

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Red Hen Bread LLC

v.

Norm Oeding

Cancellation No. 92051279

Kathryn Jennison Shultz, John N. Jennison and Carl E. Jennison of Jennison & Shultz, P.C. for Red Hen Bread LLC.

Robert O. Blinn of Erickson Kernell Derusseau & Kleypas LLC for Norm Oeding.

Before Seeherman, Holtzman and Cataldo, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Red Hen Bread LLC has petitioned to cancel the registration of Norm Oeding for the mark LITTLE RED HEN BAKERY, with BAKERY disclaimed, for "fresh, baked bread products, namely, bread, buns, bagels, bread rolls and

baguettes.”¹ The grounds for cancellation, as set forth in the amended petition,² are that respondent’s mark is likely to cause confusion with petitioner’s mark RED HEN BREAD, and that respondent did not make use of his mark on all of the goods identified in his registration prior to the filing of the application that subsequently issued as the registration. In his answer to the amended petition, respondent stipulated to the following allegations:

1. The registrant obtained a federal registration for the mark LITTLE RED HEN BAKERY (“Registrant’s Mark) for “fresh, baked bread products, namely, bread, buns, bagels, bread rolls and baguettes” in Class 30, claiming an August 29, 2005, first date of use and an August 29, 2005, first date of use in commerce. This registration is identified by Registration No. 3,614,763 with a May 5, 2009 registration date.
2. Petitioner has adopted and continuously used the trademark RED HEN BREAD since at least as early as December 9, 1996 to the present, in connection with bakery products, namely, bread buns, bagels, bread rolls, baguettes, croissants, cookies, muffins, scones, Danish, tarts and assorted pastries.
3. Petitioner has filed an application to register the mark RED HEN BREAD (“Petitioner’s Mark”) for “bakery products, namely, bread, buns, bagels, bread rolls, baguettes, croissants, cookies, muffins, scones, Danish, tarts and assorted pastries” in International Class 30. This application, which is based on the petitioner’s use of this trademark in commerce in connection with the named goods in Class 30 since at least as early as December 9, 1996, was filed April 6, 2009, and is identified by Serial No. 77/707,868. The U.S. Patent and Trademark Office has refused

¹ Registration No. 3614763, issued May 5, 2009, from an application filed March 16, 2008.

² Petitioner’s motion to amend its pleading was granted as conceded on April 15, 2011.

- registration under Trademark Act Section 2(d) 15 U.S.C. Section 1052(d), because "of a likelihood of confusion with the mark in U.S. Registration No. 3,614,763 as to be likely to cause confusion, to cause mistake, or to deceive as to the source of the goods."
4. There is no issue as to priority of use. Petitioner has continuously used its RED HEN BREAD trademark since at least as early as December 9, 1996, which is prior to the March 16, 2008 filing date for U.S. Trademark Application Serial No. 77/423,259, which matured into Registration No. 3,614,763, and prior to the August 29, 2005 first date of use alleged by the Registrant.
 5. The Registrant's Mark and the Petitioner's Mark contain the term "RED HEN."
 6. Bread, buns, bagels, bread rolls and baguettes are listed in the identification of goods for Registration No. 3,614,763 and for Trademark Application Serial No. 77/707,868.
 7. Registrant did not make use of the LITTLE RED HEN BAKERY mark on all of the goods identified in his use-based application at least as early as the filing date of the underlying application for Registration No. 3,614,763.
 8. Registrant did not make use of the LITTLE RED HEN BAKERY as a trademark on all of the goods identified in Registration No. 3,614,763 in interstate commerce prior to or on the filing date of the underlying use-based application for Registration No. 3,614,763.

Respondent also "accepts and stipulates that there is a 'purchasing public' that 'has come to know, rely upon, and recognize the goods of Petitioner by [Petitioner's] mark," but asserts that petitioner's purchasing public is limited in geographic scope to the Chicago metropolitan area, and "knows of no evidence showing that Petitioner's 'purchasing

public' includes individuals in the Wichita area or the region surrounding Wichita, Kansas." ¶ 3. Respondent has denied the remaining allegations in the petition for cancellation, to wit, that respondent's mark is likely to cause confusion with petitioner's mark; that purchasers are likely to consider the goods of the respondent advertised under the mark LITTLE RED HEN BAKERY as emanating from or associated with petitioner; that prior to the filing of his underlying application respondent sold his products only in locations in the state of Kansas; that respondent did not sell or ship baked bread products under his mark outside of the state of Kansas prior to the filing date of his underlying application; that respondent has not sold, shipped or distributed baked bread products under the mark outside of the state of Kansas; and that the existence of respondent's registration casts a cloud on petitioner's right to use, register and expand the use of its RED HEN trademark.

