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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re International Foodstuffs Co.

Serial No. 78215275

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for International Foodstuffs Co.

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Before Seeherman, Walsh and Cataldo, Administrative
Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

On February 14, 2003, International Foodstuffs Co.
(applicant) applied to register the mark ENERGIZER on the
Principal Register in standard-character form for goods now
identified as "foodstuff for animals and pet foods,
specifically excluding dairy feed in pellet form containing
low soluble protein and high soluble carbohydrates" in
International Class 31. After amendment, the application
is now based on applicant's bona fide intent to use the

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mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

The Examining Attorney has refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the mark in Reg. No. 1172500, ENERGIZER 20, in standard-character form, for "dairy feed in pellet form containing low soluble protein and high soluble carbohydrates" in International Class 31. The cited mark was registered on October 6, 1981; the registration has been renewed and is active. Applicant argued against the refusal; the Examining Attorney made the refusal final; and applicant appealed. Applicant and the Examining Attorney have filed briefs and both applicant and the Examining Attorney took part in an oral hearing.

Section 2(d) of the Trademark Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion..." Id. The opinion in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977) sets forth the factors we may consider in determining likelihood of confusion. Here, as is often the case, the crucial factors are the similarity of the marks and the similarity of the goods of the applicant and

registrant. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

The Marks

In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

While we must consider the marks in their entireties, it is entirely appropriate to accord greater importance to the more distinctive elements in the marks. As the Court of Appeals for the Federal Circuit observed, "...in articulating reasons for reaching a conclusion on the issue 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. Indeed, this type of analysis appears to be unavoidable." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant argues that the Examining Attorney failed to consider the marks in their entireties, stating, "The Examining Attorney's analysis is based on a comparison of only a portion of the cited mark to Applicant's mark." Applicant states further, "...the marks at issue are dissimilar in appearance, create different impressions, and are not confusingly similar." The Examining Attorney disagrees and argues that the marks create the same overall impression.

We conclude that applicant's ENERGIZER mark is highly similar to the cited ENERGIZER 20 mark in all respects - appearance, sound, connotation and commercial impression. We conclude so principally because ENERGIZER is both the first and the dominant element in both marks. Presto Products, Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895, 1897 (TTAB 1988) ("...[it is] a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered."). Furthermore, the inclusion of "20" after ENERGIZER in the registered mark fails to distinguish the marks. In the registered mark "20" not only follows, but it is also subordinate to ENERGIZER. A number following a word mark under most circumstances merely serves to complement the word element. There is no evidence here

that "20" possesses any special significance which would elevate its importance in the perception of the registered mark. Consequently, "20" is insufficient to distinguish the marks. Accordingly we conclude that ENERGIZER and ENERGIZER 20 are highly similar.

Strength of the Registered Mark

In a related argument, applicant also argues that the ENERGIZER component of the registered mark is weak, and consequently the registered mark is only deserving of narrow protection. In support of this argument applicant provides copies of USPTO electronic records of certain third-party registrations for marks which include either ENERGY in some form or ENERGIZER, as well as listings of other third-party registrations, without copies of the full records.

The Examining Attorney points out that third-party registrations are entitled to little weight on the question of likelihood of confusion. We generally concur. See, e.g., In re Hub Distributing, Inc., 218 USPQ 284 (TTAB 1983). Such registrations are not evidence that the marks are in use or that the public is familiar with them. See, e.g., AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). As the Federal Circuit has stated, "[t]he probative value of third-party trademarks

depends entirely upon their usage." Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 73 USPQ2d at 1693.

In its reply brief, applicant, on the other hand, cites, among other authorities, TMEP § 1207.01(d)(iii) which states, "[t]hird-party registrations may be relevant to show that the mark or a portion of the mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services. [citations omitted] Properly used in this limited manner, third-party registrations are similar to dictionaries showing how language is generally used." (Emphasis by applicant.) Applicant's reply Brief at 2. We will consider applicant's evidence for this limited purpose.

