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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Learning Annex, LLC
v.
Chiquita Brands LLC

Opposition No. 91171133
to application Serial No. 78627860
filed on May 11, 2005

Andrew L. Hyams of Kerstein, Coren & Lichtenstein for
Learning Annex, LLC.

Lynda E. Roesch and Kathryn K. Przywara of Dinsmore & Shohl
for Chiquita Brands LLC.

Before Quinn, Mermelstein and Wellington, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Chiquita Brands LLC filed, on May 11, 2005, an intent-
to-use application to register the mark BRAIN FUEL for
"fresh fruit" (in International Class 31).

Learning Annex, LLC opposed registration under Section
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground
that applicant's mark, when used in connection with
applicant's goods, so resembles BRAINFUEL, the mark in
opposer's earlier-filed application for "dietary supplement

to enhance mental performance" (in International Class 5),¹ as to be likely to cause confusion.

Applicant, in its answer, denied the salient allegations of likelihood of confusion.

The record consists of the pleadings; the file of the opposed application; trial testimony, with related exhibits, taken by each party; and portions of a discovery deposition, opposer's responses to certain of applicant's interrogatories, and an official record, all introduced by way of applicant's notices of reliance. Both parties filed briefs.

EVIDENTIARY OBJECTIONS

Applicant, in its brief, maintains certain objections to the testimony of William Zanker, opposer's founder and president. Applicant also maintains an objection relating to a question raised by opposer's cross-examination of Robb Adams, applicant's business manager.

Applicant's objections are grounded on hearsay and irrelevancy; in another instance, applicant objects to testimony relating to information that purportedly is the

¹ Application Serial No. 76515898, filed May 21, 2003, based on an allegation of a bona fide intention to use the mark in commerce. The application also listed "educational services in the nature of live and recorded classes and conferences to enhance mental performance" (in International Class 41). Pursuant to opposer's request to divide, the services were placed in child application Serial No. 76979092. The '092 application matured into Registration No. 3894128 on December 21, 2010. Opposer filed its notice of opposition only on the basis of its parent application covering the goods in International Class 5.

subject of interrogatory responses that were never supplemented.

We have considered the entirety of Mr. Zanker's testimony, including pages 79-82. As to the hearsay and irrelevancy objections, suffice it to say that, in reviewing the Mr. Zanker's testimony, we have kept in mind these objections when weighing the probative value of the objected-to statements.

Lastly, we have considered the entirety of Mr. Adams' testimony, including page 45.

THE PARTIES

Opposer is primarily an adult education company, selling courses and seminars, tapes, books, downloads and CDs. These products cover a variety of topics, including real estate, psychic information and spiritual matters. Opposer also operates a variety of websites directed to the same topics. Mr. Zanker, in discussing opposer's proposed dietary supplement in the context of opposer's other business activities, stated: "For an online learning company, to learn online where you could learn stuff, improve your brain, and to buy - to sell products. (Zanker test. dep., p. 21).

Applicant is a marketer of fresh fruits and vegetables for sale at retail outlets. Its primary business is in the marketing and sale of bananas.

STANDING

Opposer has established its standing to oppose registration of the involved application. In particular, opposer's earlier-filed intent-to-use application is of record and, further, opposer has shown that it is not a mere intermeddler.² *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

PRIORITY

Opposer's earlier-filed application establishes its priority, a point that applicant does not dispute.

LIKELIHOOD OF CONFUSION

The only issue for decision is likelihood of confusion. Our 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. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Ft. Howard Paper Co.*, 544 F.2d

² Opposer, in its reply brief, refers to statements in applicant's brief that imply opposer's lack of a bona fide intention to use its mark in commerce. To the extent that applicant suggests that opposer lacks a bona fide intent to use its mark, this defense was neither pleaded in the answer nor tried by the parties, either implicitly or expressly. Accordingly, we have not considered any remarks in this regard.

1098, 192 USPQ 24 (CCPA 1976). These factors, and the other relevant *du Pont* factors in the proceeding now before us, are discussed below. Opposer has the burden to establish that there is a likelihood of confusion by a preponderance of the evidence.

