC 23 at para 20]. The question to be posed is whether this individual would be likely to conclude that the Applicant's goods and services are manufactured, sold, leased, hired or performed by the Opponent.

[26] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight [*Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC) and *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC)].

Section 6(5)(a) – inherent distinctiveness and extent to which the marks have become known

[27] Both of the parties' trade-marks possess a fairly low degree of inherent distinctiveness due to the laudatory nature of the term "ultimate". The parties conceded that the word "ultimate" is laudatory at the hearing and agreed that it has the same meaning in both marks.

[28] A trade-mark may also acquire distinctiveness by means of it becoming known through promotion or use. However, in this case, the Applicant has not evidenced any promotion or use of its Mark and the Opponent's evidence is lacking in many respects.

[29] According to the Cooper affidavit, the Opponent (or its predecessor-in-title) has been selling fresh fruit in Canada in association with the trade-mark ULTIMATE since at least as early as November 1987 [para 3]. Mr. Cooper states that the Opponent has had continuous and extensive sales of fresh fruit in Canada, in association with its trade-mark [para 6]. He provides approximate total annual sales and sales by case for the years 2011-2014. The approximate sales by case for those years range from 247,000 to 452,000 and the approximate sales values for those years range from \$3,600,000 to \$5,400,000.

[30] Attached as Exhibit 2 to Mr. Cooper's affidavit are examples of representative invoices evidencing sales by the Opponent of fresh fruit in Canada in association with the Opponent's trade-mark [para 7].

[31] Mr. Cooper states that the Opponent's trade-mark is prominently displayed on the packaging and labelling of the fresh fruit sold in connection with the mark and has been continuously since 1987 [para 8]. Attached as Exhibit 3 are printouts of the product packaging specifications featuring the Opponent's trade-mark.

[32] Notably, the Opponent's trade-mark appears on the packaging only in the context of other descriptive matter (i.e. as "ultimate sweet California mandarins"), which may arguably be said to reinforce or emphasize its laudatory nature. It does not appear elsewhere on the packaging, without descriptive matter, and the Opponent hasn't provided any other evidence in this regard. The only other evidence of record that shows the mark is in the Gallagher affidavit [Exhibit 15]. It contains a printout from the Applicant's website that makes reference to "ultimate limes", "ultimate lemons" and "ultimate oranges".

[33] I note that the invoices attached as Exhibit 2 to Mr. Cooper's affidavit refer to a multitude of trade and/or company names, including, Paramount Citrus, Paramount Citrus Cooperative, Paramount Growers Cooperative, Inc. and Paramount Consolidated LLC. However, they do not make reference to the Opponent's predecessor-in-title, (Paramount Citrus LLC), which is the

entity who owned the trade-mark at the time that Mr. Cooper's affidavit was sworn and at the time that these opposition proceedings were commenced. There is no indication in Mr. Cooper's affidavit that the mark was used under license by any of these entities and Mr. Cooper has not explained the nature of the relationship between these entities and the Opponent or its predecessor. Without any further details or explanation in this regard, I am unable to infer that any use associated with those invoices would have inured to the benefit of the Opponent in accordance with section 50 of the Act, and I am of the view that they cannot assist the Opponent in establishing use or distinctiveness of its mark.

[34] There are similar issues with respect to the packaging attached as Exhibit 3 to Mr. Cooper's affidavit. The packaging includes an indication that the product is packed by an entity called "Paramount Citrus Packing Company", and an indication that the words and images are trademarks and copyright of "Paramount Citrus or affiliates". The copyright notice then references the name of the Opponent's predecessor-in-title (Paramount Citrus LLC). I accept that most consumers would likely understand that the packing company is not necessarily the source or producer of the goods, but simply a packing company. With respect to the copyright notice, I acknowledge that it does reference the Opponent's predecessor. However, due to its size and location on the packaging, as well as what precedes it, I do not consider it to amount to any clear indication of the owner of the mark or the source of the goods.

