

## Appeal decision

Appeal No. 2018-9768

Chiba, Japan

Appellant

KIKKOMAN CORPORATION

Patent Attorney

ASAMURA PATENT OFFICE

The case of appeal against the examiner's decision of refusal of Trademark Application No. 2015-78506 has resulted in the following appeal decision:

### Conclusion

The examiner's decision is revoked.

The trademark in the Application shall be registered.

### Reason

#### 1 The trademark in the Application

The trademark in the Application is configured as indicated in Attachment 1, and registration application was filed on August 17, 2015 as a position mark by setting Class 30 "Soy sauce [soya sauce]" as the designated goods. Thereafter, the designated goods in the application was amended to Class 30 "Unheated soy sauce" by the written amendment submitted on January 23, 2017 in the original examination.

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

The examiner's decision acknowledged and determined that "Actually, various decorative characters, figures, and colors other than a mark indicating the source of the goods are used for the purpose of creating an aesthetic impression or attracting consumers' attention in a package of a product and the like. Then, in the business field of "soy sauce", a large number of examples are found in which horizontal-striped figures are arranged on an upper portion and a lower portion on a front side of a package of a product similarly to the trademark in the Application, and in addition, the character of "生 (nama; raw)" is only understood as having a meaning of "unheated" in relation to the designated goods in the application. In consideration of this, it is acknowledged that even if the trademark in the Application is used for the package of the designated goods and the like, consumers coming in contact with this only

understand a kind of a figure that may be used for a package to simply creating an aesthetic impression and the like and a quality of the product that is not heated. Furthermore, the applicant mentioned that, as a result of wide use of the trademark in the Application, the trademark in the Application is a trademark by which consumers are able to recognize the goods as those pertaining to a business of a particular person. However, it cannot be said that consumers are able to recognize the goods as those pertaining to a business of a particular person according to the submitted means of evidence. Therefore, the trademark in the Application falls under Article 3(1)(vi) of the Trademark Act", and this application was rejected.

### 3 Judgment by the body

#### (1) Regarding the trademark in the Application

The trademark in the Application is configured as indicated in Attachment 1 and is a position mark in which a figure having a plurality of horizontal stripes including lavender, ultramarine, white, gold, and pink is applied on each of the upper portion and the lower portion on the front side of the package container and the character of "生 (nama; raw)" is applied between the center and the lower portion on the front side of the package container. As "Detailed Description of a Trademark", it is described that "the trademark for which registration is sought (referred to as "trademark" below) is a position mark in which a position where a mark is applied is specified and includes the horizontal-striped figure on the upper portion on the front side of a body of a package container of a product (however, partially filled with color at the center), the horizontal-striped figure on the lower portion on the front side of the body, and the character of "生 (nama; raw)" expressed by red and gold applied between the center and the lower portion on the front side of the body. In the horizontal-striped shape on the upper portion on the front side of the body, lavender, ultramarine, white, gold, and white are applied in this order from the top, and the middle portion is filled with ultramarine. In the horizontal-striped shape below, white, ultramarine, white, lavender, white, pink, white, lavender, white, pink, white, ultramarine, white, pink, white, lavender, white, and ultramarine are applied in this order from the top. The horizontal-striped shape on the lower portion on the front side of the body has a configuration in which colors including ultramarine, white, lavender, white, pink, white, ultramarine, white, and lavender are applied in this order from the top. It must be noted that dotted lines shown are for

explanation purposes only, and do not constitute a part of the trademark". The designated goods are Class 30 "Unheated soy sauce".

Incidentally, in the business field handling the designated goods in the application, various decorative figures and colors are widely applied to the package containers of the products in general for the purpose of improving the attraction of the product and attracting consumers' attention. As in the examples indicated in the original examination (refer to Attachments 2(1) to 2(3)), many cases have appeared where unheated soy sauce on which the horizontal-striped shapes are applied on the upper portion and the lower portion of the package container thereof is manufactured and sold, as affairs now stand.

Furthermore, in the configuration of the trademark in the Application, the character of "生 (nama; raw)" applied between the center and the lower portion on the front side of the package container can be easily understood as indicating "unheated soy sauce" in relation to the designated goods in the application as indicated in the examples indicated in the original examination (refer to Attachments 2(4) and 2(5)).

Then, it can be said that the plurality of horizontal-striped shapes are generally applied on the upper portion and the lower portion on the front side of the package container of the unheated soy sauce and the character of "生 (nama; raw)" is generally applied to the unheated soy sauce, as affairs now stand.

