

## Appeal Decision

Appeal No. 2015-15882

USA

Appellant KWIK LOK CORPORATION

Tokyo, Japan

Patent Attorney YAMAGUCHI, Sakuo

The case of appeal against the examiner's decision of refusal of Trademark Application No. 2014-45393 has resulted in the following appeal decision.

### [Conclusion]

The examiner's decision is revoked.

The trademark of the application shall be registered.

### [Reason]

#### 1 The trademark in the application

The trademark in the application is configured as indicated in Attachment, and the application for its registration was filed on Jun 4, 2014 by setting the goods as described in the application which belong to Class No. 20 as the designated goods.

Then, the designated goods were amended by a written amendment received on February 12, 2015 and a written amendment received on August 27, 2015 and submitted simultaneously with the demand for appeal in the original examination to Class No. 20 "Plastic clips for closing bags of bread products or packages of bread products; plastic bag opening stoppers for packages of bread products; plastic opening stoppers for bags of bread products.".

#### 2 Gist of reasons for refusal stated in the examiner's decision

The examiner's decision has found and judged that "the trademark in the application consists of a three-dimensional shape as indicated in Attachment, and cannot be recognized as being equipped with a unique form which is hard to expect from the purpose and function of the designated goods or a decorative shape giving a special impression and the like, and traders and consumers just recognize shapes themselves of

'plastic clips for closing bags of food; plastic bag opening stoppers for packages of food; plastic opening stoppers for bags of food' which are the designated goods, and the shapes themselves cannot be recognized to have force for distinguishing relevant products from others, so that it is recognized as a trademark consisting solely of a mark indicating the shape of the designated goods in a common way. Therefore, the trademark in the application falls under Article 3(1)(iii) of the Trademark Act. Furthermore, with the evidences submitted by the applicant, as a result of the use of the trademark in the application generally in the designated goods, it cannot be said that the trademark enables consumers to recognize the goods as being connected with a certain person's business, so that the trademark does not meet requirements stipulated in Article 3(2) of the Trademark Act.", and rejected the application.

### 3 Judgment by the body

#### (1) Regarding applicability to Article 3(1)(iii) of the Trademark Act of the trademark in the application

The trademark in the application, as indicated in Attachment, is a rectangular plate which has a U-shaped hole in the center. A notch is cut in toward the center hole from the outside, and a notched part has a shape entering the inside in the manner of a hook toward the center hole. The trademark consists of a shape which has projecting portions at a right upper corner and a left lower corner, and a light lower part and a left upper part, and has recessed portions below the right upper corner projecting portion and above the left lower projecting portion. The shape consists of the center hole for binding a bag or a package, and the notched part functioning as a passage for inserting the bag or the package in the hole, in the "plastic clips for closing bags of bread products or packages of bread product; plastic bag opening stoppers for packages of bread products; and plastic opening stoppers for bags of bread products" which are the designated goods of the application, and thus is recognized to indicate one embodiment which is generally adopted in goods. Also, it can be said that the projecting/recessed portions on the right and left sides of the trademark in the application are nothing more than the shape selected for the reasons of a function or a good appearance.

Then, it is reasonable to understand that the three-dimensional shape of the trademark in the application still remains in a thing indicating the shape of the goods in a common way, and it should be said that the shape of the designated goods of the trademark in the application are within a range which can be expected by the consumers.

Therefore, as the trademark in the application only indicates the shape of the goods in the common way, even if it is used for its designated goods, it falls under

Article 3(1)(iii) of the Trademark Act.

(2) Regarding Article 3(2) of the Trademark Act

A The appellant (the applicant) alleges that the trademark in the application, even if it falls under Article 3(1)(iii) of the Trademark Act, enables consumers to recognize the goods as being connected with a certain person's business as a result of use, as provided in Article 3(2) of the Trademark Act, and submitted Evidence A No. 1 to A No. 10, so that we will examine whether or not the trademark in the application meets the requirements stipulated in Article 3(2) of the Trademark Act, as below.

