

This Opinion is Not a
Precedent of the TTAB

Hearing: March 30, 2017

Mailed: April 18, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re iSatori, Inc.
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Serial No. 86397344
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for iSatori, Inc.

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Before Quinn, Lykos and Adlin,
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

iSatori, Inc. (“Applicant”) seeks registration on the Principal Register of **iSatori Bio-Gro**, in standard characters, for “dietary and nutritional supplements.”¹ The Examining Attorney refused registration under Section 2(d) of the Trademark Act on the ground that Applicant’s mark so resembles three commonly-owned registered marks – BIOGROWN, BIOGROW and BIOGROWTH – all in typed form and all for

¹ Application Serial No. 86397344, filed September 17, 2014 under Section 1(a) of the Trademark Act.

“nutritional supplements,”² that use of Applicant’s mark in connection with Applicant’s goods is likely to cause confusion or mistake or to deceive. After the refusal became final, Applicant appealed and filed a request for reconsideration which was denied. Applicant and the Examining Attorney then filed briefs and appeared at an oral hearing.

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *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 differences in the essential characteristics of the goods and differences in the marks.”).

Turning first to the goods and channels of trade, they are in-part identical, as Applicant and Registrant both offer “nutritional supplements.” Where, as here, Applicant’s and Registrant’s goods are in-part identical, we must presume that the channels of trade and classes of purchasers for those goods are also the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though

² Registration Nos. 2411342 (issued December 5, 2000), 2496763 (issued October 9, 2001) and 2643285 (issued October 29, 2002), respectively; all three registrations are on the Principal Register and have been renewed.

there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011). In any event, Applicant conceded at the oral hearing that the goods are in-part identical and must be presumed to travel in the same channels of trade.

The legal identity (in part) of Applicant's and Registrant's goods and their overlapping channels of trade not only weigh heavily in favor of a finding of likelihood of confusion, but also reduce the degree of similarity between the marks necessary to find a likelihood of confusion. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

As for the marks, they are highly similar "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). In fact, the BIO-GRO portion of Applicant's mark looks and sounds so similar to each of the cited marks, and conveys such a similar meaning, that it may very well be perceived as another variation of Registrant's BIOGROW/BIOGROWN/BIOGROWTH marks.³

³ In analogous cases, we have found that marks differing by only a single letter are confusingly similar. See *Apple Computer v. TVNET.net Inc.*, 90 USPQ2d 1393, 1396 (TTAB

Applicant stresses that its mark begins with the term iSatori, and argues that this is sufficient to distinguish its mark from Registrant's marks. While Applicant is correct that the first portion of a mark is often its most important and dominant feature, we nevertheless disagree that it is sufficiently distinguishing in this case. Instead, we find that adding the house mark iSatori⁴ to BIO-GRO may in fact exacerbate confusion, even though it comes first and even if we assume it is more distinctive than BIO-GRO. Our conclusion is based in part on Applicant's specimen of use, which displays BIO-GRO by itself, and in larger letters than iSatori:



2007) (*VTUNES.NET vs. ITUNES*); *Interlego AG v. Abrams/Gentile Entertainment Inc.*, 63 USPQ2d 1862, 1863 (TTAB 2002) ("Obviously, the marks LEGO and MEGO are extremely similar in that they differ simply by one letter."); *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999) ("Applicant's mark STRATEGYN and registrant's mark STRATEGEN are phonetic equivalents and differ by only one letter.")

⁴ Not only is iSatori Applicant's trade name, but it is separately registered, in standard character format, for dietary and nutritional supplements (Registration No. 4731503). Request for Reconsideration of February 26, 2016.

Furthermore, in a number of analogous cases, the addition of a house mark or additional term to the beginning of a registered mark has been found to be, in essence, an “aggravation rather than a justification.” *In re C.F. Hathaway Co.*, 190 USPQ 343, 345 (TTAB 1976) (citation omitted); *see also, In re Christian Dior, S.A.*, 225 USPQ 533, 534 (TTAB 1985). For example, in affirming a refusal to register VANTAGE TITAN based on a registration for TITAN, we stated: “Applicant has taken registrant’s mark and added its ‘product mark’ to it. It is not clear why the addition of the word VANTAGE would avoid confusion. It is more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices.” *In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009). *See also, Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (finding STONE LION CAPITAL confusingly similar to LION and LION CAPITAL); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1367 (TTAB 2007) (affirming refusal to register CLUB PALMS MVP based on prior registration of MVP, finding consumers “likely to believe that the CLUB PALMS MVP casino services is simply the now identified source of the previously anonymous MVP casino services”); *In re Pierce Foods Corp.*, 230 USPQ 307, 309 (TTAB 1986) (in dicta, stating that even if Applicant’s proposed amendment to its drawing was accepted, “Applicant’s institutional purchasers, aware of registrant’s CHICKEN BAKE coating mix, may well believe that applicant’s PIERCE CHICK’N BAKE pre-seasoned chicken is a product produced under license from registrant or otherwise sponsored or produced

