

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

Mailed:
January 22, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Integrated Management Information, Inc.

v.

Barrie

Opposition No. 91195943

Cheryl L. Burback of Hovey Williams LLP for Integrated
Management Information, Inc.

Frank Barrie, pro se.

Before Zervas, Shaw and Hightower, Administrative Trademark
Judges.

Opinion by Zervas, Administrative Trademark Judge:

On December 2, 2009, Frank Barrie ("applicant") filed
an application (Serial No. 77883973) for registration on the
Principal Register of the mark



Opposition No. 91195943

for the following International Class 35 services:

Promoting health and environmental awareness within people so that they can lead a clean and healthy life; Promoting public awareness of shopping locally; Promoting public awareness of the need for sustaining local agriculture; Promoting the goods and services of others by providing a web site at which users can link to local agriculture sources.

The application sets forth a claim of a bona fide intention to use the mark in commerce pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Applicant entered (i) a disclaimer of all the wording in the mark, and (ii) the following description of the mark:

The mark consists of the earth with North America and South America outlined by use of fruit and vegetable shapes appearing in blue and white and the words "know where your food comes from.com" appearing in black with "your food" in bolder black lettering. These words circle clockwise around the top with a long directional arrow circling counterclockwise around the bottom.

Integrated Management Information, Inc. ("opposer"), opposed registration of applicant's mark on the ground of priority and likelihood of confusion. At paragraph 4 and 5 of its notice of opposition, opposer pleaded that it is the owner of the following registrations, both for "food quality verification services, namely, verifying the origin and handling practices of food production" in International Class 42:

1. Registration No. 3694440 (registered October 6, 2009 on the Supplemental Register) for the mark WHERE FOOD COMES FROM (in standard character form)

Opposition No. 91195943

claiming first use on October 15, 2007 and first use in commerce on October 28, 2008; and

2. Registration No. 3837316 (registered August 24, 2010 on the Principal Register) for the mark



with a disclaimer of all of the wording in the mark, claiming first use on July 31, 2008 and first use in commerce in February 2009.¹

In addition, opposer alleged prior common law rights in the phrase WHERE FOOD COMES FROM since at least as early as July 31, 2008 for "food quality verification services, namely, verifying the origin and handling practices of food production"; that the marks of Registration Nos. 3694440 and 3837316 "have become highly distinctive, have acquired extensive goodwill, and are well known and recognized by the relevant consuming public"; and that applicant's mark so resembles opposer's marks as to be likely to cause

¹ Opposer pleaded the underlying application, which matured into Registration No. 3837316 during the course of the proceeding.

The registration contains the following description: "The mark consists of two concentric circles, the words "WHERE FOOD COMES FROM" and "VERIFIED" displayed within the outer concentric circle, and a fanciful tree design in the inner circle."

Opposition No. 91195943

confusion, mistake or deception. See Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d).

Applicant has denied the salient allegations of the amended notice of opposition.

The record consists of the pleadings; the file of the involved application; the trial testimony of opposer's witness, John Saunders, opposer's founder, Chairman of the Board and Chief Executive Officer, and exhibits thereto; and opposer's notice of reliance.

This case is fully briefed. Applicant did not submit any trial testimony or other evidence during its testimony period.

Background

Opposer verifies food origin claims of more than six-thousand food producers and retailers, namely, farmers, ranchers, feeding and growing operations, restaurants, food processors and food stores, by contracting with independent auditors who verify such claims. Opposer's marks or designations appear on the food products or on menus along with quick response codes. Information on the origin of the food product may be accessed through the quick response code by means of a personal data device connected to the Internet. Saunders at 12, 13, 18, 28, 33 and 37.

Standing

We first consider whether opposer has established that it is the owner of a valid and subsisting registration. A registration on the Supplemental Register is sufficient to establish a real interest in this proceeding. *Otter Products LLC v. BaseONElabs LLC*, 105 USPQ2d 1252 (TTAB 2012).

