



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2022 TMOB 083

Date of Decision: 2022-04-26

IN THE MATTER OF AN OPPOSITION

Brasserie Jukebox Inc.	Opponent
and	
Cross the Road Restaurants Ltd.	Applicant
1,762,964 for JUKE	Application

OVERVIEW

[1] Brasserie Jukebox Inc. (the Opponent) opposes registration of the trademark JUKE (the Mark) which is the subject of application No. 1,762,964 filed by Cross the Road Restaurants Ltd. (the Applicant).

[2] The application for the Mark was filed on January 12, 2016 in association with “Restaurant services” on the basis of proposed use in Canada. The Mark was advertised for opposition purposes in the *Trademarks Journal* of June 13, 2018 and, on November 2, 2018, the Opponent filed a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985 c T-13 (the Act). All references in this decision are to the Act as amended on June 17, 2019, with the exception of references to the grounds of opposition which refer to the Act before it was amended [section 70 of the Act].

[3] The grounds of opposition pleaded by the Opponent allege that the Applicant is not the person entitled to registration of the Mark under section 16(3)(a) of the Act and that the Mark is not distinctive under section 2 of the Act.

[4] The Applicant filed and served a counter statement denying all of the allegations contained in the statement of opposition. Both parties submitted evidence, which is outlined below and further discussed, where appropriate, in the analysis of the grounds of opposition. Only the Opponent filed written representations, however both parties were represented at a hearing.

PARTIES' EVIDENCE

Opponent's evidence

[5] In support of its opposition, the Opponent filed the statutory declarations of Renaud Gouin, dated May 1, 2019, along with Exhibits RG-1 to RG-23 (the Gouin declaration) and Gillian Dunne, dated May 2, 2019, along with Exhibits GD-1 to GD-6 (the Dunne declaration). Neither Mr. Gouin nor Ms. Dunne was cross-examined.

Gouin declaration

[6] Mr. Gouin was a director and president of the Opponent from April 11, 2012, the date of its incorporation, until December 1, 2018.

[7] On December 1, 2018, the Opponent and Avant-Garde Artisans Brasseurs Inc. were amalgamated to form Avant-Garde Artisans Brasseurs Inc. (Avant-Garde). Filed as Exhibit RG-1 is a printout from the *Registraire des entreprises du Québec* for Avant-Garde dated April 16, 2019. Mr. Gouin is identified as the director, president and treasurer of Avant-Garde since December 2018. I note that, despite this amalgamation, Avant-Garde has not been added or substituted as an opponent in this proceeding, and the Opponent remains as the only opponent of record.

[8] Mr. Gouin states that the Opponent carries on the business of selling beer in association with its trademark JUKEBOX. He explains that, at first, the Opponent's JUKEBOX beer was

brewed by Brasseurs de Montreal Inc., which also sold and distributed such beer for the benefit of the Opponent in return for a commission paid by the Opponent. Mr. Gouin states that this distribution agreement was in force until May 2016.

[9] Mr. Gouin states that the first flavour of JUKEBOX beer was for a Blonde/Pale Ale product and that one of the first sales of beer bearing the trademark JUKEBOX was made by Brasseurs de Montreal Inc. to Dépanneur Peluso situated in Montreal, Quebec. Filed as Exhibit RG-2 is a copy of an invoice issued by Brasseurs de Montreal Inc. on August 23, 2012 for this transaction.

[10] Mr. Gouin states that, between September 2013 and April 2015, the Opponent began the sale of several new flavours of beer respectively named *Distorsion*, *Jazz*, *Mélocdie* (later re-named *Mélocdie Sauvín*) and *Double Distorsion* in association with the trademark JUKEBOX. Filed as Exhibits RG-3 to RG-10 are copies of the sales sheets—which illustrate the labels bearing the trademark JUKEBOX stated to be used by the Opponent—as well as actual bottles of beer for each flavour.