[35] In my view, these deficiencies cast doubt on whether the sales figures provided in paragraph 6 of Mr. Cooper's affidavit accrue solely to the benefit of the Opponent.

[36] Finally, I note that Mr. Cooper has not provided any details pertaining to the advertising or promotion of the goods associated with the Opponent's trade-mark, nor has he provided any advertising expenditures.

[37] In view of the foregoing, I am not prepared to conclude that the Opponent's trade-mark has acquired a great deal of distinctiveness.

Section 6(5)(b) – the length of time each has been in use

[38] According to the Cooper affidavit, the Opponent’s trade-mark has been in use since at least as early as November 1987. As mentioned previously, the application for the Mark is based upon proposed use and there is no evidence to suggest that use of the Mark has commenced in Canada.

Sections 6(5)(c) and (d) – the nature of goods, services or business and trade

[39] When considering sections 6(5)(c) and (d) of the Act, it is the statement of goods in an application for a mark and the statement of goods in an opponent’s registration that governs the assessment of the likelihood of confusion under section 12(1)(d) of the Act [*Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA) and *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)]. Those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. Evidence of the parties' actual trades is useful in this respect [*McDonald's Corp v Coffee Hut Stores Ltd* (1996), 68 CPR (3d) 168 (FCA); *Procter & Gamble Inc v Hunter Packaging Ltd* (1999), 2 CPR (4th) 266 (TMOB); and *American Optical Corp v Alcon Pharmaceuticals Ltd* (2000), 5 CPR (4th) 110 (TMOB)].

[40] In the present case, the registration for the Opponent’s trade-mark registration covers “fresh fruit” and the application for the Mark covers goods described as “fresh lemons and lemon water” and services described as “educational services outlining the benefits of lemons and lemon water”. Notably, in his affidavit, Mr. Cooper states that the Opponent sells fresh fruit, including lemons, oranges and mandarins in association with its trade-mark. Thus, to the extent that both parties sell “fresh fruit”, and in particular, “lemons”, there is direct overlap in their goods. While there is not direct overlap between the remaining goods and services in the application for the Mark and those of the Opponent, I do consider them to be closely related.

[41] According to the Cooper affidavit, the Opponent sells its fresh fruit through various different channels of trade in Canada, including directly to retailers as well as through food wholesalers and distributors [Cooper affidavit, para 10]. In view of the direct overlap or close

relationship between the parties goods and services and in the absence of any evidence to the contrary from the Applicant, I consider it reasonable to conclude that there is also potential overlap in the parties' channels of trade.

Section 6(5)(e) – the degree of resemblance between the trade-marks

[42] It is well-established that when considering the degree of resemblance between trade-marks, the trade-marks must be considered in their totality and it is not correct to lay them side by side and carefully compare and observe the similarities or differences among their elements. It is also not correct to dissect the marks.

[43] In *Masterpiece*, the Supreme Court observed that even though the first word of a trade-mark may be the most important, for the purpose of distinctiveness [*Conde Nast Publications Inc v Union des éditions modernes* (1979), 46 CPR (2d) 183 (FCTD)], the preferable approach when comparing marks is to begin by determining whether there is an aspect of the trade-mark that is particularly striking or unique [*Masterpiece*, supra at para 49].

[44] In the present case, I do not consider there to be anything striking or unique about either of the parties' marks. The Opponent's trade-mark consists solely of the laudatory term "ultimate" and the Mark is a unitary phrase consisting of a combination of that same term and other descriptive terms. To the extent that both of the parties' trade-marks contain the word ultimate and the Mark incorporates the whole of the Opponent's mark, there is a fair degree of resemblance between them. That being said, there are some visual and phonetic differences between the parties' marks and the Mark possesses a somewhat different connotation, as it suggests that its associated goods and services relate to a diet drink.

Surrounding Circumstance – state of the register/marketplace

[45] As an additional surrounding circumstance, the Applicant has submitted state of the register/marketplace evidence to show that ULTIMATE is a component of other trade-marks which currently co-exist on the trade-mark register for various food and beverage related products [Gallagher affidavit, paras 2-3; Exhibits A1 to A28 and B1 to B18].

