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October 26, 2004
Paper No. 17
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Rodale Inc.

Serial No. 75776753

Jody H. Drake of Sughrue Mion PLLC for Rodale Inc.

Daniel F. Capshaw, Trademark Examining Attorney, Law Office 110
(Chris A.F. Pedersen, Managing Attorney).

Before Hohein, Hairston and Holtzman, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Rodale Inc. has filed an application to register the
mark "LIVING BETTER LONGER" for "publications, namely, magazines
in the fields of health, fitness, diet, exercise and lifestyle."¹

Registration has been finally refused under Section
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that
applicant's mark, when applied to its goods, so resembles the
mark "LIVING BETTER, LONGER," which is registered for "retail
store services featuring nutritional products, beverage bar,

¹ Ser. No. 75776753, filed on August 16, 1999, based on an allegation
of a bona fide intention to use such mark in commerce and which, by an
amendment to allege use, sets forth a date of first use anywhere and
in commerce of February 2000.

vitamins, minerals, herbs, protein powders, supplements, nutrient-rich foods, enzymes, body care products, teas, coffees, candles, incense, pillows, bath robes, aromatherapeutic products, ceramic items, juicers, books and other periodicals relating to nutrition, cards and stationery, and air purifiers,"² as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods and services and the similarity of the marks.³ Here, inasmuch as the respective marks are virtually identical in all respects, including evocation of essentially the same overall commercial impression,⁴ it is plain that the contemporaneous use thereof in

² Reg. No. 2,535,238, issued on February 5, 2002, which sets forth a date of first use anywhere and in commerce of May 1998.

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and services] and differences in the marks."

⁴ Applicant, in fact, states in its initial brief that "it is conceded that the marks are nearly identical."

connection with related goods and services would be likely to cause confusion as to source or sponsorship. The principal focus of our inquiry is accordingly on the similarities and dissimilarities in the respective goods and services, including similarities and dissimilarities in established, likely to continue channels of trade and the conditions under which and buyers to whom sales are made.

Applicant argues, among other things, that confusion is not likely from contemporaneous use of the marks at issue due to the differences in the respective goods and services, and the sophistication of the purchasers thereof. In particular, applicant emphasizes in its initial brief its assertion that "[c]onsumers view registrant's LIVING BETTER, LONGER service mark as identifying a retail store location, and presumably do not identify the products sold within the retail store location as LIVING BETTER, LONGER products." By contrast, applicant insists, while its "publication entitled LIVING BETTER LONGER deals with issues generally connected to health, fitness, nutrition and well-being," consumers purchasing such publication "would not leap to the conclusion that applicant is in the field of retail store services selling ... products bearing hundreds of different marks on a wide variety of nutritional products." Thus, according to applicant:

It follows that registrant would not be logically tied to the publishing field. In other words, applicant's magazine should be viewed as dissimilar from registrant's retail store services, and it follows that consumers viewing both marks would not be lead [sic] to the conclusion that they are related goods and services sharing a common origin.

As to the Examining Attorney's attempt to show that there is a relationship between the goods and services at issue herein by making of record "Internet evidence ... showing several web sites promoting online services promoting nutritional products that also provide books, magazines and printed matter," applicant maintains that such evidence "does not support the argument that retail store services and the title of a publication would be considered proximate goods and services." The reason therefor, applicant contends, is that such web sites "simply promote the publications of various third parties on a variety of health and nutrition topics." Also, with respect to certain third-party registrations made of record by the Examining Attorney which include "retail store services and publications in the same registration," applicant dismisses such as evidence of the relatedness of the goods and services in this appeal because "the cited registration in this case is simply for retail store services" and does not include publications.

Applicant additionally asserts its belief that "consumers exercise greater care when purchasing health-related or nutritional products, and that this consumer discretion further supports applicant's position that consumers will likely distinguish registrant's retail store services from the title of applicant's publications." In consequence thereof, applicant contends that "[t]he simple fact that applicant's magazine could be sold in retail stores does not lead to the conclusion that trade channels overlap and consumers will be confused." Applicant urges, moreover, that the mere fact that registrant's

retail store services specifically include the sale of "books and other periodicals relating to nutrition" does not mean that its magazines must be considered to be related to such services since, "[i]f the Examining Attorney's logic is followed, then all the goods listed in the registrant's recitation of services could conceivably be viewed as "related" to registrant's services if any of them happened to bear a mark similar to LIVING BETTER, LONGER (for example, LIVING BETTER, LONGER candles, bathrobes, juicers, all allegedly sold in registrant's retail store)."

