

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: October 5, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Tootsie Roll Industries, LLC

v.

Keelen and Breckenfeld

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Opposition No. 91212895
to Application Serial No. 85755320
—

Douglas R. Wolf and Christina M. Licursi of Wolf, Greenfield & Sacks for Tootsie Roll Industries, LLC.

Jerome P. Keelen, Esq. for Kate E. Keelen and Nicolas W. Breckenfeld.

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Before Quinn, Wellington and Lykos, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Kate E. Keelen and Nicolas W. Breckenfeld (“Applicant”) filed an application to register the mark FLUFF IT UP (in standard characters) for “natural cotton candy” in International Class 30.¹

Tootsie Roll Industries, LLC (“Opposer”) opposed registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark,

¹ Application Serial No. 85755320, filed October 16, 2012 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use anywhere on October 1, 2012, and first use in commerce on October 10, 2012.

when used in connection with Applicant's goods, so resembles Opposer's previously used and registered marks FLUFFY STUFF (in typed letters)² and FLUFFY STUFF COTTON CANDY POPS (in standard characters) ("COTTON CANDY POPS" disclaimed),³ both for "cotton candy" in International Class 30, as to be likely to cause confusion.

Applicant, in the answer, admitted Opposer's priority, but denied the salient allegations comprising Opposer's claim of likelihood of confusion.⁴

The parties agreed, during a telephone conference with the Board on October 2, 2014, to proceed with this case by way of Accelerated Case Resolution ("ACR"), which the Board approved in an order dated October 17, 2014. (9 TTABVUE).⁵ Pursuant to their agreement, the parties filed, on November 12, 2014, materials captioned "Joint Stipulated Facts and Submissions of Evidence." (10 TTABVUE). The parties agreed that:

[T]he facts set forth in this document are undisputed and true and the exhibits attached hereto are genuine, and the facts set forth in those exhibits are undisputed and true, that neither Opposer nor Applicant may now or in the future object to the truthfulness or admissibility of any of the following facts in connection with this proceeding, that this stipulation is offered to show such facts without the necessity of, and in lieu of, offering

² Registration No. 1860481, issued October 25, 1994; renewed. Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i) (July 2015).

³ Registration No. 2869460, issued August 3, 2004; renewed.

⁴ Applicant also asserted several "Alternative Statements of Defense," which are amplifications of its denials.

⁵ Citations to the record reference TTABVUE, the Board's online docketing system. Specifically, the number preceding "TTABVUE" corresponds to the docket entry number, and the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry where the cited materials appear.

witnesses or additional documentary evidence, and that the [Board] and any court to or in which either party may appeal or commence de novo proceedings may render judgment based on the stipulated facts and attached exhibits. (10 TTABVue 29).

The parties filed briefs on the case.

The stipulation and accompanying exhibits establish the following facts pertinent to the likelihood of confusion issue before us.

Standing

With respect to standing, the parties stipulate that Opposer has standing to oppose Applicant's application. ¶ 17.

Priority

As to priority, the parties stipulate that priority is not in dispute; each of Opposer's marks was used and registered prior to Applicant's first use. ¶¶ 14, 16.

The Parties

Opposer is one of the country's largest candy companies, with nationwide operations. ¶ 3. Among its many products, Opposer manufactures and sells some of the country's most popular confectionary brands. ¶ 4. Opposer began use of its mark FLUFFY STUFF in connection with cotton candy in February, 1993; and began use of its mark FLUFFY STUFF COTTON CANDY POPS in connection with cotton candy in January, 2001. Such uses have been continuous to the present day. ¶¶ 6a-b.

Opposer is the largest producer of cotton candy in the United States. ¶ 18 and Ex. A. Based on sales and marketing data, Opposer's products bearing its FLUFFY

STUFF marks are in the top 3 of national sales in the cotton candy segment. ¶ 20 and Ex. C (confidential).

Opposer's marks and goods sold thereunder have been promoted on the internet, at trade shows, catalogs and in point of sale materials. ¶¶ 21-22. More recently, Opposer has expanded its promotional efforts to include social media. ¶¶ 23.

Applicant first used its mark in commerce on October 10, 2012. ¶ 47. Applicant's labels indicate that its goods are "organic, fair trade cotton candy." ¶ 48. Total sales under the mark in 2013 were \$6,000, and as of June in 2014, \$5,200. ¶ 55. Applicant has advertised its goods in Zocalo Magazine. ¶ 57.