[46] Ms. Gallagher located 28 applications/registrations for trade-marks containing the element ULTIMATE on the Canadian trade-mark register [para 2; Exhibits A1-A28]. She went on to locate use of some of these marks on the internet and attaches website printouts showing such uses, as Exhibits B1-B18 of her affidavit.

[47] It has been held that while state of the register evidence can be useful to assess the commonality or distinctiveness of a trade-mark or portion of a trade-mark in relation to the register as a whole, it is only relevant insofar as inferences may be made with respect to the state of the marketplace, and inferences about the state of the marketplace can only be drawn when a significant number of pertinent registrations are located [*Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432 (TMOB); *Welch Foods Inc v Del Monte Corp* (1992), 44 CPR (3d) 205 (FCTD); and *Maximum Nutrition Ltd v Kellogg Salada Canada Inc* (1992), 43 CPR (3d) 349 (FCA)].

[48] At the hearing, the Opponent pointed out that of the 28 marks on the register, only 3 cover “fresh fruit”, and one of these 3 marks is the Opponent’s mark. The Opponent asserts that the other marks all relate to other food products and beverages and therefore they don’t limit the scope of protection to which the Opponent’s trade-mark is entitled in association with “fresh fruit”. In addition, the Opponent pointed out that many of the marks have additional distinguishing features. The Opponent pointed out that there are similar issues with respect to the internet evidence and also noted that not all of the websites associated with the print-outs featured in Exhibits B1-B18 appear to be Canadian.

[49] In response, the Applicant pointed out that while only 3 of the applications/registrations clearly pertain to “fresh fruit” [Exhibits A1, A8 and A22], including the registration for the Opponent’s mark, at least a few others cover fruit in various other forms or are fruit related. For example, some cover “preserved fruit”, “fruit concentrates and purees used as ingredients in beverages”, “fruit juices”, “fruit-based soft drinks”, “packaged fruit”, “canned fruit”, etc. [Exhibits A3, A4, A5, A7, A13, A23, A24 and A27].

[50] It’s true that not all of the marks located by Ms. Gallagher relate to “fresh fruit”, *per se* and that some have other distinguishing features. I also acknowledge that the same is true of some of the internet evidence, that not all of the websites located by Ms. Gallagher are Canadian

and that I cannot draw any meaningful inferences from the mere existence of these websites regarding the extent to which consumers have accessed them or the extent to which the trade-marks featured on them have become known.

[51] However, I am still prepared to give the state of the register/marketplace evidence some limited weight. I agree with the Applicant that, at least some of the other marks located in the state of the register search are relevant considerations. While they may not relate to “fresh fruit”, several are fruit related and most are associated with other items that one might expect to find in a grocery store or similar outlet that carries food and beverage type items, such as those which are associated with the parties’ marks. While that still might not leave us with an overly large number of marks, the internet evidence supports an inference that at least some of the marks are in use.

Conclusion Regarding Likelihood of Confusion

[52] As indicated above, section 6(2) of the Act is not concerned with confusion of the marks themselves, but confusion of the goods or services from one source as being goods or services from another source.

[53] The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the Mark on the Applicant's goods, at a time when he or she has no more than an imperfect recollection of the Opponent’s ULTIMATE trade-mark in association with goods which are the same as or related in nature to the goods and services of the Applicant and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot Ponsardin v Boutiques Clicquot Ltée, supra* at para 20].

[54] The question to be posed is whether this individual would be likely to conclude that the Applicant’s goods or services are manufactured, sold, leased, hired or performed by the same source as those covered in the Opponent’s registration for ULTIMATE.

[55] There is direct overlap in the nature of the parties’ goods and services and their channels of trade and due the fact that the Mark encompasses the whole of the Opponent’s trade-mark

ULTIMATE, there is a fair degree of resemblance between the parties' marks. However, as previously discussed, the parties' trade-marks are weak.