To make a registration of record which shows the status and title of the registration, a plaintiff may take advantage of Trademark Rule 2.122(d)(1) regarding the introduction of pleaded registrations in inter partes proceedings.² In this case, opposer did not take advantage of Trademark Rule 2.122(d)(1), but rather sought to establish its registration by introducing a copy of its two original registration certificates (Exhs. 2 and 3, which are not status and title copies of the registrations) in Mr. Saunders' testimonial deposition. See *Citigroup Inc. v.*

² The rule, in pertinent part, reads:

A registration of the opposer or petitioner pleaded in an opposition or petition to cancel will be received in evidence and made part of the record if the opposition or petition is accompanied by an original or photocopy of the registration prepared and issued by the United States Patent and Trademark Office showing both the current status of and current title to the registration, or by a current printout of information from the electronic database records of the USPTO showing the current status and title of the registration.

Capital City Bank Group Inc., 94 USPQ2d 1645 (TTAB 2010).

Opposer elicited the following testimony from Mr. Saunders:

Ex. 2 - WHERE FOOD COMES FROM:

Q. I'm going to hand you what's been marked as Exhibit Number 2, and if you would take a moment to look at that, and when you're finished, if you would let me know.

A. Yes.

Q. Can you identify what's contained in Exhibit 2?

A. This is the -- our Where Food Comes From registration document, service mark.

Saunders at 18 - 19.

Ex. 3 - WHERE FOOD COMES FROM VERIFIED and Design:

Q. And if you could identify what's contained in Exhibit 3.

A. This is the trademark office approval of our service mark with the black and white color of our logo -- picture of our logo.

Q. Is that a copy of the certificate of registration for the logo?

A. Yes.

Saunders at 23. This testimony is sufficient to establish that opposer is the owner of the registrations, but does not establish that the registrations are subsisting. We turn then to applicant's brief to consider whether applicant acknowledged that the registrations are subsisting.

On p. 4 of his brief, applicant stated, "The Applicant agrees with the Opponent's statement of the issue in its Trial Brief: Whether there is a likelihood of confusion

Opposition No. 91195943

between the Opposer's marks WHERE FOOD COMES FROM and WHERE FOOD COMES FROM VERIFIED (and Design) and Applicant's mark KNOW WHERE YOUR FOOD COMES FROM.COM (and Design).” In addition, applicant did not challenge the registrations on the grounds that they are not subsisting (or, for that matter, that they are not owned by applicant). We therefore accept that the two registrations are subsisting and owned by opposer. Opposer therefore has established its standing. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Priority and Acquired Distinctiveness

Priority is not in issue in an opposition if an opposer establishes that it is the owner of a subsisting registration on the Principal Register or on the Supplemental Register. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974); *Otter Products*, 105 USPQ2d at 1254-55, and cases cited therein. Because opposer established its registrations, priority is not an issue with respect to Registration Nos. 3694440 and 3837316. Of course, priority is an issue with respect to opposer's common law claim.

With regard to a Supplemental Register registration,

[an] opposer cannot prevail in [a] proceeding based solely on its Supplemental Register Registration. In fact, to successfully oppose registration of a mark under Section 2(d) of the

Opposition No. 91195943

Act, "the opposer must prove he has proprietary rights in the term he relies upon to demonstrate likelihood of confusion as to source" *Otto Roth & Co., Inc. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981); *see also, Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002); *Towers v. Advent Software Inc.*, 913 F.2d 942, 16 USPQ2d 1039, 1042 (Fed. Cir. 1990).

* * *

Because the mark in Opposer's Supplemental Register Registration is presumed to be merely descriptive, and opposer has introduced no evidence of use of its mark sufficient to prove that its alleged mark has acquired distinctiveness, it cannot prevail based solely on its ownership of this registration.