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. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). 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 (CCPA 1976).

Of Opposer's two pleaded registered marks, we will confine our decision to a consideration of the likelihood of confusion between its FLUFFY STUFF mark shown in Registration No. 1860481 and Applicant's mark. We do so on the basis that this registration for the mark and identified goods, when considered vis-à-vis the applied-for mark and identified goods, is most likely to support a finding of

likelihood of confusion. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

The Goods

As to the second *du Pont* factor, when analyzing the similarity of the goods, likelihood of confusion can be found “if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721-22 (Fed. Cir. 2012) (citing *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). The issue here, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). Applicant, in its brief, conceded that there “could be some overlap [between the parties’] products and consumers.” (14 TTABVUE 8).

Opposer’s cotton candy includes ingredients such as artificial flavors, chemical preservatives, and food coloring. ¶ 9. Opposer has not sought approval for organic labeling or fair trade certification. ¶¶ 10-11. Natural cotton candy is a type of cotton candy. ¶ 37. Applicant’s natural cotton candy is of “artisan quality”; Applicant’s product is sought out by event planners, chefs and consumers because it does not contain preservatives or artificial colors. ¶ 39.

Although we have noted the specific differences between “regular” cotton candy such as Opposer’s and “natural” cotton candy such as Applicant’s, in making our determination regarding the relatedness of the goods we must look to the goods as identified in Opposer’s registration and Applicant’s application. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Both Opposer and Applicant offer cotton candy under their respective marks, albeit Applicant’s product is “natural.”

Opposer’s identification of goods, “cotton candy,” does not include any limitations. Where the goods in a cited registration are broadly described and there are no limitations in the identification of goods as to their nature, type, channels of trade or classes of purchasers, it is presumed that the scope of the registration encompasses all goods of the nature and type described, that the identified goods move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Thus, Opposer’s identification of goods is broad enough to encompass both “regular” cotton candy and “natural” cotton candy.

In view of the legal identity of the goods, this factor weighs heavily in favor of a finding of likelihood of confusion.

Trade Channels and Purchasers

Opposer's cotton candy is sold under the marks to the general public in supermarkets, warehouse and membership stores, drug stores and convenience stores. ¶ 27. Unlike Applicant, Opposer does not offer a fresh hand-spun cotton candy at live venues such as weddings and local fairs, and does not offer customized catering of its cotton candy products for banquets, fund raisers and other private and public events. ¶¶ 32-33. Applicant has sold its goods through its internet website, Facebook and Etsy. ¶ 56. Applicant also has sold goods as a vendor at festivals, private birthdays and weddings, art shows and other events. ¶ 58.

Again, although we have noted the specific differences in the way the parties' cotton candy is sold, neither of the identifications of goods is limited with respect to trade channels or classes of purchasers. In any event, "regular" cotton candy and "natural" cotton candy may be sold in the same stores, including grocery stores. ¶¶ 34-36. Further, given the legal identify of the goods, we presume that the goods travel through all usual channels of trade and are offered to all normal potential purchasers. These trade channels would include the same stores, including grocery stores, as reflected in the parties' stipulated facts. *See 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 re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). *See also In re Viterra Inc.*, 671 F.3d 1358, 101

USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though 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). The classes of purchasers would include ordinary consumers.

The identity in trade channels and purchasers are factors that weigh heavily in favor of a finding of a likelihood of confusion.

The Marks

With respect to the first *du Pont* factor, we must compare the marks in their entirety 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 Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). In comparing the marks when used in connection with Opposer’s and Applicant’s goods, we are mindful that where, as here, the goods are

legally identical, the degree of similarity between the marks necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

“Fluff” is a noun or verb that has a common root with the adjective “fluffy.” ¶ 45. The term FLUFF is an important and integral term in Applicant’s mark; Applicant chose FLUFF IT UP because the proposed mark has a “fun and engaging hook, and describes what [Applicant] is doing”; Applicant sometimes refers to its cotton candy as “fluff.” ¶¶ 42-44. FLUFF and FLUFFY are related terms with related meanings. ¶ 52. FLUFF is either the noun or verb form and FLUFFY is the adjective form. To FLUFF something is take a physical action. FLUFF when included in the phrase FLUFF IT UP is a verb. FLUFFY in FLUFFY STUFF is an adjective that modifies a noun. ¶ 53. Applicant’s and Opposer’s marks begin with the letters F-L-U-F-F. ¶ 54.

