

ESTTA Tracking number: **ESTTA466120**

Filing date: **04/09/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92051279
Party	Defendant Norm Oeding
Correspondence Address	ROBERT O BLINN ERICKSON KERNELL DERUSSEAU & KLEYPAS LLC PO BOX 75144 WICHITA, KS 67275-0144 UNITED STATES rblinn@robertblinn.com
Submission	Other Motions/Papers
Filer's Name	Robert O. Blinn
Filer's e-mail	rblinn@robertblinn.com
Signature	/robert o blinn/
Date	04/09/2012
Attachments	92051279RHBvOedingReplyBrief.pdf (10 pages)(123429 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

RED HEN BREAD, LLC,	:	
	:	
Petitioner,	:	
	:	
v.	:	Cancellation No. 92/051,279
	:	(Reg. No. 3,614,763)
NORM OEDING,	:	
	:	
Respondent.	:	
_____	:	

RESPONDENT'S REPLY TO PETITIONER'S MAIN BRIEF

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	2
INDEX OF CASES	3
I. Facts	4
II. STATEMENT OF LAW AND ARGUMENT	
B. The duPont factors do not weigh in favor of finding confusion likely	4
(1) The number and nature of similar marks in use on similar goods	5
(2) The absence of any actual confusion	7
(3) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion	7
C. Respondent's use in interstate commerce	7
III CONCLUSION	9

INDEX OF CASES

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

In re Silenus Wines, Inc. 194 USPQ 261 (1977)

I. FACTS

Respondent filed application Serial No. 77/423,259 for LITTLE RED HEN BAKERY for fresh baked bread products on March 16, 2008. This application matured into Registration No. 3,614,763.

On April 6, 2009, Petitioner file an application to register RED HEN BREAD for bakery products. This application as refused by the Trademark office for being likelihood of confusion with the mark of Registration No. 3,614,763.

II. STATEMENT OF LAW AND ARGUMENT

A. Petitioner's Standing and Priority

Respondent admits that Petitioner has standing and priority. Respondent has stipulated that Petitioner's use of the RED HEN BREAD mark dates back to 1996. However, Respondent has also observed that such use by Petitioner appears to have been and appears to continue to be limited to the Chicago metropolitan area.

B. Likelihood of Confusion;

Petitioner has correctly cited *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) as the source for the relevant factors needed by the board to find likelihood of confusion. However, Petitioner, in its brief, does not address several of the du Pont factors. The du Pont court provides factors 6, 7 and 8 which read as follows (6) The number and nature of similar marks in use on similar goods. (7) The nature and extent of any actual confusion and (8) The length of time during and conditions under which there has been concurrent use without evidence of actual

confusion. The du Pont court noted that “[t]he evidentiary elements are not listed above in order of merit. Each may from case to case play a dominant role.”

(1) The number and nature of similar marks in use on similar goods;

“The Little Red Hen” is a well known folk tale popularized in a well known version published by the Little Golden Books, a series of children’s books, sometime prior to 1960. In the story, the Little Red Hen grows wheat, produces flour and bakes bread using the flour. During the narrative, the little red hen asks her neighbors to help with the various steps of the process. The neighbors offer various excuses and do not help the little red hen. When the bread reaches completion, the neighbors ask the little red hen to share her bread and she declines noting their earlier refusal to help with the bread making process. (Respondent adopted the LITTLE RED HEN BAKERY mark because Respondent actually is involved in the organic production of the wheat that is used in his bread products, is actually directly involved with the milling of the wheat into flour and is involved with the production of the bread using that flour, much like the little red hen character of the story.) The Little Red Hen story provides a popular motif for use by bakers or producers of baking related products who wish to adopt a mark including some reference to a Red Hen, perhaps invoking a positive association with the industrious, do-it-yourself work ethic of the title character. As such, Red Hen should not be seen as having the strength of a purely arbitrary mark such as, for example, Red Cow would have for bread or baked goods. Thus, the Board, when considering likelihood of confusion in this proceeding should consider the number and nature of similar marks in

use on similar goods. The number and nature of similar uses is most likely, in this case, arises from the popularity of the folk tale to which those uses make reference.

In this connection the Respondent asks the board to take notice of Registration Number 1498842 for THE LITTLE RED HEN for Bakery Goods in class 030 which was registered in 1988 and canceled in 1995. The Respondent also asks the board to take notice of Registration Number 2,267,757 for RED HEN BREAD for mixes for baked goods in class 030 which was registered in 1999 and canceled in 2006. Exhibits which were attached to the Respondent's reply to the earlier motion for summary judgement, which are of record, showed web pages for two bakeries which appear to use trademarks which include a reference to "Red Hen". Respondent's attorney for Respondent gathered such examples of other uses of "Red Hen" for baked goods and the like by means of a simple Google search and gathered these items with less than one hour of effort. These examples provide evidence that RED HEN is a commonly used motif for bakeries and baked goods and is therefore not highly distinctive.