by registrant.”); *In re Riddle* 225 USPQ 630 (TTAB 1985) (affirming refusal to register RICHARD PETTY’S ACCU TUNE & Design based on registration for ACCU-TUNE); *In re Christian Dior*, 225 USPQ at 533 (LE CACHET DE DIOR for men’s dress shirts likely to be confused with CACHET for toilet soap, dresses and cologne); *Key West Fragrance & Cosmetic Factory, Inc. v. The Mennen Company*, 216 USPQ 168 (TTAB 1982) (finding likelihood of confusion between SKIN SAVERS for face and throat lotion and MENNEN SKIN SAVER for cosmetic and toilet preparations, namely, hand and body lotion); *In re Champion International Corp.*, 196 USPQ 48 (TTAB 1977) (affirming refusal to register CHECK MATE based on registration of HAMMERMILL MICR CHECK-MATE); *In re C.F. Hathaway*, 190 USPQ at 343 (affirming refusal to register HATHAWAY GOLF CLASSIC based on registration of GOLF CLASSIC).⁵ Suffice it to say, we find these cases much more relevant and analogous to this one than the cases upon which Applicant relies in which the

⁵ As a general principal, “the presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical.” *In re Mighty Leaf Tea*, 94 USPQ2d 1257, 1260-61 (Fed. Cir. 2010) (finding ML in standard characters confusingly similar to ML MARK LEES in stylized form). Where an additional term or house mark is added to the end of a registered mark, confusion may also be likely. *In re Chica Inc.*, 84 USPQ2d 1845, 1848-49 (TTAB 2007) (affirming refusal to register CORAZON BY CHICA & Design based on a registration of CORAZON in stylized format, stating “to many consumers, applicant’s mark for the identical word ‘Corazon’ followed by the phrase ‘BY CHICA’ will simply be viewed as the identification of the previously anonymous source of the goods sold under the mark CORAZON”); *In re Apparel Ventures, Inc.* 229 USPQ 225, 226 (TTAB 1986) (“Applicant has chosen as its mark the same word already registered by registrant and simply added ‘by sassafras’ to it. The words ‘by sassafras’ indicate to prospective purchasers that ‘sassafras’ is the name of the entity which is the source of the ‘SPARKS’ brand clothing. Prospective purchasers do not necessarily know or care which business calls itself ‘sassafras,’ but they would assume that when ‘SPARKS’ appears on two similar products they both come from the same source.”).

addition of a house mark or another term to a registered mark was found sufficient to avoid confusion.⁶

This is so even though we agree with Applicant that its mark and Registrant's marks are all somewhat suggestive of nutritional supplements. The suggestiveness of the marks in this case is less important than the fact that Registrant owns three obviously similar marks, all of which are variations of each other, and all of which combine the terms "bio" and "grow" or forms thereof. As a result, this case is somewhat unique in that here Applicant's mark would not only be perceived as another nutritional supplement from the previously anonymous source of BIOGROWN, BIOGROW and BIOGROWTH nutritional supplements, but as another nutritional supplement from the previously anonymous source of what is in fact a series of BIOGROW/BIOGROWTH/BIOGROWN products, from a source already known to adopt and offer supplements under closely similar names including the term BIO followed by forms of the term GROW.

⁶ In *New England Fish Company v. The Herwin Co.*, 511 F.2d 562, 184 USPQ 817 (CCPA 1975), the common term, KITTY, was merely descriptive for cat food, whereas here BIOGROW and forms thereof are at most suggestive of nutritional supplements, and in that case the applicant's mark included after KITTY the initial "O's." As indicated, Applicant's reliance on both *In re Fiesta Palms*, 85 USPQ2d at 1360 and *In re Christian Dior*, 225 USPQ at 533 is misplaced, as both support a finding of confusing similarity in this case. Several cases upon which Applicant relies -- *AutoZone Inc. v. Tandy Corp.*, 373 F.3d 786, 71 USPQ2d 1385 (6th Cir. 2004), *Scorpiniti v. Fox Television Studios, Inc.*, 918 F.Supp.2d 866 (N.D. Iowa 2013) and *Worthington Foods Inc. v. Kellogg Co.* 732 F.Supp. 1417, 14 USPQ2d 1577 (S.D. Ohio 1990) are not controlling, and in any event: (1) in *AutoZone*, an infringement case, the marks were more different than those here and the goods were found "not related enough" for confusion to be likely; (2) in *Worthington Foods* the cited decision merely denied a preliminary injunction and we distinguished that case in *General Mills, Inc. and General Mills IP Holdings II, LLC v. Fage Dairy Processing Industry S.A.*, 100 USPQ2d 1584 (TTAB 2011), which supports a finding of confusing similarity in this case; and (3) in *Scorpiniti* the Court relied in large part distinct "font colors and typefaces" among other differences.