Finally, applicant asserts that even if there is some overlap between the respective goods and services, "the mere movement of goods through the same overlapping [trade] channels in connection with the services will not necessarily result in a likelihood of confusion," absent a showing of "something more." Applicant, citing, *inter alia*, *In re Coors Brewing Co.*, 373 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003), maintains that:

If an overlap is considered *de minimus* [sic], then a likelihood of confusion should be viewed as unlikely. Any potential overlap between registrant's and applicant's goods in this case should be considered *de minimus* [sic].

The Examining Attorney, citing *Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70 (TTAB 1981), notes on the other hand that where, as here, the marks at issue are nearly identical, "the relationship between the goods and services need not be as close to support [a finding of likelihood of confusion.]" According to the Examining Attorney, in the present case:

The evidence of record supports a finding that the goods and services are related. The evidence demonstrates that it is common for providers of health and nutrition retail stores, such as that of the registrant, to also produce publications, such as magazines, under a single trademark.

Attached to the October 30, 2002 office action is evidence of eight registrations showing producers and service providers using a single mark for magazines ... as well as retail store services Additionally, attached to the Final office action of June 25, 2003 are websites evidencing retail service providers who sell publications as well as produce magazines.

In particular, as to the various use-based third-party registrations which are of record, it is settled that while such registrations are not evidence that the different marks shown therein are in use or that the public is familiar with them, they may nevertheless have some probative value to the extent that the registrations serve to suggest that the goods and services listed therein are of the kinds which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988). Although none of the eight use-based third-party registrations of record involves the same goods and services which are at issue herein, the copies thereof clearly show that as to six of such registrations, the same mark is registered for the following publications, on the one hand, and retail store services involving such publications and/or their subject matter, on the other hand: (i) "periodically published magazines, newsletters, price guides, and catalogs in the field of collectible dolls" and "retail store and catalog

services in the field of collectible dolls"; (ii) "fishing magazines" and an "on-line retail store in the nature of fishing merchandise"; (iii) "printed magazines providing review of books and literature" and "retail store ... services for books, printed publications and related products"; (iv) "magazines, catalogs, brochures, and pamphlets concerning ... philatelic products" and "retail store and outlet services ... featuring philatelic products"; (v) "magazines, pamphlets and brochures relating to stuffed and plush toy animals and dolls" and "retail store ... services in the fields of stuffed toy animals and plush toy animals, and ... magazines and brochures relating to stuffed and plush toy animals and dolls"; and (vi) "magazines, bulletins, newsletters in the field of sports and entertainment" and a "retail store featuring ... sports related merchandise." With respect to the website evidence which the Examining Attorney contends shows "retail service providers who sell publications as well as produce magazines," such evidence demonstrates that several on-line retailers of various health and fitness products offer, under the same mark, printed and/or electronic magazines or newsletters which feature articles or books and other publications on such subjects as food and diets, vitamins and nutritional supplements, or weight loss and well being.

In view of the above, and additionally arguing that "the applicant's magazines may be sold through the [cited] registrant's retail establishment"⁵ inasmuch "as it is common for

⁵ Notably, however, the Examining Attorney has not explained why the cited registrant would wish to allow such sales if, as the Examining Attorney insists, confusion would be likely.

health and nutrition retailers to retail health and nutrition publications," the Examining Attorney insists that magazines and retail store services of similar subject matter are commercially related for purposes of the analysis as to whether confusion is likely. In particular, the Examining Attorney points out in this regard that:

Trademark Trial and Appeal Board precedent holds the goods and services of the parties related in this case. In *The Conde Nast Publications Inc. v. Vogue Travel, Inc.*, 205 USPQ 579 (TTAB 1979)[,] the ... Board discussed at length the categories of cases where magazines are typically found related to other goods and services. The TTAB, in *In re Cruising World, Inc.*, 219 USPQ 757 (TTAB 1983), paraphrased the Board's categorization in *Conde Nast Publications* where it stated:

This is not the first case to deal with similar marks in use on a magazine and on goods or services which are in some way related thereto. Four separate categories of such cases, wherein conflicts were found to exist, have been defined in *Conde Nast Publications Inc. v. Vogue Travel, Inc.*, 205 USPQ 579 (TTAB 1979)[,] and cases cited therein. Briefly they are (a) where the goods or services are of a type normally featured in the magazine and/or there was an advertising tie-in between goods or services of this type and the magazines[;] (b) where both were directed to the same segment of the public and involved closely related communications media (i.e., radio broadcasting and magazine); (c) where both were sold through the same outlets; and (d) where other activities were engaged in under the auspices of the magazine which activities enhanced the likelihood that there would be confusion as to the source of the goods or services of a second user of a similar mark.

In re Cruising World, Inc., 219 USPQ 757, 758
(TTAB 1983).

....

