

ESTTA Tracking number: **ESTTA671406**

Filing date: **05/10/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86384029
Applicant	Sammy Snacks, Inc.
Applied for Mark	A MODERN ANCESTRAL DIET
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Attachments	20150510 Appeal Brief.pdf(205638 bytes)
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**In the United States Patent & Trademark Office
Before the Trademark Trial and Appeal Board**

Applicant/Appellant: Sammy Snacks, Inc.
Serial No.: 86384029
Filing Date: September 6, 2014
Mark: A MODERN ANCESTRAL DIET
Law Office: 102
Examining Attorney: Tara L. Bhupathi

Appeal Brief

Commissioner for Trademarks
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

The present Appeal Brief is submitted in support of the Notice of Appeal filed electronically on April 10, 2015.

Appellant and owner of the refused mark is Sammy Snacks, Inc.

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I. DESCRIPTION OF THE RECORD.

Registration of the present mark “A MODERN ANCESTRAL DIET”, for use in connection with International Class 031 - Cat food; Cat treats; Dog food; Dog treats; Pet food; Pet treats has been finally refused under Trademark Act Section 2(d). The refusal of registration is based on an asserted likelihood of confusion with the mark "THE ANCESTRAL DIET MEETS MODERN NUTRITION” - U.S. Registration No. 3722281, for International Class 031 – Pet food.

Appellant respectfully requests reversal of the refusal of registration and allowance of the present application for publication as Appellant’s mark, when applied to Appellant’s services, is sufficiently different and distinct from the cited mark to avoid a likelihood of confusion.

II. ARGUMENT

In testing for likelihood of confusion under Sec. 2(d) thirteen factors are considered:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.
- (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels.
- (4) The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.
- (5) The fame of the prior mark (sales, advertising, length of use).
- (6) The number and nature of similar marks in use on similar goods.
- (7) The nature and extent of any actual confusion.
- (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
- (9) The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark).
- (10) The market interface between applicant and the owner of a prior mark:
 - (a) a mere "consent" to register or use.
 - (b) agreement provisions designed to preclude confusion, i.e. limitations on continued use of the marks by each party.
 - (c) assignment of mark, application, registration and good will of the related business.

(d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.

(11) The extent to which applicant has a right to exclude others from use of its mark on its goods.

(12) The extent of potential confusion, i.e., whether de minimis or substantial.

(13) Any other established fact probative of the effect of use.

In re E. I. Du Pont de Nemours & Co., 476 F.2d 1357, 1361 (C.C.P.A. 1973).

The pertinent factors in this appeal are factors (1), (5), (6), and (8).

A. Factor (1) – The Marks are Dissimilar in Their Appearance, Sound, Connotation, and Commercial Impression

Concerning factor (1), marks are to be perceived in their entireties, and all components thereof must be given appropriate weight. *In re Hearst Corp.* 982 F.2d 493, 494 (Fed.Cir.1992). The similarities and dissimilarities between the two marks must be considered, for likelihood of confusion depends on the overall impression of the marks. *In re Electrolyte Laboratories, Inc.*, 929 F.2d 645, 647 (Fed. Cir. 1990).

The Federal Circuit has held that the basic principle in determining confusion between marks is that marks must be compared in their entireties. *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). It follows that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark. *Id.*

No feature of a mark can be ignored. *Id.* (citing, *Massey Junior College, Inc. v. Fashion Institute of Technology*, 492 F.2d 1399 (CCPA 1974)). No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone. *Id.*

In rejecting registration of the mark, the Examiner did not properly weigh the differences between Applicant's mark and the mark asserted against Applicant's mark.

The appearance, sound, sight, and commercial impression of "THE ANCESTRAL DIET MEETS MODERN NUTRITION" is distinct from the applied-for mark "A MODERN ANCESTRAL DIET". The appearance of "A MODERN ANCESTRAL DIET" is different from "THE ANCESTRAL DIET MEETS MODERN NUTRITION" because the terminology "THE", "MEETS", and "NUTRITION" is nowhere present in Applicant's mark and the order of the words "MODERN", "ANCESTRAL" and "DIET" is different between the two marks.

The sound of "A MODERN ANCESTRAL DIET" is distinct from the sound of "THE

ANCESTRAL DIET MEETS MODERN NUTRITION”. At least four syllables of the mark “THE ANCESTRAL DIET MEETS MODERN NUTRITION” are not present in Applicant’s mark. In addition, the ordering of the words and syllables of the words is also very different. Consequently, the sound of the two marks is profoundly different.

The sight of “THE ANCESTRAL DIET MEETS MODERN NUTRITION” is distinct from the applied-for mark “A MODERN ANCESTRAL DIET” as well. The absence of the words “MEETS” and “NUTRITION” and the different ordering of words make the sight of Applicant’s mark different.

