

Trial decision

Revocation No. 2014-300026

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The case of trial regarding the revocation of the Trademark Registration No. 5169730 between the parties above has resulted in the following trial decision.

Conclusion

The trademark registration No. 5169730 shall be cancelled.

The costs in connection with the trial shall be borne by the demandee.

Reason

No. 1 The Trademark

The trademark with Trademark Registration No. 5169730 (hereinafter referred to as "the Trademark") consists of the characters of "緑健青汁 (ryokuken aojiru)," "りよくけん青汁 (ryokuken aojiru)," "リヨクケン青汁 (ryokuken aojiru)," and "RYOKUKEN AOJIRU," horizontally written in four lines, its registration application was filed on January 9, 2007, the trademark was registered on January October 3, 2008 with Class 29 "Dietary supplements in the form of granules, capsules, grains, tablets, powders, liquids, and jellies which is mainly made from barley young leaves or kale; dietary supplements in the form of powders, granules, capsules, tables, or liquids which is mainly made from barley young leaves or kale and is blended with indigestible dextrin; dietary supplements in the form of powders, granules, capsules, tablets or liquids which is mainly made from barley young leaves or kale and is blended with dietary fiber chitosan." as its designated goods, and it is still valid as of now.

In addition, the registration date of the demand for trial of the case is January 29,

2014.

No. 2 The demandant's allegation

The demandant requested a trial decision whose content is the same as the conclusion, alleged that any one of the holder of trademark right, the exclusive right to use or non-exclusive right to use has not used the Trademark for the designated goods pertaining to the cancellation of trial of the case within three years before the registration of the trial of the case (hereinafter referred to as "the period required to prove trademark use") in Japan, summarized and mentioned reasons for the request as follows in the written demand for trial, the written refutation of the trial case dated March 28, 2014, the written refutation of the trial case dated October 8, 2014, and the written statement dated September 1, 2016, and submitted Evidence A No. 1 to Evidence A No. 15 as means of proof.

1 Regarding use of the Trademark

(1) Regarding use in product catalogs

The demandee submitted product catalogs (Evidence B No. 1 and B No. 2) (hereinafter, referred to as the "demandee product catalog 1" and "the demandee product catalog 2", and collectively referred to as "the demandee product catalog"), and alleges that since the holder of trademark right had used the trademark "緑健青汁" (hereinafter, referred to as the "trademark used by the demandee") for designated goods in Japan within the period required to prove trademark use, the Trademark should not be cancelled under the provisions of Article 50(2) of the Trademark Act. Although the demandee, then, submitted transaction documents and the like of the demandee product catalogs, as described below, credibility thereof is low.

The demandant, prior to the demand for trial, so as to ascertain whether or not the Trademark is used, called to the phone number previously published on the website in 2013, and obtained the answer that four to five years had passed since the demandee stopped the green juice and health food business, from employees of Igaku Shuppan, Inc. (a publisher in which the representative of the demandee serves as a representative) who answered the phone (Evidence A No. 3). Although any of persons in charge who responded to the phone answers that a considerable number of years had passed since the demandee stopped selling the product, as alleged by the demandee, if the demandee product catalog was printed in 2013 and the products were sold until recently, such an answer is extremely unnatural and it is inevitable to say that the fact that the products with the trademark used by the demandee and the demandee product catalog actually existed in 2012 and 2013 itself is extremely dubious. Since Igaku Shuppan, Inc. is based on publishing as a business and can easily make catalogs and the like at any time, the use of the Trademark should not be approved by the submission of the demandee product catalog with low credibility.

Although the demandee refuses to submit a delivery note due to the infringement of the privacy right, about this point, it is only necessary to submit that in a form with which individuals cannot be identified, and it cannot be a valid reason to refuse to submit. The demandee has not submitted any proof that the products with the trademark used by the demandee were actually sold.

(2) Identity from common sense between the Trademark and the trademark used by the demandee

The Trademark is arranged with each character element of "緑健青汁," "りよくけん青汁," "リヨクケン青汁," and "RYOKUKEN AOJIRU" in upper and lower four lines, and these constituent elements collectively configures one trademark. On the other hand, the used trademark of the case is only "緑健青汁" which omits each character element of "りよくけん青汁," "リヨクケン青汁," and "RYOKUKEN AOJIRU," and it is clearly not recognized as the trademark deemed identical with the Trademark from generally accepted perspective.

(3) Regarding use to a magazine

A Regarding the credibility of Evidence B No. 3

Although the demandee submitted the first issue of "WOC Nursing" as a magazine distributed nationwide, when I browsed the relevant magazine in the possession of National Diet Library (hereinafter, referred to as the "magazine in the possession of National Diet Library"), the advertisement of the demandee was not posted on the magazine in the possession of National Diet Library which was actually distributed (Evidence A No. 6).

