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Paper No. 9
AD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re A & J Cheese Company, Inc.

Serial No. 75/596,082

Lena A. Basile of Sheldon & Mak, Inc. for A & J Cheese Company, Inc.

Rebecca Gilbert, Trademark Examining Attorney, Law Office 113 (Meryl Hershkowitz, Managing Attorney).

Before Seeherman, Quinn and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

A & J Cheese Company, Inc. (applicant) has filed an application to register the mark A & J CHEESE CO. and design, as shown below, for services ultimately identified as "merchandise packaging, wholesale stores and distributorship services, all in the field of and featuring

food products, namely cheese and cheese products" in International Class 35.¹:



The Examining Attorney has refused to register applicant's mark under Section 2(d) of the Trademark Act because of the registration of the mark shown below for "wholesale agricultural products, namely, fresh fruits and vegetables" in International Class 31.²



The mark consists of the letters A & J and representations of apples and grapes, which are disclaimed. It is lined for the colors yellow, red and green.

¹ Serial No. 75/596,082 filed on November 27, 1998, alleging a date of first use of April 1993 and a date of first use in commerce of April 1995.

² Registration No. 1,738,555 issued December 8, 1992. Section 8 and 15 affidavits have been accepted or acknowledged.

After the Examining Attorney made the refusal final, this appeal followed. Both applicant and the Examining Attorney filed briefs. An oral hearing was not requested.

We reverse.

The Examining Attorney argues that:

The term A & J is the dominant feature and focal point of each of the marks. Moreover, in each of the marks A & J is set at a nearly identical top to bottom angle and appears in highly similar fonts. Accordingly, the commercial impressions conveyed by the two marks are highly similar.

Examining Attorney's Appeal Brief, p. 4.

The Examining Attorney also argues that the goods and services are highly related. She relies on ten third-party registrations to show that many companies have adopted the same mark in connection with their cheese products and fruits and vegetables. She also points out that applicant's specimens show that it sells canned fruits and vegetables. Because the Examining Attorney believed that the dominant feature of the marks were identical and the goods were related, she maintained the refusal to register.

Applicant argues that the marks are strikingly different. In addition to the common feature, "A & J," applicant's mark includes the words "Cheese Co." and a wreath design. The registrant's mark contains no additional wording, but it has a three-color fruit design.

While applicant admits that the goods are both food products, it maintains that cheese and fruits and vegetables are sold in different stores or in different sections of supermarkets, and the goods are, therefore, dissimilar.³

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The first question we address is whether applicant's and registrant's marks, when compared in their entireties, are similar in sound, appearance or meaning such that they create similar overall commercial impressions.

Regarding the marks, we find that their overall commercial impression is dissimilar. The only point of

³ With its Appeal Brief, applicant, for the first time, attaches copies of trademark registrations to support its arguments. The Examining Attorney has objected to this untimely evidence, and we will not consider it. 37 CFR 2.142(d).

commonality is the letters "A & J." Visually, the marks are very different, with the designs playing a significant role in each mark.



While we assume that the letters in registrant's mark are more prominently displayed in actual use, they do not dominate the mark as words and letters often do.

Even if the marks were similar, the goods and services are not closely related. To determine whether the goods are related, we look to the identification of goods and services in the application and registration. In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). We start with the principle that there is no per se rule that all or virtually all food products are related. Martin's Famous Pastry, 221 USPQ 364, 365 (TTAB 1984), aff'd, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). Second, the goods in this case are not simply cheese and fresh fruit, which would be expected to be sold to retail consumers in grocery stores. Applicant is seeking registration of its mark for merchandise packaging,

wholesale stores and distributorship services, all in the field of and featuring food products, namely cheese and cheese products. Registrant's goods, on the other hand, are wholesale agricultural products, namely, fresh fruits and vegetables, and therefore, they would not be purchased by the public at large.

To show the relatedness of these goods and services, the Examining Attorney submitted copies of ten third-party registrations. None of these registrations shows that wholesale agricultural products, namely, fresh fruits and vegetables and merchandise packaging, wholesale stores, and distributorship services in the field of cheese and cheese products emanate from the same source. Even concerning the general question of whether cheese and fresh fruits and vegetables would be expected to come from the same source, the evidence is not persuasive. Three of the registrations are essentially duplicates of other referenced registrations, with minor variations in the marks (Reg. Nos. 2,290,812/2,180,085; 2,262,556/2,262,555; and 1,500,088/1,500,087). Of the seven remaining non-duplicate registrations, one is for a grocery store (Reg. No. 914,871) and two are for house marks (Reg. No. 1,500,088 and 2,092,512). The fact that cheese and vegetables are listed in these registrations along with such items as

laundry detergent, cutlery, and book matches does not demonstrate the relatedness of the applicant's and registrant's goods and services.

Another registration (Reg. No. 2,117,836) involves a retail shop selling trays of fresh pasta, fresh sauce, cheeses, dry goods, canned vegetables, and packaged vegetables. One is for a restaurant (Reg. No. 2,290,812) and another (Reg. No. 2,147,518) involves wholesale distributorship services including, inter alia, cheese and breaded vegetable products, namely, onion rings and peppers.

In addition, applicant's catalog, which identifies certain non-cheese items that applicant is selling, does not establish that wholesale fruits and vegetables are related to applicant's services.

With this evidence, we would have little basis to conclude, even if this were the issue, that cheese and fresh fruits and vegetables would be expected to come from the same source. In this case, we are mindful that the goods and services are not simply cheese and fruits and vegetables, but rather wholesale agricultural products, namely, fresh fruits and vegetables and merchandise packaging, wholesale stores and distributorship services involving cheese and cheese products. Thus, we do not have

ordinary consumers making impulse purchases in a grocery store. Instead, purchasers of applicant's cheese-related merchandise packaging, wholesale store and distributorship services and registrant's wholesale fruits and vegetables would likely be more careful, and even sophisticated, purchasers. This factor would make the likelihood of confusion more remote. In re Mars, Inc., 741 F.2d 395, 222 USPQ 938 (Fed. Cir. 1984) (No likelihood of confusion when the marks for the identical word CANYON were used on candy bars and fresh citrus fruits). Here, where the goods and services are distinct and the marks are not legally identical, we conclude that there is no likelihood of confusion.

Decision: The refusal to register is reversed.