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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Bayer Aktiengesellschaft
v.
Stamatios Mouratidis

Opposition No. 91185473
to application Serial No. 77208071
filed on June 17, 2007

Jennifer Fraser and Christina M. Hillson of Connolly Bove
Lodge & Hutz LLP for Bayer Aktiengesellschaft.

Stamatios Mouratidis *pro se*.

Before Quinn, Kuhlke and Bergsman,
Administrative Trademark Judges.

Opinion by Bergsman Administrative Trademark Judge:

Bayer Aktiengesellschaft ("opposer") filed an
opposition to the application of Stamatios Mouratidis
("applicant") to register the mark ORGANIC ASPIRIN on the
Principal Register, in standard character form, for "dietary
supplements for human consumption," in International Class
5. As grounds for opposition, opposer asserted that the
mark ORGANIC ASPIRIN as applied to dietary supplements is
deceptive under Section 2(a) of the Trademark Act of 1946,

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15 U.S.C. §1052(a), and is deceptively misdescriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1). In its answer, applicant admitted that its dietary supplements do not contain acetylsalicylic acid but otherwise denied the salient allegations in the opposition.

The Record

By rule, the record includes applicant's application file and the pleadings. Trademark Rule 2.122(b), 37 CFR §2.122(b).

Only opposer introduced evidence. Opposer filed a notice of reliance on the following items:

1. Certified copies of three federally-registered marks, shown below, owned by opposer, prepared and issued by the U.S. Patent and Trademark Office showing both the current status of and current title to the registrations:

- a. Registration No. 2063685 for the mark BAYER and design for "pharmaceutical preparations, namely anti-fungals, anti-infectives and anti-hypertensives; vitamin and mineral supplements; and diagnostic reagents for medical use," in Class 5;
- b. Registration No. 2065441 for the mark BAYER for "pharmaceutical preparations, namely anti-fungals, anti-infectives and anti-hypertensives; vitamin and mineral

supplements; and diagnostic reagents for medical use," in Class 5; and

- c. Registration No. 3345876 for the mark BAYER NUTRITIONAL SCIENCES for "nutritional supplements," in Class 5.

2. Articles from printed publications purporting to show the prevalence of organic supplements to which consumers are exposed and which are made available in the marketplace.

3. Articles from printed publications purporting to show the health benefits of aspirin.¹

4. Applicant's response to opposer's interrogatory No. 11, applicant's supplemental responses to opposer's interrogatory Nos. 2, 10, 14, 15, and 25, applicant's response to opposer's interrogatory No. 54, and applicant's supplemental responses to opposer's interrogatory Nos. 40 and 42.

5. Applicant's responses to opposer's requests for admission Nos. 3-4, 7-10, 14-15, 29-4, 39, 41, 43, 44 and 53-78, applicant's supplemental response to opposer's request for admission No. 80, and applicant's responses to

¹ Opposer submitted articles from two foreign sources: Hindustan Times (B00420-423) and PR Newswire Europe (B00430-432). Because opposer offered no testimony regarding why consumers in the U.S. would encounter these foreign sources, we have not given them any consideration.

opposer's requests for admission Nos. 86-91, 93-95, 98 and 100-104.

6. Excerpts from various websites including, but not limited to, the Food and Drug Administration and applicant.

7. Dictionary definitions for the words "organic" and "aspirin."

Opposer also submitted excerpts from the 1991-2008 Physicians Desk Reference for Nonprescription Drugs purporting to "show the presence of aspirin and non-aspirin over-the-counter products in the market place." However, the excerpts from the Physicians Desk Reference for Nonprescription Drugs are evidence only that the products have been included in the book, not that the products have been sold or that consumers are aware of the products. Likewise, the articles from printed publications and websites have limited probative value because such materials are probative only for what they show on their face, not for the truth of matters contained therein. *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010); *Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1117 n.7 (TTAB 2009).