The case at hand includes facts similar to those in [category "(a)" of] *Cruising World* and requires the same holding of relatedness of the goods and services. Like in *Cruising World*, the marks at issue here are essentially identical. Moreover, the subject matter featured in the [applicant's] magazines as well as the subject matter of the registrant's retail services are related. The applicant's magazines are in the fields of "health, fitness, diet, exercise and lifestyle." The registrant's services involve the retail[ing] of "nutritional products," "vitamins," "minerals," "herbs," "protein powders," "supplements," "nutrient-rich foods," "enzymes," "body care products," as well as "books and other periodicals relating to nutrition."

Because "[t]he fields of 'health, fitness, diet, exercise and lifestyle' typically include subjects involving 'nutritional products,' 'vitamins,' 'minerals,' 'herbs,' 'protein powders,' 'supplements,' 'nutrient-rich foods,' 'enzymes,' 'body care products,' as well as 'books and other periodicals relating to nutrition,' the Examining Attorney maintains that, "as in *Cruising World*, the Applicant and Registrant ... [respectively] provide magazines and retail services in the same field[s] under essentially identical marks."

With respect to applicant's contention that consumers typically exercise greater care when purchasing health-related or nutritional products and thus, in view of such discrimination and sophistication, will be able to distinguish between the sources of registrant's retail store services and applicant's publications, the Examining Attorney notes that "no evidence

exists in the record establishing purchaser sophistication." The Examining Attorney contends, instead, that customers for applicant's publications and registrant's retail services would appear to be ordinary consumers, pointing out in particular that:

The applicant's publication, judging by the example of record, does not appear to be a high priced, sophisticated or scientific publication. On the contrary[,] examination of the specimen of record shows that it's [sic] content is intended for the masses and is easily digestible and readable. Likewise, no evidence exists in the record that users of Registrant's service[s] are sophisticated.

Observing, furthermore, that "the applicant's magazines and the goods of the typed [sic] retailed by the registrant are relatively inexpensive items," the Examining Attorney notes that "[p]urchasers of low cost items which are subject to impulse purchase are held to a lesser standard of purchasing care, and thus are more likely to be confused as to the source of the goods and services here," citing *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984). Moreover, the Examining Attorney insists that, even if customers for the goods and services at issue herein were to be considered knowledgeable and sophisticated in the fields of health and nutritional products and services related thereto, such would not mean that they necessarily are knowledgeable and sophisticated in the field of trademarks and service marks or immune from source confusion.

Applicant, in reply, asserts among other things that:

In the instant case, the parties' goods and services do not have the level of similarity and/or overlap as existed in *The Conde Nast Publ'n [sic] Inc.* and *In re*

Cruising World, Inc. The parties do not operate solely within the same niche field. Although the Examining Attorney ... has characterized registrant's retail store services as being limited in nature to that of a specialty nutritional and health store, the identification in the cited registration does not reflect or support that characterization. Instead, the identification reflects a retail store that provides some nutritional products amongst a variety of different products[,] many of which are unrelated or loosely related to health and nutrition (e.g., candles, incense, pillows, bath robes, cards and stationery). Registrant's identification reads like a run-of-the-mill variety store..., which certainly would not be considered specialty nutritional and health stores. In contrast, applicant's magazine is limited to the nutritional and health field.

Moreover, there is no evidence of record that the registrant's retail services offered under its mark have been advertised in Applicant's magazine, as in *In re Cruising World, Inc.* Nor does this case involve a very well-known mark like VOGUE in *The Conde Nast Publ'n [sic] Inc.*, which was a factor in the Board's finding of a likelihood of confusion in that case.

Applicant reiterates, instead, that the facts of this appeal are more analogous to such cases as *In re Coors Brewing Co*, supra, as well as *John Deere & Co. v. Payless Cashways, Inc.*, 681 F.2d 528, 217 USPQ 606 (8th Cir. 1982) and *Family Circle, Inc. v. Family Circle Associates, Inc.*, 332 F.2d 534, 141 USPQ 848 (3d Cir. 1964), in which the variety of goods offered as part of the various services is simply so large that customers would not attribute the same source to the services and individual goods.