Indeed, while BIOGROW and forms thereof is somewhat suggestive of nutritional supplements, it is nowhere near as suggestive as the marks in cases where the addition of a house mark was found to be sufficiently distinguishing to avoid a likelihood of confusion. This is clear by contrasting this case with *Knight Textile Corp. v. Jones Investment Co., Inc.*, 75 USPQ2d 1313 (TTAB 2005), one of the cases upon which Applicant primarily relies. In *Knight Textile*, we found the mark ESSENTIALS for women's clothing to be "highly suggestive" based in part on a dictionary definition. We found that the term "connotes that the clothing items sold under the marks are basic and indispensable components of, or 'essentials' of, one's wardrobe." *Id.* at 1316. The finding was supported by 23 third-party registrations (registered to 21 different owners) for marks which include ESSENTIALS for clothing, "at least two" of which "are comprised of the word ESSENTIALS coupled with apparent house marks." *Id.* at 1316-17 & n.7.

In this case, however, there is no evidence like that in *Knight Textile* nor is there any basis to find that BIOGROW/BIOGROWTH/BIOGROWN are highly suggestive of nutritional supplements. In fact, here Applicant relies on evidence which is neither quantitatively nor qualitatively on par with the evidence in *Knight Textile*, specifically: dictionary definitions of BIO and GROW ("bio" being defined as "connected with life and living things" and "grow" being defined as "to increase in size or amount");⁷ and 12 third-party registrations of marks containing the term BIO for nutritional supplements. Based on this evidence, Applicant argues that: (1) "[t]he

⁷ Office Action response of July 6, 2015 (printouts from Cambridge Dictionaries Online).

Register contains a plethora of marks containing the term, BIO, for nutritional supplements;” and (2) “[i]n the context of nutritional supplements, the terms, BIOGROW, and all of its variations, suggests the increase in muscle mass and other general personal health effects gained by taking nutritional supplements” 7 TTABVUE 17. In other words, in sharp contrast to *Knight Textile*, only a portion of the shared term in this case is registered for the relevant goods, and there are only 12 such third-party registrations. Applicant conceded during the oral hearing that none of the third-party registrations upon which it relies are as close to Registrant’s marks as is Applicant’s mark. In *Knight Textile*, not only were there were almost twice as many third-party registrations in evidence, but they all included the exact shared term, in its entirety, registered for the relevant goods. Similarly, while in *Knight Textile* the dictionary definition closely tracked the meaning of the shared term ESSENTIALS (“indispensable components of, or ‘essentials’ of, one’s wardrobe”), here by contrast the dictionary definitions upon which Applicant relies have a much more tenuous relationship to nutritional supplements, such that consumers encountering forms of BIOGROW must make several mental connections, first between “life and living things” generally and humans seeking supplementary nutrition specifically, and then between an “increase in size or amount” generally and an increase in the muscle mass of nutritional supplement users specifically. In short, ESSENTIALS, an English word commonly used by numerous parties for clothing, is significantly more suggestive than BIOGROW and forms thereof, which is not a word and which has not been revealed to be used by anyone other than Applicant and

Registrant for nutritional supplements. Therefore, *Knight Textile* is inapposite and this case is much more closely analogous to cases such as *Toshiba Medical Systems, Fiesta Palms* and *Riddle*.⁸

Finally, we accept Applicant's argument that consumers would exercise a heightened level of care in purchasing nutritional supplements. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1744 (TTAB 2014). However, we find that this factor, which weighs against a finding of likelihood of confusion, is easily outweighed by the identical goods and channels of trade, and the similar marks, especially because Applicant's mark may be assumed to be a fourth variation of Registrant's BIOGROW/BIOGROWTH/BIOGROWN marks for identical goods. *See, In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986); *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970); *see also, HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd, Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

⁸ Applicant's evidence that BIO-GROW and variations thereof is registered for soil amendments, flower pots and vases, hair care products, sludge management services and fertilizer nutrient supplement for agricultural use is essentially irrelevant. None of these goods and services are similar or even related to nutritional supplements for people. *See National Cable Television Ass'n Inc. v. American Cinema Editors Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991) and *SBS Products Inc. v. Sterling & Rubber Products, Inc.*, 8 USPQ2d 1147, 1149 n.6 (TTAB 1988). Indeed, Applicant's argument is exactly the type of "abstract proposition" asserted in *National Cable Television Ass'n*, and here, as there, it is "essentially meaningless."

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In short, even though we assume that consumers will exercise care in purchasing, because the goods are identical, with overlapping channels of trade, and bear similar marks, confusion is likely.

Decision: The Section 2(d) refusal to register Applicant's mark is affirmed.