The parties have made the following stipulations:

1. Applicant's goods do not contain acetylsalicylic acid; and
2. Acetylsalicylic acid is a synthetic compound.

Standing

As indicated above, opposer has made its federally-registered marks for, *inter alia*, vitamin, mineral and nutritional supplements of record. The registrations suffice to establish opposer's commercial interest in this proceeding and, thus, its standing. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

Elements for Proving a Mark is Deceptive and Deceptively Misdescriptive

Opposer contends that applicant's mark ORGANIC ASPIRIN is deceptive and deceptively misdescriptive. The Court of Appeals for the Federal Circuit has articulated the following test for whether a mark consists of or comprises deceptive matter:

1. Is the term misdescriptive of the character, quality, function, composition or use of the goods?
2. If so, are prospective purchasers likely to believe that the description actually describes the goods?
3. If so, is the misdescription likely to affect a significant portion of the relevant consumers' decision to purchase?

In re Budge Mfg. Co. Inc., 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988), *aff'g* 8 USPQ2d 1790 (TTAB 1987).

If the first two questions are answered affirmatively, the mark is deceptively misdescriptive of the goods under

Section 2(e)(1) of the Trademark Act. *In re Quadry Winery Inc.*, 221 USPQ 1213, 1214 (TTAB 1984). The third question, whether the misdescription is likely to affect the decision to purchase, distinguishes marks that are deceptive from marks that are merely deceptively misdescriptive. *Id*; see also *In re Shniberg*, 79 USPQ2d 1309, 1311 (TTAB 2006) ("If the misdescription is more than simply a relevant factor that may be considered in purchasing decisions but *is* a material factor, the mark would also be deceptive") (emphasis in the original).

A. Whether the mark ORGANIC ASPIRIN is misdescriptive of the character, quality, function, composition or use of dietary supplements?

Aspirin is "[a] white, crystalline compound ... derived from salicylic acid and commonly used in tablet form to relieve pain and reduce fever and inflammation. It is also used as an antiplatelet agent. Also called *acetylsalicylic acid*." (Emphasis in the original).² In its brief, applicant concedes that "aspirin is a generic term for the chemical acetylsalicylic acid."³

"Organic" has the following relevant definitions:

1. Of, relating to, or derived from living organisms: *organic matter*.

* * *

² The American Heritage Dictionary of the English Language, p. 107 (4th ed. 2000) attached to opposer's notice of reliance; see also applicant's supplemental response to interrogatory No. 15.

³ Applicant's Brief, p. 4.

3b. Raised or conducted without the use of drugs, hormones, or synthetic chemicals: *organic chicken; organic cattle farming.*⁴

In his brief, applicant succinctly defines the word "organic" as "produced without synthetic chemicals."⁵

As a starting point for analysis, we observe that for a term to misdescribe goods, the term must be merely descriptive of a significant aspect of the goods which the goods could plausibly possess but in fact do not. *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002). We find that it is plausible that dietary supplements could contain aspirin for its cardiovascular and other health benefits. See the discussion below. Applicant's dietary supplements do not contain acetylsalicylic acid otherwise known as aspirin.⁶ Thus, the term "Aspirin" is misdescriptive of applicant's goods. See *In re ALP of South Beach Inc.*, 79 USPQ2d 1009, 1010 (TTAB 2006) (CAFETERIA used in connection with restaurant services that explicitly excludes cafeterias is misdescriptive); *In re Shapely, Inc.*, 231 USPQ 72, 73 (TTAB 1986) ("There is no question that the presence of the noun 'silk' as a prefix renders the mark

⁴ The American Heritage Dictionary of the English Language, p. 1239 (4th ed. 2000) attached to opposer's notice of reliance; see also applicant's supplemental response to interrogatory No. 25.

⁵ Applicant's Brief, p. 7.

⁶ Stipulation No. 1; applicant's supplemental response to interrogatory No. 2; applicant's response to request for admission No. 43.

SILKEASE misdescriptive of appellant's blouses and dresses which contain no silk fibers").

B. Whether prospective purchasers are likely to believe ORGANIC ASPIRIN describes applicant's goods?

Reasonably prudent consumers are likely to believe that applicant's ORGANIC ASPIRIN dietary supplements contain aspirin derived without synthetic chemicals. In fact, excerpts from applicant's website, shown below, liken its product to aspirin, thus, leading consumers to mistakenly believe that applicant's dietary supplements include a naturally occurring aspirin (emphasis added).

Studies have shown that aspirin (acetylsalicylic acid) consumption benefits the heart. **Salicylates like aspirin have been used in various forms since antiquity. Actually, the first salicylates consumed were all botanical.** The use of naturally occurring salicylates from plant extracts prompted the chemical synthesis of aspirin. Today, all aspirin is synthesized industrially from phenol (a byproduct or coal of benzene).