The record consists of the pleadings and petitioner's notice of reliance, through which petitioner has submitted respondent's responses to certain of petitioner's interrogatories and the Office action from petitioner's application file in which the examining attorney refused registration on the basis of likelihood of confusion with

respondent's registration. Respondent did not submit any evidence.

The proceeding has been fully briefed. In his brief respondent asks the Board to take notice of two third-party registrations, and also makes reference to exhibits respondent submitted in connection with an earlier summary judgment motion. None of this material is properly of record. The Board does not take judicial notice of records residing in the Patent and Trademark Office, see *In re Duofold, Inc.*, 184 USPQ 638 (TTAB 1974). Further, it is well established that if evidence is submitted in connection with a summary judgment motion and the case goes to trial, "the summary judgment evidence may not form part of the evidentiary record to be considered at final hearing unless it is properly introduced in evidence during the appropriate testimony period." See TBMP § 528.05(a)(1) and cases cited at Note 8 therein. Accordingly, respondent's assertions that are not supported by evidence of record have been given no consideration.

Standing

Respondent has stipulated that petitioner has used the mark RED HEN BREAD since 1996 in connection with bakery products, and that petitioner's application for RED HEN BREAD has been refused registration because of a likelihood

of confusion with the mark in respondent's registration. Petitioner has also submitted a copy of the Office action showing this refusal. In view of this, petitioner has demonstrated that it is not a mere intermeddler, and has established its standing. *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).

Likelihood of Confusion

There are two elements to proving the ground of likelihood of confusion, priority and likelihood of confusion. Respondent has stipulated that "there is no issue as to priority of use" and that "petitioner has continuously used its RED HEN BREAD trademark since at least as early as December 9, 1996." Further, because respondent has not submitted any evidence of his use, the earliest date on which he may rely is the March 16, 2008 filing date of his underlying application. *Brewski Beer Co. v. Brewski Brothers Inc.*, 47 USPQ2d 1281, 1284 (TTAB 1998) (a respondent may rely on its registration for the purpose of proving that its mark was in use as of the application filing date). Thus, petitioner has established that it has priority.

With respect to the issue of likelihood of confusion, we make our determination based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

Respondent has stipulated that petitioner uses its mark in connection with "bakery products, namely, bread, buns, bagels, bread rolls, baguettes, croissants, cookies, muffins, scones, Danish, tarts and assorted pastries." The goods identified in respondent's registration are "fresh, baked bread products, namely, bread, buns, bagels, bread rolls and baguettes." Thus, petitioner and respondent both use their marks on bread, buns, bagels, bread rolls and baguettes, and the parties' goods are legally identical. Further, because respondent's identified goods are deemed to travel in all channels of trade that are appropriate for such goods, and because the goods are legally identical, the channels of trade and classes of customers must be deemed to be, at least in part, identical as well. See *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994).

Although neither party has discussed the du Pont factor of "the conditions under which and buyers to whom

sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing," it is clear from the nature of the goods themselves that they are relatively inexpensive and frequently replaced products sold to the public at large, and would be purchased by unsophisticated consumers without great deliberation and care.

We turn now to a consideration of the marks, noting that when marks would appear on virtually identical goods or services, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Petitioner's mark is RED HEN BREAD; respondent's mark is LITTLE RED HEN BAKERY. In comparing the marks, we give less weight to the word BREAD in petitioner's mark, since it is generic for bread, and we give less weight to the descriptive (and disclaimed) word BAKERY in respondent's mark, since consumers will not look to these descriptive/generic words to distinguish the source of the goods. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (it is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons,

more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties). Although respondent's mark includes the word LITTLE, and petitioner's mark does not, this additional word is not sufficient to distinguish respondent's mark from petitioner's. The impression of both marks remains the same, that of a RED HEN, with respondent's mark merely providing some additional information about the hen. Overall, the marks are similar in appearance and pronunciation, and convey substantially identical connotations and commercial impressions.

