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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re QC Properties Company, LLC

Serial No. 77020368

Scott W. Petersen of Holland & Knight LLP for QC Properties Company, LLC.

Colleen Dombrow, Trademark Examining Attorney, Law Office
101 (Ronald R. Sussman, Managing Attorney).

Before Drost, Kuhlke and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

QC Properties Company, LLC filed an intent-to-use application for the mark OLA BELL'S, in standard character format, for "croutons, stuffing consisting of bread; shred which is a form of bread stuffing; dried bread, bread batters; spices, namely spice blends for croutons and stuffing," in Class 30.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark is likely to

cause confusion with the mark BELL'S and design, shown below, for "dry ready-mixed stuffing for poultry; a mix containing bread crumbs, flour and seasoning for making a meatloaf, chicken flavor stuffing mix", in Class 30.¹



Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of

¹ Registration No. 1075634, issued October 18, 1977; affidavits under Sections 8 and 15 accepted and acknowledged; second renewal.

differences in the essential characteristics of the goods and differences in the marks").

A. The similarity or dissimilarity and nature of the goods.

In an *ex parte* appeal, likelihood of confusion is determined on the basis of the goods as they are identified in the application and the cited registration. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). See also *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed").

Applicant's "croutons, stuffing consisting of bread" and "shred, which is a form of bread stuffing" are similar to the registrant's "dry ready-mixed stuffing for poultry." The listed products of applicant and registrant are stuffing and because applicant's products are not restricted in any way, we must presume that they encompass

stuffing used with poultry. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ at 640.

In addition, applicant's "spices, namely spice blends for croutons and stuffing" are similar to the registrant's "mix containing bread crumbs, flour and seasoning for making a meatloaf, chicken flavor stuffing mix" because both products are used to make stuffing: applicant's spices may be used to season stuffing and registrant's "mix" is a combination of ingredients, including seasoning, for stuffing. As indicated above, because applicant's spices are not restricted, applicant's spices for croutons and stuffing may be used with chicken and meatloaf.

While the precise language used to describe the products is not identical, we find that the products are highly related, if not identical. Applicant's argument that the goods at issue are not related because the cited registration does not have croutons is without merit because croutons and stuffing are products consumers would

believe emanate from the same source. The Examining Attorney submitted 14 third-party, use-based registrations that include stuffing and croutons in the description of goods. Although third-party registrations are not evidence that the marks shown therein are in commercial use, they have some probative value to the extent that they may serve to suggest that the listed goods are of a type which may emanate from a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). In addition, the Examining Attorney submitted excerpts from five websites where the merchant advertised the sale of croutons and stuffing under the same mark. See the following websites:

1. Campbell's Wellness website (campbellwellness.com) advertising the sale of PEPPERIDGE FARM croutons and stuffing;
2. Arnold's website (arnold.gwbakeries.com);
3. Fresh Gourmet website (freshgourmet.com);
4. Marzetti website (the URL was not identified) advertising CHATHAM VILLAGE croutons and stuffing; and,
5. MRS. CUBBISON'S website (mrscubbisons.com).

Not only is there a clear overlap in the description of goods regarding stuffing, but the uncontroverted evidence submitted by the Examining Attorney demonstrates

that croutons and stuffing sold under the same mark are products that consumers would believe emanate from the same source.

B. The similarity or dissimilarity of likely-to-continue trade channels.

Because there are no limitations as to channels of trade or classes of purchasers in either the application or the registration, it is presumed that the registration and the application encompass all of the goods of the type described in the description of goods, that the goods so identified move in all channels of trade normal for those goods, and that the products are available to all classes of purchasers for the listed products. *See In re Linkvest S.A.*, 24 USPQ2d at 1716.

In addition, because the goods in the application and the cited registration are highly related, if not identical, we must also presume that the channels of trade and classes of purchasers are the same. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels

of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

C. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, *supra*. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that where, as here, the goods are highly related, if not identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Real Estate One, Inc. v. Real Estate 100 Enterprises Corporation*, 212 USPQ 957, 959 (TTAB 1981); *ECI Division of E-Systems, Inc. v.*

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Environmental Communications Incorporated, 207 USPQ 443, 449 (TTAB 1980).

In addition, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). In this case, the relevant public would be the general public who buys stuffing.

The marks are similar in both appearance and sound because they share the word or name "Bell's" in the possessive form. Applicant argues, however, that the marks have different meanings and engender different commercial impressions. For example, applicant contends that OLA

BELL'S is a woman's name, specifically, the mother of the applicant's principal, while the registrant's mark engenders the commercial impression of the hollow, cusp shaped, metal instrument by virtue of the design of the bells in the registered mark. Even assuming that applicant's argument is correct, the bell design does not create a significant difference between the marks because the bell reinforces the word portion (BELL'S) of registrant's mark.

