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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Reckitt Benckiser LLC

Serial No. 85082505

Amie Peele Carter and Louis T. Perry of Baker & Daniels LLP
for Reckitt Benckiser LLC

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(Dan Vavonese, Managing Attorney).

Before Grendel, Holtzman and Kuczma
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Reckitt Benckiser LLC ("applicant") filed an
application to register the mark AMERICA'S FAVORITE
pursuant to §§ 1(a) and 2(f) of the Trademark Act, 15
U.S.C. §§ 1051(a) and 1052(f), for "Mustard" in Class 30.

The examining attorney issued a final refusal to
register the mark pursuant to § 2(d) of the Trademark Act
of 1946, 15 U.S.C. §1052(d), citing Registration Nos.
3500966 and 3724203 as bars to registration.¹ The cited

¹ Registration No. 3500966 issued September 16, 2008; and
Registration No. 3724203 issued December 15, 2009. Both
Registrations were issued pursuant to § 2(f) of the Trademark

Registrations are for the mark AMERICA'S FAVORITE in standard character format and are owned by the same entity. Registration No. 3500966 is for "condiments, namely ketchup" in Class 30, and Registration No. 3724203 is for "sauces" in Class 30.

Applicant and the examining attorney have filed briefs.² In her appeal brief, the examining attorney requested the Board take judicial notice of the definition of "condiment" found at www.dictionary.infoplease.com/condiment citing to *Random House Unabridged Dictionary*, copyright 1997, by Random House Inc.³ Accordingly, we take judicial notice of the definition of "condiment" as "something used to give a special flavor to food, as mustard, ketchup, salt or spice."

Act, 15 U.S.C. § 1052(f), based on acquired distinctiveness of the mark.

² In its brief, applicant has cited to some cases only by their Federal Reporter citations, even though these cases were also reported in United States Patent Quarterly. "When cases are cited in a brief, the case citation should include a citation to the [USPQ], if the case has appeared in that publication." TBMP § 801.03 (3rd ed.); *In re Carlson*, 91 USPQ2d 1198, 1199 (TTAB 2009) (case citations should include citation to United States Patent Quarterly if the case appears in that publication).

³ Examining Attorney's Appeal Brief p. 15 (unnumbered). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

Likelihood of Confusion

Our determination of likelihood of confusion under § 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the 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 Co.*, 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 and/or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). These are two factors to which applicant and the examining attorney have devoted considerable attention. In addition, applicant has also addressed the weakness of the mark and its past ownership of expired federal registrations.

A. Similarity or dissimilarity of the marks as to appearance, sound, connotation and commercial impression

Applicant's AMERICA'S FAVORITE mark is identical to the AMERICA'S FAVORITE mark in the cited Registrations. Thus, the *du Pont* factor of the similarity of the marks strongly favors a finding of likelihood of confusion.

B. The similarity or dissimilarity and nature of the goods, channels of trade and classes of consumers

We next address the *du Pont* factor involving the similarity or dissimilarity of applicant's goods ("mustard"), in relation to the goods in the cited Registrations ("condiments, namely, ketchup" and "sauces"). It is well-settled that the issue of likelihood of confusion between applied for and registered marks must be determined on the basis of the goods as they are identified in the involved application and registration. *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

For purposes of likelihood of confusion, it is sufficient to show that because of the conditions surrounding their marketing, or because they are otherwise related in some manner, the goods would be encountered by the same consumers under circumstances such that offering the goods under confusingly similar marks would lead to the mistaken belief that they come from, or are in some way associated with, the same source. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) and *In re Iolo Technologies LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010).

While applicant does not dispute that mustard is "somewhat related" to ketchup and sauces, it argues that these products are no more related than other products such as cakes and cookies, or candy and bubblegum, which are the subject of existing registrations for the AMERICA'S FAVORITE mark.⁴ Applicant's argument misses the point as it fails to address the evidence showing the close association between applicant's and registrant's goods.

The evidence shows that ketchup and mustard are both condiments and that condiments are "preparation[s] (a sauce or relish or spice) to enhance the flavor or enjoyment."⁵ The internet evidence provided by the examining attorney also establishes that mustard, ketchup and sauces are commonly offered by a single entity under a single mark. Indeed, applicant and the owner of the cited Registrations sell these products under their respective brand names.⁶

⁴ Applicant's Appeal Brief p. 5.

⁵ See definition of "condiment" attached to Examining Attorney's Appeal Brief of which we take judicial notice, and definitional information regarding "mustard" from www.vocabulary.com attached to 7/21/11 Request for Reconsideration Denied.

⁶ Applicant's website, www.frenchs.com, features images of mustard, Worcestershire sauce, and honey mustard dipping sauce. See 12/21/2010 Office Action. Another website owned by applicant, www.frenchsfoodservice.com, features ketchup sold under the same brand name. See 7/21/2011 Request for Reconsideration Denied. Registrant's website, www.heinz.com, shows that it offers ketchup and sauces, as well as mustard, under the same brand name. See 12/21/2010 Office Action.

