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LE REGISTRAIRE DES MARQUES DE COMMERCE

THE REGISTRAR OF TRADEMARKS

**Citation: 2020 TMOB 15**

**Date of Decision: 2020-01-31**

**IN THE MATTER OF AN OPPOSITION**

**Ignite Media Corp.**

**Opponent**

**and**

**Rogers Communications Inc.**

**Applicant**

**1,702,235 for ROGERS IGNITE**

**Application**

BACKGROUND

[1] On November 12, 2014, Rogers Communications Inc. (the Applicant) filed an application to register the trademark ROGERS IGNITE (the Mark). The application was filed based on proposed use of the Mark in Canada in association with business management consulting services; business marketing consulting services; business organization consulting services (the Services). The application was advertised for opposition purposes in the *Trademarks Journal* of July 29, 2015.

[2] On September 29, 2015, Ignite Media Corp. (the Opponent) filed a statement of opposition opposing the application on grounds of opposition based on sections 30(a), 30(b), 30(e), 30(h), 30(i), 16(1)(a), 16(1)(c), 16(3)(a), 16(3)(c), and section 2 of the *Trademarks Act*,

RSC 1985, c T-13 (the Act). This Act was amended on June 17, 2019. All references in this decision are to the Act as amended, with the exception of references to the grounds of opposition which refer to the Act before it was amended (see section 70 of the Act).

[3] The sections 2 and 16 grounds of opposition are based on the Opponent's use of the trademark and trade name Ignite Media in association with an online advertising company who offers business management consulting services, business marketing consulting services, business organization consulting services, and internet services with a focus on the online advertising industry. The remaining grounds of opposition are based on technical challenges to the application.

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

[5] The Opponent filed as its evidence the affidavit of Andrew Best. The Applicant did not file any evidence. Nether party filed a written argument or requested a hearing.

#### LEGAL ONUS AND EVIDENTIAL BURDEN

[6] Before considering the grounds of opposition, it is necessary to review some of the technical requirements with regard to (i) the evidential burden on an opponent to support the allegations in the statement of opposition and (ii) the legal onus on an applicant to prove its case.

[7] With respect to (i) above, there is, in accordance with the usual rules of evidence, an evidential burden on the opponent to prove the facts inherent in its allegations pleaded in the statement of opposition [*John Labatt Limited v The Molson Companies Limited*, 30 CPR (3d) 293 at 298 (FCTD)]. The presence of an evidential burden on the opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist. With respect to (ii) above, the legal onus is on the applicant to show that the application does not contravene the provisions of the Act as alleged by an opponent in the statement of opposition (for those allegations for which an opponent has met its evidential burden). The presence of a legal onus on an applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against an applicant.

## SECTION 30 GROUNDS OF OPPOSITION

[8] The material date for each of the section 30 grounds of opposition is November 12, 2014, the date of filing the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 at 475].

[9] I find that the Opponent has not met its evidential burden with respect to each of these grounds of opposition for the following reasons.

- Section 30(a): The Opponent alleges that the application does not comply with section 30(a) of the Act because the Applicant has not provided a statement in ordinary commercial terms of the specific services in association with which the Mark is proposed to be used. As there are no submissions or evidence impugning the descriptions of any of the Services, the Opponent fails to meet its evidential burden.
- Section 30(b): The Opponent alleges that the Applicant has not provided the date from which the Mark has been used in Canada. As there is no evidence to suggest that the Applicant had commenced use of the Mark prior to the filing date, the Opponent fails to meet its evidential burden.
- Section 30(e): The Opponent alleges that the application does not include a statement that the Applicant intends to use the Mark in Canada. While the printout from the Canadian Trademark Database of the ROGERS IGNITE application attached as Exhibit I of the Best affidavit does not reference the Applicant's statement, the application filed with the Registrar on November 12, 2014 does include the statement "the applicant by itself and through a licensee, or by itself and through a licensee, intends to use the Mark in Canada". In view of this, and since there is no evidence to suggest any lack of intention to use the Mark on the part of the Applicant, the Opponent fails to meet its evidential burden.
- Section 30(h) – The Opponent alleges that the application does not include a drawing of the Mark. As the Mark is a word mark rather than a design mark, section 30(h) of the Act does not apply and there is no requirement for a drawing or representation to be filed. As such, the Opponent fails to meet its evidential burden.
- Section 30(i) – The Opponent alleges that the application does not include a statement that the Applicant is satisfied to use the Mark in Canada. As the application filed with the Registrar does include such a statement and there is no evidence that the Applicant was not satisfied it was entitled to use the Mark, the Opponent fails to meet its evidential burden.

