

**IN THE HEARINGS AND MEDIATION DEPARTMENT OF THE  
INTELLECTUAL PROPERTY OFFICE OF SINGAPORE**

**[2022] SGIPOS 13**

Trade Mark No. 40201818395R

**IN THE MATTER OF A TRADE MARK APPLICATION BY  
APPLE INC.**

*... Applicant*

**AND OPPOSITION THERETO BY  
SWATCH AG (SWATCH SA) (SWATCH LTD.)**

*... Opponent*

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**FOUNDATIONS OF DECISION**

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**Swatch AG (Swatch SA) (Swatch Ltd.)**

**v**

**Apple Inc.**

**[2022] SGIPOS 13**

Trade Mark No. 40201818395R  
Principal Assistant Registrar See Tho Sok Yee  
25 April 2022

21 July 2022

**Principal Assistant Registrar See Tho Sok Yee:**

**Introduction**

1 The parties in this case are no strangers to each other. The present dispute has a sister case decided by me in 2018, but the parties' history goes beyond that. The Applicant, Apple Inc. (the "Applicant"), and the Opponent, Swatch AG (Swatch SA) (Swatch Ltd.) (the "Opponent"), have been embroiled in legal disputes worldwide, including over the trade marks "ONE MORE THING", "SWATCH ONE MORE THING", "THINK DIFFERENT" and "TICK DIFFERENT".

**Procedural history**

2 The Applicant applied to register the trade mark **THINK DIFFERENT** (the "Application Mark") in Singapore on 12 September 2018 in Class 9 in respect of the following specification:

Computers; computer hardware; computer peripherals; computer software; network servers; smartwatches; smartphones; wrist-mounted smartphones; watches that communicate data to smart phones; smartphones in the shape of a watch; all parts and fittings for all the aforesaid goods; all included in Class 9.

3 The Opponent filed its Notice of Opposition to oppose the registration of the Application Mark on 10 May 2019. The Applicant filed its Counter-Statement on 5 September 2019.

4 The Opponent filed its evidence in support of the opposition on 9 October 2020. The Applicant filed its evidence in support of the application on 6 August 2021. Following the close of evidence, a pre-hearing review was held on 20 December 2021. The opposition was heard on 25 April 2022.

### **Ground of opposition**

5 The Opponent’s sole ground of opposition is based on Section 7(6) of the Trade Marks Act 1998 (the “Act”), alleging that the Applicant made its application to register the Application Mark in bad faith.

### **Opponent’s evidence**

6 The Opponent’s evidence is set out in a statutory declaration made on 23 September 2020 in Switzerland by Mireille Koenig, Chief Legal Officer Brands and Countries at The Swatch Group AG (The Swatch Group SA) (The Swatch Group Ltd) (“The Swatch Group”). The Swatch Group is the entity that manages the Opponent’s trade marks.

### **Applicant’s evidence**

7 The Applicant’s evidence is set out in (i) a statutory declaration made on 4 August 2021 in the United States of America by Thomas R. La Perle, Senior Director of the Applicant’s Legal Department (the “Applicant’s SD”); and (ii) a supplementary statutory declaration made on 1 September 2021 in the United States of America by the same deponent.

### **Applicable law and burden of proof**

8 The applicable law is the Act. There is no overall onus on the Applicant before the Registrar during examination or in opposition proceedings. The undisputed burden of proof in the present case falls on the Opponent.


### **Background**

#### ***The Applicant***

9 The Applicant is incorporated in California in the United States of America. Its key products include mobile communications and media devices, personal computers, and smartwatches. Its products bear highly recognisable names, such as “iPhone”, “iPad”, “iMac” and “Apple Watch”. Since the launch of the Apple Watch in 2014, and its official sale since 2015, it has become one of the Applicant’s key products.

#### ***The Opponent***

10 The Opponent is a Swiss company and one of the subsidiaries of The Swatch Group. The Swatch Group and its subsidiaries collectively own many brands of Swiss watches, including SWATCH, OMEGA, TISSOT, LONGINES and RADO.

