

On August 24, 1987, the applicant, FBI Brands Ltd. - Les Marques FBI Ltee, filed an application to register the trade-mark JUSPOP for "lightly carbonated juice-based soft drinks" based on proposed use in Canada. The application was advertised for opposition purposes on November 9, 1988.

The opponent, Coca-Cola Ltd., filed a statement of opposition on March 9, 1989, a copy of which was forwarded to the applicant on March 23, 1989. The first ground of opposition is that the application does not comply with the provisions of Section 30 of the Trade-marks Act because the applied for trade-mark is not registrable because it is either clearly descriptive or deceptively misdescriptive of the character or quality of the applied for wares.

The second ground of opposition is that the applied for trade-mark is not registrable pursuant to the provisions of Section 12(1) (b) of the Act because the applied for mark is clearly descriptive or deceptively misdescriptive of the character or quality of the applied for wares. The third ground is that the applied for mark is not distinctive because it is clearly descriptive or deceptively misdescriptive of the character or quality of the applied for wares.

The applicant filed and served a counter statement. As its evidence, the opponent filed the affidavit of Mildred Joan Lusk which evidences a number of dictionary definitions for the words "jus" and "pop." The applicant did not file evidence. Both parties filed a written argument and an oral hearing was conducted at which both parties were represented.

The opponent's first ground is not a proper ground of opposition. The opponent has failed to indicate which subsection of Section 30 of the Act the applicant's application does not comply with. Thus, the first ground does not satisfy the provisions of Section 38(3) (a) of the Act. Furthermore, it is not apparent how an allegation of non-registrability would support a ground of non-compliance with Section 30 of the Act.

As for the second ground of opposition, the material time for considering the circumstances respecting the issue arising pursuant to Section 12(1) (b) of the Act is the filing date of the application: see Oshawa Group Ltd. v. Registrar of Trade Marks (1980), 46 C.P.R. (2d) 145 at 147 and Carling Breweries Limited v. The Molson Companies Limited (1984), 1 C.P.R. (3d) 191 at 195. The issue is to be determined from the point of view of an everyday user of the wares. Furthermore, the trade-mark in question must not be carefully analyzed and dissected into its component parts but rather must be considered in its entirety and as a matter of first impression: see Wool Bureau of Canada Ltd. v. Registrar of Trade Marks (1978), 40 C.P.R. (2d) 25 at 27-28 and Atlantic Promotions Inc. v. Registrar of Trade Marks (1984), 2 C.P.R. (3d) 183 at 186.

As conceded by the applicant, its proposed mark is comprised of the ordinary French

word "jus" and the ordinary English word "pop." The former word is clearly descriptive in the French language of the character of the applied for wares since those wares are "juice-based." The latter word is clearly descriptive in the English language of the character of the wares since the wares are "soft drinks" or "pop." The combination of the two words, however, does not offend the provisions of Section 12(1)(b) of the Act which precludes registration of a trade-mark that is

...whether depicted, written or sounded,
either clearly descriptive or deceptively
misdescriptive in the English or French
language.... (emphasis added).

Section 12(1)(b) of the Act does not preclude the registration of a trade-mark comprised of a combination of French and English words individually descriptive of the wares: see the opposition decision in Wool Bureau of Canada Ltd. v. Bruck Mills Ltd. (1980), 61 C.P.R.(2d) 108 at 113. (On a related point, see the decision in Molson Companies Ltd. v. John Labatt Ltd. (1981), 58 C.P.R.(2d) 157 (F.C.T.D.).)

The agent for the opponent submitted that even if the foregoing conclusion is correct, it only applies to the trade-mark when "depicted" or "written" and not when "sounded." She submitted that the trade-mark is the phonetic equivalent of the words "juice pop" and that the mark would therefore clearly describe two aspects of the applicant's proposed product, namely, that it is a pop or soft drink and that it contains juice. If her submission as to the pronunciation of the mark is correct, I would agree with her conclusion. However, I do not consider that the opponent has established that "juice pop" would be the likely pronunciation of the applicant's mark by the everyday user of the wares.

The only evidence of record in this case consists of photocopied excerpts from various dictionaries. Based on that evidence, it would appear that the average bilingual or francophone consumer would, when viewing the applicant's mark on a fruit-based soft drink, likely pronounce the mark by giving the French pronunciation to the component JUS. Based on that same evidence (and, in particular, the excerpts from English dictionaries), it would appear that the average anglophone consumer would likely pronounce the component JUS as in the English word "justice." It seems less likely that such a consumer would pronounce JUS as "juice" in the context of this case. The opponent was unable to point to any JUS-prefixed English words having such a pronunciation and did not file any evidence from consumers to support its contention. Thus, the second ground of opposition is unsuccessful.

Another possibility in the present case is that anglophone and bilingual consumers might pronounce JUSPOP as "just pop" and that the applicant's trade-mark would then arguably be deceptively misdescriptive of the character of the applied for wares. However, neither party raised this possibility and there would not appear to be sufficient evidence to support such a contention.

The third ground of opposition is contingent upon the second ground, the only difference being that the material time for considering the circumstances is as of the filing of the opposition. In view of my finding respecting the second ground, I must also find that the third ground is unsuccessful.

In view of the above, I reject the opponent's opposition.

DATED AT HULL, QUEBEC, THIS 29th DAY OF NOVEMBER 1991.

David J. Martin,
Member,
Trade Marks Opposition Board.