(A) Similarity of trademark and using start period and the like

KWIK LOK JAPAN LTD. (hereinafter referred to as the "Japanese subsidiary of the applicant"), which is a subsidiary company having the same holding company, has continuously manufactured and sold "plastic clips for closing bags of bread products or packages of bread products; plastic bag opening stoppers for packages of bread products; and plastic opening stoppers for bags of bread products" (hereinafter, referred to as the "goods in the application") which consist of three-dimensional shapes with the same form as the trademark in the application, in Japan, since 2007 until now (Evidence A No. 2, A No. 3, A No. 7, and A No. 8). Then, according to the investigation by ex officio in the body, the fact that companies other than the Japanese subsidiary of the applicant have manufactured and sold opening stoppers for bread product bags with the same shape as the trademark in the application, could not be found.

(B) Sales performance and the like

Concerning the sales performance of the goods in the application in our country by the Japanese subsidiary of the applicant, manufacturing and sales were started from 2007, and 18 billion or more pieces have been sold until now, and on the average from fiscal 2008 to 2013, 2,600 million or more pieces have been sold per year, and it has sales of 800 million to 1 billion yen every year (Evidence A No. 2). Also, the goods in the application are delivered to factories all over the country of each of Yamazaki Baking Co., Ltd, Pasco Shikishima Corporation, and Fuji Baking Group, which are three major companies in the baking industry, and total sales volume of those three companies reaches about 1,940 million pieces per year (Evidence A No. 3).

Then, concerning the sales volume of the goods in the application, according to the estimation of production quantities of loaves of bread calculated by the applicant or submitted articles in newspapers or magazines, it can be surmised that a share of the goods in the application in opening stoppers for bags of bread products is close to 100% in relation to loaves of bread, and is almost exclusive in the whole of bread products (Evidence A No. 4, A No. 5, A No. 8).

(C) Promotional advertising and the like

It is recognized that the Japanese subsidiary of the applicant had exhibited the goods in the application at exhibitions for industries of food machinery, packaging machinery, packaging materials, and the like such as "FOOMA JAPAN" and "JAPAN PACK" 25 times since 2007 until 2014, and had distributed 100-1000 copies of catalogs or leaflets about the goods in the application every time (Evidence A No. 6). Also, according to the submitted materials, the goods in the application were taken up at least 4 times by newspapers and magazines and 7 times by televisions, about the fact that those are goods connected with the handling of the Japanese subsidiary of the applicant (Evidence A No. 8 and Evidence A No. 9).

(D) Questionnaire result

According to questionnaires mainly conducted to persons in charge of makers for manufacturing and selling bread products, who are the consumers of the trademark in the application, 90% of respondents seeing the goods in the application recognized that those are the goods connected with the handling of the Japanese subsidiary of the applicant, and even in the remaining 10%, there is no person who responded with names of other companies (Evidence A No. 10).

B Summary

According to A mentioned above, the goods in the application have been continuously manufactured by the Japanese subsidiary of the applicant for about 9 years since 2007 until now, and about 2,600 million pieces of that are sold over the country every year, and it is recognized that the almost 100% of the share is possessed in the opening stoppers for bags of loaves of bread. Furthermore, the promotional advertising of the goods in the application has been continuously carried out by setting up a booth at the exhibitions for the industry and the like, and the awareness in the makers for manufacturing and selling the bread products, which are the main consumers, reaches 90%.

Then, it is reasonable that the trademark in the application came to enable consumers to recognize the goods as being connected with the business of the applicant, as a result of the continuous use for a long period by the Japanese subsidiary of the applicant, concerning "plastic clips for closing bags of bread products or packages of bread products; plastic bag opening stopper for packages of bread products; plastic opening stopper for bags of bread products" which are the designated goods of the trademark in the application.

(3) Conclusion

As mentioned above, the trademark in the application falls under Article 3(1)(iii)

of the Trademark Act, but meets the requirements stipulated in Article 3(2) of the Trademark Act. Therefore, the trademark in the application should be registered, and the examiner's decision shall be definitely revoked.

No reason for refusal about the application is found.

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

May 10, 2016

Chief administrative judge: TANAKA, Koichi

Administrative judge: SAKAI, Fukuzo

Administrative judge: TOYOIZUMI, Hirotaka

Attachment (the trademark in the application)