11 The Opponent is the registered proprietor of the mark  (“the Opponent’s Mark”) in Class 9 (TM No. 40201523105X) and Class 14 (TM No. 40201522634S). The Opponent’s Mark was registered after an earlier opposition by the Applicant failed: see *Apple Inc. v Swatch AG (Swatch SA) (Swatch Ltd.)* [2018] SGIPOS 15 (the “earlier ‘Tick Different’ opposition”). While the earlier “Tick Different” opposition put in issue whether the marks “Tick Different” and “THINK DIFFERENT” were

confusingly similar, the present dispute concerns a different issue, that of alleged bad faith on the part of the Applicant in applying to register the Application Mark. We now turn to this sole ground of opposition.

### **Ground of opposition under Section 7(6)**

12 Section 7(6) of the Act reads:

(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.

13 The relevant date in these opposition proceedings is the date of application for registration of the Application Mark, being 12 September 2018.

### ***Opponent's pleading***

14 It is worth setting out the Opponent's pleading under Section 7(6) here:

5. The Application was made in bad faith.

6. As mentioned above, the Opponent's Marks have been extensively applied for and registered in various jurisdictions, including in Singapore. Furthermore, the Opponent's marks have been used actively and continuously before the filing date of the Application Mark, such that the Opponent's Marks are and have become reputable and distinctive of the Opponent and its goods in Singapore and elsewhere. In these circumstances, the Applicant cannot seriously be said to have any intention of using the Application Mark in relation to the goods claimed under the Application, particularly when the goods sought to be registered for (*sic*) are identical or similar to the goods covered by the Opponent's Marks. Therefore, the Application Mark was filed with the intention to ride upon the Opponent's substantial goodwill and reputation in the Opponent's Marks and to benefit from a favourable association with the Opponent and/or the Opponent's Marks.

7. In Singapore specifically, the Applicant had previously failed in an attempt to prevent the Opponent from registering the Opponent's Marks (Registered Trade Mark Nos. 40201523105X and 40201522634S) in Classes 9 and 14. In light of these circumstances, it can be said that the Applicant intends to use the Application Mark as a tool to oppose others for any application, registration, and use of any two-word

expression with the word “different” being the last word in the expression.

8 Thus, the Applicant cannot validly claim to be the bona fide proprietor of the Application Mark in relation to the goods covered under the Application Mark.

15 Based on the above, the Opponent’s allegations of the Applicant’s bad faith can be summarised as follows:

(a) No intention to use

“the Applicant cannot seriously be said to have any intention of using the Application Mark in relation to the goods claimed under the Application”: [6] of the Opponent’s pleading quoted in the preceding paragraph.

(b) Intention to ride on the Opponent’s goodwill and reputation and to benefit from a favourable association

“the Application Mark was filed with the intention to ride upon the Opponent’s substantial goodwill and reputation in the Opponent’s Marks and to benefit from a favourable association with the Opponent and/or the Opponent’s Marks”: [6] of the Opponent’s pleading quoted in the preceding paragraph.

(c) Intention to oppose based on the Application Mark

“the Applicant intends to use the Application Mark as a tool to oppose others for any application, registration, and use of any two-word expression with the word “different” being the last word in the expression”: [7] of the Opponent’s pleading quoted in the preceding paragraph.



(d) Not the bona fide proprietor of the Application Mark

“the Applicant cannot validly claim to be the bona fide proprietor of the Application Mark in relation to the goods covered under the Application Mark”: [8] of the Opponent’s pleading quoted in the preceding paragraph.

***Preliminary points***

16 In theory and practice, there are several possible heads of bad faith under which Section 7(6) can be established. Examples include the applicant not being the owner of the mark nor entitled to register the mark; the applicant not having a *bona fide* intention to use the mark; and, possibly, the specification being too wide.

17 I am mindful that the Opponent’s pleaded head of bad faith under Section 7(6) is very specific, as it ought to be. The heart of the claim resides in [8] of the grounds of opposition set out above, that “*Thus, the Applicant cannot validly claim to be the bona fide proprietor of the Application Mark in relation to the goods covered under the Application Mark*”.

18 Other mental elements linked to this allegation are found in the preceding paragraphs, at [6] of the grounds of opposition: “*the Applicant cannot seriously be said to have any intention of using the Application Mark*”, “*the Application was filed with the intention to ride upon the Opponent’s substantial goodwill and reputation in the Opponent’s Marks and to benefit from a favourable association with the Opponent and/or the Opponent’s Marks*”; and at [7] of the grounds of opposition: “*the Applicant intends to use the Application Mark as a tool to oppose others*”.