Before reviewing the evidence, we note that we cannot accept applicant's premise that ENERGY and ENERGIZER are equivalent for the purpose of determining the strength or weakness of ENERGIZER.

In an attempt to draw a connection between "ENERGY" and "ENERGIZER" applicant offers a dictionary entry defining "energize" as "to impart energy to." Although the fact that "energy" is used in a definition of "energize" indicates that the terms are related, the definitions do

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not show that the words mean the same thing. The entry does not demonstrate that ENERGY and ENERGIZER are equivalent in the impact either would have on relevant consumers when used as a trademark. A closer look at applicant's evidence, in fact, demonstrates that "ENERGIZER" is rare relative to "ENERGY" in the world of registered trademarks.

We also reject applicant's implied assumption in discussing this evidence that human nutritional products and human food are sufficiently similar to animal feed that the significance that ENERGIZER may have for human food and nutritional products is the same as that for animal feed. Applicant has not offered any support for this proposition, and, without evidentiary support, we reject this assumption.

Turning to the evidence, among the third-party registrations for which applicant provided copies of records, there are only three registrations which include ENERGIZER, namely, ULTIMATE ENERGIZER (Reg. No. 2508685), GINGER ENERGIZER (Reg. No. 2402857), ENERGIZER (Reg. No. 1313072). The only other registered mark in this group which includes the root "ENERGIZE" is GET ENERGIZED.. NATURALLY (Reg. No. 2348537). All of these registrations cover nutritional products or foods for humans. None

covers animal feed or similar products. These registrations do not show that ENERGIZER is a weak mark in the animal feed field.

Among the registered marks for which applicant provided copies of registrations, there are nineteen registrations which include "ENERGY" in some form. In this group, fifteen cover feed for animals or the equivalent, including four which specify food for pets, and three cover dietary supplements for humans. However, because, as we have stated, the words ENERGY and ENERGIZER have different meanings and impact, we do not find the third-party registrations for ENERGY marks to affect the strength to be accorded the cited registration.

In addition to the copies of third-party registrations, applicant also provided listings of registrations. These listings include very limited information -- the application and registration numbers, the marks, class and the status. None of the listings includes the specific identifications of goods or the names of owners. The Board generally will not consider mere listings of third-party registrations. In re Psygnosis Ltd., 51 USPQ2d 1594, 1597-98 (TTAB 1999). However, in this case, because the Examining Attorney failed to object and discussed this evidence, we will consider it, however

limited its probative value may be. Cf. In re Hayes, 62 USPQ2d 1443, 1445 n.3 (TTAB 2002). And because these listings provide very limited information about the goods, that is, only the classification, they have very limited probative value. We note that many of the registrations in the listings are identified as "dead." Dead registrations, even with complete information, have no probative value. Mattel, Inc. v. Funline Merchandise Co., Inc., __ USPQ2d __, Cancellation No. 92040128 (TTAB, November 7 2006). Accordingly, we have not considered the listings related to dead records.

To the extent we can draw any conclusions from the listings, we find that they provide no support for applicant's position that ENERGIZER is a weak mark for animal feed. The first group of listings is limited to registrations in International Class 5. Class 5 covers "pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; materials for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides." 37 C.F.R. § 6.1. The results indicate that the search found 254 records for marks which include "ENERGY" in some form. Applicant

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provided the first 100 records which include 98 live records. There are no ENERGIZER marks among these records. Furthermore, based on the limited information provided, we must conclude that the registrations could cover any type of Class 5 goods, as defined above, but not animal feed which is in International Class 31. Accordingly, we conclude that these records are not probative of the strength of ENERGIZER as applied to animal feed.

Applicant also provided the results from a search for marks including ENERGY in any form for International Class 30. Class 30 covers "coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey; treacle; yeast, baking powder; salt, mustard; vinegar; sauces (condiments); spices; ice." 37 C.F.R. § 6.1. These results included 51 live records among the total of 78. There are no ENERGIZER marks among these records. Furthermore, based on the limited information provided, we again conclude that the registrations could cover any type of Class 30 goods, as defined above, but not animal feed which is in International Class 31. Accordingly, we conclude that these records are not probative of the strength of ENERGIZER as applied to animal feed.

