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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Nutritional Services, Inc.**

Serial No. 78/052,872

Michael J. Greathouse, General Counsel, for **Nutritional Services, Inc.**

Patty Evanko, Senior Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

Before **Hohein, Hairston and Holtzman**, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Nutritional Services, Inc. has filed an application to register the mark "NSI" and design, as reproduced below,



for the services of a "retail distributorship featuring dietary supplements."¹

¹ Ser. No. 78/052,872, filed on March 13, 2001, which alleges a date of first use anywhere and in commerce of June 13, 2001.

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 services, so resembles the following marks, which are registered by the same registrant for the goods and services set forth below, as to be likely to cause confusion, mistake or deception: (i) the mark "NSI," which is registered for "dietary supplements and vitamins, minerals, herbs, herbal extracts and herbal combinations, all for use as dietary supplements;"² and (ii) the mark "NSI NUTRACEUTICAL SCIENCES INSTITUTE" and design, as illustrated below,



for "computerized on-line ordering services in the field of vitamins and dietary supplements; [and] mail order services featuring vitamins and dietary supplements."³

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

² Reg. No. 2,411,431, issued on December 5, 2000, which sets forth a date of first use anywhere in commerce of September 14, 1999.

³ Reg. No. 2,491,928, issued on September 25, 2001, which sets forth a date of first use anywhere and in commerce of September 14, 2001. The term "NEUTRACEUTICAL" is disclaimed. The stippling is for shading purposes only and does not indicate color.

The 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/or services and the similarity of the marks.⁴

Turning first to consideration of the respective goods and services, 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 registrations, and not in light of what such goods and services are shown or 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 applicant's and services and registrant's goods and services are broadly

⁴ 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/or services] and differences in the marks."

described as to their nature and type, it is presumed in each instance that in scope the application and registrations encompass not only all goods and services of the nature and type described therein, but that the identified goods and services move in 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 applicant's services need not be identical or even competitive in nature with registrant's services and/or compete with its goods in order to support a finding of likelihood of confusion. Instead, it is sufficient that the services and/or goods 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).

Applicant, as supported by the declaration of its owner and chief executive officer, Jill Bjorndahl-Jay, argues in its initial brief that it "operates through the referral of its customers from two East Coast physicians and, as such, does not compete with any [other] dietary supplement companies." However,

as the Senior Attorney correctly observes in her brief, "[n]either the registrant nor the applicant has limited the recitation of [their respective] services in any way as to channels of trade, class of purchasers, etc." The Senior Attorney also accurately notes that "inasmuch as online ordering and mail order services are a form of retail distribution" of dietary supplements, registrant's services are in part encompassed by and are otherwise closely related to applicant's services. Moreover, it is obvious that registrant's goods, which constitute dietary supplements as such as well as vitamins, minerals, herbs, herbal extracts and herbal combinations for use as dietary supplements, are closely related to applicant's retail distributorship services featuring dietary supplements inasmuch as the former are precisely the kinds of products which are offered through the latter.

Clearly, therefore, customers for dietary supplements may seek to purchase such products by utilizing applicant's retail distributorship services or they may avail themselves of registrant's computerized on-line ordering services and its mail order services. As the Senior Attorney additionally points out, even the kind of purchaser who is a "pre-selected" medical patient and "has obtained dietary supplements through physician referral in the past, is not limited to that type of purchase in the future." We consequently agree with the Senior Attorney that "[i]t is highly likely that purchasers would mistakenly assume that dietary supplements available through different distribution

methods ... emanate from a single source" when offered under the same or highly similar marks."