Respondent does not really argue the differences in the marks, but contends that petitioner's mark is entitled to a limited scope of protection because there are a number of similar businesses offering similar products.³ However, respondent has not submitted any evidence of third-party use. Although we may take judicial notice that there is a children's story about a little red hen who is attempting to bake some bread, without any evidence to show that third

³ Respondent makes the statement that "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." Brief, p. 6. While a showing of a genuine issue of material fact is enough to prevent the entry of summary judgment, that standard does not apply to a final decision on the merits.

parties have adopted RED HEN marks because the term has a suggestive connotation for bakery products, we are hard-pressed to find that petitioner's mark RED HEN BREAD is suggestive of bread or other bakery products. Compare, *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (third-party registrations may be given some weight to show the meaning of a mark in the same way that dictionaries are used, and 38 third-party registrations provide some evidence that 38 applicants considered the suffixes of the parties' marks to be suggestive). Moreover, to the extent that petitioner's mark RED HEN BREAD has a slight suggestive connotation, respondent's mark LITTLE RED HEN BAKERY has the same suggestive connotation. Thus, even if we were to find that petitioner's mark is not entitled to the broad scope of protection accorded an arbitrary mark, its protection certainly extends to protecting petitioner from the use of such a similar mark as respondent's for identical goods.

The final du Pont factors that the parties have discussed are the nature and extent of any actual confusion and the length of time during and conditions under which there has been concurrent use without evidence of actual confusion. Respondent points out that petitioner has failed to submit any evidence of actual confusion.

However, as has been frequently stated, evidence of actual confusion is difficult to obtain, and in particular, where relatively inexpensive items such as food products are involved, confusion about sponsorship or affiliation would not necessarily be brought to the attention of either petitioner or respondent. *General Mills Inc. v. Fage Dairy Processing Industry SA*, 100 USPQ2d 1584, 1604 (TTAB 2011). Further, it is not clear that there has been an opportunity for confusion to occur, since the evidence shows that respondent has used his mark only in the state of Kansas, and there is no evidence to show that the parties operate in the same geographic areas, or the extent of either party's sales and advertising. Thus, the fact that there is no evidence of actual confusion does not show that confusion is not likely to occur. See *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1833-34 (TTAB 2012).

Having reviewed all of the evidence and the arguments regarding the various du Pont factors, we find that petitioner has proven that the use of respondent's mark, LITTLE RED HEN BAKERY, for his identified goods, is likely to cause confusion with petitioner's mark RED HEN BREAD for its goods.

Nonuse in Commerce

Petitioner alleged in its petition for cancellation that respondent did not make use, and did not make use in interstate commerce, of the LITTLE RED HEN BAKERY mark on all of the goods identified in his use-based application as of the filing date of that application. Respondent stipulated to these allegations in his answer. In its brief, petitioner has argued only that respondent did not make use of his mark in commerce as of the filing date of his underlying application, and has not discussed the stipulation that respondent did not make any use whatsoever of the mark on some of the goods. Therefore, although failure to make use of a mark on all of the goods in a use-based application as of the filing of the application is grounds for cancelling the registration, we will not address this claim. We also point out that petitioner does not contend that respondent's statements in his application constitute fraud on the Patent and Trademark Office.

We therefore turn to the ground that was briefed, that as of the filing date of his application that issued as the subject registration, petitioner did not make use in commerce of the mark on all of the goods identified in the application. Besides respondent's stipulating to this in his answer, petitioner has made of record respondent's interrogatory responses which indicate that respondent has

sold his goods in locations in only two counties in the state of Kansas, and that respondent has no distributors outside of Kansas.

Despite respondent's stipulation in his answer, in his brief he has argued that his activities within Kansas constitute use in commerce, and that "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." p. 9.

Respondent's mere assertions in his brief that he engaged in activities that constitute use in commerce are not sufficient to rebut his own admission that he did not make use of his mark in interstate commerce on all of the identified goods as of the filing of his application. Although there are situations in which intrastate sales may be found to have such an effect on commerce that may be controlled by Congress that the activities constitute use in commerce, see *In re Silenus Wines, Inc.*, 557 F.2d 806, 194 USPQ 261 (CCPA 1977), there must be a *showing* that the activities have such an effect. Because respondent has not submitted any evidence at all with respect to his use of the mark, he has not shown that the use of his mark constitutes use in commerce, and therefore we only have his stipulation that he did not make use of his mark in

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commerce on all of the goods identified in his application as of the filing of the application. In view thereof, we find that respondent did not use his mark in commerce on all of his identified goods as of the filing date of his underlying application, and that his registration must be cancelled on the ground of nonuse.

Decision: The petition for cancellation is granted on the grounds of likelihood of confusion and nonuse.