



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

Citation: 2010 TMOB 35
Date of Decision: 2010-03-30

**IN THE MATTER OF AN OPPOSITION
by Jemella Group Limited to application
No. 1306752 for the trade-mark EHD
TECHNOLOGY in the name of
Koninklijke Philips Electronics N.V.**

[1] On June 27, 2006, Koninklijke Philips Electronics N.V. (the Applicant) filed an application to register the trade-mark EHD TECHNOLOGY (the Mark) based upon proposed use of the Mark in Canada. The applied for wares, as revised, are as follows:

“electric hair-curlers, hair stylers and hair-waving apparatus, hair driers, hood hair dryers and parts for the aforesaid goods”.

[2] The application was advertised for opposition purposes in the Trade-marks Journal of February 7, 2007.

[3] On July 9, 2007, Jemella Group Limited (the Opponent) filed a statement of opposition. The Applicant filed and served a counter statement in which it denied the Opponent’s allegations.

[4] Neither the Opponent nor the Applicant filed any evidence.

[5] Both parties filed a written argument. An oral hearing was not requested.

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[6] 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].

[7] The Opponent has not met its initial burden with respect to the following three grounds of opposition:

- s. 30(a): there is no evidence that the applied for wares are not in ordinary commercial terms;
- s. 30(i): there is no evidence that the Applicant could not have been satisfied that it was entitled to use the Mark in Canada; and
- s. 38(2)(d): there is no evidence that the Opponent's trade-mark GHD had been used or made known in Canada prior to July 9, 2007.

[8] Accordingly, the three aforementioned grounds of opposition fail.

Remaining Grounds of Opposition

[9] Regarding the s. 12(1)(b) ground of opposition, the issue as to whether the Applicant's mark is clearly descriptive must be considered from the point of view of the average purchaser of those wares at the filing date of the application. The Mark must not be dissected into its component elements and carefully analyzed but must be considered in its entirety as a matter of immediate impression (see *Wool Bureau of Canada Ltd. v. Canada (Registrar of Trade Marks)* (1978), 40 C.P.R. (2d) 25 (F.C.T.D.) at 27-8; *Atlantic Promotions Inc. v. Registrar of Trade Marks* (1984), 2 C.P.R. (3d) 183 (F.C.T.D.) at 186). Character means a feature, trait or characteristic of the wares and "clearly" means "easy to understand, self-evident or plain" (see *Drackett Co. of Canada Ltd. v. American Home Products Corp.* (1968), 55 C.P.R. 29 (Can. Ex. Ct.) at 34).

[10] The Opponent has pleaded that EHD TECHNOLOGY is clearly descriptive or deceptively misdescriptive of the character or quality of the applied for wares. In this regard, the Opponent has pleaded that the initials EHD are an acronym for Even Heat Distribution which is a heating element in the wares that is purported to eliminate hot spots on the hair care appliances so that results are consistent and long-lasting.

[11] The Applicant, however, has noted that the Canadian Oxford Dictionary does not contain an entry for EHD as a word or acronym. In the absence of any evidence from the Opponent indicating that this portion of the mark is known as an acronym for Even Heat Distribution in the eyes of the average purchaser of these wares, I am not satisfied that the mark as a whole is contrary to s. 12(1)(b) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act). This ground is therefore unsuccessful.

[12] The Opponent's s. 16(3) ground of opposition was pleaded as follows:

“Pursuant to s. 38(2)(c), the Applicant is not the person entitled to registration of the Trade-mark in view of s. 16(3) of the Act, since at the date of filing of the application, namely June 27, 2006, the trade-mark was confusing with a trade-mark that had been previously used in Canada by another person, namely the Opponent's Mark.”

[13] The only other background information that was provided in the statement of opposition was that the Opponent was the owner of the mark GHD, and that it had used this mark in Canada in association with various hair products and preparations and hair care appliances prior to the filing date of the application, namely June 27, 2006.

[14] In its written argument, however, the Opponent explains that at the time of filing of the statement of opposition, its GHD mark was the subject of pending application no. 1,227,705 filed August 16, 2004, and that this application issued to registration on Sept. 12, 2007, under No. TMA696,241 in association with a long list of wares and services.

[15] The Opponent has not filed a certified copy of its application no. 1,227,705, nor of its registration. Normally, having regard to the potential public interest in assessing a s. 16(3)(b) ground, the Registrar will exercise his discretion to check the Trade-marks Office records to

confirm the existence of a pending application being relied upon in support of such a ground [see *Royal Appliance Mfg. Co. v. Iona Appliances Inc.* (1990), 32 C.P.R. (3d) 525 (T.M.O.B.) at p. 529]. In the present case, however, I do not consider that the s.16(3)(b) ground was properly pleaded. In this regard, the Opponent did not reference its trade-mark application in its statement of opposition nor state that its trade-mark application was forming the basis of a ground of opposition pursuant to s. 16(3)(b) of the Act.

[16] At best, and having regard to the statement of opposition as a whole, the ground as pleaded was based on s. 16(3)(a) of the Act, namely that the applicant was not the person entitled to the mark because at the date of filing the mark was confusing with the Opponent's GHD mark which had been previously used or made known in Canada. I note that this is also how the ground was referred to by the Opponent in its written argument.

[17] Under this ground, it was up to the Opponent to submit evidence of previous use or making known of its mark, and non-abandonment of the trade-mark at the date of advertisement of the applicant's application pursuant to s.16(5) and 17(1) of the Act. As the Opponent has not filed any evidence of use of its GHD trade-mark, it has not met its evidential burden under this ground. This ground of opposition is therefore also unsuccessful.

Disposition

[18] Having been delegated by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I reject the opposition pursuant to s. 38(8) of the Act.

Cindy Folz
Member,
Trade-marks Opposition Board
Canadian Intellectual Property Office