

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Mailed: July 25, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Flowers Bakeries Brands, Inc.
v.
Independent Marketing Alliance LP

Opposition No. 91167151
to application Serial No. 78432642

Theodore H. Davis, Jr., Olivia Maria Baratta and Alicia
Grahm Jones of Kilpatrick Stockton LLP for Flowers Bakeries
Brands, Inc.

Martyn B. Hill and Bartt G. Thompson of Pagel, Davis & Hill,
P.C. for Independent Marketing Alliance LP.

Before Hairston, Cataldo and Mermelstein,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

On June 9, 2004 applicant, Independent Marketing
Alliance LP, filed an application to register on the
Principal Register the mark COBBLESTONE MARKET, in standard
character form, based upon its assertion of a bona fide
intention to use the mark in commerce for the following
goods, as amended: "deli meats; cooked deli items, namely,
soups, cheese; refrigerated salads except macaroni, rice,
and pasta salad; pickles; bagged potato chips, frozen soups;

frozen entrees, namely, entrees consisting primarily of meat, fish, poultry or vegetables," in International Class 29.¹

Registration has been opposed by Flowers Bakeries Brands, Inc. ("opposer"). As grounds for opposition, opposer asserts that it is the owner of the following COBBLESTONE MILL marks, previously used and registered on the Principal Register, for the following goods:



for "bakery products - namely, bread buns and rolls" in International Class 30;²

COBBLESTONE MILL

for "bakery products, namely bread, buns and rolls" in International Class 30;³ and

¹ Application Serial No. 78432642. Applicant has disclaimed the exclusive right to use the term "MARKET."

² Registration No. 1326230 issued on March 19, 1985. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

³ Registration No. 1991258 issued on August 6, 1996. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.



for "bakery products" in International Class 30.⁴

Opposer argues in its amended notice of opposition that it has made use of its COBBLESTONE MILL marks in connection with the above goods since prior to the filing date of applicant's intent-to-use application; and that applicant's mark, COBBLESTONE MARKET, when used on applicant's goods so resembles opposer's COBBLESTONE MILL marks for its recited goods as to be likely to cause confusion, to cause mistake, and to deceive. Opposer further argues that applicant committed fraud on the United States Patent and Trademark Office (USPTO) by falsely averring a bona fide intent to use its mark in connection with certain goods recited in the involved application.

Applicant's answer consists of a general denial of the allegations in the amended notice of opposition.⁵

⁴ Registration No. 2762164 issued on September 9, 2003 with a disclaimer of "QUALITY BREADS, A FAMILY OF BAKERS SINCE 1919, SAN FRANCISCO SOURDOUGH" and "RECIPE" and the following lining statement: "The lining is a feature of the mark and does not indicate color."

⁵ In addition, applicant asserts as "affirmative defenses" (1) that the amended notice of opposition fails to state a claim upon which relief can be granted; and (2) that "Applicant's mark, when used correctly with Applicant's goods is not likely to cause confusion with the mark for Opposer's goods." As to the former, inasmuch as applicant did not file a motion to dismiss under Fed.

The Record

By operation of Trademark Rule 2.122, 37 C.F.R. §2.122, the record in this case consists of the pleadings and the file of the involved application. In addition, during its assigned testimony period, opposer submitted the testimony depositions, with exhibits, of Janice Anderson, its vice president of marketing. Opposer also a filed a notice of reliance.

During its assigned testimony period, applicant submitted the testimony deposition, with exhibits, of Robert Planck, its president, and the testimony deposition, with exhibits, of Robert Fontana, its director of marketing and general merchandising. Applicant also filed a notice of reliance.

In addition, the parties stipulated to treat the discovery depositions of Ms. Anderson, Mr. Planck and Mr. Fontana as trial testimony herein. As a result, the parties have submitted such discovery depositions as part of their respective notices of reliance.⁶

R. Civ. P. 12(b)(6) by means of which the sufficiency of the amended notice of opposition may be tested, such "affirmative defense" will be given no further consideration. Applicant's second "affirmative defense" is deemed to be an amplification of applicant's denials of the allegations contained in the amended notice of opposition.

⁶ We note with approval the parties' utilization of stipulated evidence in light of the savings in time and expense for the parties as well as the judicial economy afforded the Board thereby. See Target Brands Inc. v. Hughes, 85 USPQ2d 1676 (TTAB 2007).