When considering the similarity of the marks, weight should be given the scope that should be accorded to the marks. Accordingly, the Respondent argues, in view of the number and nature of similar marks that appear to be in use on similar goods there is at least a genuine issue of material fact which goes to likelihood of confusion. Since the text RED HEN appears to be in use by a number of other similar businesses offering similar products, then it may be appropriate to give a mark used by a bakery containing the term "Red Hen" narrow scope. Thus, given the apparent number of other similar uses of RED HEN, and since the two marks in question share only the words "red" and "hen" and are different in all other respects, the Board is able to consider LITTLE RED HEN

BAKERY sufficiently dissimilar from RED HEN BREAD to avoid the likelihood of confusion sufficient to justify the cancellation of Respondent's registration.

(2) The absence of any actual confusion

Respondent notes that the Petitioner has provided no evidence regarding the existence of any actual confusion between the two marks.

(3) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion

Respondent has been producing and selling bread products under the LITTLE RED HEN BAKERY mark for nearly seven years. As noted previously, Respondent has received no communication from any of his customers regarding the existence of RED HEN BREAD in Chicago.

C. Respondent's Use in Interstate Commerce

The Petitioner has cited and relied on *In re Bagel Factory, Inc.*, 183 USPQ 153 to support the assertion that Petitioner has not used his mark in commerce for baked goods.

Section 45 of the Act (15 USC 1127) states the following:

“The word ‘commerce’ means all commerce which may lawfully be regulated by Congress.”

and,

“The term ‘use in commerce’ means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this chapter, a mark shall be deemed to be in use in commerce—

(1) on goods when—

(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) the goods are sold or transported in commerce,”

The Court of Customs and Patent Appeals addressed the use in commerce requirement in *In re Silenus Wines, Inc.* 194 USPQ 261 (1977). In *In re Silenus*, the court stated that “[i]t logically follows that goods are ‘sold or transported in commerce’ when their sale or transportation directly affects interstate or other commerce which may lawfully be regulated by Congress.” 194 USPQ at 263.

The Respondent directs the Board’s attention the plain words of the act as given above. The act states “The word ‘commerce’ means all commerce which may lawfully be regulated by Congress.” The requirement given later in subsection (B) for goods is merely that the goods be “sold ... in commerce”. In *In re Silenus*, the court appropriately found that the foreign importation of marked wine bottles for subsequent intra-state sale directly effected commerce which may be lawfully regulated by Congress. 194 USPQ at 264.

The *In re Silenus* court goes on to say:

“We find further support for our conclusion in the numerous cases in which the Supreme Court has supported Congressional efforts to regulate intrastate transactions which affect interstate or foreign commerce. For example, the Supreme Court has expressly held that intrastate sales of food which had formerly traveled in interstate commerce sufficiently affected that commerce to allow federal regulation of the intrastate sale.” 194 USPQ at 264

Since the *In re Silenus*, opinion was written, Congress has enacted the Nutrition Labeling and Education Act of 1990 (Public Law 101-535). The information given on Respondent’s bread products package labels are regulated by this act, and therefore, Respondent’s sale and distribution of such products, being subject to Federal regulation, constitutes use “in commerce” under the Lanham act.

Accordingly, under the plain words of the statute, since the “commerce” engaged in by Respondent is “commerce” which Congress may lawfully regulate, then Respondent has been and is using his trademark in commerce and was doing so at the time he made his pro se application to register his mark.

Moreover, Respondent continues to maintain that he has distributed his marked products to numerous locations which have on occasion been frequented by customers from outside the state of Kansas.

III. Conclusion;

Accordingly, Respondent maintains:

(a) A sufficient likelihood of confusion does not exist between Petitioner's mark and Respondent's mark to support the cancellation of US Registration 3,614,763.

(b) The use by Respondent of his mark was sufficient to meet the use-in-commerce requirement as set forth in the Act as noted above.

Accordingly, The Respondent respectfully asks the Trademark Trial and Appeal Board to reject Petitioner's petition to cancel US Registration 3,614,763 for LITTLE RED HEN BAKERY.

Respectfully submitted,

Date:

4/9/2012



Robert O. Blinn

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing RESPONDENT'S REPLY TO PETITIONER'S MAIN BRIEF was served upon Petitioner by mailing same via First Class Mail, postage prepaid, to Kathryn Jennison Shultz, 2001 Jefferson Davis Highway, Suite 1102, Arlington, VA 22202, this 9th day of April, 2012.



Robert O. Blinn