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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Summit Entertainment, LLC

Serial No. 77809429

Jill M. Pietrini and Ryan Hilbert of Manatt, Phelps & Phillips, LLP for Summit Entertainment, LLC.

Lydia M. Belzer, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Seeherman, Mermelstein and Lykos, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Summit Entertainment, LLC has appealed from the final refusal of the trademark examining attorney to register TWILIGHT in standard character form for "candy; chewing gum."¹ Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the

¹ Application Serial No. 77809429, filed August 20, 2009, asserting first use and first use in commerce on March 21, 2009.

ground that applicant's mark, used for its identified goods, so resembles the mark TWILIGHT DELIGHT, in standard character form, registered for "chocolate bars,"² that it is likely to cause confusion or mistake or to deceive.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning first to the goods, applicant's identified goods are candy and chewing gum; the goods identified in the cited registration are chocolate bars. Chocolate bars are a type of candy, and thus are encompassed within applicant's identified goods. Therefore, applicant's goods are, in part, identical to the registrant's identified

² Registration No. 3197660, issued January 9, 2007.

goods.³ Applicant has argued that its goods are different, stating that its candy is candy hearts as shown in the specimen submitted with its application, while the registrant's goods are dark chocolate bars. Applicant also asserts that the purposes for which consumers buy the goods are different, stating that its mark refers to the motion pictures *Twilight* and *The Twilight Saga: New Moon* that applicant produced and distributed, and the candy for which it uses the mark is licensed merchandise that relates to the motion picture. As a result, applicant claims that consumers purchase applicant's goods because "they (or the people for whom they are buying the products) are fans of the Twilight Motion Pictures and are looking for something non-chocolaty in nature," while the registrant's chocolate bars are bought "to satisfy a chocolate craving of a specific nature or as a gift to someone who loves chocolate." Brief, p. 7.

We are not persuaded by applicant's argument. It is well settled that the issue of likelihood of confusion must be determined based on an analysis of the mark as applied

³ In its reply brief applicant appears to assert that a "candy bar" is different from a "chocolate bar." We acknowledge that not all candy bars are made of chocolate. However, "chocolate bars" are a type of candy, applicant has identified its goods as "candy," and therefore applicant's identified goods encompass the goods identified in the cited registration.

to the goods recited in an applicant's application vis-à-vis the goods and/or services recited in the cited registration, rather than what the evidence shows the goods and/or services to be. In re 1st USA Realty Professionals Inc., 84 USPQ2d 1581, 1585 (TTAB 2007). See also Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A., 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Thus, whether or not applicant currently limits its "candy" to candy hearts, or even goods with a *Twilight* movie theme, its application is for "candy" per se, and we must construe the identification to include all types of candy, including chocolate bars. Accordingly, applicant's candy and the registrant's identified chocolate bars are, in part, legally identical, and the channels of trade and the consumers for these legally identical goods must be considered identical as well. The du Pont factors of the similarity of the goods and the channels of trade favor a finding of likelihood of confusion.

The examining attorney has also submitted evidence as to the similarity of the chewing gum identified in applicant's application and chocolate bars, through numerous single-class third-party registrations showing that many entities have adopted a single mark for both goods, and excerpts from third-party websites showing that

companies manufacture both chewing gum and chocolate bars. We need not discuss such evidence, however, in view of the fact that applicant's candy is, in part, legally identical to the registrant's goods. Likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application. See *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

This brings us to the du Pont factor of the similarity of the marks. In considering this factor, we keep in mind that when marks would appear on virtually identical goods or services, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applicant's mark is TWILIGHT; the cited mark is TWILIGHT DELIGHT. We take judicial notice of the dictionary definition of "delight," submitted with the examining attorney's brief, as meaning "something that gives great pleasure"; the reference lists as synonyms,

inter alia, "delectation, feast, treat."⁴ In fact, a type of candy is actually called "Turkish delight."⁵ The word DELIGHT in the registrant's mark, therefore, has a suggestive meaning as applied to chocolate bars.

It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In this case, the first word of the cited mark, TWILIGHT, is the dominant feature. As discussed further below, it is an arbitrary term for chocolate bars, while DELIGHT has a suggestive meaning. Further, as the first word in the mark, and paired with the suggestive term DELIGHT, the arbitrary term TWILIGHT contributes more to the commercial impression of the mark than DELIGHT. See Palm Bay Imports Inc. v. Veuve

⁴ Merriam-Webster Online Dictionary, <http://www.merriam-webster.com>, definition taken from Merriam-Webster College Dictionary (11th ed. 2008). The Board may take judicial notice of dictionary definitions. University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁵ The American Heritage Dictionary of the English Language (1970).

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Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 73, USPQ2d 1689 (Fed. Cir. 2005) (in mark VEUVE ROYALE, arbitrary term VEUVE contributes more to commercial impression of product than ROYALE).

The dominant part of the cited mark, TWILIGHT, is identical to applicant's mark, TWILIGHT. Although the registered mark has the second word DELIGHT, because of the suggestiveness of this word it does not serve to distinguish the marks, and the presence of this word in the registered mark does not effectively change the appearance, pronunciation, connotation or commercial impression of the marks. We find that, when compared in their entirety, the marks are similar, and that this du Pont factor favors a finding of likelihood of confusion.