Next applicant provided a list of results for a search for registered marks which include ENERGIZE in any form in Class 5. There are 20 results including 9 live records from this search. Among the live records, there is one ENERGIZER mark, other than those for which applicant had provided full records, namely, GOLDEN ENERGIZER (Reg. No. 2029808). Based on the limited information provided, we must conclude that this registration could cover any type of Class 5 goods, as defined above, but not animal feed which is in International Class 31. Accordingly, we conclude that these records are not probative of the strength of ENERGIZER as applied to animal feed.

Applicant also provided search results for ENERGIZE marks in International Class 30. Among the five results there are four active records and one ENERGIZER mark, in addition to those for which applicant provided full records, namely, PEANUT PORRIDGE MIX - THE ENERGIZER (Reg. No. 2745909). Again, based on the limited information provided, we again conclude that the registration could cover any type of Class 30 goods, as defined above, but not animal feed which is in International Class 31. Accordingly, we conclude here also that these records are not probative of the strength of ENERGIZER as applied to animal feed.

In sum, after considering all of the third-party evidence applicant submitted, we conclude that ENERGIZER is not a weak mark in the field of animal feed. In so concluding we also note the applicant's fundamental argument that here the public will look to elements, other than ENERGIZER to distinguish the source of the goods in this case. Applicant's entire mark is ENERGIZER and the registered mark is ENERGIZER 20. As a practical matter there is nowhere else to look to distinguish the marks. As discussed above, the numeral 20 is not a sufficient distinguishing factor.

The Goods

Applicant also argues that its goods are sufficiently distinct from the goods of the registrant to avoid confusion.

The goods and services of opposer and applicant need not be identical to find likelihood of confusion under Section 2(d) of the Trademark Act. They need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods or services originate from the same source. In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978). See also

On-Line Careline Inc. v. America Online Inc., 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000);

Furthermore, in comparing the goods we must consider the goods as identified in the application and registrations. See Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") See also Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.")

Also, the proper inquiry is not whether the goods could be confused, but rather whether the source of the goods could be confused. Safety-Kleen Corp. v. Dresser Indus., Inc., 518 F.2d 1399, 186 USPQ 476, 480 (CCPA 1975); In re Rexel, Inc., 223 USPQ 830, 831 (TTAB 1984).

Applicant states, "Applicant's goods are a 100% fat product that is distinguishable from low soluble protein

and high soluble carbohydrate products. Moreover, Applicant's goods come in fine flakes or beads which have the appearance of a powder. This form is highly distinguishable from pellets which are at least two millimeters in diameter." Applicant also argues that its goods are fed to cattle to fatten them for slaughter while the registrant's goods are fed to dairy cows.

On the other hand, the Examining Attorney argues that the goods, as identified in the application and cited registration, are similar. Specifically, the Examining Attorney states, "...while the amended identification excludes the exact product in the identification, the amended identification still includes goods such as dairy feed in pellet form in a different combination of ingredients, dairy feed in other forms, and other feed in pellet form containing low soluble protein and high soluble carbohydrates. In addition, the amended identification does not identify what applicant's goods actually are."

The Examining Attorney's statement goes to the core of the issue. In an apparent attempt to differentiate its goods from those identified in the cited registration, applicant amended its prior identification "foodstuffs for animals and pet goods" simply by excluding only the specific goods identified in the cited registration -

"dairy feed in pellet form containing low soluble protein and high soluble carbohydrates."

However, as the Examining Attorney points out, because the goods in the cited registration are identified with such particularity with regard to a series of factors, the amendment fails to distinguish applicant's goods effectively. The factors identified in the registration include: field of use - "dairy"; form - "pellet"; and content - "low soluble protein and high soluble carbohydrates" (emphasis provided). Again, as the Examining Attorney notes, one or more of these factors can be changed to negate the very specific exclusion applicant adopted. For example, applicant's goods, as identified, could differ from the goods in the cited registration only in form, that is, adopting any form other than pellets, but still consisting of the identical ingredients--low soluble protein and high soluble carbohydrates. Likewise either one of the specifically defined attributes of the content could differ. That is, either the low soluble protein or high soluble carbohydrates could be modified to negate the exclusion in applicant's identification. With such a change, applicant's goods could include products for use in the dairy field. Thus, the effect of any such alteration could be to identify a product which is in substance either

the same as (except as to form) or closely related to the products identified in the cited registration.