In the advertisement of the demandee posted on the magazine (hereinafter, referred to as the "magazine submitted by the demandee") submitted as Evidence B No. 3, preliminary announcement that "detailed material" of 緑健青汁 (Ryokuken green juice) will be distributed at "Annual Congress of Japanese Society of Pressure Ulcers" on July 19 and 20, 2013 is posted. The release date of the magazine submitted by the demandee was July 20, 2013 (Evidence A No. 8), and since when readers saw the advertisement, the congress would have been over, the fact that such a formal "conference preliminary announcement" was posted itself can be said to be extremely unnatural.

Therefore, it is natural that the advertisement of the demandee on the magazine submitted by the demandee is regarded as formally made only for the trial of the case by Igaku Shuppan, Inc.

B Regarding the distribution of the demandee product catalog 2 (Evidence B No. 2)

Although the demandee states that the distribution period and distribution places of the demandee product catalog 2 are specified in the lower right side of the advertisement of the demandee on the magazine submitted by the demandee, as described in A above, there are many unnatural points in the magazine submitted by the demandee and the advertisement of the demandee posted thereon, and it should not be adopted as evidence. In addition, in the magazine submitted by the demandee and the advertisement of the demandee posted thereon, it is merely described as "material of '緑健青汁 (Ryokuken green juice)' " or " 'detailed material' of 緑健青汁 (Ryokuken green juice)," and it is not sure at all what kind of material was distributed in the venue, namely, whether or not the demandee product catalogs (Evidence B No. 1 and B No. 2) were actually distributed.

As described above, the demandee's allegation that the demandee product catalog 2 was distributed in various conferences is groundless.

(4) Regarding the credibility of each of the respective Evidence B

A Regarding the nominal use of the Trademark

There is very much doubt in the use evidence concerning the submission of the demandee. From the written replay dated February 20, 2014 to a response letter dated July 20, 2016, in the evidence submitted with each document, there are extremely many

unnatural points such as inconsistency, and thus it cannot absolutely be recognized as the proof of the distribution of the demandee product catalog (Evidence B No. 1 and B No. 2) required in the inquiry dated July 1, 2016 was made.

In view of the fact that the demandee merely submitted the demandee product catalog in the response letter, the fact that concerning the magazine submitted by the demandee which is submitted then, if doubt is presented to evidence power thereof, a new transaction document and the like which would have been possible to submit by a response letter or the written request for proof were submitted after-retroactively, the fact that all of the important respective Evidence B relating to use facts of the Trademark were printed and submitted by a specific person (Okumura Printing Inc.) having a deep relationship with the demandee, the fact that in the preliminary investigation prior to the demand for trial (Evidence A No. 3), a plurality of employees of related companies of the demandee acknowledged that RYOKUSAI had already suspended the business of green juice, and the fact that many unnatural points are seen in each proof relating to the submission of the demandee, it is natural that the respective evidences submitted by the demandee is considered to include those created retroactively for the purpose of smoothing over the use result of the Trademark, and it should not be regarded as the Trademark was used with these respective items of Evidence B.

Also, the demandee merely submitted a bill and the like referred to as a printing cost and the like of the demandee product catalog, and did not submit any documentary evidence relating to the sale of the product with the trademark used by the demandee. Although it is still good if the product with the trademark used by the demandee was sold before and after the distribution of the demandee product catalog, since the demandee did not sell the products, only with action that appears like a nominal use of a trademark for the purpose of escaping a trial for revocation of a registered trademark, it should be said that it does not fall under the use of the trademark prescribed in Article 2(3)(Viii).

B Regarding the relationship between Okumura Printing Inc. and the demandee

All of those which the demandee continues to submit as documentary evidence proving the use, such as the demandee product catalog (Evidence B No. 1 and B No. 2), the magazine submitted by the demandee (Evidence B No. 3), and transaction documents relating thereto, relate to printing / binding / issuance of Okumura Printing Inc. (hereinafter, referred to as "Okumura Printing").

Okumura Printing is a printing company that undertakes printing and binding of magazines published by Igaku Shuppan, Inc. (Evidence A No. 7) in which the representative of the demandee serves as a representative (described in the imprint of the respective Evidence A No. 6, Evidence B No. 3, B No. 17, B No. 18, B No. 20, and B No. 21 as a printing binding company).

Namely, Igaku Shuppan, Inc. and a company group in which the demandee serves as a representative correspond to important customer for Okumura Printing. Therefore, it is easy to guess that Okumura Printing is cooperative with the demandee.

2 Regarding the credibility of a use investigation report (Evidence A No. 3) by the demandant

Regarding Evidence A No. 3 showing that the demandee did not do the business of green juice within the period required to prove trademark use, although the demandee denies its credibility based on the assumption that a creator of Evidence A No. 3 is the

demandant himself/herself or a person concerned, Evidence A No. 3 is created by a private research company, not by the demandant himself/herself, and the company is a comprehensive research company founded in 1966 and is a company that has high reliability on investigating the use of trademarks (Evidence A No. 15).

As Evidence A No. 3 shows, the plurality of employees of the related companies of the demandee acknowledged that RYOKUSAI CO., LTD. had suspended the business of green juice for at least the past three years, and although the demandee alleges that the demandee product catalog was distributed in July and September, 2013, actually, it turns out that the telephone number of an order destination was in a state of unusable at the time of December, 2013, and it also turns out that in December, 2013, even though a researcher actually requested to purchase the product, he/she could not purchase that.