[10] As the Opponent has failed to meet its evidential burden, with respect to each of the section 30 grounds of opposition, they are all rejected.

SECTIONS 16(1)(A) AND 16(1)(C) GROUNDS OF OPPOSITION

[11] Sections 16(1)(a) and 16(1)(c) of the Act pertain to whether a trademark which has been previously used is confusing with another party's trademark or trade name which has been used or made known in Canada. As this application is based on proposed use of the Mark, sections 16(1)(a) and 16(1)(c) do not apply and these grounds of opposition are rejected.

SECTION 16(3)(A) GROUND OF OPPOSITION

[12] In the statement of opposition, the Opponent pleads:

6(b)(iv) ... the Applicant is not the person entitled to registration of the [Mark] pursuant to section 16(3)(a) of the *Trademarks Act* ... because one cannot register a proposed trademark if the same is confusing with a trademark previously used in Canada or made known in Canada, which is the case herein of the Opponent's trademark and trade name of Ignite Media which is confus[ing] with the [Mark].

[13] With respect to this ground of opposition, there is an initial burden on the Opponent to evidence use of its trademark Ignite Media prior to the Applicant's filing date and non-abandonment of its trademark as of the date of advertisement of the Applicant's application [section 16(5) of the Act].

[14] The case law is clear that only a single sale or instance of use is needed for an opponent to meet its burden so long as the mark functions as a trademark [*J.C. Penney Co v Gaberdine Clothing Co* (2001), 16 CPR (4th) 151 (FCTD) at 178].

[15] Mr. Best's evidence includes the following:

(a) Mr. Best has been the Chief Executive Officer of the Opponent since its inception in April 1, 2011 (para 4).

- (b) As Exhibit A, Mr. Best attaches a copy of his business card on which appears the trademark Ignite Media and states at paragraph 10 “Ignite has created a brand over the past 5.5 years of operation with its title and logo as depicted in the business card, and based on its technology and client services”. As Exhibit C he attaches a printout of the *www.ignitemediagroup.ca* website. At Exhibit D, the Opponent includes a description of the services performed in 2014 for one client in the form of a Facebook Success Story.
- (c) As Exhibit E to his affidavit, he includes an advertisement appearing in *Business News* magazine (December 2013 January 2014 issue). This advertisement includes the following:

**Why Ignite Media?**

Ignite Media is your one-stop shop for online advertising. We amalgamate the process of buying media online across all three key delivery methods; display, social and search. ...

I accept that *Business News* was directed at those in Eastern Canada as each of the excerpts included in Mr. Best’s affidavit (Exhibits E-G) include reference to Eastern Canada.

[16] In view of the evidence provided by Mr. Best set out above, I am satisfied that the Opponent’s trademark Ignite Media has been shown in *Business News* and on his business card in the advertisement of the Opponent’s services prior to the filing date of the application.

**test for confusion**

[17] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class or appear in the same class of the Nice Classification.

[18] 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 trademarks 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 trademarks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight [see, in general, *Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC); *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC)].

[19] In support of the opposition, Mr. Best also raises several additional circumstances in his affidavit which he submits weigh in favour of finding that there is a likelihood of confusion. Below, I consider each of the circumstances enumerated in section 6(5) of the Act as well as the additional circumstances raised by the Opponent.

#### **the inherent distinctiveness**

[20] The Opponent's trademark Ignite Media possesses a fair degree of inherent distinctiveness owing to the component Ignite which has no direct connection to the Opponent's services. The second component Media is descriptive of the Opponent's services and therefore adds little to the mark's distinctiveness.