[11] Mr. Gouin states that, at the end of January 2016, the Opponent began the direct sale of its JUKEBOX beer and terminated the distribution agreement with Brasseurs de Montreal Inc. Mr. Gouin further states that, in May 2016, the Opponent transferred the production of its JUKEBOX beer to Brasserie et Distillerie Oshlag, which became the brewer of the Opponent's beer under this trademark.

[12] Mr. Gouin states that, between July 2016 and June 2018, the Opponent re-introduced its first flavour of beer under the name *Classique* and began the sale of three new flavours of beer respectively named *New Wave*, *Electrique* and *Funkadélique Brettastique*, all in association with the trademark JUKEBOX. Filed as Exhibits RG-11 to RG-16 and RG-23 are copies of sales sheets as well as actual bottles of beer for these flavours.

[13] Mr. Gouin also provides sales figures totalling over 2.3 million dollars, representing the Opponent's gross sales of beer in association with the trademark JUKEBOX for 2013 to 2018. He states that the majority of the Opponent's customers for its JUKEBOX beer are depanneurs, grocers, bistros, restaurants and specialty food stores, all situated in the province of Quebec.

[14] With respect to promotion, Mr. Gouin states that, since August 2012, the Opponent has inscribed (“*inscrit*”) the trademark JUKEBOX on social networks, such as Facebook and that since 2013, the Opponent has been the owner of the website *bieresjukebox.com* and the trademark JUKEBOX has always appeared thereon. Filed as Exhibit RG-17 is a printout from the Opponent’s website, captured March 13, 2013 and obtained from the Internet Archive Wayback Machine. Mr. Gouin draws attention to page 3 of this exhibit, which displays the first flavour of beer bearing the trademark JUKEBOX sold by the Opponent, namely Blonde/Pale Ale. Filed as Exhibit RG-18 is another printout from the Opponent’s website, captured April 14, 2014 and also obtained from the Internet Archive Wayback Machine.

[15] Mr. Gouin further explains that, since 2013, in an effort to promote the sale of beer in association with the trademark JUKEBOX, representatives of the Opponent have been present at beer festivals held in the province of Quebec —such as *Festival mondial de la bière* and *Festival bières et saveurs de Chambly*—where visitors were offered small glasses of the different flavoured beers bearing the trademark JUKEBOX. He states that, at such festivals, the Opponent sold beer glasses and t-shirts bearing the trademark JUKEBOX. Filed as Exhibits RG-19 and RG-20 are samples of such beer glasses and t-shirts. Filed as Exhibit RG-21 is a printout from the “Beers and exhibitors” section of the website *festivalmondialbiere.qc.ca* which lists Avant-Garde and “Bières Jukebox” amongst the participants. Filed as Exhibit RG-22 is a printout from a brewer’s website, *boiteamalt.com*, which describes the nature of the second festival referenced above. I note that both printouts are dated April 29, 2019. I also note that there is no indication of the specific dates of the beer festivals attended by the Opponent nor any corresponding attendance numbers.

Dunne declaration

[16] Ms. Dunne is a legal assistant with the agents for the Opponent. She provides definitions she found online on May 1, 2019 for the words “juke” and “jukebox”. These include the following:

juke:

- (1) (noun) A roadside or rural establishment offering liquor, dancing, and often gambling and prostitution. Also called juke house, juke joint. (2) (verb) To

play dance music, especially in a juke. (3) (verb) To dance, especially in a juke or to the music of a jukebox. (4) (verb) To deceive or outmaneuver (a defending opponent) by a feint; fake. (5) (verb) To deceive or outmaneuver a defender by a feint. (6) (noun) A feint or fake. [*thefreedictionary.com*; Exhibit 1]

- (1) (verb) To make a move intended to deceive (an opponent). (2) (noun) A fake or feint, usually intended to deceive a defensive player. (3) (noun) jukebox. [*dictionary.com*; Exhibit 5]
- (noun) A small roadside establishment that plays music and provides refreshments [*collinsdictionary.com*; Exhibit 3]

jukebox:

- (1) (noun) A money-operated machine that plays music, usually equipped with pushbuttons for the selection of particular recordings. (2) (noun) A coin-operated machine, usually found in pubs, clubs, etc. that contains records, CDs or videos, which are played when selected by a customer. [*thefreedictionary.com*; Exhibit 2]
- (noun) A jukebox is a machine that plays CDs in a place such as a pub or bar. You put money in and choose the song you want to hear. [*collinsdictionary.com*; Exhibit 4]
- (noun) A coin-operated phonograph, typically in a gaudy, illuminated cabinet, having a variety of records that can be selected by push button. [*dictionary.com*; Exhibit 6]

[17] As I can also refer to dictionaries, I have consulted the *Oxford Canadian Dictionary* (2nd ed., 2006) and would note at this juncture that the definitions of the words “juke” and “jukebox” therein are overall consistent with those provided by Ms. Dunne.

Applicant’s evidence

[18] In support of its application, the Applicant filed the affidavits of Joanne Grison, sworn August 28, 2019, along with Exhibit A (the Grison affidavit) and Cord Jarvie, sworn August 29, 2019, along with Exhibits A to K (the Jarvie affidavit). Neither Mr. Jarvie nor Ms. Grison was cross-examined.

Grison affidavit

[19] Ms. Grison is the owner of Grison I.P. Services Inc. with experience in the intellectual property area relating to searches and document retrieval. She introduces into evidence a copy of

the file wrapper of Canadian trademark application No. 1,831,173 for the mark JUKEBOX filed by the Opponent.

Jarvie affidavit

[20] Mr. Jarvie is part owner of the Applicant, which operates JUKE fried chicken restaurants. He provides some information with respect to the planning stages of the JUKE restaurant concept in 2015-2016. Filed as Exhibit B is a copy of an article from the online magazine *Scout Vancouver* titled “Fried Chicken & Rib Joint ‘Juke’ To Open In The Heart Of Chinatown This Spring”, dated October 21, 2015. Filed as Exhibit C is a copy of “draft signage and coming soon package” developed by a brand design firm in March 2016. In May 2016, signage for the exterior and interior of the restaurant was ordered. Filed as Exhibit D is a copy of an invoice dated May 17, 2016, showing the deposit for those signs. Filed as Exhibit G is a copy of an article from the online magazine *Scout Vancouver* titled “Chinatown’s Highly Anticipated ‘Juke’ Fried Chicken Joint Set for Launch on Friday” dated July 27, 2016, regarding the JUKE restaurant’s anticipated opening. Filed as Exhibit F is a copy of an online article from *Dished Vancouver* titled “Juke: Fried chicken joint set to open in Chinatown” dated July 28, 2016, that discusses the theme behind the restaurant, the food, the restaurant itself, and the anticipated opening date.

[21] The Applicant’s first restaurant opened on July 29, 2016 and Mr. Jarvie states that “JUKE Restaurant has been in continuous use since that date”. Filed as Exhibit E are pictures of the outside of the restaurant and signage showing the Mark.

[22] The Applicant’s restaurant is both a dine in and take-out. More specifically, Mr. Jarvie explains that JUKE restaurant offers a full service dinner menu, and an all-day take out counter that serves fried chicken with all the trimmings. Filed as Exhibit H are pictures of a menu and take-out boxes. Amongst other information, the menu lists the Applicant’s website as *jukefriedchicken.com* and the Mark appears on at least one of the boxes.

[23] The Applicant opened a second restaurant location called Little JUKE on August 29, 2018. Filed as Exhibit J is a copy of an article from the online publication *The Georgia Straight* titled “Fried chicken and ribs alert: Juke Fried Chicken opens Little Juke in Vancouver’s West End”. This article was published on the day the second location opened.

[24] Mr. Jarvie states the Applicant's advertising is through social media, such as Facebook and Instagram, articles written in various publications, and word of mouth. He indicates that customers are able to visit the website at *jukefriedchicken.com* and, included as Exhibit K, is a printout of this website showing menus and information on each of the Applicant's locations. The Mark appears on the website.