Those are important facts in considering whether or not respective items of Evidence B really existed, or whether or not the distribution of the demandee product catalog falls under the nominal use.

From the above, Evidence A No. 3 is not a subjective and arbitrary documentary evidence created by the demandant himself/herself, but an objective and credible documentary evidence relating the creation of a private investigation company.

3 Summary

As described above, it is unnatural that RYOKUSAI CO., LTD. which was supposed to have stopped work and IKI IKI RYOKUKEN CO., LTD. which should have never existed as a company printed and distributed the demandee product catalog as of July, 2013.

Also, even if the demandee product catalog existed, it cannot be recognized that the trademark relating to use applied on the demandee product catalog is identical with the Trademark from generally accepted perspective.

The magazine submitted by the demandee is different from the actually circulated magazines and should not be adopted as proof. Even if the distribution of the demandee product catalog is recognized, the demandee has suspended the sales business of the product with the trademark used by the demandee, and the distribution of the demandee product catalog should be regarded as merely being used nominally for the purpose of escaping revocation for the reason of no-use and does not prove the use of the Trademark.

No. 3 The demandee's allegation

The demandee requested a trial decision "The demand for trial of the case is groundless. The costs in connection with the trial shall be borne by the demandant," summarized and mentioned reasons for request as follows in the written reply of the trial case, in the written request for proof dated August 28, 2014, in the written opinion to the written refutations of the trial case dated December 9, 2014 and dated December 11, 2014, in the written statements dated May 7, 2015, dated May 8, 2015, and dated July 10, 2015, in the written opinion dated January 14, 2016, in the written reply to the inquiry dated July 20, 2016, and in the written statement dated March 7, 2017, and submitted Evidence B No. 1 to Evidence B No. 30 as a means of proof.

Furthermore, Evidence B No. 5 to Evidence B No. 21 submitted in the written statement of the trial case dated July 10, 2015, are partially overlapped with the proof submitted so far in proof numbers, and thus are made to be respectively Evidence B No.

8 to Evidence B No. 24 in the trial decision of the case.

Also, Evidence B No. 25 and Evidence B No. 26 submitted in the written statement dated March 7, 2017, are partially overlapped with the proof submitted so far in proof numbers, and thus are made to be respectively Evidence B No. 29 and Evidence B No. 30 in the trial decision of the case.

1 Regarding the use of the Trademark

(1) Regarding product catalog

A Regarding the demandee product catalog 1 (Evidence B No. 1)

A product to which a mark of "緑健青汁 (Ryokuken aojiru, Ryokuken green juice)" is affixed is dietary supplements in the form of granules, capsules, grains, tablets, powders, liquids, and jellies which is mainly made from barley young leaves or kale.

The demandee product catalog 1 is a catalog of barley young leaves green juice "緑健青汁(Ryokuken green juice)," the character of "緑健青汁" is printed in the photo of the product on Page 6 of the catalog. Then, from the fact that in the demandee product catalog 1, a copyright holder and a year in which copyright was set are clearly written as "Copyright (c) 2012 RYOKUSAI & IKI IKI RYOKUKEN" (Note by the body, (c) is recognized as a copyright indication in which a small letter "c" is written with in a circle. Hereinafter the same.), and the fact a sender expiration date of a "delivery postage paid by addressee" postcard is "until March 15, 2013," and the sender expiration date is stipulated as two years according to the postal law, the fact that the Trademark had been used for Class 29 "Green juice mainly made from barley young leaves" within the period required to prove trademark use is proved,.

B Regarding the demandee product catalog 2 (Evidence B No. 2)

As well as A above, the product affixed with "緑健青汁 (Ryokuken aojiru, Ryokuken green juice)" is dietary supplements in the form of granules, capsules, grains, tablets, powders, liquids, and jellies which is mainly made from barley young leaves or kale.

The demandee product catalog 2 is a catalog of barley young leaves green juice "緑健青汁 (Ryokuken green juice)," the character of "緑健青汁" is printed in the photo of the product on the back cover of the catalog. Then, from the fact that in the demandee product catalog 2, a copyright holder and a year in which copyright was set are clearly written as "Copyright (c) 2012&2013 RYOKUSAI & IKI IKI RYOKUKEN", the fact that the Trademark had been used for Class 29 "Green juice mainly made from barley young leaves" within the period required to prove trademark use is proved.

C All of the products of the holder of trademark right was sold and delivered to individuals, and the "delivery note" cannot be submitted due to the infringement of the individual privacy right.

(2) Regarding the distribution of the demandee product catalog

A Regarding distribution to medical workers

The products using the Trademark are sold as limited to a specified market (medical workers, especially nurses) as "sales products sold exclusively to medical workers."

In the advertisement posted in the magazine submitted by the demandee, the distribution period and distribution places of the demandee product catalog are clearly written. In addition, the demandee product catalog was sent by direct mail to the relevant medical worker (especially, a plurality of nurses of each specialized area).