* * *

Organic Aspirin capsules provide you with salicylates for your heart's protection. ... Organic Aspirin products contain exclusively naturally occurring phytochemicals and salicylates which later convert into salicylic acid in our bodies and allow for gentler digestion than harsher synthetic medications while at the same time providing a wider range of benefits.

* * *

*Our products contain salicin from both botanical forerunners of aspirin.*⁷

History of aspirin (acetylsalicylic acid, ASA)

Aspirin: Initially people relied on botanical extracts for their aches and pains. It was thanks to the healing properties of a few salicin containing plants that people realized the value of salicylates. We sure have come a long way, and along the way our approach and reliance to nature has changed. Today, many medications, including aspirin, are synthesized from petroleum byproducts.⁸

Botanical Sources of Organic Aspirin Products

Organic Aspirin capsules are formulated to contain salicylates (aspirin-like phytochemicals), flavonoids, tannins and heparin from biodiverse sources.⁹

Applicant's website also presents the following comparison of ingredients between ORGANIC ASPIRIN and synthetic aspirin, thus, implying that there are two types of aspirin.¹⁰

⁷ Notice of reliance (B00063).

⁸ Notice of reliance (B00068).

⁹ Notice of reliance (B00074).

¹⁰ Notice of reliance (B00078-79).

Organic Aspirin™ capsules vs. synthetic aspirin tablets

Comparison of constituent ingredients between Organic Aspirin™ capsules and synthetic aspirin tablets

Organic Aspirin™ capsules	Synthetic aspirin tablets
<p>Phyto-chemicals found in Organic Aspirin™ capsules</p>	<p>Chemicals added in regular aspirin tablets:</p>
<p>Organic Aspirin™ capsules do NOT contain acetyl salicylic acid (ASA, aka aspirin).</p>	<p>Regular aspirin tablets contain acetylsalicylic acid (ASA, aka aspirin) which is buffered by any of the following chemicals:</p>
<p>Organic Aspirin™ capsules contain salicylates (such as salicocortin, acetylsalicycortin and tremulactin) from White Willow bark extract, which, upon ingestion, get converted to ASA (the urinary metabolite spectrum of oral salicylates is similar to that of oral ASA) (1). Another one of the main ingredients of Organic Aspirin™ capsules is Meadowsweet (<i>Spiraea ulmaria</i>). The primary chemical constituents of spirinid ulmaris include essential oils (salicylaldehyde, methylsalicylate, hyperoside), salicylic acid, aspirins, gaultherins, spirinocoids, flavonoids (qurin, spirinocoids), vanillin, glycoside, mucilage, tannin, coumarins, and vitamin C. Hiefflein berry (<i>Chaenactis laevigata</i>) is rich in oligomeric proanthocyanidins (OPC) known for their cardiovascular and beneficial</p>	<p>Calcium carbonate, carmelum gum, colloidal silicon dioxide, corn starch, D&C red #7 calcium lake, FD&C blue #2 aluminum lake, FD&C red #40 aluminum lake, hypromellose, microcrystalline cellulose, pregelatinized starch, propylene glycol, shellac, sodium starch glycolate, titanium dioxide, zinc stearate, triacetin, croscarmel</p>

Finally, applicant advertises that its ORGANIC ASPIRIN is similar to a botanical predecessor of aspirin.

Organic Aspirin capsules contain salicin from both forerunners of aspirin and should not be used by those who are allergic to aspirin, have a gastrointestinal disorder, tinnitus, are pregnant, and/or breast-feeding.

* * *

Organic Aspirin capsules contain naturally occurring salicin, calcium and phytochemicals, including heparin-like compounds and tannins.¹¹

Applicant argues to the contrary that ORGANIC ASPIRIN is not misdescriptive and not deceptively misdescriptive

¹¹ Applicant's response to request for admission No. 98 (Document OA0002).

because the combination of the words "Organic" and "Aspirin" is incongruous, thus, creating an inherently distinctive mark.¹² This argument is based on the facts that there is no such thing as organically grown aspirin, that the term ORGANIC ASPIRIN is not synonymous with aspirin, and that ORGANIC ASPIRIN has no meaning.¹³

However, we find that the term ORGANIC ASPIRIN conveys the literal commercial impression that applicant's products are, or contain, a natural aspirin product. The text of applicant's websites and advertising noted above reinforces this commercial impression by contrasting applicant's products with synthetic aspirin. As we noted above, applicant's advertising leads consumers to believe that there are two types of aspirin: organic and synthetic.