[25] Mr. Jarvie further opines on a number of issues, including on the Mark's distinctive character, on its ability to distinguish the Applicant's services, and on the likelihood of confusion with the Opponent's trademark. I should note at this juncture that I have disregarded any opinion or conclusion statements made by Mr. Jarvie on issues of fact and law that are to be determined by the Registrar in the present proceeding.

PARTIES' RESPECTIVE BURDEN OR ONUS

[26] 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)]. If this burden is met, the Applicant then bears the legal onus of establishing, on a balance of probabilities, that no grounds of opposition prevent the registration of its Mark.

NON-ENTITLEMENT GROUND OF OPPOSITION

[27] The Opponent pleads that the Applicant was not the person entitled to the registration of the Mark, having regard to the provisions of section 16(3)(a) of the Act, because at the date of the filing of the application the Mark was confusing with the Opponent's trademark JUKEBOX, previously used in Canada by the Opponent in association with beer glasses, t-shirts and beer.

[28] To meet its evidential burden in respect of this ground, the Opponent must show that, as of January 12, 2016, it had used its relied upon trademark and that, as of June 13, 2018, this trademark had not been abandoned [section 16(5) of the Act]. As per my summary above, based on a fair review of the whole of Mr. Gouin's evidence, I am satisfied that that the Opponent has met this burden at least insofar as beer is concerned.

Test for confusion

[29] The test to determine the issue of confusion is one of first impression and imperfect recollection. Section 6(2) of the Act stipulates that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely 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.

[30] Therefore, section 6(2) of the Act does not concern confusion of the trademarks themselves, but confusion of the goods or services from one source as being from another.

[31] In applying the test for confusion, I must take into consideration all the relevant surrounding circumstances, including those listed 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 they have 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 including in appearance or sound or in the ideas suggested by them. These criteria are not exhaustive and different weight will be given to each one in a context-specific assessment [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23; *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis. In the present case, I will therefore consider the degree of resemblance factor first.

Degree of resemblance

[32] When considering the degree of resemblance, the law is clear that the trademarks must be considered in their totality. The appropriate test is not a side-by-side comparison but an imperfect recollection in the mind of a consumer of an opponent's trademark [*Veuve Clicquot* at para 20]. While in some cases, the first element of a trademark may prove the most important for the purpose of distinction, the preferable approach is to begin the confusion analysis by

determining whether there is an aspect of each trademark that is particularly striking or unique [*Masterpiece* at para 64].

[33] The striking aspect of the Mark is the word JUKE. It follows that there is resemblance between the trademarks to the extent that this element forms part of the Opponent's trademark.

[34] The Opponent contends that the striking aspect of its relied upon trademark is also JUKE, which is incorporated in its entirety in the Applicant's Mark. The Opponent also contends that the idea suggested by the respective trademarks is similar based on its evidence introduced by Ms. Dunne which includes definitions for the word "juke" meaning a small roadside establishment that provides refreshments and plays music, while there are also definitions for the word "jukebox" meaning a coin operated machine, usually found in pubs and clubs, which plays records, CDs and videos selected by the establishment's customers. The Opponent further points to the definition of the word "juke" in the online dictionary *thefreedictionary.com*, reproduced above. The Opponent submits that it follows that an average consumer with an imperfect recollection of the Opponent's trademark, when confronted with the Applicant's Mark, would likely infer that its restaurant services are being offered with the consent or authorization of the Opponent or that the respective goods and services emanate from the same source.

[35] As indicated above, the resemblance between the trademarks is due to the common element JUKE. However, in my view, the striking aspect of the Opponent's trademark is not JUKE, but the word JUKEBOX as a whole. I therefore find that, when they are considered in their entireties, this distinguishes the parties' trademarks and makes them more different than alike in appearance and in sound. Notwithstanding the Opponent's submissions in this regard, I find that the ideas suggested by the parties' trademarks are also somewhat more different than alike. While I accept that the idea of JUKEBOX is that of a machine playing music, in association with the applied-for services, given the various definitions of JUKE, it is not clear what idea is suggested by the Mark, beyond the word itself.