The demandee has a members list of medical workers involving the hundreds of

thousands of people and is extremely effective data for distributing the demandee product catalog.

B Regarding the relationship between the demandee product catalog and gift application postcards

Evidence B No. 12 and Evidence B No. 13 are application postcards for "a barley young leaves green juice '緑健青汁 (Ryokuken green juice)' gift" (hereinafter, referred to as the "application postcard of the case"), and since the related keyword of them is "barley young leaves green juice," the relationship between them is obvious.

The demandee distributed the demandee product catalog within the period required to prove trademark use, by direct mail using the potential purchaser list of the "barley young leaves green juice" based on the application postcard of the case.

Also, although the demandant alleges that no evidence has been submitted indicating that the product was sold to a customer, from the fact that the product the "barley young leaves green juice '緑健青汁 (Ryokuken green juice)'" was distributed as a gift by the application postcard of the case, it is obvious that the Trademark was used with the period required to prove trademark use.

C Regarding the bill and the like relating to the demandee product catalog 2

As a proof that the demandee product catalog 2 was placed in a state that enables the general public to view through the advertisement, distribution, and the like within the period required to prove trademark use, the bill, deliver note and receipt (Evidence B No. 14 to B No. 16, Evidence B No. 25 to B No. 28) relating to the demandee product catalog received from Okumura Printing are submitted. In the period of distribution was July, 2013, the demandee product catalog 2 was distributed by direct mail (Evidence B No. 15 to B No. 16), and the number of distribution was 25,000 (Evidence B No. 12 to B No. 16).

Also, the relationship between the demandee product catalog and the bill (Evidence B No. 14) is obvious from the fact that a bill which reissued the bill (Evidence B No. 25, simultaneously submitted with the written reply to the inquiry dated July 20, 2016) and the delivery note (Evidence B No. 28) describe "sale promotion brochures '緑建青汁 (Ryokuken green juice)'".

D Regarding the description of the distribution of the demandee product catalog in the magazine submitted by the demandee

The magazine submitted by the demandee (Evidence B No. 3) is a magazine in which the advertisement of the product of the barley young leaves "緑建青汁 (Ryokuken green juice)" is posted. The publication source is "Igaku Shuppan", the name of the magazine is "WOC Nursing" (the first issue of 2013), and the issue date is July 10, 2013. On the front page of the front cover of the magazine submitted by the demandee, the advertisement of the product of the barley young leaves "緑建青汁 (Ryokuken green juice)" is posted.

The magazines submitted by the demandee were sold in medical specialty bookstores nationwide and major large bookstores nationwide, the readers of the magazines submitted by the demandee are co-medical such as a nurse, physician, pharmacist, physical therapist and the like belonging to medical institutions nationwide (university hospitals, large general hospitals and other medical institutions), and as of November 2013 immediately after its launch, the magazine won the second place in "Medical magazine/medical journal ranking (medical, medical science, nursing miscellaneous: 545 magazines)" (Evidence B No. 4).

Then, the distribution period and distribution places of the demandee product catalog 2 are specified in the lower right side of the advertisement of the magazine submitted of the demandee.

Also, although the demandant alleges that since the contents of the advertisements posted in the magazine submitted by the demandee and the magazine in the possession of National Diet Library are different, the magazine submitted by the demandee was evidence forged, the magazine submitted by the demandee was issued by Igaku Shuppan Inc. which is a third party, and the demandee had not requested or instructed the forgery of evidence, and is not in a legal position which can do such a thing.

Then, the magazine submitted by the demandee is the second printing, and although the demandee was planning to post the advertisement to the magazine "WOC Nursing" which is the first edition, since it turned out that the number of printed copies was small, the posting of the advertisement was put off. However, contrary to prior expectations, since the magazine was sold out at the same time as printing, the advertisement was posted on the second printing. The demandee heard that the issue date of the second printing was the same as it was because there was a deviation of about 1 day on the finished date of bookbinding with what was printed first.

2 Regarding the investigation report (Evidence A No. 3) submitted by the demandant

Although the demandant alleges that he/she performed the use investigation relating the product group relating to the demandee (Evidence A No. 3) and a considerable number of years had passed at least since the demandee no longer doing business with regard to the green juice and health food business, the investigation is merely a summary of the demandant with the intention of leading to its own advantage, and thus it has no value as evidence.

No. 4 Judgment by the body

1 Although the demandee alleges that the Trademark was used by the holder of trademark right within the period required to prove trademark use, in the created demandee product catalog (Evidence B No. 1 and B No. 2) and the magazine submitted by the demandee (Evidence B No. 3) for "dietary supplements in the form of granules, capsules, grains, tablets, powders, liquids, and jellies which is mainly made from barley young leaves or kale" included in the designated goods relating the demand for trial of the case, according to the evidences submitted by the demandant and demandee and the allegations of the parties, the following matters are recognized.