19 I observe the internal contradiction in the allegations in [6] of the Opponent’s grounds of opposition. On the one hand, it alleges that the Applicant had no intention to use the Application Mark. On the other, it claims that the Applicant intended to ride on the Opponent’s reputation in the Opponent’s Marks and benefit from a favourable association. Incidentally, my counterpart at the UK Intellectual Property Office, in his decision *Apple Inc. v Swatch AG (Swatch SA) (Swatch Ltd)* O-531-17 at [57], also opined that “*what does strike me is that having no intention to use ... is diametrically opposed to the pleaded allegation which suggests that some form of use will be made, otherwise there would be no ... benefit from reputation.*” (That UK decision pertained to the two marks “SWATCH ONE MORE THING” and “ONE MORE THING”.)

20 My further difficulty with the Opponent’s pleading at [6] of its grounds of opposition is that the Applicant’s alleged lack of intention to use the Application Mark is attributed to the Opponent’s active and continuous use of its “Tick Different” mark such that “Tick Different” has become reputable and distinctive of the Opponent and its goods. It is hard to see the causal connection, and, as noted below, the Opponent appears to have abandoned this line of argument at the hearing.

***Starting point***

21 This opposition needs to be understood in the light of the earlier “Tick Different” opposition. That dispute involved the same parties (where the Applicant here was the opponent there, and vice versa), and I made the following observations at [66] to [68]:

66 I would first note that since the 10<sup>th</sup> Edition of the Nice Classification<sup>1</sup> (2016 version) came into force in Singapore on 1 January 2016, “smartwatches” have been recognised in Class 9 and are no longer acceptable in Class 14. Before this, as a matter of practice, the Registry of Trade Marks accepted “smartwatches” in both Class 9 and Class 14.

67 The relevant date in this opposition is 2 November 2015, being the application date of the Applicant’s Class 9 Application and Class 14 Application. Hence, the 10<sup>th</sup> Edition of the Nice Classification (2016 version) would not apply. In any case, the abovementioned development in classification practice does not provide a straightforward answer here. This is because the competing specifications of goods are already in Class 9 (the Opponent’s Mark) and Class 14 (the Application Mark). The real question is whether “Computers; computer hardware” in Class 9 and “watches, wristwatches” in Class 14 are similar goods. On that question, the oft-cited *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 281, 286 offers non-exhaustive factors for consideration.

68 Further, there may be an issue whether, when the application to register the Opponent’s Mark was filed almost twenty years back in 1999, it was reasonably envisaged that “Computers; computer hardware” would encompass computers in the form and nature of “watches, wristwatches” in another class of goods. This is such that I would not dismiss offhand the Applicant’s submission that it would be an “*unreasonable and unfair expansion*” of the Opponent’s Specification and the Opponent’s monopoly rights in relation thereto, if I were to find “Computers; computer hardware” and “watches, wristwatches” similar. However, in the absence of more in-depth submissions from parties, I make no finding on the point.

22 The Applicant states its reason for filing this opposed application at [28] and [29] of its written submissions:

28 Further, the Application was filed in the light of the learned Registrar’s *obiter* comment at [68] of the Swatch

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<sup>1</sup> The Nice Classification (to which Singapore is a contracting party) is an international system used to classify goods and services for the purposes of the registration of trade marks. It is administered by the World Intellectual Property Organization, a specialised United Nations agency. The Nice Classification is regularly reviewed and revised.

Decision. She expressed doubt on whether the specification “Computers; computer hardware” in the Applicant’s Registered THINK DIFFERENT mark (TM No. T9907895H) would encompass computers in the form and nature of “watches, wristwatches” in another class of goods. This leaves a potential gap in the Applicant’s protection of its rights, namely, the protection of the Applicant’s exclusive rights to use its longstanding THINK DIFFERENT Marks in relation to Apple Watches. To address this, the Application was filed.

29 In light of these legal developments, it was commercially understandable and sensible for the Applicant to have filed the Application to also include “smartwatches; smartphones; wrist-mounted smartphones; watches that communicate data to smart phones; smartphones in the shape of a watch”. The Applicant cannot be faulted for protecting its interests.