[36] Accordingly, overall, I find this factor favours the Applicant, albeit not strongly.

Inherent distinctiveness and extent known

[37] The Opponent's trademark has some inherent distinctiveness as it is not suggestive or descriptive in the context of the goods in respect of which it is being used. The Applicant's Mark has less inherent distinctiveness inasmuch as it could be suggestive of a type of establishment that serves refreshments and food, such as a restaurant.

[38] With respect to the extent to which the trademarks have become known, as outlined above, the Opponent's trademark has acquired some distinctiveness in association with beer—primarily through sales since August 2012 in the province of Quebec—albeit not to any significant degree considering that the Opponent's evidence lacks advertising or promotional expenditures; attendance particulars for any beer festivals; or specifics on the number of customers that have accessed the Opponent's website or social media pages. Similarly, the Applicant's evidence concerning the use and promotion of the Mark falls short of establishing any significant acquired distinctiveness. While it opened its first restaurant under the Mark on July 29, 2016 in Vancouver's Chinatown, as well as a second restaurant on August 29, 2018, also in Vancouver, there is no evidence as to the sales of these restaurants, of the number of customers served at any time, nor any statistics with respect to the Applicant's website or social media pages. In addition, while Mr. Jarvie provides several online articles—which according to the Applicant show the success and popularity of its restaurants operated in association with the Mark—there is no evidence with respect to the number of Canadians who may have accessed the corresponding websites and/or read the articles in question.

[39] Considering the inherent distinctiveness of the parties' trademarks, the evidence of use and therefore the extent to which they have become known, on balance, I find this factor favours the Opponent.

Length of time in use

[40] As discussed above, the Opponent's trademark has been used for a greater length of time. Accordingly, this factor also favours the Opponent.

Nature of the goods, services, businesses and trade

[41] The Mark is applied for in association with restaurant services.

[42] The Opponent contends that it sells beer to depanneurs, grocers, bistros and restaurants and that, as such, the nature of the parties' respective goods and services overlap one another, because it is possible that the Opponent's beer could be offered for sale or sold in the Applicant's restaurants, especially since at least one of the Applicant's restaurants has a bar where it offers for sale wines and spirits. The Opponent also contends that the nature of the trade of the respective parties overlap one another and refers to the case of *Bellwoods Brewery Inc v The Roman Candle Company*, 2018 TMOB 82 in which an application covering restaurant and catering services amongst other things was successfully opposed on the basis of the likelihood of confusion with an opponent's trademark used in association with beer. The Opponent also refers to the case of *Prime Restaurants Inc v Pacific Vision Proprietary Ltd*, 2014 TMOB 9 in which an application covering distilled spirits was successfully opposed on the basis of the likelihood of confusion with an opponent's trademark registered and used in association with services for the operation of a restaurant and bar.

[43] The Applicant contends that its services are ultimately different in nature from the goods sold by the Opponent and that the jurisprudence on which the Opponent relies can be distinguished based on the facts, notably in that —unlike in the case at hand— neither applicant had filed evidence and the trademarks were either identical (ROMAN CANDLE vs. ROMAN CANDLE) or virtually identical (TIR NA N'OG vs. TIR NAN OG).

[44] I am in general agreement with the Applicant's submissions on this point. The specific nature of the parties' goods and services is different and while I accept there is a general connection between their trades to the extent that restaurants can sell alcoholic beverages —including beer— there is no evidence in the instant case to further link the parties' trades. For example, in the *Bellwoods Brewery* case above, the evidence established that the opponent operated a brewery and pub and sold its beer through its pub, its onsite brewery retail store, as well as to third-party bars and restaurants. Similarly, in the *Prime Restaurants* case above, the evidence established that there are restaurants which sell wine or beer under the same trademark

as their restaurant services are offered. There is no comparable evidence here. Moreover, those cases were further unique given the nature of the trademarks at issue.