(1) Regarding the demandee product catalog

A Regarding the demandee product catalog 1 (Evidence B No. 1)

The demandee product catalog 1 (Evidence B No. 1) is a product catalog created by "RYOKUSAI CO., LTD." which is regarded as one of the holder of trademark right of the Trademark in order to sell green juice which uses and powders 100% of barley young leaves, and is dissolved in water or lukewarm water to drink. From the fact that on the cover of the demandee product catalog 1, the character of "緑建青汁" (hereinafter, referred to as the "used trademark of the case") is indicated, and the fact that the sender expiration date of the postcard posted in the lower left part of the back cover of the demandee product catalog 1 is "until March 15, 2013" and the description of the year of copyright setting, it can be assumed that the demandee product catalog 1 was created in around 2012 which is within the period required to prove trademark use.

B Regarding the demandee product catalog 2 (Evidence B No. 2)

The demandee product catalog 2 is created by "RYOKUSAI CO., LTD." which is regarded as one of the holder of trademark right of the Trademark in order to sell the product which uses and powders 100% of barley young leaves blended with indigestible dextrin and dietary fiber chitosan (hereinafter, referred to as the "used product 1 of the case"). From the fact that on the cover of the demandee product catalog 2, the used trademark of the case is indicated, and the fact that ages of persons introduced as "real opinions of customers" in the demandee product catalog 2 are updated one by one in the demandee product catalog 2 as compared with those in the demandee product catalog 1, it can be assumed that the demandee product catalog 2 was created in around 2013 which is within the period required to prove trademark use.

(2) Regarding documents relating to the demandee product catalog

Evidence B No. 14 to Evidence B No. 16 submitted with "the written opinion to notification of trial examination" dated January 14, 2016, and Evidence B No. 25 to Evidence B No. 28 submitted with "the written reply to the inquiry" dated July 20, 2016 are the transaction documents relating to the demandee product catalog 2, and all of them are from Okumura Printing to "RYOKUSAI CO., LTD." which is one of the holder of trademark right of the Trademark. According to these documents, the followings are recognized.

A Evidence B No. 14 is a bill dated July 20, 2013 of 1,443,750 yen for the price of 25,000 of "sales brochures" printed out.

Also, although in the inquiry dated July 1, 2016 in the body, it is notified that printed matters requested for Okumura Printing cannot be specified as the demandee product catalog from the indication of "sales promotion brochures" described in the bill, the demandee reissued the bill as the one relating to the printing of "the sales promotion brochures '緑建青汁 (Ryokuken green juice)'" and submitted that with the delivery note (Evidence B No. 28) (Evidence B No. 25).

B Evidence B No. 15 is a bill dated July 20, 2013 of 224,017 yen for the price of 25,100 of A4 size vinyl envelopes (including printing).

C Evidence B No. 16 is a bill dated July 20, 2013 of 2,073,750 yen for the price of dispatch of 25,000 direct mails.

D Evidence B No. 26 is a bill dated July 20, 2013 of 152,859 yen for the price of 9,698 dispatch operation (enclosing and label output), and the dispatch operation includes the enclosing of documents of 16 pages in A4 size and labeling (including label layout creation, print output, and the like).

E Although Evidence B No. 27 is a receipt dated November 20, 2013 of the price of 3,894,376 yen, there is no description in the provision of the receipt, and it cannot be confirmed for what costs relating to the receipt are.

F Evidence B No. 28 is a delivery note dated July 10, 2013 of 25,000 of "the sales promotion brochures '緑建青汁 (Ryokuken green juice)'."

(3) Regarding the first issue of the magazine "WOC Nursing"

A Regarding the magazine submitted by the demandee (Evidence B No. 3)

(A) On the cover, the alphabetic characters "WOC" and "Nursing" are written in two lines in slightly large size, and there are the description of "ウォック・ナーシング" between the alphabets in small letters, the description of the characters of "2013 創刊号 Vol. 1 No. 1" on the right side thereof, and is the description of "New idea and future for pressure ulcers - Innovation of prevention, treatment, and care of pressure

ulcers" under that. Then, in the lower left of the cover, there is a description of "Igaku Shuppan".

(B) In the upper line of Page 1, a photo of a packaging box on which the characters of "りよくけん" and "緑健青汁" are displayed along with the description of "plenty natural barley young leaves 100% green juice" and the large description of "緑建青汁 (Ryokuken green juice)" is posted, and there are the description of "'緑建青汁 (Ryokuken green juice)' is a limited sales product to medical workers" on the right side of that, and the characters of "Ryokusai Co., Ltd." in a lower line on the left side.

(C) In the line of "the fundamental difference of a manufacturing method" in the line of "緑建青汁 (Ryokuken green juice)" in the "comparison chart" on Page 1, there is the description of "Milling: Since it is a fine powder of 50 microns, it shows uniform green color evenly when melted."

(D) In the lower right side on Page 2, there is the description of "We are preparing detailed materials of '緑建青汁 (Ryokuken green juice).' "The detailed materials' of 緑建青汁 (Ryokusai green juice) will be distributed in the venue of the 15th Annual Congress of Japanese Society of Pressure Ulcers (July 19 (Fri) and July 20(Sat), 2013 Kobe Convention Center)."