THE MARKS

In comparing the marks, BRAIN FUEL and BRAINFUEL, we must consider the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

The marks are identical, except for the space between the words "BRAIN" and "FUEL" in applicant's mark. This space is hardly sufficient to distinguish the marks; the

marks are identical in sound and virtually identical in appearance. As to meaning, the marks convey the identical suggestion, that is, that the goods will fuel or feed your brain, thereby enhancing its function. In sum, the marks engender essentially identical overall commercial impressions. Applicant does not dispute this point.

The first *du Pont* factor, the similarity between the marks, weighs in favor of a finding of likelihood of confusion.

THE GOODS

Given that the marks are essentially identical, the parties have focused their attention on the *du Pont* factor of the similarity/dissimilarity between opposer's and applicant's goods. Indeed, the crux of this litigation centers on the similarity, if any, between opposer's "dietary supplement to enhance mental performance" and applicant's "fresh fruit."

In comparing the goods, we initially note that where essentially identical marks are involved, as is the case here, the degree of similarity between the parties' goods that is required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688-1689 (Fed. Cir. 1993); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001). It is only

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necessary that there be a viable relationship between the two to support a finding of likelihood of confusion. *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). The issue here, of course, is not whether purchasers would confuse "fresh fruit" with a "dietary supplement to enhance mental performance," but rather whether there is a likelihood of confusion as to the source of these goods. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

The sum of opposer's position on this *du Pont* factor is as follows: "[B]oth products are ingested by human beings and are therefore related. Moreover, as testified to by Mr. Zanker, the Opposer's product 'will be based on fruits and vegetables that can enhance your brain.' [citation omitted] Thus, the products are related or are, at the very least, somewhat related." (Brief, p. 6).

Simply put, opposer has failed to show, by a preponderance of the evidence, that there is even a "viable" relationship between fresh fruit and dietary supplements. The fact that the parties' goods both may be ingested is hardly a basis, in and out itself, for a finding that the goods are related. The goods are specifically different; opposer's proposed product is a manufactured supplement, whereas applicant's product is a whole food product. See *In re Mars, Inc.*, 741 F.2d 395, 222 USPQ 938 (Fed. Cir. 1984)

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(CANYON on candy bars and fresh citrus fruits is not likely to cause confusion).

We recognize that Mr. Zanker, when asked about the ingredients planned for opposer's dietary supplement, testified as follows (Zanker test. dep., pp. 21-22):

Well, I'm a big believer on a personal level of natural products. In my own personal life, that's what I do. So I think it will be based on fruits and vegetables that can enhance your brain. That's what I'm hoping to make it out of.

You know there is obviously certain fruits and vegetables that are good for your brain, and we'll put those in, in our supplements.

Mr. Zanker's testimony reveals, only in the most general terms, his plans for opposer's dietary supplement. The record is devoid, however, of any corroborating evidence that dietary supplement pills are related to fresh fruit or that the relevant public would make such an association; Mr. Zanker's plan to use fruit as an ingredient in opposer's supplement is purely speculative. There is nothing in the record to even suggest that supplements include fruits as ingredients; Mr. Zanker only mentions the herbs ginkgo and bacopa. In sum, Mr. Zanker's statements are mere speculation, and the statements are no substitute for evidence to support a finding that the goods are related. The cases relied upon by opposer, wherein confusion was found likely between marks for food items, are readily

distinguishable from the present case on the simple basis that those cases included sufficient evidence upon which such a finding could be made.

The differences between the goods weigh against a finding of likely confusion among consumers.

TRADE CHANNELS AND PURCHASERS

We make our determination regarding the similarities between the parties' channels of trade and classes of purchasers based on the goods as they are identified in the application and registration, respectively. *Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The identifications of goods do not include any limitations in these regards, and so we must presume that that they move in all channels of trade normal for these goods, and that they are available to all classes of purchasers for the described goods. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

Thus, the goods would move through the identical trade channels, such as grocery stores, supermarkets and health food stores; moreover, the record shows this to be the case for dietary supplements and fresh fruit. The evidence also shows, however, that fresh fruit and dietary supplements are sold in different sections of such stores. Mr. Zanker testified that its goods would be sold in "the supplement section." (Zanker test. dep., p. 50). Mr. Adams testified

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that retailers such as supermarkets generally have a dedicated section for supplements and vitamins, near health and beauty products. To his knowledge, applicant has never marketed its fresh fruit in the vitamin and supplement section. (Adams' dep., pp. 15-16; 31).