[21] The Applicant's trademark ROGERS IGNITE possesses a fair degree of inherent distinctiveness owing to the component IGNITE which has no direct connection to the Services. In the absence of other circumstances, the first component ROGERS would likely be perceived as a surname and therefore it contributes little to the inherent distinctiveness of the mark as a whole: see, for example, *Sarah Coventry, Inc v Abrahamian* (1984), 1 CPR(3d) 238 at 240 (FCTD).

#### **extent known and length of time in use**

[22] The affidavit of Mr. Best includes information on the Opponent including examples of use of its Ignite Media trademark on a business card, its website and advertisements published in *Business News* (Exhibits A, C, E). Mr. Best does not provide any sales information *per se* but

does provide an example of the Opponent's work in the form of a Facebook Success Story discussing the successful results of an Ignite Media client (para 9, Exhibit D). The remainder of Mr. Best's evidence focusses on the Applicant's use, the grounds of opposition, and what Mr. Best categorizes as "personal experiences showing confusion" and "general public / consumer confusion issues".

[23] The acquired distinctiveness and length of time in use favours the Opponent to a very slight extent as the evidence is that it commenced use of the trademark Ignite Media in 2011 (para 10; Exhibit A) and circulated advertisements with the trademark Ignite Media in an issue of *Business News* published in December 2013/January 2014. It is, however, not possible to ascertain whether the Opponent's trademark was known to a significant extent. Mr. Best's evidence lacks information regarding sales and distribution, circulation and in the case of on-line advertising - access of the Opponent's website including the trademark Ignite Media. With respect to the evidence of the Applicant's use in Mr. Best's affidavit, none of this had occurred by the material date.

#### **degree of resemblance**

[24] The most striking aspect of the Opponent's trademark is the word Ignite as the word Media is descriptive of the associated services. The Mark incorporates this component. Owing to the component Ignite featured in each trademark, I find that the parties' trademarks resemble each other visually, aurally and in ideas suggested, albeit that the Applicant's mark further suggests services which may ignite consumer interest provided by a person with the surname Rogers. Although the first component of a mark is often considered more important for the purpose of distinction, when the first component is weak, such as the case with a surname, the significance of the first component decreases [*Conde Nast Publications Inc v Union des Editions Modernes* (1979), 46 CPR (2d) 183 (FCTD); *Murjani International Ltd v Universal Impex Co Ltd* (1986), 12 CPR (3d) 481 (FCTD)].

#### *nature of services, business and trade*

[25] This factor favours the Opponent as I find that the Services overlap with those offered by the Opponent. In particular, the [www.ignitemediagroup.ca](http://www.ignitemediagroup.ca) website explains that the Opponent

delivers “your ad campaigns directly to your target audience while they’re engaged in online activity” and “employs a wide variety of targeting techniques including channels, interests, demographics, context and topics” (Exhibit L). The Opponent’s website references the Applicant. The Opponent’s evidence also includes evidence that the Applicant’s VP of Innovation and head of Rogers Ignite said that the Applicant “would be interested in companies with technology for similar platforms, as well as proposals for new advertising models for the digital world.” (para 31, Exhibit N – quote from Rob Switzman in *playbackonline.ca*). Mr. Best states in his affidavit (para 32):

THAT during this interview which was about Rogers Ignite, Switzman was also referring to Rogers Media Division, using the same interchangeably with Rogers and Rogers Ignite (causing more confusion with Ignite Media) and specifically referenced wanting to evolve on the media side ... and seeking new advertising models for the digital world which is one of the main components of what Ignite Media does. ...

[26] The Applicant’s website *www.rogersmedia.com* attached as Exhibit K indicates that it has “Best-in-class Integrations We work with you to build customized, innovative solutions, incorporating best-in-class creative to grow your business...” and “Rogers creates a breadth of content for consumers that’s available on the platform of their choice...” and “Millenials Reach younger, bolder audiences through key brands and innovative partnerships...” Although the *playbackonline.ca* article and the Opponent’s website set out in Mr. Best’s affidavit post-date the material date for this ground of opposition, the Registrar may take into account such evidence insofar as it may indicate a situation existing at the material date, namely, the Applicant’s intention for the use of its trademark [see, for example, *George Weston Ltd v Corporate Foods Ltd* (1988), 19 CPR (3d) 566 (TMOB)].