***First allegation: No intention to use***

*Opponent’s arguments*

23 As set out at [6] of the Opponent’s pleading, it contends that “*the Applicant cannot seriously be said to have any intention of using the Application Mark in relation to the goods claimed under the Application*”.

24 The Opponent drew my attention to a number of trade mark applications filed by the Applicant in various jurisdictions:

| <b>Applicant’s “THINK DIFFERENT” Registered Marks</b> |                            |                     |                              |                             |   |
|---|----------------------------|---------------------|------------------------------|-----------------------------|---|
| <b>S/No.</b>  | <b>Date of Application</b> | <b>Jurisdiction</b> | <b>Registration no.</b>      | <b>Date of registration</b> | <b>Page Reference in the Applicant’s SD</b> |
| 1   | 24 Feb 2016                | Cambodia            | KH/M/1210085<br>(IR 1210085) | 11 Jan 2017                 | 156   |

|   |             |        |   |                |             |
|---|-------------|--------|---|----------------|-------------|
| 2   | 11 Oct 2016 | Laos   | 39194<br>(IR 1210085)                           | 9 Oct 2017     | 161         |
| 3   | 24 Feb 2016 | Canada | TMA997501                                       | 25 Mar<br>2018 | 156         |
| 4   | 2 Apr 2019  | Samoa  | 1210085<br>(IR 1210085)                         | 23 Jul 2020    | 165         |
| <b>Applicant's "THINK DIFFERENT" Marks Pending Registration</b> |             |        |   |                |             |
| 5   | 24 Feb 2016 | EUTM   | (Application<br>No.)<br>015142862               | Pending        | Not in list |
| 6   | 3 Aug 2020  | Canada | (Application<br>No.)<br>2049580<br>(IR 1210085) | Pending        | Not in list |

25 The long and short of the Opponent's argument here is that the above applications, filed either after the 10<sup>th</sup> Edition of the Nice Classification took effect in Singapore on 1 January 2016 or even after the filing date of the presently opposed application, 12 September 2018, all did not claim "*smartwatches; smartphones; wrist-mounted smartphones; watches that communicate data to smart phones; smartphones in the shape of a watch*" ("the Smartwatch Specification")<sup>2</sup> in their specifications in Class 9 (the class for computer hardware and software). The Applicant's evidence also does not show the Application Mark used on goods covered by the Smartwatch Specification,

<sup>2</sup> As set out above, the Applicant explained at [28] of its written submissions that the opposed application was filed to address the potential gap in the protection of its mark in relation to the Smartwatch Specification, specifically its Apple Watch.

specifically the Apple Watch. This is the case even though official sales of the Apple Watch started quite some years back, in April 2015. Further, the Opponent pointed out that even before the 10<sup>th</sup> Edition of the Nice Classification, the Applicant had not claimed the Smartwatch Specification in Singapore in the former class, Class 14 (the class for watches and other horological instruments) – thus questioning the latter’s interest (or lack thereof) in protecting the goods covered by the Smartwatch Specification. Taken in totality, the Opponent concludes that the Applicant had no intention to use the Application Mark in relation to the goods covered by the Smartwatch Specification. As such, the opposed application was filed in bad faith.

26 The Opponent submitted that the Applicant’s purported explanation for filing the present opposed application was contrived, since the Applicant allegedly had no intention to use the Application Mark in relation to the Apple Watch. Counsel for the Opponent also pointed to the Applicant’s state of mind, submitting that there is more than meets the eye (and not as simple as filling in a gap to protect the Application Mark) because of the strained relationship between the parties and their litigious history.

*Applicant’s arguments*

27 The Applicant submitted that its reason for filing this opposed application is straightforward, namely, to address the potential gap in the protection of its mark in relation to the Smartwatch Specification, specifically its Apple Watch. At the hearing, counsel for the Applicant submitted that this simplest explanation was the right one – the Registrar raised a concern in an earlier decision, and the Applicant acted on it by filing this opposed application.