Opposer and applicant filed main briefs on the case, and opposer filed a reply brief.

Facts

Since 1983, opposer has used its COBBLESTONE MILL marks in connection with bakery goods.⁷ Opposer's goods under its COBBLESTONE MILL marks are featured on grocery store shelves and display racks, as well as deli shops.⁸ Opposer advertises its goods under the COBBLESTONE MILL marks in displays in grocery stores, in nationally distributed magazines, at cooking events, and on its Internet websites flowersfoods.com and cobblestonemill.com.⁹ In 2006, opposer spent \$400,000 on advertising goods under the COBBLESTONE MILL marks and in 2007, opposer spent \$600,000 on such advertisements.¹⁰ Sales of opposer's goods under its COBBLESTONE MILL marks were \$100 million in 2005 and \$105 million in 2006.¹¹

Applicant consists of six independent food service distributors¹² and facilitates branding, product development and marketing support for its member companies.¹³ Applicant began using the COBBLESTONE MARKET mark on goods as early as

⁷ Notice of Reliance, Exhibit 1.

⁸ Anderson Discovery Deposition, 93-94.

⁹ Anderson Testimony. P. 9-10, 46-47, Anderson Discovery Deposition, p. 24, 53, Exhibit 1, Notice of Reliance, Exhibit 9.

¹⁰ Anderson Testimony, p. 76.

¹¹ Anderson Discovery Deposition, p. 26.

¹² Planck Discovery Deposition, p. 12.

¹³ Planck Testimony, p. 9.

2004.¹⁴ By September 2007, applicant's annual sales of goods under its COBBLESTONE MARKET mark were \$80 million.¹⁵

Opposer's Standing and Priority of Use

Because opposer has properly made its pleaded registrations of record, we find that opposer has established its standing to oppose registration of applicant's mark. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Moreover, because opposer's pleaded registrations are of record, Section 2(d) priority is not an issue in this case as to the COBBLESTONE MILL marks therefor and goods and services covered thereby. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). We note in addition that applicant does not contest either opposer's standing to bring this proceeding or priority of use.

Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm*

¹⁴ Fontana Testimony, p. 24-27.

¹⁵ Planck Testimony, p. 9.

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Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We will concentrate our discussion of the issue of likelihood of confusion on that registration of opposer's which is closest to the mark for which applicant is seeking registration for the most similar goods, namely, opposer's Registration No. 1991258 for COBBLESTONE MILL in standard character form for "bakery products, namely bread, buns and rolls" in International Class 29.

The Marks

In this case, opposer's COBBLESTONE MILL mark is similar to applicant's COBBLESTONE MARKET mark in that both share the identical word COBBLESTONE as their first term. We find that the word COBBLESTONE, being the first term in both parties' marks, is the dominant feature in the commercial impression created thereby. See *Presto Products, Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("...[it is] a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered."). See also *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, *supra*, ("Veuve" is the most prominent part of the mark VEUVE

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CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label). Furthermore, the word MILL in opposer's mark refers back to, and reinforces, the first word COBBLESTONE. Likewise, the word MARKET in applicant's mark refers back to, and reinforces, COBBLESTONE. As a result, both marks as a whole connote rustic structures made from cobblestones. Thus, we find that the word COBBLESTONE in the parties' marks contributes more significantly to their commercial impressions than the terms MILL and MARKET.

In terms of appearance, sound, connotation and overall commercial impression, we find that the similarities between the parties' marks which result from the presence of COBBLESTONE as their first term outweigh the dissimilarities resulting from the different second terms, MILL and MARKET. Viewing the marks in their entireties, we find that they are similar because the word COBBLESTONE is the dominant, and identical, feature of both.

In view of the similarities between opposer's COBBLESTONE MILL mark and applicant's COBBLESTONE MARKET mark, this du Pont factor favors opposer.

Strength of Opposer's COBBLESTONE MILL Mark

With regard to the strength of the COBBLESTONE MILL mark, we note opposer's contention that its mark has "acquired a high degree of recognition, fame, and

distinctiveness"¹⁶ as applied to its goods. Opposer's evidence of such recognition mainly consists of sales and advertising numbers, as well as testimony regarding consumer recognition and the nature and extent of opposer's advertising. However, opposer provides no evidence to support its assertions regarding the extent to which consumers recognize its COBBLESTONE MARKET mark, and the testimony of its officers regarding such recognition is insufficient to support its claim that the COBBLESTONE MARKET mark has achieved widespread notoriety.