Turning, then, to consideration of the marks at issue herein, applicant maintains in its initial brief that its "NSI" mark, which it insists "is a unique design consisting of a green-colored swirl positioned above blue, slanting letters," "is radically different" from registrant's "NSI" mark, which is "without any other distinctive ... characteristics," and is "considerably different" from registrant's "NSI NUTRACEUTICAL SCIENCES INSTITUTE" and design mark, which "consists of a maze-like pattern" forming the letters "NSI" inside a pill or vitamin-like design above the wording. In addition, applicant contends that the letters "NSI" in its mark "are broader and wider" than those in registrant's marks, "thereby eliminating the possibility of any confusion." Applicant, insisting that the case of *In re Electrolyte Laboratories Inc.*, 913 F.2d 930, 16 USPQ2d 1239 (Fed. Cir. 1990), "is strongly supportive of its argument that registration should be granted to its proposed trademark," asserts that when the respective marks are considered in their entireties, its mark is readily distinguishable from both of registrant's marks. In particular, applicant urges in its reply brief that, as to registrant's service mark, "the predominant feature of the mark is the phrase 'Nutraceutical Sciences Institute'" rather than the term "NSI."

While there are plainly differences between applicant's mark and registrant's marks which are apparent upon a side-by-side comparison, such a comparison is not the proper test to be

used in determining the issue of likelihood of confusion inasmuch as it is not the ordinary way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is accordingly on the recollection of the average purchaser, who normally retains a general rather than a specific impression of marks. See, e.g., Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); Envirotech Corp. v. Solaron Corp., 211 USPQ 724, 733 (TTAB 1981); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975). Moreover, as the Senior Attorney properly notes in her brief, when a mark consists of a literal portion and a design portion, it is "the literal portion [which] is more likely to be impressed upon a purchaser's memory and [to be] used in calling for the goods or services." See, e.g., In re Appetito Provisions Co. Inc., 3 USPQ2d 1553, 1554 (TTAB 1987).

Keeping the above principles in mind, we concur with the Senior Attorney that, when considered in their entirety, "[t]he dominant feature of the applicant's mark is the acronym NSI," which is identical to registrant's "NSI" mark. Such acronym is also the dominant, or at the very least a prominent, feature of registrant's "NSI NUTRACEUTICAL SCIENCES INSTITUTE" and design mark given the descriptiveness of the pill or vitamin design and the term "NEUTRACEUTICAL," which appears along with

the words "SCIENCES INSTITUTE" in smaller lettering than the acronym "NSI." As to the latter, we further note that our principal reviewing court has indicated that, in articulating reasons for reaching a conclusion on the issue 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 [that] 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). For instance, according to the court, "that a particular feature is descriptive ... with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark" Id.

In the present case, it accordingly is apparent that applicant's "NSI" and design mark is essentially identical to registrant's "NSI" mark in sound, appearance, connotation and overall commercial impression. In particular, it is pointed out with respect to the virtual identity in appearance between such marks that, contrary to applicant's contentions, the fact that registrant's "NSI" mark is in typed form means that the display thereof could include not only a similar green and blue color scheme⁵ but also the same stylized manner of lettering as that utilized by applicant for its "NSI" and design mark. See, e.g., 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

⁵ As the Senior Attorney accurately observes in her brief, however, "color has never been claimed as a feature of the [applicant's] mark."

limited to the depiction thereof in any special form]; and INB National Bank v. Metrohost Inc., 22 USPQ2d 1585, 1588 (TTAB 1992) ["[a]s the *Phillips Petroleum* case makes clear, when [an] applicant seeks a typed or block letter registration of its word mark, then the Board must consider all reasonable manners in which ... [the word] could be depicted"]. The presence, therefore, of a swirl design in applicant's "NSI" and design mark is simply insufficient to distinguish such mark from registrant's "NSI" mark, especially in view of the arbitrary nature of the shared acronym "NSI". The latter, as the Senior Attorney persuasively argues in her brief, "clearly distinguishes" this appeal from *In re Electrolyte Laboratories Inc.*, supra, in which "the feature of the marks ["K+" and design and "K+EFF" and design] that was common to both was the descriptive term K+" inasmuch as "K+ is the symbol for potassium ion and the goods were [in each instance potassium] dietary supplements."