28 At the hearing, I also asked the Applicant to address the Opponent’s point that the former did not claim the Smartwatch Specification in other

worldwide applications. Counsel for the Applicant responded that they had no instructions on the filing strategy in other jurisdictions but ventured that there could be different localized responses to the latest Nice Classification and that national IP offices may adopt different Nice Classification editions at different times. Further, in Singapore, the Registrar’s decision in the earlier “Tick Different” opposition was a trigger to file a new application here, to cover the Smartwatch Specification.

29 The Applicant further rebutted that the Opponent assumed the Applicant kept its filings worldwide consistent especially in relation to smartwatches. It contended that just because there was a comment in passing, which was not legally binding as precedent, in a decision in Singapore did not mean that the Applicant was obliged to take action and file for the Smartwatch Specification worldwide.

30 Apart from the Smartwatch Specification, the opposed application also claims other items of goods in Class 9, as the specification shows:

Computers; computer hardware; computer peripherals; computer software; network servers; smartwatches; smartphones; wrist-mounted smartphones; watches that communicate data to smart phones; smartphones in the shape of a watch; all parts and fittings for all the aforesaid goods; all included in Class 9.

31 In relation to other goods items in the specification such as “computers; computer hardware”, the Applicant submitted that its evidence shows it has sold over 120,000 iMac products featuring the “THINK DIFFERENT” mark in Singapore between the first quarter of 2009 to the third quarter of 2019.<sup>3</sup>

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<sup>3</sup> [49] of the Applicant’s SD.

*Evaluation*

32 An allegation of bad faith is a serious one – it must be fully and properly pleaded and should not be upheld unless it is distinctly proved, and this will rarely be possible by a process of inference<sup>4</sup>. The bad faith inquiry is very fact-dependent, and it is to the facts that we now turn.

33 Whether or not it is indeed the case that the Applicant has used the “THINK DIFFERENT” mark in Singapore in relation to other goods items in the specification such as “computers; computer hardware”, the Opponent’s argument is that the Applicant did not have the intention to use the Application Mark *in relation to goods covered by the Smartwatch Specification*. It is also not in dispute between the parties that the Application Mark has not been used in Singapore in relation to such goods, in particular the Apple Watch. Hence, the focus of the contention is whether there is an *intent* to so use the Application Mark.

34 I have sought to understand the Opponent’s proposition that the Applicant has no intention of using the Application Mark in relation to the goods covered by the Smartwatch Specification based on the latter’s trade mark filing behaviour around the world. However, any trade mark applicant has the freedom to structure its global filing strategy in accordance with myriad factors. These factors include an applicant’s budget, markets of interest, existing operations, future activities, prevailing circumstances (which could differ in each market) and so on. As for the Applicant’s allegedly nefarious state of mind in the context of the parties’ bad history, I am again mindful that such an allegation is a serious one and must be distinctly proved. However, beyond the Opponent’s

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<sup>4</sup> The Court of Appeal in *Valentino Globe BV v Pacific Rim Industries Inc* [2010] 2 SLR 1203 at [30], citing *Royal Enfield Trade Marks* [2002] RPC 508 at [31].



impassioned assertions, I cannot see how such a claim has been distinctly proved.

35 In a separate but related vein, at [6] of the grounds of opposition, the Opponent claims that in view of the reputation and distinctiveness of the Opponent's Mark, "Tick Different", the Applicant could not have intended to use the Application Mark. The Opponent did not take this point further in its written submissions nor at the hearing; and appears to have abandoned the argument. In any case, since the causal connection in this allegation is not apparent to me, I find that the Opponent has not made out its specific case in this regard.

36 This tribunal has already opined in *Philip Morris Products S A v PT Perusahaan Dagang Dan Industri Tresno* [2010] SGIPOS 8 at [249] that any concern that an applicant would not use its mark would be suitably addressed by the risk of a revocation action on the ground of non-use:

In relation to the Opponents' arguments that the Applicants have no intention to use the Application Mark in Singapore and to use it in the manner as filed, while there are no provisions in the legislation as to when an applicant is to commence using a mark, it is accepted, as a general guideline, that an applicant will have 5 years from the date of completion of the registration procedure to commence using the mark since Section 22 of the Act which allows for revocation due to non-use requires a continuous period of 5 years of non-use from the completion of registration procedure. In the event that the Applicants do not use the mark within the said period, then the Applicants will have to accept the risk of being open to a revocation action.