[56] In *Provigo Distribution Inc v Max Mara Fashion Group SRL* (2005), 2005 FC 1550 (CanLII), 46 CPR (4th) 112 at para 31 (FCTD), de Montigny J. stated the following:

The two marks being inherently weak, it is fair to say that even small differences will be sufficient to distinguish among them. Were it otherwise, first user of words in common use would be unfairly allowed to monopolize these words. A further justification given by courts in coming to this conclusion is that the public is expected to be more on its guard when such weak trade names are used

...

[57] It is possible for the degree of distinctiveness attributed to a weak trade-mark to be enhanced through extensive use [*Sarah Coventry Inc v Abrahamian* (1984), 1 CPR (3d) 238 (FCTD)]. However, while the evidence in this case may establish that there has been use of the Opponent's trade-mark, it is not clear that the benefit of such use enures solely to the benefit of the Opponent and in light of the evidence with respect to the use and ownership of the mark, I am unable to infer that it has acquired any significant degree of distinctiveness.

[58] I therefore have difficulty with the Opponent's submission that upon seeing the Applicant's Mark, namely, THE ULTIMATE DIET DRINK, a consumer having an imperfect recollection of the Opponent's trade-mark would assume from the word "ultimate", that the Applicant's goods and services originate from the Opponent. Rather, I think it more likely that such a consumer would simply view it as a laudatory part of the Mark as a whole. I am therefore of the view that the differences between the parties' marks are sufficient to enable consumers to distinguish between them.

[59] In view of the foregoing, I therefore find that the Applicant has satisfied its onus to show that, on a balance of probabilities, confusion between the parties' trade-marks is unlikely.

[60] Accordingly, the section 12(1)(d) ground of opposition is unsuccessful.

Non-entitlement – Section 16(3)(a)

[61] The Opponent has pleaded that the Applicant is not the person entitled to registration of the Mark because at the filing date of the application, the Mark was confusing with the trade-mark ULTIMATE, which was previously used in Canada by the Opponent or its predecessors or for their benefit by licensees.

[62] There is an initial burden on the Opponent in respect of this ground to evidence use or making known of its trade-mark prior to the filing date of the application for the Mark and to establish that it had not abandoned its trade-mark as of the date of advertisement of the Applicant's application [section 16(5)].

[63] Even if I were to conclude that the Opponent has met its burden in respect of this ground, it would fail for reasons similar to those set out in my analysis under section 12(1)(d) above, as the different material date does not significantly impact my findings regarding the likelihood of confusion under this ground of opposition.

[64] Accordingly, this ground of opposition is also unsuccessful.

Non-distinctiveness – Section 2

[65] The Opponent has pleaded that the Mark does not distinguish and is not adapted to distinguish the Applicant's proposed goods and services from the goods of others, including those of the Opponent. Since the Opponent has not identified any "others", I consider it reasonable to read this ground as being limited to the Opponent.

[66] The material date to assess this ground of opposition is the filing date of the statement of opposition [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC)].

[67] In order to satisfy its initial burden with respect to a distinctiveness ground of opposition, an opponent's evidence must show that its trade-mark had become known sufficiently as of the commencement of the opposition to negate the distinctiveness of the applied-for trade-mark

[Metro-Goldwyn-Mayer Inc v Stargate Connections Inc (2004), 34 CPR (4th) 317 (FC) and Motel 6, Inc v No. 6 Motel Ltd (1981), 56 CPR (2d) 44 at 58 (FCTD)].

[68] As previously discussed in my analysis under section 12(1)(d) above, the Opponent's trade-mark lacks inherent distinctiveness and the evidence of record does not permit me to conclude that it has acquired any significant measure of distinctiveness.

[69] In view of the foregoing, I am unable to conclude that the Opponent has met its initial evidential burden in respect of this ground.

[70] Accordingly, this ground of opposition is also unsuccessful.

IV Disposition

[71] In view of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(8) of the Act.

Lisa Reynolds
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE: 2016-06-23

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