The marks are similar in appearance to the extent that they each begin with the same letters F-L-U-F-F, that is, FLUFFY and FLUFF, respectively. To that extent, the marks also sound alike. The remainder of each mark, however, is different, resulting in marks that are somewhat different in appearance and sound as a whole. We find, however, that the overall similarities in appearance and sound outweigh the differences.

The parties agree that the terms FLUFFY and FLUFF have related meanings, and each mark conveys the suggestion that the respective cotton candy product is fluffy.

Because of the similarities in appearance, sound and meaning of the marks FLUFFY STUFF and FLUFF IT UP, we find that the marks in their entireties engender similar overall commercial impressions.

Applicant's argument that Opposer's packaging prominently features the brand name CHARMS with Opposer's mark FLUFFLY STUFF, thereby mitigating the likelihood of confusion, is immaterial to our determination. Simply put, we must compare Opposer's registered mark *as shown in the registration certificate* to Applicant's mark as shown in the drawing in the application. Opposer's registered mark does not include CHARMS. Further, the differences in packaging, trade dress and labeling also do not factor into the analysis. *See Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984) (trade dress can be changed at any time).

The similarity of the marks, especially when considered in the context of identical goods, is a factor that weighs in favor of finding a likelihood of confusion.

Conditions of Sale

Opposer's goods are sold in bags in two sizes, 1 ounce and 2.5 ounce. The suggested retail price for the 1 ounce bag is \$2. ¶ 61. Applicant's goods cost \$5 for a freshly spun serving (available at live events) and \$2 for a 0.5 ounce bag. ¶ 61. Traditional cotton candy is often purchased on impulse. ¶ 38.

Cotton candy, whether regular or natural, is inexpensive and clearly subject to impulse purchase. “When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 223 USPQ at 1282. As indicated earlier, purchasers would include ordinary consumers, who would be expected to exercise nothing more than ordinary care in purchasing cotton candy.

This *du Pont* factor favors a finding of likelihood of confusion.

Third-Party Uses/Registrations

The sixth *du Pont* factor focuses on the number and nature of similar marks in use on similar goods.

Other than Opposer’s two marks, there are no other FLUFF or FLUFFY-formative marks in use and/or registered in connection with cotton candy. ¶ 24. Neither FLUFF nor FLUFFY are descriptive for cotton candy. ¶ 25. In fact, based on the popularity of products sold under Opposer’s FLUFFY STUFF marks, Opposer’s marks are well-known. ¶ 40.

Applicant has not shown that either of Opposer’s marks is weak or diluted for cotton candy. Rather, Opposer’s FLUFFY STUFF marks are distinctive in the candy industry.

Further, in response to one of Applicant’s arguments, the lack of a survey regarding the level of public or consumer recognition or fame of Opposer’s marks is

of no consequence. The Board does not require surveys in *inter partes* proceedings, and we do not draw any negative inferences from a party's failure to offer survey evidence in a proceeding before the Board. *See Schering-Plough HealthCare Prods. Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1328 (TTAB 2007).

The distinctiveness of Opposer's mark is a *du Pont* factor favoring a finding of likelihood of confusion.

Actual Confusion

Neither party is aware of any instances of actual confusion. ¶ 62.

The absence of actual confusion does not compel a different result in the likelihood of confusion analysis. Although each party is unaware of any actual confusion, there has been contemporaneous use of the marks for only a relative short period of time (less than 3 years). In any event, evidence of actual confusion is not essential to proving a case of likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

This factor is neutral or, at best, weighs only slightly in Applicant's favor.

Conclusion

In the present case, the similarity of the marks, the identity of the goods, the presumed identity of trade channels and purchasers, the conditions of sale, and the distinctiveness of Opposer's mark are factors that weigh in favor of a finding of likelihood of confusion.

We conclude that purchasers familiar with Opposer's "cotton candy" sold under the marks FLUFFY STUFF would be likely to mistakenly believe, upon

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encountering Applicant's mark FLUFF IT UP for "natural cotton candy," that the goods originate from or are associated with or sponsored by the same entity.

Decision: The opposition is sustained and registration to Applicant is refused.