37 Here, firstly, the Opponent has not established that the Applicant did not intend to use the Application Mark. Secondly, there is a certain control mechanism as regards use of registered marks. If a registered proprietor does not use its registered mark for a consecutive period of five years after the completion of registration, and there is no proper reason for such non-use, the

registration will be vulnerable to revocation for non-use. Hence, there is a check and balance in the system to allow an applicant to register a trade mark on the basis of intent to use, and hold the applicant to that intent by the possibility of revocation if it does not use the mark in Singapore within a consecutive period of five years. It is always open to the Opponent to make an application for revocation if the Applicant indeed does not use its mark within the required period after registration. On the other hand, it would be premature to conclude now, in the absence of clear evidence, that even before registration, the Applicant had no intention of using the Application Mark.

*Conclusion on first allegation*

38 The Opponent has not established that the Applicant filed the application to register the Application Mark without intention to use the mark.

***Second allegation: Intention to ride on the Opponent's goodwill and reputation and to benefit from a favourable association***

39 Although the Opponent pleaded this, it did not take the point further in its written submissions nor at the hearing. I am unable to conclude, based on the evidence, that the allegation that the Applicant intended to ride on the Opponent's goodwill and reputation, and intended to benefit from a favourable association, has been made out.

***Third allegation: Intention to oppose based on the Application Mark***

40 At [7] of the grounds of opposition, the Opponent pleaded that "*the Applicant intends to use the Application Mark as a tool to oppose others for any application, registration, and use of any two-word expression with the word 'different' being the last word in the expression*". The Opponent's pleading claims that this allegation is based on the fact that "*the Applicant had previously*

*failed in an attempt to prevent the Opponent from registering the Opponent's Marks (Registered Trade Mark Nos. 40201523105X and 40201522634S) in Classes 9 and 14".*

*Opponent's arguments*

41 As obtuse as the above appears, the Opponent elaborates in its written submissions as follows:

81 ... it appears that the Applicant considers itself to possess the monopolistic right in the use of the expression "THINK DIFFERENT", especially in respect of goods in Class 9.

82 According to the documents previously filed by the Applicant in the Tick Different Oppositions, this is due to the deliberate adoption of an expression which the Applicant alleges as grammatically incorrect in the English language. The Applicant firmly believes that no one would naturally adopt a grammatically incorrect expression as a trade mark.

83 As a result of such a belief, the Applicant has been using the Application Mark as a basis in other jurisdictions to oppose other parties, including the Opponent, for any registration and use of any mark consisting of a two-word expression with the word "different" being the second word. These opposition proceedings, including the Applicant's Failed Oppositions were filed on the grounds that such marks are similar and/or confusingly similar to the Applicant's "THINK DIFFERENT" mark.

84 Put differently, the Application, if successful, would allow the Applicant to use the Application Mark as a basis to challenge any other third-party mark that it deems to be similar and/or confusingly similar to "THINK DIFFERENT", and the Opponent submits that this should not be allowed given that the Applicant has clearly filed the Application as a mere afterthought without any intention to use the Application Mark in connection with the Apple Watch. See [**Error! Reference source not found.**] to [**Error! Reference source not found.**] below.

42 Counsel for the Opponent submitted at the hearing that the application was filed not because of a real intention to use the mark, but because the Applicant was upset that it lost the earlier “Tick Different” opposition, and still sought somewhat blanket rights to “THINK DIFFERENT” to stifle competition. It alleged that the Applicant wanted to “get back” at the Opponent following the Applicant’s unsuccessful opposition against “Tick Different”, and prevent third parties (including the Opponent) from leveraging on the Applicant’s rights in words ending with the word “different”. Counsel for the Opponent said that they did not have evidence at present that the Applicant attempted to stop *third parties* from using two-word expressions with the second word “different”, but it was the Opponent’s contention that this was the Applicant’s ultimate motive, to oppress the competition.

