

judgedate:

December 5, 1963

caseid:

1962 (O) 953

casename:

A case of seeking rescission of the JPO decision

casetitle:

Judgment regarding the method for determining the similarity between trademarks in the case where a single trademark produces two or more pronunciations or concepts.

summary\_judge:

1. In the case where a single trademark produces two or more pronunciations or concepts, even if it cannot be said that one of the pronunciations or concepts is identical or similar to the pronunciation or concept of another person's trademark, it is reasonable to interpret that the two trademarks are still similar if any other pronunciation or concept of the trademark is similar to that of another person's trademark.
2. Given the fact situation found by the court, a trademark which has the designated goods of "Soap" and which consists of the combination of a figure of a lyre and the characters, "宝塚" [read as "takarazuka" in Japanese], produces the pronunciation and concept of simply a "takarazuka" mark in addition to the pronunciation and concept of a "lyre/lyra takarazuka" mark, so that it should be acknowledged that the above trademark is similar to the trademark, "宝塚", which also has the designated goods of "Soap".

court second:

Tokyo High Court, Judgment of April 24, 1962

references:

Article 2, paragraph (1), item (ix) of the former Trademark Act (Act No. 99 of 1921)

### Main text

The final appeal of the present case shall be dismissed.  
Appellant shall bear the cost of the final appeal.

### Reasons

Regarding Reason 1 for the final appeal according to Appellant's attorney, ●●●●.

The gist of Appellant's argument is that the judgment in prior instance, which held that Trademark is similar to Cited Trademark in pronunciation and concept by extracting only the character part, "宝塚" [read as "takarazuka" in Japanese], from the constituent parts of Trademark for comparison with Cited Trademark, "宝塚", is against the principle and the experimental rule for determining similarity between trademarks.

Since a trademark is created so as to be identifiable from another person's trademark based on the entirety of the constituent parts, it is not permissible, without due cause, to extract part of the constituent parts of a trademark to compare only such part with another person's trademark to determine the similarity between trademarks per se, as per the asserted opinion. However, in actual transactions where simplicity and promptness are valued, with regard to a trademark which cannot be acknowledged as having each of the constituent parts joined together in such a way as to suggest that it would be unnatural in transactions to observe the constituent parts separately from one another, it is not always the case that a pronunciation or concept is produced from the name of the entirety of the constituent parts, and it is often the case that a pronunciation or concept is produced from only part of the trademark, in an abbreviated manner, and as a result, two or more pronunciations or concepts are produced from a single trademark, as we already know from the empirical rule (refer to the judgment rendered on June 23, 1961 by the Second Petty Bench, Minshu Vol. 15, No. 6, p. 1689). Having said that, even if it cannot be said that a pronunciation or concept is identical or similar to the pronunciation or concept of another person's trademark, if another pronunciation or concept is similar to that of another person's trademark, it is reasonable to interpret that the two trademarks are still similar.

The above is considered in light of the present case as follows. The Trademark has the designated goods of "Soap" in Class 4, and consists of the combination of a figure of a lyre, which is said to have been used in ancient Greece, and the characters, "宝塚", and furthermore, the characters, "リラタカラズカ" and "LYRATAKARAZUKA", are attached thereto. As such, it is clear that the pronunciation and concept of a "lyre/lyra takarazuka" mark is produced from this

trademark, and it is sufficient to presume that this is also where the intention of Appellant Company in creating Trademark lay. However, according to the facts having been confirmed in the judgment in prior instance, the fact that the above figure is that of a "lyre" which was used in ancient Greece is not widely known among ordinary people who are involved in transactions of "Soap", which is the designated goods for Trademark, whereas "宝塚" has a clear meaning in itself and is something with which ordinary people are familiar, and furthermore, the above characters, "宝塚", are shown almost at the center of Trademark and written in an ordinary print in a manner that is very easy to read, and is independent, and has a constitution that attracts the attention of those who see the trademark. Accordingly, the judgment in prior instance, which was rendered under such fact situation to the effect that since the above figure of a lyre and the characters, "宝塚", are not joined together in such a way as to suggest that it would be unnatural in transactions to observe the constituent parts separately from one another, it is acknowledged that Trademark often produces the pronunciation or concept of simply a "takarazuka" mark in addition to the pronunciation or concept of a "lyre/lyra takarazuka" mark, and that Trademark is therefore similar in pronunciation and concept to Cited Trademark, "宝塚", which equally has the designated goods of "Soap" in Class 4, is reasonable, and there is no illegality with the asserted opinion. The legal precedents having been cited in the asserted opinion are not appropriate for the present case, which concerns a different issue.

Accordingly, the gist of Appellant's argument is groundless and cannot be accepted.

Regarding Reason 2 for the final appeal.

In sum, the gist of Appellant's argument is that the aforementioned findings in the judgment in prior instance ignored the judicial admissions and carried out fact finding which is contrary to the judicial admissions, thereby violating the empirical rule and legal precedents, and thus being illegal based on incorrect interpretation of Article 2, paragraph (1), item (ix) of the former Trademark Act (Act No. 99 of 1921).

However, as records show, Appellee clearly denies that it was known to the public that the figure of a lyre in Trademark has been used over many years as an emblem of Takarazuka Revue Company and that Takarazuka Revue Company has been involved in the management of Appellant's company. As such, although the parties are not in dispute over the fact that the figure of a lyre is well known to the public as a symbol of music and that it is something with which people are familiar, it cannot be said that

the finding in the judgment in prior instance to the effect that "it cannot be acknowledged that the figure of a lyre and "宝塚" inevitably came to be joined together as a concept", as per the asserted opinion, is a result of having ignored judicial admissions. Also, given that the documentary evidence that supports the asserted opinion constitutes certified copies of the trial decisions and judgments which were made with respect to the applications for registration of trademarks other than Trademark, the fact that the content of the documentary evidence was not used as materials for determining on the similarity between Trademark and the aforementioned Cited Trademark in the judgment in prior instance cannot be considered as contravening the legal precedents cited in the asserted opinion. As for other points in the gist of Appellant's argument, they merely refer to the illegality of the asserted opinion by building on a unique perspective that is different from the judgment in prior instance.

Accordingly, the judgment in prior instance has no illegality in regards to the asserted opinion, and the gist of Appellant's argument is entirely groundless, so that the reversal of the judgment in prior instance is unavoidable.

Therefore, the judgment of this court is rendered unanimously by all judges, as per the main text, by application of Articles 401, 95, and 89 of the Code of Civil Procedure.

Supreme Court, First Petty Bench

Presiding judge: OSABE Kingo  
Judge: IRIE Toshio  
Judge: SHIMOIZAKA Masuo  
Judge: SAITO Kitaro