Furthermore, opposer's sales and advertising figures, while indicating that opposer has enjoyed a high degree of success in marketing and selling its goods under the COBBLESTONE MARKET mark, fall short of establishing that such mark is famous. We note, for example, that opposer's \$600,000 annual advertising figure is very low, compared to annual advertising figures for other marks we have found to be famous. See, for example, Motion Picture Association of America, Inc. v. Respect Sportswear Inc., 83 USPQ2d 1555 (TTAB 2007) (opposer's member annually spent 4 billion dollars on advertisements and promotion). Thus, opposer's evidence falls short of demonstrating that the successful marketing of opposer's COBBLESTONE MARKET products translates into widespread recognition of the mark.

¹⁶ Brief, p. 3.

Accordingly, we find on this record that the evidence falls short of establishing that opposer's mark COBBLESTONE MARKET is famous for purposes of our likelihood of confusion determination.

Nevertheless, we find that the evidence is sufficient to show that opposer's mark COBBLESTONE MARKET has achieved at least a degree of recognition and strength in the market and thus is not a weak mark that is entitled only to a very narrow scope of protection, as argued by applicant. In coming to this determination, we have considered all of the evidence relevant thereto, including applicant's evidence, more fully discussed below, of third-party use and registration of various "COBBLESTONE" formative marks.

Registration and Use of Similar Marks

In its brief, applicant identifies third-party uses of various COBBLESTONE marks and refers to a list of third-party applications and registrations in a summary from the USPTO's Trademark Electronic Search System (TESS) database. This summary, however, does not make the listed registrations of record. To make third-party registrations of record, a party must submit a copy of the registration or a printout of such registration from the USPTO's electronic database. In re Duofold, Inc., 184 USPQ 638, 640 (TTAB 1974) ("[T]he submission of a list of registrations is insufficient to make them of record."). Furthermore,

applicant's submission of third-party applications is entitled to no probative value because applications are only evidence that an applicant has filed for registration of a mark. See *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002).¹⁷

In addition, applicant's submission of the truncated results of two searches of the GOOGLE Internet search engine of "cobblestone" and "cobblestone food" provide very little information regarding the nature and extent of use, if any, of the terms retrieved thereby. It is settled that truncated results from search engines are entitled to little weight. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007):

Bayer asserts that the list of GOOGLE search result summaries is of lesser probative value than evidence that provides the context within which a term is used. We agree. Search engine results—which provide little context to discern how a term is actually used on the webpage that can be accessed through the search result link—may be insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations.

Similarly, in this case the results of applicant's GOOGLE search provide insufficient information regarding the

¹⁷ We also point out that, even if properly made of record, third-party registrations are not evidence that the marks shown therein are in use. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973). Thus, they have no probative value with respect to the du Pont factor of the number and nature of similar marks that are in use for similar goods and services.

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asserted use of COBBLESTONE formative marks by third parties to support a finding that such term is weak as applied to food products. Likewise, applicant's submission of electronic mail messages listing asserted third-party uses and registrations of various COBBLESTONE formative marks is insufficient to make such registrations of record or provide relevant information regarding such asserted use. See *Id.* and *In re Duofold, Inc.*, *supra*.

As a result, we are not persuaded that opposer's COBBLESTONE MILL mark is weak or otherwise entitled only to a narrow scope of protection.

The Goods

With respect to the goods, it is well established that the goods or services of the parties need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods or services of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. See *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re*

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International Telephone & Telephone Corp., 197 USPQ 910, 911 (TTAB 1978).

We base our determination of the similarity or dissimilarity between the parties' respective goods, as we must, upon the goods recited in the involved application and opposer's above-noted registration for its COBBLESTONE MILL mark. See *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.") In that regard, we observe that, as identified, opposer's goods under its COBBLESTONE GRILL mark are food items in the nature of "bakery products, namely bread, buns and rolls." Applicant's goods, as identified in its subject application, are also food items in the nature of "deli meats; cooked deli items, namely, soups, cheese; refrigerated salads except macaroni, rice, and pasta salad; pickles; bagged potato chips, frozen soups; frozen entrees, namely, entrees consisting primarily of meat, fish, poultry or vegetables." Because neither opposer's nor applicant's identification of goods articulates any limitations as to the type, ethnicity, or cuisine of the food items provided under their marks, we must presume that applicant's deli meats and deli items, salads, pickles, chips, frozen soups and entrees as well as opposer's bread, buns and rolls