43 When asked for evidence on this state of mind, counsel referred me to the Applicant’s SD at page 341 where an article on [www.cnet.com](http://www.cnet.com)<sup>5</sup> is exhibited. The article is dated 31 August 2012 and entitled “Apple Tries Out New ‘Think Different’ Campaign”. The subtitle “Apple’s flurry of lawsuits is part of its strategy to get competitors to think different – i.e. to sink time and money into steering clear of any resemblance to the iPhone, iPad or iWhatever” points to the Applicant’s tactics against competitors. Counsel for the Opponent also referred to page 342 of the same article, which cites an example of such tactics: “*As CNET’s Brian Cooley characterized Apple’s suit against Samsung, Apple is really trying to roadblock Google’s Android platform, which powers most smartphones sold, and ‘spook the herd’ of companies using it ... Part of Apple’s magic is to give the impression to the outside world that all other smartphone or tablet manufacturers are like art forgers, copying from Apple’s original art,*

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<sup>5</sup> CNET is an American media website that publishes content on technology and consumer electronics.

*which upon closer examination isn't necessarily wholly original.*" Although these statements do not relate specifically to the Application Mark, the Opponent submits that the Applicant's known conduct in the commercial space should be taken into account in inferring its bad faith.

*Applicant's arguments*

44 The Applicant's counter-arguments in its written submissions are as follows:

58 First, it is well within the Applicant's rights to protect its interests in the THINK DIFFERENT Marks worldwide by filing trade mark applications for the same. It is difficult to fathom why a trade mark proprietor applying for marks with the view of protecting its legitimate interests may be considered as bad faith conduct. In this regard, we highlight the Applicant's longstanding use of the THINK DIFFERENT Marks worldwide (including Singapore).

59 Second, assuming that it is indeed bad faith conduct (which is denied), the allegation (as pleaded) is wholly speculative. The fact that the Applicant had previously opposed the Opponent's "TICK DIFFERENT" marks in Singapore cannot be considered "cogent evidence" that the Applicant intends to use the Application Mark "*as a tool to oppose **others** for any application, registration and **use of any two-word expression with the word "different" being the last word in the expression***" (emphasis added).

60 Third, in support of this alleged intention, the Opponent relies on a list of court decisions in various opposition proceedings by the Applicant against the Opponent's application and use of the "TICK DIFFERENT" marks in various jurisdictions. These foreign court decisions fall beyond the scope of the Opponent's pleaded case. The Opponent's pleaded case, that the Applicant intends to use the Application Mark as a tool to oppose others, is based on the Applicant's opposition in the Swatch Case in Singapore ("*previously failed in an attempt to prevent the Opponent from registering the Opponent's Marks (Registered Trade Mark Nos. 40201523105X and 40201522634S)*") and not the court decisions in other jurisdictions.

45 At the hearing, the Applicant also addressed the Opponent’s allegation that it sought to stifle competition. It pointed out that there was no evidence of stifling competition from other businesses. As for the Opponent itself, its mark “Tick Different” had already been registered after the earlier “Tick Different” opposition, and under Section 28(3)<sup>6</sup> of the Act, the Applicant would not be able to stifle any competition from the Opponent connected with the use of the latter’s mark “Tick Different”.

#### *Evaluation*

46 At the outset, it does not appear too helpful to evaluate emotive allegations such as “being upset” and “wanting to ‘get back’”. After all, an action (such as filing a trade mark application) may well be taken in a state of being upset with the outcome of an earlier, unsuccessful case, and still fall within “*the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area*”: *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 at 379.

47 Here, the Opponent alleges that “*the Applicant intends to use the Application Mark as a tool to oppose others for any application, registration, and use of any two-word expression with the word ‘different’ being the last word in the expression*”. However, there is nothing inherently wrong with asserting one’s registered trade mark against a later mark through opposition. There will still be a judicial, or quasi-judicial administrative, determination on the merits of such oppositions.

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<sup>6</sup> Section 28(3) of the Act provides that “Despite section 27, a registered trade mark is not infringed by the use of another registered trade mark in relation to goods or services for which the latter is registered.”