Therefore, whether or not the plurality of horizontal-striped shapes applied on the upper portion and the lower portion on the front side of the package container of the unheated soy sauce and the character of "生 (nama; raw)" applied between the center and the lower portion on the front side of the package container, which are the trademark in the Application, constitute a trademark by which consumers are able to recognize the goods as those pertaining to a business of a particular person is examined and determined as follows.

## (2) Regarding used condition of the trademark in the Application

According to the allegation of the appellant and respective items of Evidence A submitted by the appellant, the use condition of the trademark in the Application is as follows.

### A Time of starting the use

The appellant launched unheated soy sauce named "いつでも新鮮しぼりたて生しょうゆ 200 ml (always fresh raw soy sauce 200 ml) (referred to as "soy sauce of the case" below) in August, 2011. A character of "生 (nama; raw)" expressed by red and gold is arranged between the center and a lower portion of a package container of the soy sauce of the case, and a plurality of horizontal-striped shapes including lavender,

ultramarine, white, gold, and pink are arranged on an upper portion and the lower portion of the package container. The character of "生 (nama; raw)" and the horizontal-striped shape arranged on the lower portion of the package container are the same as those of the trademark in the Application, and the horizontal-striped shape arranged on the upper portion of the package container can be identified as that of the trademark in the Application (Evidence A No. 2, A No. 86, A No. 101, A No. 102, and A No. 149).

Thereafter, it is acknowledged that the horizontal-striped shapes that can be acknowledged to be the same as the trademark in the Application are applied on the upper portion and the lower portion of the package container of the soy sauce of the case launched in 2012 (Evidence A No. 93) and have been continuously used up to the present day (Evidence A No. 27 to A No. 74, A No. 78 to A No. 84, A No. 93 to A No. 100, A No. 110, A No. 115, A No. 118 to A No. 121, A No. 125 to A No. 127, A No. 131 to A No. 133, A No. 135, A No. 141, A No. 151, A No. 157 to A No. 176, and A No. 189).

#### B Used region

According to "point-of-sale situation (shop rate) survey of about 4000 monitor shops throughout Japan, SRI (panel survey on retail stores in Japan) by the sales investigation company INTAGE Inc." submitted by the appellant, the sales rate of the soy sauce of the case has been about 100% in general supermarkets since 2011, and the sales rate has been about 100% in large and middle-sized supermarkets since 2012 and 2013. Furthermore, in convenience stores, the sales rate has increased year by year, and the soy sauce of the case is sold in about 66% of stores as of October in 2017 (Evidence A No. 22 and A No. 154).

Then, it is estimated and acknowledged that the soy sauce of the case has been sold in supermarkets and convenience stores in Japan since the start of sale.

Note that products such as soy sauces are usually displayed and sold in a mode, in which appearance of the product may be confirmed, in the stores. In a case of a display method in which entire appearance of the product that is the soy sauce of the case cannot be visually recognized; that is, in a case where a product name and the like applied in three lines between the center and the lower portion of the package container are hidden by a store shelf and cannot be visually recognized, it can be seen that the soy sauce of the case is displayed and sold in a mode in which the horizontal-striped shape arranged on the upper portion of the product container may be confirmed (Evidence A No. 84 and A No. 151).

#### C Sales volume and market share

In the seasoning market in which it is said that "sales volume of one billion yen means winning a big market" (Evidence A No. 83), regarding the sales volume of soy sauces named "いつでも新鮮" (always fresh) series including the soy sauce of the case, the sales volume of the series of products including the soy sauce of the case has been greatly increased in some years after the start of sale, and the series of products are acknowledged as a major hit product having a share equal to or more than 80% in the sealed soy sauce market according to reports such as "Since the soy sauce is classic seasoning, it is hard to create a popular product. This is 'common sense' in the soy sauce market. However, there is a product that makes a rapid breakthrough by breaking the common sense. ... That is 'いつでも新鮮しぼりたて生しょうゆ' (always fresh raw soy sauce) series. The sales volume in this period (ending in March in 2001) is two billion yen and is expected to increase by about 80% from the previous period (1.1 billion yen)" ("Toyo Keizai Online" dated on December 27, 2012, Evidence A No. 110), "A table bottle including 200 ml which has been sold in 2011 has explosive sales" ("Josei seven" released on April 17, 2014, Evidence A No. 95), "'いつでも新鮮' (always fresh)' series has become a big hit. The sales volume is 1.1 billion yen in 1999 and 4.5 billion yen in 2001, and the goal of this year is 5.5 billion yen" ("Yuukan Fuji" eighth page dated on June 11, 2014, Evidence A No. 83), and "The product has an overwhelming share over 80% in the sealed category, and the sales in the latest year has exceeded 10 billion yen that is two orders greater than the sales volume in the last year" ("The Japan Food Journal" fourth page dated on February 27, 2017, Evidence A No. 179).