(E) In the lower line of the imprint, there are the descriptions of "WOC Nursing," "Vol. 1 No. 1 [Vol. 1] issued on August 10, 2013," the same name as the representative of the demandee as "The editor and publisher," "Publishing place Igaku Shuppan Inc.," and "Printing and binding Okumura Printing Inc."

(F) On the last page, there is the description of "Monthly magazine released on the 20th every month." under the caption of "WOC Nursing".

B Regarding the magazine in the possession of National Diet Library (Evidence A No. 6)

(A) Regarding the cover, there is the description similar to A (A) above.

(B) On Page 1, although there are the descriptions of "Specialized magazines for staff engaged in dialysis / renal failure nursing," "dialysis staff," "Dialysis Staff," "Available on sale" and "2013 the first issue VOL. 1 NO. 1" along with the description of "Igaku Shuppan" in the lower left side, the contents thereof differ from that on Page 1 of the magazine submitted by the demandee (Evidence B No. 3).

(C) On Page 2, although there are descriptions of "Operation Nurse," "The first issue 2013 Vol. 1 No. 1," "Viewpoint of preoperative and postoperative nursing," and "Released on September 10, 2013," along with the description of "Igaku Shuppan" in the lower left side, the contents differ from that on Page 2 of the magazine submitted by the demandee (Evidence B No. 3).

(D) On the imprint and the last page, there are the same descriptions as A(D) and (E) above.

C Regarding the issue date of the magazine "WOC Nursing" first issue

According to the advertisement of a magazine in the website of "Fijisan.co.jp," it can be recognized that the magazine "WOC Nursing" first issue was released on July 20, 2013 (Evidence A No. 8).

(4) Regarding the application postcard of the case (Evidence B No. 12 and B No. 13) Although the demandee alleges that the application postcard of the case is a photo of an application postcard of "a barley young leaves green juice '緑健青汁 (Ryokuken green juice)' gift," the application postcard has the following description.

A In the letter of the application postcard of the case (Evidence B No. 12), the address, name and telephone number are described along with the description of the characters "大麦若葉の青汁" in the uppermost line (the characteristics of "desired" and the like are described after the characters in a part of the postcards).

B From the photo of the application postcard of the case (Evidence B No. 12 and B No. 13), it is not possible to confirm the postmark and the like of a destination face.

2 Judgment

(1) Regarding the demandee product catalog

The Trademark consists of the characters of "緑健青汁 (Ryokuken aojiru, Ryokuken green juice)," "りよくけん青汁 (Ryokuken aojiru, Ryokuken green juice)," "リヨクケン青汁 (Ryokuken aojiru, Ryokuken green juice)," "RYOKUKEN AOJIRU (Ryokuken green juice)," horizontally written in four lines.

On the other hand, the used trademark of the case consists of the characters of "緑健青汁".

Then, when the Trademark is compared with the used trademark of the case, the two trademarks are common in a spelling of the characters of "緑健青汁." Then, it can be said that the character parts of "りよくけん" and "リヨクケン" of the characters of "りよくけん青汁" and "リヨクケン青汁" in the Trademark represent how to pronounce the parts of "緑健" of "緑健青汁". Also, it is reasonable that the characters of "RYOKUKEN AOJIRU" in the Trademark merely describe "緑健青汁" in alphabetic characters.

Then, the Trademark and the used trademark of the case are common in the characters of "緑健青汁," and it is reasonable that they are assumed to fall under "trademark that is written in different characters, Hiragana characters, Katakana characters, or Latin alphabetic characters, from the registered trademark but identical with the registered trademark in terms of pronunciation and concept" stated in a parenthesis of Article 50 of the Trademark Act. Therefore, the used trademark of the case can be deemed identical with the Trademark from generally accepted perspective.

Also, it can be said that the used product 1 of the case (the product which uses and powders 100% of barley young leaves blended with indigestible dextrin and dietary fiber chitosan) is included in the category of "dietary supplements in the form of grains, granules, capsules, tables, or liquids which is mainly made from barley young leaves or kale and is blended with indigestible dextrin."

(2) Regarding the evidence of distribution of the demandee product catalog 2 by the transaction document

A Although Evidence B No. 25, according to the demandee's allegation, is a bill relating to printing costs of the demandee product catalog 2 dated July 20, 2013 from Okumura Printing to RYOKUSAI CO., LTD which is one of the holders of trademark right, since the bill was submitted by reissuing the bill of Evidence B No. 14 in response to the inquiry dated July 20, 2016 in which the bill of Evidence B No. 14 could not specify that the printed matter requested to Okumura Printing was the demandee product catalog, it is obvious that it was created after the registration date of the demand for trial of the case.

B The demandee had consistently requested the work from printing of the demandee product catalog 2 to dispatch by direct mail to Okumura Printing, and the price "3,894,376 yen" described in the receipt dated November 20, 2013 to Okumura Printing

(Evidence B No. 27) agrees with the total billing amount relating to the transaction documents dated July 20, 2013 (Evidence B No. 15, B No. 16, B No. 25, and B No. 26).