48 Further, in Singapore, it had already been found in the earlier “Tick Different” opposition that the Opponent’s “Tick Different” mark and the Applicant’s “THINK DIFFERENT” mark were not confusingly similar. The marks were found more dissimilar than similar in the first step of the three-step test in *Staywell Hospitality Group v Starwood Hotels & Resorts Worldwide* [2014] 1 SLR 911. The Opponent would have to think twice before trying to prevent the use or registration of other “— DIFFERENT” formative marks in Singapore. At the point that the application to register the Application Mark was made, on 12 September 2018, there is insufficient evidence for me to conclude that the Applicant had no intent to use the mark as a badge of origin, and instead intended to use it as a tool “*to oppress the competition*”. It would be speculative to assume that the Applicant would oppose other “— DIFFERENT” formative marks where there is no reasonable ground for such opposition.

49 The CNET article “Apple Tries Out New ‘Think Different’ Campaign” relied on by the Opponent reflects one personal opinion by a Mr Brian Cooley, and would not have been determinative of the Applicant’s intention as such. Every allegation of bad faith is fact-dependent, and I must draw the line at this. The article does not relate to the present issue before me, nor even to the facts of the present dispute, which concerns the Application Mark “THINK DIFFERENT”. I cannot draw an inference of the Applicant’s bad faith based on this article, whether on its own or in combination with the Opponent’s other evidence.

*Conclusion on third allegation*

50 The Opponent has not established that “*the Applicant intends to use the Application Mark as a tool to oppose others for any application, registration,*

*and use of any two-word expression with the word ‘different’ being the last word in the expression”.*

51 Neither has it logically explained why even if that was the intent, such intent amounts to bad faith which falls short of “*the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area*”. Opposition is a mechanism provided by law for an opponent to object to the registration of a mark based on particular grounds in the law. It can be legitimately used, and it can be misused. However, I have no grounds to conclude that it is the latter case here.

***Fourth allegation: Not the bona fide proprietor of the Application Mark***

52 As with the second allegation of bad faith in the grounds of opposition, despite pleading this fourth allegation, the Opponent did not address the point in its written submissions nor at the hearing. I am unable to agree with the Opponent’s bare assertion, and in any case, am persuaded on the Applicant’s evidence that it has conceived, and is the proprietor of, the Application Mark “THINK DIFFERENT”.

***Conclusion on opposition under Section 7(6)***

53 It bears repeating that an allegation of bad faith is a serious one – it must be fully and properly pleaded and should not be upheld unless it is distinctly proved. This will rarely be possible by a process of inference.

54 I have examined all four allegations pleaded in relation to bad faith under the ground of opposition at Section 7(6). None have been made out by the Opponent. This ground of opposition therefore fails.



**General comments on the Opponent’s pleading on bad faith under Section 7(6)**

55 I observe that the Opponent’s pleading under Section 7(6) and its submissions, both written and oral, do not correlate well. For instance, the Opponent submitted that the Applicant had no intention of using the Application Mark in relation to the goods covered by the Smartwatch Specification, and this is based on the latter’s trade mark filing behaviour around the world and the timing of the opposed application to register the Application Mark. This formed a large part of the Opponent’s submission at the hearing. However, it was not “*fully and properly pleaded*” when the Opponent filed its notice of opposition.

56 As a general point of good practice, opponents should pay attention to how their grounds of opposition are crafted at the commencement of proceedings. The importance of careful pleading cannot be overstated, as pleadings guide the content of evidence and, eventually, submissions. That submissions should be within the parameters of what has been pleaded is part of the framework of fair play and transparency in our legal system, so that a party knows the case it has to answer and can best prepare for it in order to assist the court or this tribunal.

**Overall conclusion**

57 Having considered all the pleadings and evidence filed and the submissions made in writing and orally, I find that this opposition fails because the sole ground of opposition failed. The application will proceed to registration.

58 As regards costs, the Applicant has filed an overwhelming amount of evidence, most of which was not integral to the case<sup>7</sup>. The Applicant is thus entitled to only 20% of its costs, to be taxed, if not agreed.

See Tho Sok Yee  
Principal Assistant Registrar

Jasper Lim and Valen Lim (Lee & Lee) for the Applicant;  
Kevin Wong and Lim Jia Ying (Ella Cheong LLC) for the Opponent.

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<sup>7</sup> 755 pages of exhibits (including exhibit covers) were disproportionately adduced to support 34 pages of main content in the Applicant's SD. These pertained to the Applicant's corporate background, products, marketing efforts, articles on the tagline "THINK DIFFERENT", years' worth of annual reports etc.