We are constrained, however, to agree with the Examining Attorney that contemporaneous use of the virtually identical marks "LIVING BETTER LONGER" and "LIVING BETTER,

LONGER" in connection with, respectively, applicant's magazines in the fields of health, fitness, diet, exercise and lifestyle, and registrant's retail store services featuring, *inter alia*, nutritional products, beverage bar, vitamins, minerals, herbs, protein powders, supplements, nutrient-rich foods, enzymes, body care products, aromatherapeutic products, juicers, books and other periodicals relating to nutrition, and air purifiers is likely to cause confusion as to the origin or affiliation of such goods and services. In this regard we note, first of all, that it is well settled that the issue of likelihood of confusion must be determined on the basis of the goods and services as they are set forth in the involved application and the cited registration, and not in light of what such goods and services are asserted to actually be. See, e.g., *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where an applicant's goods and a registrant's services are broadly described as to their nature and type, it is presumed in each instance that in scope the application and registration respectively encompass not only all goods and services of the nature and type described therein, but that the identified goods and services are available through all channels of trade which

would be normal for those goods and services, and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Moreover, it is well established that an applicant's goods and a registrant's services need not be competitive in nature in order to support a finding of likelihood of confusion. It is sufficient, instead, that the respective goods and services are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

In the present case, we disagree with applicant that registrant's services, as identified, are so wide-ranging as to be essentially akin to those of a department store or mass merchandiser. Rather, just as applicant's magazines are primarily directed, as applicant concedes, to the nutritional and health field since they include articles pertaining to matters of fitness, diet, exercise and lifestyle, registrant's retail services likewise principally feature products devoted to the nutritional and health field, including a beverage bar, vitamins, minerals, herbs, protein powders, supplements, nutrient-rich foods, enzymes, body care products, aromatherapeutic products,

juicers, books and other periodicals relating to nutrition, and air purifiers. While perhaps, as applicant argues, consumers familiar with its magazines as being devoted to health and nutritional matters would not necessarily assume that applicant was also providing retail store services dealing with products in the health and nutritional field, it is nonetheless the case that customers who are aware of registrant's retail store services could reasonably believe, upon encountering applicant's magazines, that such publications emanate from or are sponsored by or affiliated with registrant, given that the marks at issue are virtually identical and the focus of the respective goods and services is on matters pertaining to health and nutrition.

Stated otherwise, we disagree with applicant that at most there is only a de minimis degree of overlap between applicant's goods and registrant's services. Instead, we find that such overlap is substantial, given the focus of both applicant's publications and registrant's retail store services on the health and nutritional field and the website evidence furnished by the Examining Attorney showing that several on-line retailers of various health and fitness products offer, under the same mark, printed and/or electronic magazines or newsletters which feature articles or books and other publications on such subjects as food and diets, vitamins and nutritional supplements, or weight loss and well-being. Furthermore, while we disagree with applicant that, for instance, the holding in *In re Coors Brewing Co.*, supra, that "something more" must be shown in order for a specific food item to be considered related to restaurant

services necessarily must be extended to the goods and services at issue herein, such "something more" is nonetheless shown by the specific emphasis of applicant's goods and registrant's retail store services on the subject matter of health and nutrition. See, e.g., In re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) [because evidence indicated that "Mexican food items are often principal items of entrees served by ... Mexican restaurants," "[t]he average consumer, therefore, would be likely to view Mexican food items and Mexican restaurant services as emanating from or sponsored by the same source if such goods and services are sold under the same or substantially similar marks"].

In addition, as contended by the Examining Attorney, there is nothing which shows that customer's for applicant's publications and registrant's retail services are anything other than ordinary consumers. The fact that such consumers are conscious of health and nutritional matters, however, does not mean that they are necessarily knowledgeable and sophisticated when it comes to discriminating as to the source or sponsorship of goods and services directed principally to the health and nutritional field, particularly where such goods and services, as in the case of applicant's magazines and registrant's retail store services, are offered under virtually identical marks, and would not generally receive the care and attention for their selection which would typically be exercised with respect to goods and services which are relatively expensive and/or highly scientifically or technically oriented. See, e.g., Wincharger

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Corp. v. Rinco, Inc., 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also In re Decombe, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983).

We accordingly conclude that ordinary consumers, including those with an interest in health and nutrition, who are familiar or acquainted with registrant's "LIVING BETTER, LONGER" mark for "retail store services featuring nutritional products, beverage bar, vitamins, minerals, herbs, protein powders, supplements, nutrient-rich foods, enzymes, body care products, teas, coffees, candles, incense, pillows, bath robes, aromatherapeutic products, ceramic items, juicers, books and other periodicals relating to nutrition, cards and stationery, and air purifiers," would be likely to believe, upon encountering applicant's essentially identical mark "LIVING BETTER LONGER" mark for "publications, namely, magazines in the fields of health, fitness, diet, exercise and lifestyle," that such closely related services and goods emanate from, or are sponsored by or associated with, the same source. To the extent, however, that applicant's arguments may serve to create any possible doubt as to such conclusion, we resolve that doubt, as we must, in favor of the registrant. See, e.g., In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); and In re Pneumatiques Caoutchouc Manufacture et Plastiques Kelber-Columbes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

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