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encompass any and all foods typically identified thereby. See *Id.* 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.") As a result, we find that opposer's recited bread, buns and rolls include those that would be suitable for use to make sandwiches with applicant's deli meats and cheese, and serve with applicant's soups, refrigerated salads, pickles and bagged potato chips. In so finding, we note that bread, buns and rolls are commonly understood to be used, served, and eaten with deli meats, chips, salads, pickles and soups. See *In re Colonial Stores, Inc.*, 216 USPQ 793, 794 (TTAB 1982) (COUNTRY PRIDE for bread found confusingly similar to COUNTRY PRIDE for prepared meat products); and *In re Martin's Famous Pastry Shoppe, Inc.*, 221 USPQ 364, 366-7 (TAB 1984) (MARTIN'S FAMOUS PASTRY SHOPPE INC. for baked goods found confusingly similar to MARTIN'S for cheese). In addition, applicant's president, Robert Planck, acknowledged

in his discovery deposition that companies purchase and use both parties' goods together:

Q. Okay. So, for sandwiches, the company might provide the components for a sandwich?

A. It's possible an operator would buy all the components for a sandwich, including [opposer's] breads distributed through our companies.

Q. Okay. Would you consider sandwiches and bread to be related items?

A. They are components that somebody used together or used separately; so, you know, there is some relationship between those, as there is between mustard and ham and mustard and bread. They could be used together under some circumstances.

Q. Cheese and bread as well?

A. Any item that could conceivable use bread could be related to any other item, including cheese.

Q. Would your customers purchase deli meats and bread during the same time period?

A. Our customers would purchase all their use items, including chemicals, foods and nonfoods,

during a similar period of time; however, that would be defined by their sales or purchase cycle.

Q. Okay. Would that also apply to mustard and bread?

A. Yes, it would.

Q. Cheese and bread?

A. It would apply to any product that they would consume and use in their business.¹⁸

Thus, the testimony of applicant's own president further establishes a relationship between bread products and deli meats, cheeses, and other sandwich items.

In view of the related nature of opposer's goods and those of applicant, this du Pont factor also favors opposer.

Channels of Trade

Because of our finding that the above goods are related, and because there are no recited restrictions as to their channels of trade or classes of purchasers, we must assume that the goods are available in all the normal channels of trade to all the usual purchasers for such goods, and that the channels of trade and the purchasers for opposer's goods as well as applicant's goods would be the same. See *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000). See also *Octocom Systems, Inc. v. Houston Computers Services Inc.*, supra. See also Paula

¹⁸ Planck Discovery Deposition, p. 49, 66-67.

Payne Products v. Johnson Publishing Co., supra. In view of the foregoing, we are not persuaded by applicant's arguments regarding, for instance, differences in the sections of grocery stores in which the parties' goods will be encountered, or other asserted differences in the channels of trade of the involved goods.

We find that, as a result of the foregoing, this du Pont factor also favors opposer.

Actual Confusion

Another du Pont factor discussed by the parties is the lack of instances of actual confusion. Applicant asserts that the absence of actual confusion since 2004 suggests no likelihood of confusion. However, it is well-settled that it is not necessary to show actual confusion in order to establish likelihood of confusion. See Weiss Associates Inc. v. HRL Associates Inc. 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). Thus, this du Pont factor is neutral.

Summary

We have carefully considered all of the evidence pertaining to priority of use and the relevant du Pont factors, as well as all of the parties' arguments with respect thereto, including any evidence and arguments not specifically discussed in this opinion.

We conclude that opposer has established its standing to bring this proceeding; its priority of use; and that a

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likelihood of confusion exists between its COBBLESTONE MILL mark and applicant's COBBLESTONE MARKET mark, as used in connection with their respective goods. To the extent that any of applicant's points raise a doubt about our conclusion, all doubt on the issue of likelihood of confusion must be resolved in favor of the prior user and against the newcomer. See *San Fernando Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 2 (CCPA 1977).

Fraud

Given our determination that there is a likelihood of confusion herein, we decline to reach a determination on the question of fraud in this proceeding.

DECISION: The opposition is sustained on the ground of priority and likelihood of confusion, and registration to applicant is refused.