Among these, the sales volume of the soy sauce of the case has been increased about eightfold in five years from 2011 to 2015, and the sales volume in 2015 was 1.3 billion yen. The sales volumes in 2016 and 2017 have been increased to 1.4 billion yen. It is acknowledged that the share in the sealed soy sauce market has been maintained to be high, at 12% to 15% since the start of sale (Evidence A No. 21 and A No. 153).

#### D Advertisement

The appellant has continuously advertised TV commercials displaying the soy sauce of the case throughout Japan since 2011 up to the present day. The commercials have been broadcasted in which an entertainer holds the soy sauce of the case, or the package container of the soy sauce of the case is displayed large on a screen (Evidence A No. 25 to A No. 76 and A No. 157 to A No. 178).

Furthermore, the appellant runs advertising of the soy sauce of the case in media such as newspapers, and runs advertising, in which the package container of the

soy sauce of the case is positioned at the center, in full-page advertisement of national newspapers such as The Nikkei and The Asahi Shimbun (Evidence A No. 77 to A No. 79).

#### E Introduction by third party

Not only functional points such that the soy sauce of the case is unheated soy sauce and the soy sauce of the case is included in a sealed package container (bottle), but also the design of the soy sauce of the case has often been introduced in newspapers and magazines together with photos of the soy sauce of the case (Evidence A No. 2, A No. 81 to A No. 83, A No. 94, A No. 95, A No. 101, A No. 102, A No. 110, A No. 116, and A No. 150). For example, "the table size of 200 ml has a white-based design and is prominent. It is considered that the main sales channel is supermarkets, and since the white-based table bottle is prominent, the bottle has high display effects" ("Nikkei marketing watcher electronic edition" dated on August 19, 2011, Evidence A No. 102), and "the design of the bottle is as important as the function of the bottle. ... The design of the table bottle is changed to a new design in which blue and purple lines are applied" ("Toyo Keizai Online" dated on December 27, 2012, Evidence A No. 110).

Furthermore, the soy sauce of the case has been introduced in the programs broadcasted by Fuji Television, TV Asahi, TV TOKYO, and the like every year from 2012 to 2016, and it can be seen that the package container of the soy sauce of the case has been displayed. For example, it can be seen that the soy sauce of the case has been introduced in a segment making a feature of product packages (Evidence A No. 136 to A No. 147).

#### F Others

As described in (1) A above, it is reasonable to understand that the horizontal-striped shape included in the trademark in the Application is recognized as a kind of horizontal-striped shape that is generally used as a pattern applied to the upper portion and the lower portion of the package container of the unheated soy sauce. However, according to the investigation by an ex officio in the body, the fact cannot be found such that a package container in which a horizontal-striped shape having 36 stripes of five colors having different vertical widths is applied on the upper portion of the package container and a horizontal-striped shape having nine stripes of four colors having different vertical widths is applied on the lower portion of the package container as in the trademark in the Application is used by a person other than the appellant from among the package containers of the unheated soy sauces. In addition, the fact cannot be found such that horizontal-striped shapes of a plurality of colors having a large number of different vertical widths, similar to the trademark in the Application, are

applied to the upper portion and the lower portion of the package container and are used by a person other than the appellant.

### (3) Judgment

According to (2) above, the soy sauce of the case that is the product of "unheated soy sauce" has maintained the appearance, since the start of sale in 2011 up to the present day, in which the horizontal-striped figure that can be identified as or is acknowledged to be the same as the trademark in the Application is applied on each of the upper portion and the lower portion of the package container and the character of "生 (nama; raw)" that is acknowledged to be the same as the trademark in the Application is applied at the position between the center and the lower portion of the package container. The advertising focusing on the appearance of the package container has been continuously made throughout Japan through TV commercials, newspapers, magazines, and the like, and the soy sauce of the case has been sold in supermarkets and convenience stores across Japan. The soy sauce of the case has an extremely high sales volume and an extremely large share for the same kinds of goods, and has become a big hit. As a result, it is reasonable to acknowledge that the horizontal-striped shapes applied on the upper portion and the lower portion of the package container and the character of "生 (nama; raw)" applied at the position between the center and the lower portion of the package container are recognized by consumers as a mark for distinguishing relevant products from others.