Otter Products, 105 USPQ2d at 1255. *See also, Hi-Shear Corp. v. Nat'l Automotive Parts Ass'n*, 152 USPQ 341, 344 (TTAB 1966) ("[A] Supplemental Registration is not accorded the prima facie presumptions afforded by Section 7(b) of the Statute with regard, *inter alia*, to the validity of the registration and registrant's exclusive right to use the mark in commerce; and manifestly therefore cannot be considered as evidence of a proprietary right in the registered mark."). Thus, without evidence of acquired distinctiveness, opposer cannot prevail based solely on its ownership of the Supplemental Register registration. Therefore, we next consider whether opposer has acquired distinctiveness in the designation WHERE FOOD COMES FROM.

The Board explained in *In re Ennco Displays Systems Inc.*, 56 USPQ2d 1279, 1283 (TTAB 2000), that to establish acquired distinctiveness,

an applicant must show that the primary significance of the product configuration in the minds of consumers is not the product but the producer. Acquired distinctiveness may be shown by direct and/or circumstantial evidence. Direct evidence includes actual testimony, declarations or surveys of consumers as to their state of mind. Circumstantial evidence, on the other hand, is evidence from which consumer association might be inferred, such as years of use, extensive amount of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers. (Internal citations omitted).

The type and amount of evidence necessary to show that a designation has acquired distinctiveness in relation to the goods or services in connection with which it is used depends on the nature of the designation and the circumstances surrounding its use. *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988); *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 829, 166 USPQ 34 (CCPA 1970); and *In re Hehr Mfg. Co.*, 279 F.2d 526, 126 USPQ 381 (CCPA 1960).

The following evidence in the record is relevant to the question of acquired distinctiveness:³

- revenue for 2010 - 2011;
- advertising expenses for 2009 - 2011;⁴

³ Opposer's revenue and advertising expenses have been designated confidential and hence are not revealed in our opinion.

⁴ According to Mr. Saunders, opposer advertised on television and radio, in online sponsored advertising, at in-person meetings, at

Opposition No. 91195943

- use of WHERE FOOD COMES FROM since at least as early as 2008;
- use of WHERE FOOD COMES FROM on opposer's website;
- approximately seven to eight thousand online users of the WHERE FOOD COMES FROM website each month at www.wherefoodcomesfrom.com; and
- Facebook (social media).⁵

At pp. 3 and 4 of its rebuttal brief, opposer states that its "marks have been in substantially exclusive use in commerce for more than four years and, therefore, should be considered to be strong and have acquired secondary meaning. And, in any event, [opposer's] service marks on the Principal and Supplemental Register, at a minimum, possess distinctiveness sufficient to sustain the opposition against Applicant."

Upon careful consideration of opposer's arguments and the evidence in the record, we conclude that opposer has not demonstrated that the designation WHERE FOOD COMES FROM has acquired distinctiveness and would be perceived as an indicator of the source of opposer's services. Opposer's designation is highly descriptive, immediately informing consumers of an aspect of opposer's services, i.e.,

trade shows, on food packaging, on point-of-purchase displays, and in press releases distributed to news agencies around the globe. Saunders at 44 - 45, 47 - 53, 58 - 59, and 66 - 67; Exhs. 6 - 10, 13, and 20 - 22.

⁵ Saunders at 46 - 47, and 62 - 64; Exhs. 16, 18 and 19.

identifying where the product the consumer intends to purchase originated from. See:

- Saunders Ex. 11, Heinen's Fine Foods press release entitled "Your meal has a story" discussing opposer and its food verification program, stating in relevant part, "'Where did my food come from?' It's the question that everyone seems to be asking these days"; and "Heinen's Fine Foods to offer customers a first-of-its-kind look at where their food comes from."
- Saunders Ex. 12, Heinen's Fine Foods press release entitled "Heinen's Fine Foods Launches Where Food Comes From[®] Meat Labeling Program," stating in relevant part, "'Knowing where your food comes from is the basis for knowing everything about what you eat,' said Tom Heinen. The Where Food Comes From[®] labeling program helps us to provide our customers information about the source of our beef and pork products, and lets consumers learn firsthand about where, how and by whom their food was raised."
- Saunders exh. 22. "Have you ever gone to the grocery store and wondered about the meat you're buying? Some might not be fussed about where their meat comes from and how the animals were treated before slaughter, but there are some who do care."

