

This Opinion Is Not a  
Precedent of the TTAB

Mailed: April 19, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*Sunkist Growers, Inc.*

*v.*

*Sunkissed Families*<sup>1</sup>

Opposition No. 91231358

Gary D. Krugman and Kevin G. Smith of Sughrue Mion, PLLC,  
for Sunkist Growers, Inc.

Eve J. Brown of Barton Gilman LLP,  
for Sunkissed Families.

Before Cataldo, Hightower, and Pologeorgis,  
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Applicant Sunkissed Families seeks registration on the Principal Register of the mark SUNKISSED FAMILIES, in standard characters and with “FAMILIES”

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<sup>1</sup> Applicant filed its Answer and its trial brief in the names of “Sunkissed Families and the Center for Social & Emotional Health, LLC.” The subject application, however, is owned only by Sunkissed Families, a Massachusetts limited liability company.

disclaimed, for “information in the field of parenting concerning the health of children,” in International Class 44.<sup>2</sup>

Opposer Sunkist Growers, Inc. opposes registration, asserting priority and a likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). Opposer pleaded scores of registrations for various goods and services consisting of or comprising the word SUNKIST; it did not plead or argue that it owns a family of marks. We base our decision on the following pleaded registration, which we find to be the most relevant and on which the parties focused some of their arguments:

SUNKIST KIDS (typeset) for “education and entertainment services, namely, providing a web site featuring games, quizzes, experiments, educational lesson plans for teachers and educators, and related multimedia materials all in the field of food, health and diet for the benefit of children,” in International Class 41.<sup>3</sup>

Applicant denied substantially all of the salient allegations in the notice of opposition.

## **I. Record**

The record consists of the pleadings and, without any action by the parties, the file of the involved application. Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1). The record also comprises the evidence summarized below.

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<sup>2</sup> Application Serial No. 87074694 was filed June 16, 2016, based on Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>3</sup> Registration No. 2858143, issued June 29, 2004; renewed. Before November 2, 2003, “standard character” drawings were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. Trademark Manual of Examining Procedure (TMPEP) § 807.03(i) (Oct. 2018).

**A. Opposer's Evidence**

Opposer filed notices of reliance on the following evidence:

- Printouts of its pleaded registrations from the USPTO Trademark Status and Document Retrieval (TSDR) database showing current status and title, pursuant to Trademark Rules 2.122(d)(2) and (g), 37 C.F.R. § 2.122(d)(2) and (g) (15 TTABVUE, most relevant registration at 15 TTABVUE 10-13);
- Applicant's admissions to Opposer's Requests for Admission Nos. 13 and 14, pursuant to Trademark Rule 2.120(k)(3)(i), 37 C.F.R. § 2.120(k)(3)(i) (16 TTABVUE); and
- Excerpts from Applicant's website and three third-party websites, pursuant to Trademark Rule 2.122(e)(2) and (g), 37 C.F.R. § 2.122(e)(2) and (g) (17 TTABVUE).

Opposer also submitted testimony declarations of the following three witnesses:

- Karen Holme, Opposer's Manager of Intellectual Property, with Exhibits 1-7 (18 TTABVUE);
- Mark Madden, Opposer's Vice President of Marketing and Global Licensing (19 TTABVUE); and
- Joan Wickham, Opposer's Director of Communications, with Exhibits 1-7 (20 TTABVUE).

**B. Applicant's Evidence**

Applicant submitted by notice of reliance pages from its website, dictionary definitions of the word "sunkissed," and examples of use of "sunkissed" on third-party websites. 22 TTABVUE, Exhibits A-C.<sup>4</sup> We sustain Opposer's objection to the new evidence embedded in Applicant's brief. *See* Applicant's brief at 4-5, 7, 28 TTABVUE 5-6, 8; Reply Brief at 2, 29 TTABVUE 6.

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<sup>4</sup> On June 8, 2018, the Board granted as conceded Opposer's motion to strike Applicant's testimony of Jeannine M. Lenehan. *See* 21 TTABVUE and 24 TTABVUE.