Furthermore, with respect to applicant's "NSI" and design mark and registrant's "NSI NEUTRACEUTICAL SCIENCES INSTITUTE" and design mark, the Senior Attorney is correct that none of the "additional matter [in registrant's mark] obviates the similarity of the marks because use of the identical acronym NSI as the dominant feature of the marks is more significant." Such an arbitrary term, while presented in registrant's mark in what applicant refers to as a "maze-like pattern," is still the principal source-indicative element of the mark, just as is the case with applicant's "NSI" and design mark. Thus, even though purchasers and potential consumers of registrant's services can

be expected to notice other elements in the mark besides the prominently displayed term "NSI," such as the pill or vitamin-like design on which the term is displayed and the words "NEUTRACEUTICAL SCIENCES INSTITUTE," from which the acronym "NSI" is obviously derived, which appear immediately below the design, customers for registrant's services would be likely to assume, upon encountering applicant's closely related services, that those services are provided or authorized by the same source as renders registrant's services, given the presence of the arbitrary term "NSI" in applicant's "NSI" and design mark.

Applicant nonetheless further argues, in both its initial and reply briefs, that "there is no evidence that any actual customers have been confused" by the contemporaneous use of the respective marks" and that, "[a]ccordingly, this is yet another [*du Pont*] factor which weighs heavily in favor of ... registration" of applicant's mark. While, of course, it is the case that evidence of the absence of any instances of actual confusion over a significant period of time is a *du Pont* factor which is indicative of no likelihood of confusion, it is a meaningful factor only where the record demonstrates appreciable and continuous use by applicant of its mark in the same markets as those served by registrant under its mark(s). See, e.g., *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In particular, there must be evidence showing that there has been an opportunity for incidents of actual confusion to occur. See, e.g., *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000).

It is pointed out, however, that the record herein contains absolutely no evidence of any kind with respect to the nature and extent of any instances of actual confusion. Plainly, assertions by applicant's counsel are not evidence. Moreover, the declaration of Ms. Bjorndahl-Jay, which constitutes the sole evidentiary submission offered by applicant, contains no averments concerning the presence or absence of any incidents of actual confusion and the extent to which, if any, applicant's services and registrant's goods and services have coexisted in the same markets under the respective marks. Because the absence of evidence of actual confusion is not evidence of the absence of actual confusion, the length of time and conditions under which there has been contemporaneous use of the marks at issue without any incidents of actual confusion is accordingly not a relevant *du Pont* factor in this appeal.

Finally, applicant maintains in its initial brief that there is no likelihood of confusion inasmuch as purchasers of its services "are highly sophisticated customers who do not shop for competitive dietary supplements ... offered by any other company selling dietary supplements," including registrant. However, as indicated earlier in this opinion, the customers for the dietary supplements sold by applicant through its retail distributorship services for such products are not limited to pre-selected medical patients who are referred to applicant by two physicians on the East Coast. Instead, in light of the absence of any restrictions as to classes of purchasers or channels of trade in the recitation of applicant's services as set forth in its

application, customers for its services must be considered to encompass consumers of all types, including ordinary consumers who have elected to try various dietary supplements without first obtaining the advice of a medical practitioner. Nevertheless, even assuming that purchases of dietary supplements, through the services offered by such providers thereof as applicant and registrant, will be made with at least some degree of care, it is well settled that the fact that consumers may indeed exercise deliberation in choosing the respective goods and services "does not necessarily preclude their mistaking one trademark [or service mark] for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. *Wincharger 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 consumers and potential customers, who are familiar or acquainted with registrant's "NSI" mark for "dietary supplements and vitamins, minerals, herbs, herbal extracts and herbal combinations, all for use as dietary supplements," and its "NSI NEUTRACEUTICAL SCIENCES INSTITUE" and design mark for "computerized on-line ordering services in the field of vitamins and dietary supplements; [and] mail order services featuring vitamins and dietary supplements," would be likely to believe, upon encountering applicant's "NSI" and design mark for the services of a "retail distributorship featuring dietary supplements," that the respective goods and services

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emanate from, or are sponsored by or associated with, the same source.

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