Further, opposer's revenue and advertising expenses are small and opposer has used its designation only for a limited time period. There are no details in the record regarding opposer's use of social media, such as the number of followers or the length of time opposer has had its Facebook page(s). Opposer's association with Heinen's, a supermarket chain in Cleveland, Ohio is relatively recent, beginning in October 2011. Saunders exhs. 12 and 22. There is no information about how long opposer has had its

Opposition No. 91195943

association with Delmonico's, a restaurant in New York City; and no or limited information about the frequency and quantity of television, radio and online-sponsored advertising, food packaging, point-of-purchase displays and press releases, and participation at trade shows. In addition, there is no information about how long opposer has maintained its volume of visitors to its website.

In prior cases involving use of a mark of comparable or even longer duration, some uses even being coupled with significant sales and advertising expenditures (not to mention direct evidence of customers' perceptions), the Board or its primary reviewing court has found a failure to demonstrate acquired distinctiveness within the meaning of Section 2(f). See *In re Andes Candies, Inc.*, 478 F.2d 1264, 178 USPQ 156 (CCPA 1973) (evidence held insufficient to show registrability under Section 2(f) for "CREME DE MENTHE" on chocolate mint candy squares notwithstanding 20 years use, \$2.5 million in annual sales, \$25,000 per year in advertising and promotion, national distribution through 1,400 distributors in 49 states and Canada, nearly 100 unsolicited letters purportedly showing mark recognition, and affidavits of president of applicant and of a chocolate distributing firm); and *In re Packaging Specialists, Inc.*, 221 USPQ 917 (TTAB 1984) (acquired distinctiveness not found despite evidence demonstrating 16 years of continuous and

Opposition No. 91195943

substantially exclusive use, between \$1 and \$4 million in annual sales under the mark for six years, and advertising expenditures in trade shows, trade publications and "yellow page" telephone directory listings involving estimated outlays of \$50,000 for several years).

Thus, opposer has not established that it has proprietary rights in WHERE FOOD COMES FROM and cannot prevail based on its Supplemental Register registration or its claim of common law trademark rights.

We next turn to opposer's claim of likelihood of confusion based on its Principal Register mark WHERE FOOD COMES FROM VERIFIED and Design, for which priority and acquired distinctiveness are not in issue.

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (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"). We consider these two factors and any other relevant *du Pont* factors in the proceeding.

A. Similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression and strength of opposer's mark.

Regarding the similarity or dissimilarity of the marks, we consider similarities or dissimilarities in their entireties as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. For convenience, the marks are reproduced below:



The marks have significantly different design elements, one depicting a stylized representation of a tree and the other depicting a stylized representation of a globe showing North and South American through the use of vegetables. As discussed above, the wording WHERE FOOD COMES FROM in opposer's mark is highly descriptive and all of the wording

in each mark has been disclaimed.⁶ (VERIFIED simply indicates that the food item on which the mark is applied has been "verified" through opposer's services.) Opposer has not established that the wording in its mark - which opposer emphasizes in arguing that the marks are similar - identifies opposer as the source of its services; and applicant's mark is dissimilar in appearance and commercial impression to opposer's mark.

B. The similarity or dissimilarity and nature of the products/services described in the application and registration and identity of purchasers.

As noted earlier in this decision, opposer's services are "food quality verification services, namely, verifying the origin and handling practices of food production" and applicant's services are as follows:

Promoting health and environmental awareness within people so that they can lead a clean and healthy life; Promoting public awareness of shopping locally; Promoting public awareness of the need for sustaining local agriculture; Promoting the goods and services of others by providing a web site at which users can link to local agriculture sources.