In light of the fact that the degree of similarity does not have to be as great to support a likelihood of confusion when the goods are highly related and because the proper focus of our analysis is on the recollection of the average consumer, and not on a side-by-side comparison of the marks, we find that the overall similarities of the marks in terms of appearance and sound outweigh any differences in meaning and commercial impression. Applicant has failed to identify anything in the nature of stuffing food products that leads us to believe that the differences between the marks carries more weight than the similarities of the marks: that is, there is nothing in the record to persuade us that that consumers would recognize the differences between these two marks, whereas, because the products are so highly related, the

similarities may trigger a mistaken recollection between the marks.

D. Third-party registrations.

In its April 19, 2007 Response, applicant submitted photocopies of ten third-party registrations, consisting, in part, of the word "Bell" registered in Class 30,² as well as a "hit list" from a search of the U.S. Patent and Trademark Office's Trademark Electronic Search System for the word "Bell" in International Class 30 that was more comprehensive than the ten third-party registrations. The "hit list" includes the serial number, registration number, the word mark, and an indication of whether the registration or application is active or inactive. In her June 1, 2007 Office Action, the Examining Attorney objected to the list of applications and registrations on the ground that the Board does not take judicial notice of registrations and that a mere list of registrations does not make them properly of record. The Examining Attorney cited *In re Delbar Products, Inc.*, 217 USPQ 859, 861 (TTAB 1981) and *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974). The Examining Attorney also explained that

² Applicant also included a copy of the cited registration.

applicant could make the registrations of record by submitting copies of the registrations.

While applicant referenced the list of applications and registrations in its brief, it did not follow the examining attorney's advice and submit copies of the registrations during the prosecution of the application. The Examining Attorney reiterated her objection to the list of registrations and applications in her brief.

The Examining Attorney's objection to the admissibility of the list of registrations and applications is sustained. The mere listing of registrations is not sufficient to make the registrations of record. *In re Dos Padres Inc.*, 49 USPQ2d 1860, 1861 n.2 (TTAB 1998); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1560 n.6 (TTAB 1996).³ Accordingly, the list of registrations and applications have been given no consideration.

The copies of the third-party registrations, absent evidence of actual use of those marks, are entitled to little weight in our likelihood of confusion analysis. *In re Hub Distributing, Inc.*, 218 USPQ 284, 285 (TTAB 1983).

[I]t would be sheer speculation to draw any inferences about which, if any, of the marks subject of the third party

³ Third-party applications have no probative value other than as evidence that the applications were filed. *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002).

(sic) registrations are still in use. Because of this doubt, third party (sic) registration evidence proves nothing about the impact of the third-party marks on purchasers in terms of dilution of the mark in question or conditioning of the purchasers as to their weakness in distinguishing source.

In re Hub Distributing, Inc., 218 USPQ at 286.

Even if we were to consider the ten registrations as evidence that the word "Bell" has appealed to others for use as a trademark for food products, and that the U.S. Patent and Trademark Office has allowed the registration of one "Bell" mark over another so that the word "Bell" may not be particularly distinctive for food products, third-party registrations will not aid an applicant to register its mark if it is likely to cause confusion with the cited registration. *Independent Grocers' Alliance v. Potter-McCune Co.*, 404 F.2d 622, 160 USPQ 46, 46 (CCPA 1968) (if applicant's mark is likely to cause confusion with a previously registered mark, third-party registrations are not controlling); *In re Hamilton Bank*, 222 USPQ 174, 177 (TTAB 1984) (third-party registrations cannot assist an applicant in registering a mark that is likely to cause confusion with a registered mark). Moreover, because applicant's third-party registrations do not list stuffing or croutons in the description of goods, they do not show

that "Bell" marks have been routinely registered for the products at issue. Accordingly, the ten third-party registrations do not weigh in favor of applicant.

E. Balancing the factors.

In view of the facts that the applicant's products are closely related, if not identical, to the goods listed in the cited registration, that the goods of the applicant and registrant must be deemed to move in similar channels of trade and be offered to the same consumers, and that the marks are similar, we find that applicant's mark OLA BELL'S for "croutons, stuffing consisting of bread; shred which is a form of bread stuffing; dried bread, bread batters; spices, namely spice blends for croutons and stuffing" is likely to cause confusion with the mark BELL'S and design registered for "dry ready-mixed stuffing for poultry; a mix containing bread crumbs, flour and seasoning for making a meatloaf, chicken flavor stuffing mix."

Decision: The refusal to register is affirmed.