However, even though it is natural that the transaction documents of the work relating to the distribution of the demandee product catalog 2 on the same date were submitted at the same time in the procedure of the trial of the case, Evidence B No. 15 and Evidence B No. 16 were submitted at different time from Evidence B No. 26 to Evidence B No. 28, and Evidence B No. 14 was reissued on the same date (Evidence B No. 25).

Furthermore, while the demandee product catalog 2 was printed 25 thousand copies (Evidence B No. 25) and it was shipped by 25 thousand direct mails (Evidence B No. 16), apart from that, the bill (Evidence B No. 26) proving that 9,698 dispatch operation (enclosing and label output) was carried out was submitted later (Evidence B No. 16 and Evidence B No. 26 are bills on the same day.), since these two works performed by Okumura Printing are to be performed as the dispatch work of the demandee product catalog and are duplicated as dispatch work, and as what overlap for dispatch work, they cannot be regarded as matching work.

C Since Evidence B No. 28, as described in 1 (2) above, is recognized as the delivery note relating to the dispatch work of the demandee product catalog 2, and it is described that the demandee product catalog 2 (25 thousand copies) was delivered from Okumura Printing to the demandee on July 10, 2013, the demandee alleges that the "detailed material" of 緑健青汁 (Ryokuken green juice) was distributed on July 19 and 20 at Kobe Convention Center. However, as described in B, it is not consistent with the allegation that 25 thousand copies of the demandee product catalog 2 were dispatched by direct mail and the fact that Okumura Printing carried out the dispatch work of the direct mail (Evidence B No. 16 and the like).

Also, although the demandee alleges that the "detailed material" of 緑健青汁 (Ryokuken green juice) distributed at Kobe Convention Center on July 19 and 20, 2013 was the demandee product catalog 1, a sender expiration date of a "delivery postage paid by addressee" postcard which is printed on the last page of the demandee product catalog 1 is "until March 15, 2013." Then, it means that the product catalog in which the postcard whose expiration date had passed was posted was distributed at Kobe Convention Center on July 19 and 20, 2013, and since it is unnatural as a method of advertisement, the demandee's allegation cannot be trusted.

D Then, it has to be assumed that the bill (Evidence B No. 26) was created so as to make the total compensation of the dispatch work (1(2) above) of the demandee product catalog 2 agree with the price (Evidence B No. 27) described in the receipt issued by Okumura Printing dated November 20, 2013, it cannot be said that the transaction documents (Evidence B No. 14 to B No. 16, and B No. 25 to B No. 28) relating to the demandee product catalog 2 have high credibility.

E Summery

As described above, since it cannot be said that the transaction documents (Evidence B No. 14 to B No. 16, and B No. 25 to B No. 28) relating to the demandee product catalog 2 have high credibility, it cannot be recognized that the demandee product catalog 2 was distributed within the period required to prove trademark use, based on the documents.

(3) Regarding the magazine submitted by the demandee

A Regarding the first issue of the magazine "WOC Nursing"

Although it is recognized that the first issue of the magazine "WOC Nursing" was released on July 20, 2013 by Igaku Shuppan Inc. (Evidence A No. 8), the magazine submitted by the demandee (Evidence B No. 3) and the magazine in the possession of National Diet Library (Evidence A No. 6) were submitted. According to the common description of the two, it is recognized that the magazine "WOC Nursing" is a monthly magazine scheduled to be released on the 20th of every month (Evidence A No. 6, A No. 8, and B No. 3).

B Regarding whether or not the magazine submitted by the demandee is a magazine actually distributed

Although the content posted on Pages 1 and 2 are different between the magazine submitted by the demandee and the magazine in the possession of National Diet Library, in the magazine submitted by the demandee, it is recognized that the advertisement of "barley young leaves 100% green juice" relating to "RYOKUSAI CO., LTD." is posted under the caption of "緑健青汁 (Ryokuken aojiru, Ryokuken green juice)" (the used trademark of the case) written in green large characters on that page. Then, in the lower right on Page 2, the description that the "detailed material" of 緑健青汁 (Ryokuken green juice) would be distributed at a congress which would be held at Kobe Convention Center on July 19 and 20, 2013 is recognized. On the other hand, in the magazine in the possession of National Diet Library, on Pages 1 and 2 thereof, the advertisements of the magazine "dialysis staff" and "Operation Nurse" relating to Igaku Shuppan Inc. are posted,

Considering that, in the advertisement posted in the magazine submitted by the demandee, as well as (1) above, the description of the used trademark of the case deemed identical with the Trademark from generally accepted perspective is recognized, the product posted in the advertisement is recognized as "the powdered origin of green juice using 100% of barley young leaves" (hereinafter, referred to as the "used product 2 of the case"), and it can be said that the used product 2 of the case is included in the category of the product "green juice bases mainly made from green color vegetables (including powder)" relating to the demand for trial.

However, although in the description posted on Page 2 of the magazine submitted by the demandee, the announcement that the "detailed material" of 緑健青汁 (Ryokuken green juice) would be distributed at the congress which would be held in Kobe Convention Center on the day before or on that day of the release date (July 20, 2013) of the first issue of the magazine "WOC Nursing" is made, since the magazine "WOC Nursing" is a monthly magazine and is distributed for at least about a month after the release, the posting which announces the distribution at the congress which would be held on the day before or on that day of the release date is unnatural.

