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THE TTAB**

Hearing:
June 15, 2004

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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nutrisoya Foods, Inc.

Serial No. 75667177

L. Lawton Rogers, III of Duane Morris LLP for Nutrisoya Foods, Inc.

Mark T. Mullen, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Simms, Hairston and Rogers, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Nutrisoya Foods, Inc. to register the mark NATUR-A for "processed food products, namely non-alcoholic soybean-based beverages for use as a milk substitute."¹

Registration has been refused by the Trademark

¹ Serial No. 75667177, filed March 23, 1999, alleging July 11, 1997 as the date of first use anywhere and first use in commerce.

Examining Attorney² pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark shown below,



previously registered for "concentrate for use in the preparation of rice based food beverages,"³ as to be likely to cause confusion, mistake or deception.

Applicant and the Examining Attorney have filed briefs and an oral hearing was held before the Board.

In determining whether there is a likelihood of confusion between two marks, we must consider all relevant factors as set forth in *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two of the most important factors are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the

² The present Examining Attorney was not the original Examining Attorney.

³ Registration No. 2,299,601 issued December 14, 1999, alleging July 3, 1989 as the date of first use anywhere and August 3, 1989 as the date of first use in commerce.

goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Considering first the goods, applicant argues:

The goods for which registration is sought are a beverage derived from soybeans used as a milk substitute and the registrant's goods are a concentrate for the preparation of a beverage based on rice non-specific as to its intended use. The differences thus include (a) differences in the food from which the goods are derived, i.e., soybeans versus rice, (b) differences in the form of the goods, i.e., beverages versus concentrate, and (c) differences in the nature or intended use of the beverages, i.e., a milk substitute and a general beverage.
(Brief, p. 3).

Further, applicant argues that the channels of trade for its goods and registrant's goods are different because its soybean-based beverages are finished products whereas registrant's goods are a concentrate for making finished products.

In support of his position that the goods are related, the Examining Attorney submitted copies of third-party registrations of marks that cover soy-based beverages, on the one hand, and rice-based beverages, on the other hand. In addition, the Examining Attorney made of record an Internet printout that is an excerpt from a paper

delivered at the Institute of Food Technologists 2002 Annual Meeting and Food Expo in Anaheim, California. The excerpt reads in relevant part:

The market for grain-based beverages from soy and rice is \$500 MM annually with growth of between 50 and 100% annually (depending on category). These beverages are usually positioned as replacements for cow's milk either for those intolerant to milk or for those who make a conscious choice to supplement or eliminate consumption of animal based milk products. The current market consists of soy based, whole rice based, and soy and whole rice based products, each processed aseptically and placed in a multitude of packages.

In addition, the Examining Attorney made of record an Internet printout from the website of The Vegetarian Resources Group which lists categories and brands of non-dairy milk. One of the categories of non-dairy milk listed is "Plant Milks" and the sub-categories listed are "Soy-based Beverages" and "Rice-based Beverages."

It is well established that the goods of applicant and registrant need not be competitive, or even that they move in the same channels of trade, to support a likelihood of confusion. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity

of the marks, give rise to the mistaken belief that they originate from the same source. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Moreover, it is well established that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited registration, and not in light of what such goods are shown or asserted to actually be. *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987).

In this case, although applicant's and registrant's goods are derived from different plants, the evidence made of record by the Examining Attorney establishes that both soy-based beverages and rice-based beverages are milk substitutes. Thus, contrary to applicant's contention, registrant's concentrate may be used in preparing a milk substitute.

Applicant's argument that the channels of trade for its goods and registrant's goods are different is not persuasive. Neither applicant's application nor the cited registration has any limitations with respect to trade

channels or purchasers. Thus, we must presume that applicant's soybean-based beverages and registrant's concentrate for preparing rice based food beverages move in all channels of trade normal for such goods and are available for purchase by all potential customers. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Thus, in our likelihood of confusion analysis, we must presume that applicant's beverages and registrant's concentrate are sold in grocery stores and health food stores to ordinary consumers. A consumer seeking a milk substitute could choose to purchase applicant's ready-to-drink soybean-based beverage or registrant's concentrate for preparing a rice based food beverage. Indeed, a consumer may purchase a ready-to-drink milk substitute for home use and a concentrate for preparing a milk substitute for travel use.

Under the circumstances, we find that applicant's and registrant's goods are sufficiently related that if sold under identical or substantially similar marks, confusion would be likely.