The mere fact that a large retail establishment such as a supermarket sells both fresh fruit and dietary supplements, however, does not necessarily support a finding that confusion is likely. The predecessor of our primary reviewing court stated the following:

A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the consumer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion arising from the use of similar marks on any goods so displayed.

Federated Foods, Inc. v. Ft. Howard Paper Co., 192 USPQ at 26 (emphasis in original). See *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899-1900 (Fed. Cir. 2000); and *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 152-53 (CCPA 1978).

The goods would be bought by the same or similar classes of purchasers, including ordinary consumers who would be expected to use nothing more than ordinary care when buying fresh fruit and dietary supplements.

The overlap in trade channels (albeit in different sections of the same retail outlets) and purchasers weighs in favor of a finding of likelihood of confusion.

THIRD-PARTY USES

The sixth *du Pont* factor focuses on the number and nature of similar marks in use on similar goods. The Board has in the past given weight to evidence of widespread and significant use by third parties of marks containing elements in common with the mark being opposed on grounds of likelihood of confusion to show that confusion is not, in reality, likely to occur. The justification is that the presence in marks of common elements extensively used by others unrelated as to source may cause purchasers not to rely upon these elements as source indicators, but to look to other elements as a means of distinguishing the source of the goods/services. See, e.g., *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125, 1131 (TTAB 1995). By relying on two third-party uses of the words "brain fuel," applicant would have us conclude that opposer's mark is weak so that confusion is unlikely to occur.

Applicant has introduced evidence of two third-party uses: "Brain Fuel" is the name of Futurebiotics "brain fuel supplement"; and GemAminos advertizes its brain and memory supplement as "ultimate brain fuel."

Aside from buttressing our finding that the parties' marks are suggestive, as noted earlier, we find that these third-party uses are of very little value in deciding this case. An obvious shortcoming of this evidence is the absence of any information regarding the extent of use of "Brain Fuel" (or "brain fuel") by the third parties. That is to say, there is no way to gauge what effect, if any, these uses may have had in the minds of consumers. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1693-94 (third-party use was not "so widespread as to 'condition' the consuming public"); *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1561 (Fed. Cir. 2001); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1110 (TTAB 2007); and *Fort James Operating Co. v. Royal Paper Converting Inc.*, 83 USPQ2d 1624, 1629 (TTAB 2007).

Thus, in the absence of evidence to corroborate the extent of the third-party uses, of which there are only two, this evidence is entitled to only minimal probative value.

ACTUAL CONFUSION

Applicant, although acknowledging that opposer has not commenced use of its mark, asserts that applicant's mark BRAIN FUEL for bananas has peacefully coexisted with the two third-party uses identified in this proceeding.

This *du Pont* factor focuses on actual confusion between the marks of opposer and applicant, and not between applicant's mark and the rest of the world. Inasmuch as opposer has not commenced use of its mark, there has been no opportunity for confusion to have occurred with applicant's mark. In any event, as often stated, proof of actual confusion is not necessary to establish likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983).

Accordingly, this factor related to actual confusion is considered neutral.

CONCLUSION

Based on the sparse record introduced by opposer, and keeping in mind that opposer has the burden of proof of establishing its likelihood of confusion claim by a preponderance of the evidence, we see opposer's likelihood of confusion claim as amounting to only a speculative, theoretical possibility, notwithstanding that essentially identical marks are involved. The differences between the goods, coupled with the suggestiveness of the marks, persuade us that confusion is unlikely to occur among consumers in the marketplace. Language by our primary reviewing court is helpful in resolving the likelihood of confusion issue in this case:

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We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 21 USPQ2d at 1391 (Fed. Cir. 1992), *citing* *Witco Chemical Co. v. Whitfield Chemical Co., Inc.*, 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g* 153 USPQ 412 (TTAB 1967).

Decision: The opposition is dismissed.