Also, the demandee alleges that the magazine submitted by the demandee is the second printing of the first issue of the magazine "WOC Nursing," and contrary to prior expectations, since the magazine was sold out at the same time as printing, the advertisement relating to 緑健青汁 (Ryokuken green juice) was posted on the second printing.

However, it cannot be recognized that the first issue of the magazine "WOC Nursing" was urgently reprinted based on the evidence of the magazine "monthly DIABETES" (Evidence B No. 20 to B No. 24), and even if the sale of the first issue was well contrary to prior expectations, it is not possible to recognize the probability to the fact that the advertisements on Pages 1 and 2 were replaced despite the second printing

as an urgent response, in addition to the fact that the announcement to distribute the "detailed material" about 緑健青汁 (Ryokuken green juice) at the congress which would be held on the day before or on that day of the release date of the first issue was posted.

Other than that, the demandee did not submit a specific evidence for the fact that the magazine submitted by the demandee was printed as the second printing of the first issue of the magazine "WOC Nursing" and was distributed.

Therefore, the magazine submitted by the demandee cannot be regarded as the one actually distributed.

C A relation between the "detailed material" of the announcement posted in the magazine submitted by the demandee and the demandee product catalog 2 is also unclear.

D Summary

According to the above, since it cannot be recognized that the magazine submitted by the demandee was actually distributed, it cannot be said that the Trademark (including the trademark deemed identical with the Trademark from generally accepted perspective) was provided by being attached to the advertisement relating to the product within the period required to prove trademark use, based on the magazine submitted by the demandee.

Also, since the magazine submitted by the demandee cannot be regarded as the one actually distributed and the relation between the announcement posted in the magazine submitted by the demandee and the demandee product catalog 2 is unclear, it cannot be recognized that the demandee product catalog 2 was distributed at Kobe Convention Center on July 19 and 20, 2013 based on the description of the announcement to distribute the "detailed material" of 緑健青汁 (Ryokuken green juice) in the magazine submitted by the demandee.

Furthermore, no evidence showing the fact that the demandee product catalog 1 was distributed was submitted.

(4) Regarding the application postcard of the case (Evidence B No. 12 and B No. 13)

Although the demandee alleges that the application postcard of the case proved that "barley young leaves green juice '緑健青汁 (Ryokuken green juice)'" was distributed as a gift, since the postmark and the like of the application postcard are unclear and it is unclear when the demandee made the advertisement and the like for which the customer applied for, it cannot be said that the used product of the case was delivered to the customer within the period required to prove trademark use based of the existence of the application postcard.

(5) Regarding other evidences relating to the use of the demandee

It is not recognized that the respective Evidences B submitted by the demandee other than the above describe the Trademark (including the trademark deemed identical with the Trademark from generally accepted perspective. The same shall apply hereinafter.), and those are not recognized to concretely prove the distribution of the demandee product catalog and the magazine submitted by the demandee, and the distribution of the sales and the like of the used product of the case and the other use of the Trademark.

(6) Summary

As described above, according to the evidences relating to the submission of the demandee, even if "RYOKUSAI CO., LTD." which is one of the holder of trademark

right of the Trademark created the demandee product catalog posting the product with the Trademark for the used product of the case 1 included in the category of "dietary supplements in the form of grains, granules, capsules, tables, or liquids which is mainly made from barley young leaves or kale and is blended with indigestible dextrin" of the designated goods relating the demand for trial of the case, since no specific evidence proving that the demandee product catalog was distributed within the period required to prove trademark use was submitted, it cannot be recognized that the Trademark had been used.

Also, according to the evidences relating to the submission of the demandee, since the magazine submitted by the demandee cannot be regarded as the one actually distributed, it cannot be recognized that the Trademark had been used.

Furthermore, since no specific evidence proving that the used produce of the case was sold within the period required to prove trademark use was submitted, it cannot be recognized that the Trademark had been used.

There is no evidence for supporting that it is recognized that the Trademark had been used for any one of the designated goods relating to the demand for the trial of the case within the period required to prove trademark use.

3 Closing

As described above, it cannot be recognized that the demandee proves the fact that any one of the holder of trademark right, the exclusive right to use or non-exclusive right to use had used the Trademark for the designated goods pertaining to the request for trial of the case within the period required to prove trademark use in Japan.

Also, the demandee did not shows just causes for non-use of the Trademark in connection with the relevant the designated goods pertaining to the request for trial of the case.

Furthermore, although the demadee submitted the written statement dated March 7, 2017 after the conclusion of proceedings, although receiving the written statement, the body does consider it was not enough for influencing the judgment, and determined there is no need of resumption of trial.

Therefore, the registration of the Trademark shall be cancelled under the provisions of Article 50 of the Trademark Act.

Therefore, the trial decision shall be made as described in the conclusion.

March 31, 2017

Chief administrative judge: HORIUCHI, Jinko
Administrative judge: HAYAKAWA, Fumihiro
Administrative judge: TAMURA, Masaaki