This brings us to a consideration of the marks. It is applicant's position that when the respective marks are considered in their entireties, they are distinguishable in sound, appearance, and overall commercial impression. Applicant argues that the hyphen in its mark and the

stylized font and oval design in the registered mark cannot be ignored. Also, applicant contends that marks containing the term "NATUR..." are weak marks which are therefore entitled to only a limited scope of protection. In this regard, applicant submitted a search report that lists over 400 third-party registrations of marks containing "NATUR...".⁴

To determine whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison. Rather, the question is whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Further, "in articulating reasons for reaching a conclusion on the issue

⁴ Generally, third-party registrations may not be made of record by introducing a search report wherein the registrations are listed. However, inasmuch as the Examining Attorney has considered the registrations listed in the search report to be properly of record, we deem the list to be stipulated into the record.

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 consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

We agree with the Examining Attorney that when considered in their entireties, the marks at issue are so substantially similar in sound, appearance, connotation and commercial impression that their contemporaneous use on the goods involved in this case is likely to cause confusion as the origin of such products.

In terms of sound, obviously the oval design in the registered mark is not spoken. Also, it is settled that there is no "correct" pronunciation of trademarks because the manner in which purchasers will pronounce marks cannot be predicted with certainty. In re Great Lakes Canning, Inc. 227 USPQ 483 (TTAB 1985); In re Energy Telecommunications & Electrical Association, 222 USPQ 350 (TTAB 1983); and In re Cresco Mfg. Co., 138 USPQ 401 (TTAB 1963). Thus, it is plausible that applicant's mark NATUR-A and registrant's mark NATURA'S and design may be pronounced in similar manners, notwithstanding the hyphen in applicant's mark. See, e.g. In re Belgrade Shoe Co., 411

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F.2d 1352, 162 USPQ 227, 228 (CCPA 1969). [In terms of sound, no material difference between the marks COL'EEJUNS and COLLEGIENNE].

In terms of appearance, it is the term NATURA'S that is the dominant portion of registrant's mark. When a mark consists of a word and a design, it is generally the word portion which is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods. In re Appetito Provisions Co. Inc., 3 USPQ2d 1553 (TTAB 1987). This is particularly true of registrant's mark because the oval therein principally serves as a background or vehicle for display of the term NATURA'S. With respect to applicant's mark, the hyphen therein is of minimal significance. Moreover, because applicant seeks to register its NATUR-A mark in typed form, the display thereof could include the same stylized lettering as that used by registrant for the term NATURA'S in its mark. See Phillips Petroleum Co. v. C. J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971)[a mark registered in typed format is not limited to the depiction thereof in any special form]. Indeed, as used on the specimen of record (reproduced below), applicant's mark is depicted in a style of lettering that is highly similar to registrant's mark.



Thus, in addition to sounding alike, applicant's and registrant's mark are substantially similar in overall appearance.

In terms of connotation, applicant argues that its NATUR-A mark suggests a natural product of "grade A" or high quality whereas registrant's mark NATURA'S and design, being in the possessive form, suggests the name of a person. We are not convinced that the marks have such dissimilar connotations. Rather, we find that because both marks contain "NATUR..." and are applied to plant-based milks, they both connote products that are "natural" or not artificial.

Admittedly, the various third-party registrations of marks containing "NATUR..." indicate that this term was chosen by the trademark owners to suggest that their products are natural or somehow connected to nature. However, this fact does not help to distinguish NATUR-A and NATURA'S and design because these marks have no additional distinctive matter which may serve as a basis to distinguish the marks. As previously noted, "NATUR..." as used in both marks, conveys the same suggestive

significance. Moreover, even a weak mark is entitled to protection against the registration of the same or a substantially similar mark for closely related goods.

We recognize that purchasers of applicant's and registrant's goods may exercise a degree of care in selecting these products because of health or dietary considerations. However, even assuming that purchasers are knowledgeable about the products, we cannot conclude on this record that purchasers necessarily would be immune to source confusion arising from the use of these highly similar marks.

Finally, if we had any doubts regarding whether there is a likelihood of confusion, we resolve them in favor of the prior registrant and against the newcomer. In re Hyper Shoppes (Ohio) Inc., 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

In sum, we find that NATUR-A for soybean-based beverages for use as a milk substitute is likely to cause confusion with NATURA'S and design for a concentrate for use in the preparation of rice based food beverages.

Decision: The refusal to register under Section 2(d) is affirmed.