Furthermore, we do not agree with applicant's argument that the incongruous combination of the words "Organic" and "Aspirin" to form ORGANIC ASPIRIN "reliably dissuades consumers from believing the goods are made of aspirin, since such a belief is not plausible."¹⁴ Applicant's conclusion is based on the premise that consumers know that there is no such thing as organic aspirin. Presumably, dietary supplements are available to all consumers some of whom may not know that there is no such thing as organic

¹² Applicant's Brief, p. 7.

¹³ Applicant's Brief, p. 6.

¹⁴ Applicant's Brief, p. 7.

aspirin. Moreover, because applicant is advertising that its dietary supplements are naturally occurring phytochemicals and salicylates which form salicylic acid and that they contain salicin from botanical forerunners of aspirin, applicant is leading consumers to mistakenly believe that its product is, or contains, aspirin derived from natural products.

Applicant contends that ORGANIC ASPIRIN is similar to the facts in *In re Robert Simmons, Inc.*, 192 USPQ 331 (TTAB 1976) where that applicant sought to register the mark WHITE SABLE for artist's paint brushes. According to applicant, "[t]he terms 'WHITE' and 'SABLE' are similarly at odds with each other, and the term 'WHITE SABLE' is not deceptive on artist's paint brushes, in view of the fact that [the] characteristic color of sable fur is black and the brush is made of synthetic brush filament."¹⁵ However, in *Simmons*, the Board found that the word "sable" when used in connection with artist's paint brushes does not "mean literally a brush whose bristles are made from the hair or fur of a sable animal." 192 USPQ at 333. Thus, the term "White Sable" would not deceive consumers because they do not believe that brushes would be made from sable fur. In other words, the Board found that by merely contemplating the goods involved [paint brushes], consumers reasonably

¹⁵ Applicant's Brief, p.7.

would be able to draw a correct conclusion about the nature of the goods. *See In re ALP of South Beach Inc.*, 79 USPQ at 1012. In this case, however, we find that when consumers consider applicant's goods [dietary supplements], they will believe that applicant's products contain aspirin and, thus, the term ORGANIC ASPIRIN mistakenly leads consumers to believe that applicant's dietary supplements contain aspirin derived without the use of synthetic chemicals.

C. Whether the use of term ORGANIC ASPIRIN is likely to affect the purchasing decision?

We find that the use of the term "aspirin" in applicant's mark ORGANIC ASPIRIN is likely to affect the purchasing decision because consumers will purchase applicant's dietary supplements in the mistaken belief that the products contain aspirin and, thus, provide the health benefits of aspirin. The heart-health and cancer preventing benefits of aspirin have been reported in the *Kansas City Star*,¹⁶ *Obesity, Fitness & Wellness Week*,¹⁷ and *USA Today*.¹⁸ Also, the U.S. Food and Drug Administration notes that aspirin may be recommended for treating heart attack, stroke, certain other cardiovascular conditions,

¹⁶ Notice of reliance (B00424).

¹⁷ Notice of reliance (B00433) and (B00439)

¹⁸ Notice of reliance (B00444). Opposer also introduced articles from the *Medical Letter on the CDC & FDA* and the *Drug Industry Daily*. However, it is unlikely that consumers for applicant's products read these publications and are influenced by them.

rheumatologic diseases, and for pain relief.¹⁹ Applicant advertises its ORGANIC ASPIRIN as providing anti-inflammatory and cardiovascular benefits without the gastrointestinal problems that aspirin can cause.²⁰

Accordingly, the use of the term ORGANIC ASPIRIN to identify applicant's dietary supplements is likely to affect the purchasing decision of consumers who want the benefits of aspirin from a natural source, as opposed to synthetic chemicals, without the problems that traditional aspirin may cause.

In view of the foregoing we find that applicant's mark ORGANIC ASPIRIN for dietary supplements for human consumption is both deceptively misdescriptive under Section 2(e)(1) and deceptive under Section 2(a).

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

¹⁹ Notice of reliance (B0001).

²⁰ Applicant's response to request for admission No. 98 (Document OA0002); Notice of reliance (B00063, 66, 72, 84, and 89).