This is consistent with the third-party registrations submitted by the examining attorney to show that the goods of applicant and registrant are related.⁷ These registrations have probative value to the extent that they serve to suggest the goods listed therein, namely, ketchup, mustard and sauces, are of a kind that may emanate from a single source under a single mark. See *In re Davey Products Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n. 6 (TTAB 1988).

Additionally, the record demonstrates that mustard, on the one hand, and ketchup and sauces, on the other, are not only related, but complementary goods. Where evidence shows that the goods at issue have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks. See *Martin's Famous Pastry Shoppe*, 223 USPQ at 1290 (bread and cheese related because they are often used in combination and "[s]uch complementary use has long been recognized as a relevant

⁷ See 8/23/10 Office Action.

consideration in determining a likelihood of confusion"); *In re Decombe*, 9 USPQ2d 1812, 1815 (TTAB 1988) (fresh produce is complementary to biscuits, cookies wafers and candy insofar as they are served and eaten together); *In re Hester Industries, Inc.*, 231 USPQ 881, 882-83 (TTAB 1986) (bread and frozen chicken parts are complementary goods, and thus related, because they are appropriate for use together in sandwiches and may otherwise be sold to the same purchasers for use in a single meal); and *In re Vienna Sausage Mfg. Co.*, 230 USPQ 799, 799-80 (TTAB 1986) (sausage and cheese are complementary goods, and thus related, because they may be used together in recipes, sandwiches, and hors d'oeuvres).

The webpage from www.samsclub.com submitted by the examining attorney shows a "Picnic Pack" consisting of ketchup, mustard and sweet relish packaged together for sale.⁸ Thus, mustard and ketchup are complementary products sold in a pack for use together. As observed by the examining attorney, the image of the hot dog in the www.samsclub.com website ad demonstrates that consumers would use mustard, ketchup and relish at the same time on a hot dog as all three of these condiments are featured on

⁸ See 7/21/2011 Request for Reconsideration Denied.

the hot dog shown.⁹ Although it is common knowledge that ketchup and mustard are condiments that are served and used together, the combination of the "Picnic Pack" and the image of the hot dog dressed with mustard, ketchup and relish is further evidence that applicant's and registrant's goods are not only related, but complementary. Similarly, the evidence submitted by the examining attorney contains examples of internet retailers offering ketchup, mustard and sauces for sale on the same webpage. For example, these three types of products are featured under the category "Ketchup & Sauces" on www.heinz.com/our-food/products.¹⁰ According to a definition of mustard on vocabulary.com, "mustard' is a type of "condiment, a preparation (a sauce or relish or spice) to enhance flavor or enjoyment."¹¹ Indeed, "honey mustard sauces" and "wing sauces" are marketed together by online retailers on the same page with ketchup and mustard products.¹² As such, when these complementary products are sold under identical

⁹ See 7/21/11 Request for Reconsideration Denied. The "Picnic Pack" featuring mustard and ketchup appears to be registrant's product, which highlights the likelihood of confusion between applicant's and registrant's marks.

¹⁰ See 7/21/2011 Request for Reconsideration Denied.

¹¹ See 7/21/2010 Request for Reconsideration Denied.

¹² See 12/21/2010 Office Action.

marks, consumers are likely to mistakenly believe that they emanate from the same source. *M.C.I. Foods Inc. v. Bunte*, 96 USPQ2d 1544, 1552 (TTAB 2010).

Because there are no restrictions in the description of goods in applicant's application or in the cited Registrations, we must consider the goods to move in all the normal and usual channels of trade and methods of distribution to all potential purchasers, and these customers would include the general public. *Octocom Systems, Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Pages from the www.carolinasauce.stores.yahoo.net, www.armadillopepper.com, and www.firegirl.com websites show that mustard, ketchup and sauces are sold through the same internet retail specialty sites and therefore travel in the same channel of trade.¹³ Thus, we find that applicant's products and the products in the cited Registrations move in the same channels of trade and are sold to the same classes of consumers.

¹³ See 12/21/2010 Office Action.

When the marks are identical, as they are here, it is only necessary that there be a viable relationship between the goods or services to support a finding of likelihood of confusion. *In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). Clearly, the relationship between applicant's and registrant's products is more than "viable." Given the related and complementary nature of the products set forth in the application and cited Registrations, and the similar trade channels and customers, the *du Pont* factors of similarity of the goods, trade channels and customers strongly favors a finding of likelihood of confusion.

C. The number and nature of similar marks in use on similar goods

In connection with the sixth *du Pont* factor, applicant points to third-party registrations for the AMERICA'S FAVORITE mark arguing that registrant's mark is weak and that consumers have become conditioned to many uses of the mark in the food industry learning to distinguish between them.¹⁴ Applicant's argument is not persuasive.

First, even if we assume that the mark AMERICA'S FAVORITE is weak, "likelihood of confusion is to be avoided, as much between 'weak' marks as between 'strong' marks, or as

¹⁴ See Applicant's Appeal Brief pp. 5-9.

between a 'weak' and 'strong' mark." *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974). More importantly, third-party registrations are not evidence that marks depicted therein are in use or that the public is aware of them, and they are thus of no probative value under the sixth *du Pont* factor. *In re Opus One Inc.*, 60 USPQ2d 1812, 1814 (TTAB 2001) citing *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992).