## **II. Opposer's Standing and Priority**

Standing is a threshold issue that must be proven by the plaintiff in every *inter partes* case. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); see also, e.g., *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1344 (TTAB 2017). In its order denying Opposer's motion for summary judgment, the Board found that standing and priority are no longer issues in this proceeding as long as Opposer remained the owner of the valid and unchallenged registrations submitted in support of its motion for summary. July 24, 2017 Order at 9, 14 TTABVue 9. Because the evidence of record submitted at trial demonstrates that Opposer remains the current owner of the registration for the mark SUNKIST KIDS and that this registration is valid and subsisting, Opposer has established its standing and priority of use with respect to the services identified in the SUNKIST KIDS registration. We therefore proceed to consider the question of likelihood of confusion.

## **III. Likelihood of Confusion**

Our determination under Trademark Act Section 2(d) is based on an analysis of all 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, 567 (CCPA 1973). Opposer bears the burden of proving its claim of likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

As noted above, we focus our analysis on the mark in Opposer's pleaded Registration No. 2858143. If we find that there is a likelihood of confusion between

this mark and Applicant's mark, there is no need for us to consider the likelihood of confusion with Opposer's other pleaded marks. Conversely, if we find there is no likelihood of confusion with this mark, we would find no likelihood of confusion with Opposer's other pleaded marks. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

We address in turn each of the *du Pont* factors bearing on our decision for which the parties submitted evidence or argument.

#### **A. Strength of Opposer's Mark**

Opposer contends that its SUNKIST mark is famous. Applicant disagrees. In determining a mark's strength, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014); *see also In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).")

##### **1. Conceptual Strength of Opposer's Mark**

As to the conceptual strength of Opposer's mark, Applicant submitted dictionary definitions of "sun-kissed" meaning "made warm or brown by the sun,"<sup>5</sup> "having plenty of bright sunlight : sunny,"<sup>6</sup> and "*of a person's skin* : having an attractive color because of having been in the sun."<sup>7</sup> These definitions do not establish that "sun-

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<sup>5</sup> Applicant's Notice of Reliance, Exhibit B (from Google.com), 22 TTABVUE 42-44.

<sup>6</sup> *Id.* (from Merriam-Webster online), 22 TTABVUE 45.

<sup>7</sup> *Id.*

kissed” or SUNKIST has a descriptive meaning in association with Opposer’s services (“education and entertainment services, namely, providing a web site featuring games, quizzes, experiments, educational lesson plans for teachers and educators, and related multimedia materials all in the field of food, health and diet for the benefit of children”). We find Opposer’s mark to be inherently strong. Indeed, Applicant admits as much, arguing that: “By adopting a fanciful misspelling of a dictionary word as its mark, and by consistently using only that misspelling (‘SUNKIST’) rather than the dictionary version (‘sunkissed’), Opposer has become associated exclusively with its misspelling.” Applicant’s Brief at 13-14, 28 TTABVue 14-15.

## **2. Commercial Strength of Opposer’s Mark**

In the likelihood of confusion analysis, fame varies along a spectrum from very strong to very weak. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017). A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Kenner Parker Toys Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Fame may be measured indirectly by the volume of sales of and advertising expenditures for the goods or services traveling under the mark, “the length of time those indicia of commercial awareness have been evident,” widespread critical assessments and notice by independent sources of the products identified by the marks, as well as the general reputation of the products. *Bose*, 63 USPQ2d at 1305-06, 1309. Raw numbers alone may be misleading, however. Thus, some context in

which to place raw statistics may be necessary, for example, market share or sales or advertising figures for comparable types of goods. *Id.* at 1309; *see also Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690 (Fed. Cir. 2018) (“Market share is but one way of contextualizing ad expenditures or sales figures.”). Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012).

Although Opposer provided significant evidence of fame “in the fruit field,” Opposer’s Brief at 25, 27 TTABVUE 29, it introduced no evidence of commercial strength specific to the SUNKIST KIDS mark in association with its identified services. In fact, Opposer submitted no evidence concerning sales, advertising, or length of use of that mark.<sup>8</sup> We therefore find Opposer’s evidence of fame to be of limited probative value in assessing the commercial strength of its SUNKIST KIDS mark in connection with the services identified thereby.