Therefore, when the trademark in the Application is used for the designated goods "Unheated soy sauce." as a position mark, it can be said that consumers of the goods recognize the trademark in the Application as a mark identifying the source of goods related to the business of the appellant.

Then, it cannot be said that the trademark in the Application is a trademark by which consumers are not able to recognize the goods as those pertaining to a business of a particular person.

Therefore, the trademark in the Application does not fall under Article 3(1)(vi) of the Trademark Act.

### (4) Summary

As described above, since the trademark in the Application does not fall under Article 3(1)(vi) of the Trademark Act, the examiner's decision made to refuse the application because of this shall be definitely cancelled.

No reason for refusal of the application is found.

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

July 8, 2019

Chief administrative judge: KANEKO, Naohito  
Administrative judge: IWASAKI, Yasuko  
Administrative judge: ISHIZUKA, Rie

## Attachment

### 1 The trademark in the Application

(1) Trademark for which registration is sought (regarding color, refer to original)



省略 omitted

(2) Detailed description of the trademark

"The trademark for which registration is sought (referred to as "trademark" below) is a position mark in which a position where a mark is applied is specified and includes the horizontal-striped figure on the upper portion on the front side of a body of a package container of a product (however, partially filled with color at the center), the horizontal-striped figure on the lower portion on the front side of the body, and the character of "生 (nama; raw)" expressed by red and gold applied between the center and the lower portion on the front side of the body. In the horizontal-striped shape on the upper portion on the front side of the body, lavender, ultramarine, lavender, ultramarine, lavender, ultramarine, lavender, ultramarine, lavender, ultramarine, lavender, ultramarine, white, gold, and white are applied in this order from the top, and the middle portion is filled with ultramarine. In the horizontal-striped shape below, white, ultramarine, white, lavender, white, pink, white, lavender, white, pink, white, ultramarine, white, pink, white, lavender, white, and ultramarine are applied in this order from the top. The horizontal-striped shape on the lower portion on the front side of the body has a configuration in which colors including ultramarine, white, lavender, white, pink, white, ultramarine, white, and lavender are applied in this order from the top. It must be noted that dotted lines shown are for explanation purposes only, and do not constitute a part of the trademark".

2 Examples indicated in the original examination

(1) In the online store of "株式会社浅利佐助商店 (Kabushikigaisha Asari sasuke shouten)", a horizontal-striped shape is used on each of the upper portion and the lower portion of the package container of the product named "白神大豆しょうゆ (Shirakami daizu soy sauce)".

(<http://fukuzyu.shop-pro.jp/?pid=87522519>)

(2) In the web site of "Morita Co., Ltd.", horizontal-striped shapes are used on the upper portion and the lower portion of the package container of the product named "特選減塩さしみたまり (special low salt tamari soy sauce for sashimi)".

(<http://moritakku.com/products/shouyu/sashimi>)

(3) In the web site of "Yamamori Inc.", horizontal-striped shapes are used on the upper portion and the lower portion of the package container of the product named "おいしさそのまま減塩しょうゆ(塩分45%カット) (deliciousness keeping low-salt soy sauce (cut 45% of salt))".

([http://www.yamamori.co.jp/product/syouyu/genen\\_sashimi.html](http://www.yamamori.co.jp/product/syouyu/genen_sashimi.html))

(4) In the web site of "YAMASA CORPORATION", under the headline of "ヤマサ特撰生(なま (nama; raw)) しょうゆ"(YAMASA special selection of raw soy sauce", it is described that "since raw soy sauce is not heated, the features of the soy sauce include mild aroma and flavor and bright color. This feature brings out the taste of ingredients".

(<http://www.yamasa.com/products/home/shoyu/nama-shoyu/>)

(5) In the web site of "YUGETA SYOUYU, INC.", under the headline of "raw soy sauce "ginjo pure soy sauce"", it is described that "General raw soy sauce is produced as an industrial product. Although our soy sauce is not sterilized by heat, yeast and lactobacillus are filtered by microfiltration, and our soy sauce can be distributed at ordinary temperature".

(<http://yugeta.com/shohin/nama.html>)