[45] Accordingly, I find this factor favours the Applicant.

Additional surrounding circumstance – prior inconsistent position taken by the Opponent during examination

[46] At the hearing, the Applicant submitted that the Opponent took the position that the trademarks at issue are not confusing when it responded to an objection from the examination section in the prosecution of its application No. 1,831,173 and that this is a surrounding circumstance which favours the Applicant. As it was introduced by the Applicant through the Grison affidavit, the response in question is part of the record.

[47] For its part, the Opponent submitted that nothing prevents a party from changing its strategy or making different arguments and that the instant proceeding was necessary, notably as it is beyond the examination section's jurisdiction to take the date of first use into account in the assessment of confusion between trademarks.

[48] The Registrar can indeed have evidence before him that was not part of the record at the examination stage; and the onus is quite different at the examination stage than at the opposition stage [*Musalem v Espiritu de Chile Ltd*, 2011 TMOB 137 at para 23; *Simmons IP Inc v Park Avenue Furniture Corp* (1994), 56 CPR (3d) 284 (TMOB) at 288; *Proctor & Gamble Inc v Morlee Corp* (1993), 48 CPR (3d) 377 (TMOB) at 386; *Thomas J Lipton Inc v Boyd Coffee Co* (1991), 40 CPR (3d) 272 (TMOB) at 277]. It is also relevant to recall that examination section decisions are not binding and hold no precedential value with respect to opposition proceedings [*PepsiCo, Inc v Coca-Cola Inc/Coca-Cola Ltée*, 2016 TMOB 12 at para 123; *Thinklab Consulting Inc v Combustion Creativity Inc*, 2018 TMOB 14 at para 85; *Worldwide Diamond Trademarks Limited v De Trung Vo*, 2016 TMOB 20 at para 32]. Ultimately, regardless of the previous position taken by the Opponent, I must come to a determination as to confusion here that is in accordance with the law and relevant jurisprudence and that takes into account the facts particular to the present case [*Molson Breweries v Labatt Brewing Co* (1996), 68 CPR (3d) 202 (FCTD) at 213].

[49] Accordingly—although my conclusion below aligns with some of the Opponent’s arguments filed in response to the examination section’s objection raised during the prosecution of its trademark filed under No. 1,831,173—I do not consider such arguments to be a significant circumstance in the present case.

Conclusion regarding the likelihood of confusion

[50] Having considered all the surrounding circumstances, I find that the Applicant has met its onus to establish, on a balance of probabilities, that the Mark is not likely to cause confusion with the Opponent’s relied-upon trademark. I reach this conclusion particularly in view of the differences between the trademarks and the differences in the parties’ goods, services and channels of trade.

[51] Accordingly, the section 16(3)(a) ground of opposition is rejected.

NON-DISTINCTIVENESS GROUND OF OPPOSITION

[52] The Opponent pleads that the Mark is not distinctive within the meaning of section 2 of the Act in that it does not actually distinguish, nor is it adapted to distinguish, the services in association with which it is proposed to be used by the Applicant from the goods of others, and in particular from the Opponent’s goods associated with the Opponent’s trademark JUKEBOX.

[53] Given that the Opponent was not successful under the section 16(3)(a) ground of opposition, it will also not succeed under the section 2 ground of opposition as it relies on the exact same trademark. In particular, even were I to consider Mr. Gouin’s evidence as sufficient to meet the threshold for the Opponent’s burden under this ground (which—as per my comments above with respect to the extent to which the Opponent’s trademark has become known—is questionable), I would nonetheless find, on a balance of probabilities, that there is no likelihood of confusion between the Mark and the Opponent’s trademark JUKEBOX for reasons similar to those discussed above. I do not find that the difference in material dates has a significant impact on my overall conclusion regarding likelihood of confusion.

[54] Accordingly, the section 2 ground of opposition is also rejected.

DISPOSITION

[55] Having regard to all of the foregoing, and pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(12) of the Act.

Iana Alexova
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE: February 3, 2022

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