Evidence of use of similar marks by third parties for the same or similar goods or services also is relevant to a mark’s commercial strength. *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). Applicant

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<sup>8</sup> The Board’s order denying Opposer’s motion for summary judgment stated: “Opposers are well-advised to limit their pleading of registrations to those most pertinent to the matter.” July 24, 2017 Order at 2 n.4, 14 TTABVUE 2. Opposer chose not to narrow the registrations at trial, instead relying on its 64 pleaded registrations then still existing.

submitted as Exhibit C to its Notice of Reliance evidence of some nine instances of use online of “sunkissed” formatives by third parties. Most, however, are for goods or services unrelated to Opposer’s services. The more relevant uses are:

- Archived food and health entries from a website titled “Sun Kissed Violet” ([sunkissedviolet.com/category/food-health](http://sunkissedviolet.com/category/food-health), 22 TTABVUE 48);
- The “Healthy & Happy Archives” from a website titled “Sunkissed in December” ([sunkissedindecember.com/category/healthy-happy](http://sunkissedindecember.com/category/healthy-happy), 22 TTABVUE 49-50); and
- An Australian website with a post titled, “The dos and don’ts of the ‘sun-kissed diet,’ the 100-year-old eating plan” ([coach.nine.com.au/2016/04/13/12/32/sun-kissed-diet](http://coach.nine.com.au/2016/04/13/12/32/sun-kissed-diet), 22 TTABVUE 65-67).

Leaving aside the fact that the last listed use is foreign, because none of the services are similar to Opposer’s identified services, the evidence of use of “sunkissed” by third parties is irrelevant to the commercial strength of Opposer’s SUNKIST KIDS mark.

### **3. Conclusion as to Strength**

Considering as a whole the record pertaining to the fifth and sixth *du Pont* factors, we accord Opposer’s mark SUNKIST KIDS the normal scope of protection for inherently distinctive marks. Specifically, Opposer remains entitled to the presumptions flowing from its registration under Trademark Act Section 7(b), 15 U.S.C. § 1057(b).

Confusion is confusion. The likelihood thereof is to be avoided, as much between “weak” marks as between “strong” marks, or as between a “weak” and a “strong” mark. Similarly, the statute, by providing remedies to trademark owners, enables those *owners* to protect their marks. It is through such owner-action that the public is protected from confusion.

*King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974).



**B. Similarity of the Marks**

We next consider the similarity of the marks. In a likelihood of confusion analysis, we compare the marks in their entireties for similarities and dissimilarities in appearance, sound, connotation and overall commercial impression. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018). “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*, 101 USPQ2d at 1721 (quotation omitted). We bear in mind our findings regarding the strength of Opposer’s mark as we turn to the first *du Pont* factor.

Opposer’s mark is SUNKIST KIDS, while Applicant’s mark is SUNKISSED FAMILIES, with FAMILIES disclaimed. KIDS and FAMILIES are highly descriptive or generic in association with the parties’ identified services, which concern children’s health. Therefore, consumers are likely to focus on the first and what we find to be the dominant portion of each mark, SUNKIST and SUNKISSED, respectively. *See, e.g., Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (stating that “it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).

Applicant admitted in its Answer to ¶ 16 of the Notice of Opposition that its mark and Opposer’s marks are “similar in sound.” In fact, they are phonetic equivalents. SUNKIST and SUNKISSED would be pronounced identically, or nearly so, under

normal English pronunciation, as confirmed by the pronunciation of “sun-kissed” submitted by Applicant: /sən kist/. Applicant’s Notice of Reliance, Exhibit B (from Google.com), 22 TTABVUE 42. The terms also are nearly identically visually and in meaning. As discussed above, Applicant acknowledges that “SUNKIST” is a misspelling of “sunkissed.”

As to the second term in each mark, KIDS and FAMILIES look and sound different, but they carry a related connotation, given that the singular “family” is defined as “spouse and children” or “the basic unit in society traditionally consisting of two parents rearing their children.”<sup>9</sup> Consumers familiar with Opposer’s prior use of its mark SUNKIST KIDS may view SUNKISSED FAMILIES as a variation or line extension of Opposer’s services when used with Applicant’s similar services.

Although there are differences between the marks in appearance and pronunciation, we find them to convey similar meanings and overall commercial impressions. The first *du Pont* factor supports a finding that confusion is likely.