See, e.g., *Conde Nast Publications, Inc. v. Miss Quality, Inc.*, 507 F.2d 1404 (CCPA 1975) (holding that the marks “Vogue” and “Country Vogues” did not look or sound alike).

The commercial impression of “THE ANCESTRAL DIET MEETS MODERN NUTRITION” derives significant contribution from the words “MEETS” and “NUTRITION” and conveys the impression that an ancestral diet has somehow been modified to have the characteristics of “Modern Nutrition”. By contrast, Applicant’s mark the impression that a current product has the characteristics of an “Ancestral Diet”

By stressing the individual words of the phrase “MODERN ANCESTRAL DIET” and completely ignoring the ordering of those words as well as the portions “MEETS” and “NUTRITION”, the Office Action did not properly compare the applied-for mark with the mark “THE ANCESTRAL DIET MEETS MODERN NUTRITION”. The Office Action erred in its diminution of the contribution of the terminology “MEETS” and “NUTRITION”. When these differences are given fair weight and the ordering of the words is considered, confusion is not likely.

The differences between the applied-for mark and “MODERN ANCESTRAL DIET” and the mark upon which the rejections are based, “THE ANCESTRAL DIET MEETS MODERN NUTRITION”, are analogous to those of “VARGAS” and “VARGA GIRL” in *In re Hearst*. The Board of Trademark Trial and Appeal Board of the United States Patent and Trademark Office (“the Board”) had refused Hearst’s application to register the trademark “VARGA GIRL” on the ground of likelihood of confusion with the registered trademark “VARGAS” for calendars and similar goods. *In re Hearst Corp.* 982 F.2d at 493. In reversing the Board’s decision, the Federal Circuit found that the appearance, sound, sight, and commercial impression of VARGA GIRL derive significant contribution from the component “girl”, which is analogous to the phrase “THE ANCESTRAL DIET MEETS MODERN NUTRITION” deriving a significant contribution from

the portions “MEETS” and “NUTRITION”. By stressing the portion “varga” and diminishing the portion “girl”; which is analogous to the stressing by the present Office Action of the individual words in “MODERN ANCESTRAL DIET” and diminishing the differences between the marks; the Board inappropriately effectively changed Applicant’s mark. After giving fair weight to the phrase “GIRL”, the Federal Circuit found that there was not a likelihood of confusion between the marks “VARGA GIRL” and “VARGAS”. *In re Hearst Corp.* 982 F.2d at 494. Similarly, after giving fair weight to the phrase “MEETS” and “NUTRITION” and considering the different ordering of words in the marks, there is little likelihood of confusion between the applied-for mark and “THE ANCESTRAL DIET MEETS MODERN NUTRITION”.

For at least the reasons mentioned herein, there is little likelihood of confusion between the applied-for mark and the mark “THE ANCESTRAL DIET MEETS MODERN NUTRITION”. Accordingly, this factor heavily favors reversal of the Examiner’s decision.

B. Factor (5) – The Prior Mark has Only Been Registered for Five Years and No Evidence is of Record that it is Famous

The record for the mark “THE ANCESTRAL DIET MEETS MODERN NUTRITION” is of record in this case from at least the Office Action of December 15, 2014 (the “Office Action”). That record indicates that the mark was not applied for until May 21, 2009 and was not registered until December 8, 2014. No evidence is of record that indicates that the referenced mark is famous.

Accordingly, this factor also favors reversal of the Examiner’s decision.

C. Factor (6) – There are Other Similar Marks Registered For Use on Similar Goods

In addition to Applicant’s mark and the prior mark, the Office Action also noted at least two other similar marks. The mark “Ancestral Model Diet” was registered on October 28, 2008 for dog food and cat food, which goods are similar to both those of Applicant as well as the prior mark.

Also, the mark “Ancestry” was registered on June 25, 2013 for Cat food; Cat treats; Dog food; Dog treats; Pet food; and Pet treats, which goods are also similar to both those of Applicant as well as the prior mark.

These other marks in essentially the same area of commerce also favor reversal of the Examiner’s decision.

**D. Factor (8) – Applicant’s Mark Has Been Concurrently Used for Over Two Years
Without Evidence of Actual Confusion**

The trademark “A MODERN ANCESTRAL DIET” has been actively used in commerce for over two years, as indicated by the record of the present application. During that time Applicant has not been made aware of any actual confusion in the market place and has had no communication from the trademark owner of the mark “THE ANCESTRAL DIET MEETS MODERN NUTRITION” expressing any concern whatsoever about Applicant’s mark.

III. CONCLUSION

For all of the reasons discussed herein, Petitioner respectfully requests that this Board reverse the rejection for the trademark “A Modern Ancestral Diet” and direct issuance of a Notice of Allowance.

Dated: May 10, 2015

By 

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