Applicant has argued that the marks have different commercial impressions because in registrant's mark TWILIGHT refers to the dark appearance of chocolate and DELIGHT "connotes chocolate's well-established reputation of providing great joy and pleasure," brief, p. 5, while applicant's mark refers to the Twilight motion pictures. We are not persuaded by this argument. The dictionary definitions of "twilight"⁶ made of record by applicant are:

⁶ Dictionary.com Unabridged, based on the Random House Dictionary (2010).

1. the soft, diffused light from the sky when the sun is below the horizon, either from daybreak to sunrise or, more commonly, from sunset to nightfall.
2. the period in the morning or, more commonly, in the evening during which this light prevails.
3. a terminal period, esp. after full development, success, etc.: *the twilight of his life*.
4. a state of uncertainly, vagueness, or gloom.

Nothing in these dictionary definitions indicates that "twilight" applies to the color of chocolate, nor is there any evidence that consumers would view the term "twilight" in any way as indicating the color of chocolate. Nor can we assume that everyone that sees applicant's mark will understand it to reference applicant's motion pictures. There may be people who are not familiar with the motion pictures, but who are familiar with the registrant's TWILIGHT DELIGHT chocolate bars, who, upon seeing the mark TWILIGHT on candy, particular chocolate bars, will assume that the TWILIGHT candy emanates from the registrant. This can occur if the consumer does not realize that applicant's goods do not have the word DELIGHT on them due to the lack of care with which candy is purchased, see discussion infra. Even if the consumer does notice the difference, he or she is likely to assume that TWILIGHT is merely a variation or shortened form of the mark TWILIGHT DELIGHT.

We also agree with the examining attorney that, if consumers are familiar with applicant's Twilight motion

pictures, there is a likelihood of reverse confusion.⁷ That is, if consumers associate applicant's TWILIGHT candy with applicant's Twilight motion pictures, consumers are likely to believe that TWILIGHT DELIGHT chocolate bars are also associated with applicant's motion pictures, and that both TWILIGHT candy and TWILIGHT DELIGHT chocolate bars emanate from or are sponsored by a single source.

Increasing the likelihood of confusion is the fourth du Pont factor, "the conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing." The goods are inexpensive general consumer products, purchased by the public at large, including children. Candy has long been considered to be an impulse purchase. See, for example, *In re Shoemaker's Candies, Inc.*, 222 USPQ 326, 328 (TTAB 1984) (candy is a low cost impulse type item which would not ordinarily be purchased with a great degree of care); Paul

⁷ In its reply brief applicant objects to the examining attorney's raising the possibility of reverse confusion for the first time in her brief, contending that "it is improper to raise for the first time on appeal an issue that was not previously raised below." Reply brief, n. 2. However, likelihood of confusion has been the issue throughout the examination of the application and the briefing of this appeal. The examining attorney is not limited as to the arguments she can make in maintaining this ground of refusal, and the Board may, in any case, rely on a different rationale. See TBMP § 1217: "[T]he examining attorney is not precluded from raising, during appeal, new arguments ... in support of a ground for refusal."

F. Beich Company v. J & J Oven Company, Inc., 147 USPQ 162, 164 (TTAB 1965) (candy falls within the category of snack items which generally are purchased on impulse with little or no discrimination). A consumer, familiar with the registrant's TWILIGHT DELIGHT chocolate bar, and seeing TWILIGHT on a chocolate bar (again, applicant's identified "candy" would include chocolate bars) is likely to simply grab the TWILIGHT chocolate bar thinking it is the bar with which he or she is familiar.

Finally, we consider the factors of strength of the registered mark, and the number and nature of similar marks in use on similar goods. Applicant has asserted that there are "many third party uses of the term TWILIGHT for goods related to candy, chewing gum, and chocolate." Brief, p. 8. However, applicant has not submitted any evidence whatsoever of third-party use. In support of its argument about use of TWILIGHT marks, and the weakness of the registrant's mark, applicant has made of record only two cancelled registrations, and an abandoned application. These documents are not evidence that the marks shown therein are in use. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200 , 22 USPQ2d 1542, 1547 (Fed. Cir. 1992) (the existence of third-party registrations is not evidence of what happens in the market place or that customers are

familiar with them). Moreover, cancelled registrations do not provide constructive notice of anything, *Action Temp. Svcs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989), while an application is evidence only of the fact that it was filed. *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003). We also note that the application submitted by applicant was not even based on use.

Third-party registrations can be used to show that a mark has been adopted because it has a certain significance in a particular industry. However, the fact that at two different points in time there was a third-party registration for, in one case, cookies, and in another case, candy, does not show that TWILIGHT has a significance for candy. Accordingly, applicant's contention that the cited mark is weak has no support in the record. On the contrary, based on the record before us, we find that the registrant's mark TWILIGHT DELIGHT is arbitrary for chocolate bars, and that the registration is entitled to the broader scope of protection of an arbitrary mark.

In view of the foregoing--the in part legally identical goods, the legally identical channels of trade, the similarity of the marks, the strength of the registered mark, and the impulse nature of the purchasing decision--we

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find that applicant's mark TWILIGHT for candy and chewing gum is likely to cause confusion with the registered mark TWILIGHT DELIGHT for chocolate bars.

Decision: The refusal of registration is affirmed.