### **C. Similarity of the Services, Customers, and Channels of Trade**

We next consider the second and third *du Pont* factors, assessing the similarity or dissimilarity of the parties’ services, customers, and trade channels. Our determination must be based on the recitation of services in the pleaded registration and subject application. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746

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<sup>9</sup> We take judicial notice of these definitions of “family” in the online Merriam-Webster dictionary ([merriam-webster.com/dictionary/families](http://merriam-webster.com/dictionary/families), last visited April 19, 2019). The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format. *E.g.*, *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *RxD Media, LLC v. IP Application Dev. LLC*, 125 USPQ2d 1801, 1813 n.66 (TTAB 2018).

F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014). That is because the goods or services recited in an application determine the scope of the benefit of registration.

*Id.*

Applicant's services are "information in the field of parenting concerning the health of children," while Opposer's services are "education and entertainment services, namely, providing a web site featuring games, quizzes, experiments, educational lesson plans for teachers and educators, and related multimedia materials all in the field of food, health and diet for the benefit of children."

Opposer's services include providing lesson plans in the field of health for the benefit of children. Applicant's services are providing information concerning the health of children. Because these services, as identified, are highly similar or overlapping, the second *du Pont* factor weighs strongly in favor of a likelihood of confusion.

And, because the services overlap, the classes of customers also overlap. In particular, we assume that some consumers of Opposer's "education and entertainment services, namely, providing a web site featuring games, quizzes, experiments . . . and related multimedia materials all in the field of food, health and diet for the benefit of children" also consume Applicant's "information in the field of parenting concerning the health of children." Applicant's services in the field of parenting are not restricted solely to parents. Similarly, Opposer's services, aside from educational lesson plans, are not restricted to teachers and educators. Thus, the consumers for both parties' services may include anyone interested in child health. *See, e.g., Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ

986, 988 (CCPA 1981); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018). We find that the third *du Pont* factor weighs in favor of a finding that confusion is likely.

**D. Lack of Evidence of Actual Confusion**

Finally, Applicant argues that there has been no actual confusion between the marks although its services have been publicly offered for more than two years. Applicant's Brief at 18, 28 TTABVue 19. Applicant's argument falls under the eighth *du Pont* factor, "the length of time during and conditions under which there has been concurrent use without evidence of actual confusion."

There is no record evidence that Applicant's mark has been in use for more than two years; the subject application was filed under Trademark Act Section 1(b), and the earliest record printouts from Applicant's website date to January 24, 2018, during trial. *See* Opposer's Notice of Reliance on Internet Materials, 17 TTABVue 5-9. Even assuming the parties' services have been offered concurrently for more than two years, that is a short period of time, particularly considering there is no evidence demonstrating that in light of the parties' actual business activities, confusion, if likely, would have occurred. *See Cunningham*, 55 USPQ2d at 1847. "A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion." *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). "However, evidence of actual confusion is notoriously difficult to come by and, in any event, such evidence is not required in order to establish likelihood of confusion." *Time Warner Entm't Co. v. Jones*, 65 USPQ2d 1650, 1662 (TTAB 2002). The eighth *du Pont* factor is neutral.

**E. Conclusion as to Likelihood of Confusion**

We have carefully considered all arguments and evidence properly of record, including those not specifically discussed herein, as they pertain to the relevant likelihood of confusion factors. To the extent that any other *du Pont* factors for which no evidence was presented by Applicant or Opposer nonetheless may be applicable, we treat them as neutral.

We have found that the parties' identified services and classes of customers are highly similar or overlapping and that Applicant's SUNKISSED FAMILIES mark is similar to Opposer's mark SUNKIST KIDS. The remaining *du Pont* factors are neutral.

We are mindful that, in any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks."); *see also, e.g., Bell's Brewery*, 125 USPQ2d at 1345. Here, both of these crucial factors favor a finding that confusion is likely. Considering the record as a whole, we find that Opposer has carried its burden to establish by a preponderance of the evidence that Applicant's mark SUNKISSED FAMILIES when used in association with the services identified in its application is likely to cause consumer confusion with Opposer's SUNKIST KIDS mark used in connection with the services identified in Registration No. 2858143.

***Decision:*** The opposition to registration of application Serial No. 87074694 is sustained.