Accordingly, we conclude that the goods now identified in the application and the goods identified in the cited registration are related and that the goods could travel through the same channels of trade to the same purchasers.

Purchaser Sophistication

Applicant also argues that there is no likelihood of confusion because the purchasers of its goods, as well as the goods identified in the cited registration, are sophisticated. Applicant states, "...purchasers of animal feed, dairy feed, and nutritional additives for animal feed, are the ultimate in 'sophisticated purchasers.'" Applicant also states, "The differences between dairy cattle and beef cattle are immense and would be recognized immediately by the careful and sophisticated farmers purchasing these products." Applicant also discusses the differences between the two categories of cattle, the differences between the settings where they are raised and fed, and the differences between the nutritional programs for the two categories. Applicant states further, "These purchasers are less brand conscious than they are concerned about purchasing exactly what type of feed is suited to their animals." The Examining Attorney disagrees and notes

that even sophisticated purchasers are not immune from trademark confusion, citing In re Decombe, 9 USPQ2d 1812 (TTAB 1988) and In re Pellerin Milnor Corp., 221 USPQ 558 (TTAB 1983).

In support of its position that the purchasers of the goods identified in the registration are sophisticated, applicant provided copies of pages allegedly from the web site of the owner of the registration. However, applicant provided this evidence for the first time with its brief, and therefore the submission is untimely. Trademark Rule 2.142(d) requires that the record be complete prior to the filing of an appeal subject to certain exceptions not relevant here.

However, even if applicant had provided this evidence at the appropriate time, it would have no probative value. In determining likelihood of confusion, we must consider the goods as identified in a cited registration and cannot consider extrinsic evidence regarding the registrant or its goods. In re Bercut-Vandervoort & Co., 229 USPQ at 764 (extrinsic evidence and argument suggesting trade-channel restrictions not specified in application rejected).

Applicant's arguments regarding the sophistication of the relevant purchasers rests on the presumption that the goods of applicant and registrant are fundamentally

different and used in different settings and by distinct classes of purchasers. Here applicant assumes that applicant's goods are narrowly defined as applicant argues throughout its brief. However, as we discussed in depth above, the identification of goods in the application, in fact, encompasses goods which could be similar to or substantially the same as the goods identified in the cited registration. Therefore, we reject applicant's arguments regarding purchaser sophistication based on distinctions between the goods of applicant and registrant.

Furthermore, we reject applicant's suggestion that, in this case, the type of goods are more important to purchasers than the brands. Implicit in this argument is the erroneous proposition that the point of our inquiry is distinctions between the goods themselves rather than the source of the goods. See In re Rexel, Inc., 223 USPQ at 831. On this point, we concur with the Examining Attorney in noting that even sophisticated purchasers are not immune from trademark confusion. In re Pellerin Milnor Corp., 221 USPQ at 560. This is particularly the case where, as here, the marks are highly similar and the goods of the parties, as identified in the application and registration, are substantially the same or closely related.

Accordingly, we conclude that the evidence in this application bearing on the sophistication of the potential purchasers fails to indicate a diminished likelihood of confusion.

Conclusion

Finally, we have considered all relevant evidence in this case bearing on the du Pont factors and conclude that there is a likelihood of confusion between applicant's ENERGIZER mark and the ENERGIZER 20 mark in the cited registration. We conclude so principally because the marks are highly similar and the goods identified in the application and cited registration are related. We note also that applicant has discussed a number of prior cases in some detail; we have considered those arguments carefully and found them unpersuasive due to significant factual differences between those cases and the one before us.

Decision: The refusal to register applicant's mark under Trademark Section 2(d) is affirmed.