⁶ Opposer notes that there is an absence of third-party registrations containing the term WHERE FOOD COMES FROM and this absence "demonstrates the strength" of opposer's marks. Brief at 20. This argument is without merit; the wording is highly descriptive for services of the type offered by opposer. In addition, absent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office). See also *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983).

Opposition No. 91195943

In determining whether the services are related, it is not necessary that the services of the parties be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that a party claiming damage establish that the services are related in some manner and/or that conditions and activities surrounding marketing of these services are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Edwards Lifesciences Corp. v. Vigilanz Corp.*, 94 USPQ2d 1399 (TTAB 2010); *Schering Corp. v. Alza Corp.*, 207 USPQ 504 (TTAB 1980); *Oxford Pendaflex Corp. v. Anixter Bros. Inc.*, 201 USPQ 851 (TTAB 1978).

There is no dispute that members of the general public will encounter opposer's mark when purchasing food from food retailers or restaurants. Applicant identifies his consumers as members of the general public who have an interest in food issues. Thus, members of the general public who are interested in food safety and the origin of food products would be exposed to, and would be targeted for, both opposer's and applicant's services.

In this age of personal data devices which access the Internet from almost anywhere in the United States, such

individuals may view opposer's and applicant's marks at more or less the same time as they make their food purchases. A shopper at a grocery store such as Heinen's may consider a quick response code bearing opposer's mark and then consider the information on applicant's website regarding the health benefits of certain vegetables or recipes available on applicant's website. We therefore find the services to be related to each other in that they may be used by the same persons at the same time in connection with food purchases.

C. The similarity or dissimilarity of trade channels.

Mr. Saunders testified as to various methods of advertising, including advertising online, on the radio and in print. In light of the food-related nature of some of applicant's services, and the fact that both parties ultimately are providing information to members of the general public to assist in food related purchases, we are persuaded that the trade channels for both parties' services overlap to the extent that they focus on members of the general public.

D. Consumer sophistication/purchaser care.

Opposer states that "high consumer sophistication is not required to receive or use the services of the parties." Brief at 18. Applicant has not raised arguments on consumer sophistication in his brief. Because both parties' services are provided to the general public, and the general public

Opposition No. 91195943

does not need any particular level of sophistication to use their services, we agree with opposer that "high consumer sophistication is not required."

The more relevant question is whether those members of the general public using the parties' services use care when considering sources of information on food. Opposer states that "[b]ecause the services at issue here are free to consumers, those consumers are likely to access the parties' websites or receive the information on impulse" Brief at 18. There is no information in the record as to what level of care consumers use in considering services of the type listed in opposer's registration and applicant's application. The information is free to the general public, but the information concerns food products, and would likely be accessed by those who have concern about what food they ingest. Thus, on balance we find that the *du Pont* factor involving purchaser care to be neutral in our analysis.

E. Conclusion.

Upon careful consideration of all of the evidence in the record and the arguments made by each party in the briefs, we find that opposer has not established that there is a likelihood of confusion between opposer's combination word and design mark of Registration No. 3837316 and applicant's mark. WHERE FOOD COMES FROM and VERIFIED in opposer's mark are highly descriptive, opposer has not

Opposition No. 91195943

established that it has acquired distinctiveness in WHERE FOOD COMES FROM, and the design elements in the marks are very different in appearance and commercial impression. The differences in the marks and the weakness in the wording in opposer's mark outweigh those factors that favor opposer.

As a final matter, opposer urges us to resolve and doubt in its favor as the prior registrant; we do not have any doubts in our conclusion.

DECISION: Opposer's claims of likelihood of confusion based on Registration Nos. 3694440 and 3837316, as well as under the common law, are dismissed.

The opposition hence is dismissed.