Thus, the third-party registrations cited by applicant do not support a lack of confusion and the sixth *du Pont* factor is neutral.

D. Other established facts probative of the effect of use

Applicant argues that because its prior Registration No. 2689567 which has since been cancelled, coexisted on the Register with the cited Registrations, registration of the subject application should be granted. In support of its argument, applicant prepared summary charts (reproduced below) contending that its AMERICA'S FAVORITE mark has peacefully coexisted on the Register with similar and identical marks owned by registrant dating back to the early 1990's when registrant (identified in the chart as

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"Heinz"), first started using and subsequently registered AMERICA'S FAVORITE KETCHUP for condiments, namely ketchup.¹⁵

Applicant's AMERICA'S FAVORITE marks:

Mark	Status	Reg. No. / App. No.	Date of First Use	Filing Date / Registration Date	Goods and Services
AMERICA'S FAVORITE MUSTARD	CANCELLED - Section 8 - September 21, 2002	1,668,714	May 1984	Filing Date: March 1, 1991 Registration Date: December 17, 1991	Mustard in International Class 30
AMERICA'S FAVORITE	CANCELLED - Section 8 - September 26, 2009	2,689,567 (Supplemental Register)	December 29, 2000	Filing Date: July 23, 2001 Registration Date: February 18, 2003	Mustard in International Class 30
AMERICA'S FAVORITE	PENDING - Final refusal mailed - December 21, 2010	85/082,505	December 29, 2000	Filing Date: July 12, 2010	Mustard in International Class 30

Heinz's AMERICA'S FAVORITE marks:

Mark	Status	Reg. No. / App. No.	Date of First Use	Filing Date / Registration Date	Goods and Services
AMERICA'S FAVORITE KETCHUP	REGISTERED - Renewed - September 14, 2007	2,098,790	June 1992	Filing Date: March 7, 1996 Registration Date: September 23, 1997	Condiments, namely, ketchup in International Class 30
AMERICA'S FAVORITE	REGISTERED - September 16, 2008	3,500,966	June 1, 1992	Filing Date: August 23, 2007 Registration Date: September 16, 2008	Condiments, namely, ketchup in International Class 30
AMERICA'S FAVORITE	REGISTERED - December 15, 2009	3,724,203	April 30, 2002	Filing Date: November 13, 2007 Registration Date: December 15, 2009	Sauces in International Class 30

We are not persuaded by applicant's arguments which lack

¹⁵ Applicant's Appeal Brief p. 11.

evidentiary and legal support. Cancelled or expired registrations generally have no evidentiary value, and certainly an applicant cannot claim a right to registration based on its prior ownership of cancelled or expired registrations.

Further, based on the record, we are not able to determine whether the owner of the cited Registrations believed there was any likelihood of confusion between its AMERICA'S FAVORITE mark for the ketchup and sauces in Registration Nos. 3500966 and 3724203 respectively, and applicant's now expired Supplemental Registration No. 2689567 for AMERICA'S FAVORITE for mustard. There is no evidence that registrant was aware of applicant's registration. Accordingly, registrant's purported lack of objection to applicant's Registration No. 2689567 does not constitute registrant's consent to applicant's application seeking registration on the Principal Register, nor does it somehow evidence a lack of a likelihood of confusion.

In any event, the Board is not bound by the prior decisions of examining attorneys in allowing the foregoing marks for registration. It has been noted many times that each case must be decided on its own facts. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of

such prior registrations does not bind the Board or this court."). Applicant's citation to *Nett* for the court's ". . . encourage[ment] of the [USPTO] to achieve a uniform standard for assessing the registrability of marks," is presented out of context.¹⁶ Specifically, it ignores the court's immediately-following observation that "the Board (and this court in its limited review) must assess each mark on the record of public perception submitted with the application."¹⁷ *Nett*, 57 USPQ2d at 1566.

In view of the foregoing, we are obligated to assess the registrability of applicant's mark on its own merits and not simply based on the existence of other registrations.

E. Balancing the factors

The identity of the marks, the related and complementary nature of applicant's goods to those in the cited Registrations, and the evidence that the goods move in the same channels of trade and are available to the same classes of consumers, strongly support a finding of likelihood of confusion. Applicant's cancelled registration coexisted with the cited Registrations (albeit on the Supplemental Register). We find that when the

¹⁶ Applicant's Appeal Brief pp. 10-11; Applicant's Reply Brief p. 4.

¹⁷ The *Nett* court also found little persuasive value in the list of third-party registrations submitted by the applicant.

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evidence of applicant's prior cancelled registration is balanced against the other *du Pont* factors, the scales remain tipped in favor of affirming the refusal. See *In re Sunmarks Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994).

Accordingly, we find that applicant's mark for mustard is likely to cause confusion with the identical mark for ketchup and sauces.

Decision: The refusal to register is affirmed.