#### **evidence of actual confusion**

[27] Mr. Best provides evidence which he characterizes as “several specific cases of confusion” including various meetings where Mr. Best was asked if the Opponent was part of Rogers or representing Rogers (paras 22-26). I am not able, however, to consider the evidence of confusion as all of this evidence postdates the material date and is not intrinsically connected with facts occurring at the material date [*Servicemaster Co v 385229 Ontario Ltd* 2015 FCA 114 at paras 21-22]. If I had considered it, the fact that the Opponent was being asked if it was



affiliated with the Applicant would not have diminished the impact of this surrounding circumstance since section 6(2) of the Act is broad enough to encompass reverse confusion in which consumers seeing the mark of the senior user (the Opponent) believe it to come from the junior user (the Applicant) [*A & W Food Services of Canada Inc v McDonald's Restaurants of Canada Ltd*, 2005 FC 406, paras 23-33].

## **conclusion**

[28] Having considered all of the surrounding circumstances and applying the test of confusion as a matter of first impression and imperfect recollection, I conclude that, on a balance of probabilities, that the Applicant has not met its legal burden of proving that there is no reasonable likelihood of confusion. I reach this conclusion due to the degree of resemblance between the marks and the overlap in the nature of the parties' services. In my view, the component IGNITE in the Opponent's mark is a striking rather than a subordinate feature of the mark ROGERS IGNITE. It appears to me that an ordinary consumer, when confronted with the Applicant's Services sold under the Mark, may assume that there is an affiliation or licensing agreement between the parties. It follows that the trademarks in issue are confusing [*Glen-Warren Productions Ltd v Gertex Hosiery Ltd* (1990), 29 CPR (3d) 7 at 12 (FCTD)].

[29] As an aside, with the benefit of evidence or representations from the Applicant, I may have found that the Applicant had met its legal burden and reached a different conclusion.

## SECTION 16(3)(C) GROUND OF OPPOSITION

[30] If I was incorrect in categorizing use of Ignite Media as trademark use, and the use of Ignite Media was rather trade name use, the section 16(1)(c) ground of opposition would have succeeded for the reasons above.

## SECTION 2 GROUND OF OPPOSITION

[31] The Opponent alleges that the Mark is not distinctive as the use of the Mark by the Applicant is confusing with the Opponent's use of Ignite Media. The Opponent alleges that both Ignite Media offers and Rogers Ignite offers/proposes to offer services in relation to business

management consulting services, business marketing consulting services, business organization services, and internet services which would create confusion.

[32] The material date with respect to distinctiveness is the date of filing the opposition, September 29, 2015 [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC)].

[33] The Opponent will have met its burden if its trademark or trade name Ignite Media is known in Canada to some extent and its reputation is substantial, significant or sufficient or, in the alternative, that it is well known in a part of Canada [*Bojangles' International, LLC v Bojangles Café Ltd*, 2006 FC 657 at paras 33-34]. A ground of opposition based on non-distinctiveness is not restricted to the sale of goods or services in Canada. It may also be based on evidence of knowledge or reputation of an opponent's trademark or trade-name including that spread by means of word of mouth or newspaper and magazine articles [*Motel 6, Inc v No 6 Motel Ltd*, (1981), 56 CPR (2d) 44 (FCTD) at 58-59].

[34] While there is sufficient evidence for me to find that some Canadians would be aware of the Opponent's trademark and trade name, in the absence of information quantifying how many Canadians have been exposed Ignite Media whether through sales or advertising, I am unable to determine that the reputation of the Opponent's trademark or trade name was substantial, significant or sufficient as required by *Bojangles*. Accordingly, I find that the Opponent has not met its initial evidential burden and this ground of opposition is rejected.

DISPOSITION

[35] In view of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I refuse this application pursuant to section 38(12) of the Act.

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Natalie de Paulsen  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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No Hearing Held

**AGENTS OF RECORD**

No agent appointed

FOR THE OPPONENT

No agent appointed

FOR THE APPLICANT