

Mailed: March 31, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Wellshire Farms, Inc.

Application No. 78478496

Eugene E. Renz, Jr. of Eugene E. Renz, Jr., PC for applicant.

Maureen L. Dall, Examining Attorney, Law Office 117 (Loretta C. Beck, Managing Attorney).

Before Seeherman, Walsh, and Mermelstein, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Wellshire Farms filed an application to register the mark THE GLOBAL GOURMET (in standard characters)¹ on the Principal Register for "meat products" in International Class 29.

The examining attorney issued a final refusal to register under Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the mark GLOBAL GOURMET (typed), previously registered for

providing users of a global computer network with access to an interactive on-line computer database and bulletin board services featuring information

¹ Filed September 3, 2004, based on a bona fide intent to use the mark in commerce. Applicant has disclaimed the exclusive right to use "gourmet" apart from the mark as shown.

about culinary products and services; providing on-line computerized ordering of nutritional, culinary and food-related products and services; providing video recordings and printed information regarding nutritional, culinary and food-related information that may be downloaded from a global computer network

in International Class 42,² that it would, if used on or in connection with the identified goods, be likely to cause confusion, to cause mistake, or to deceive.

The examining attorney has also made final a requirement for an acceptable identification of goods.

Applicant appealed. Both applicant and the examining attorney have filed briefs.

We affirm.

I. Applicable Law

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

² Registration No. 2145180, issued March 17, 1998. "Gourmet" disclaimed. Filings under Trademark Act §§ 8 & 9 accepted and granted.

In considering the evidence of record on these factors, we keep in mind that "[t]he 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." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Azteca Rest. Enter., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Record on Appeal

A. Submitted Evidence

The examining attorney submitted the following evidence:

- Dictionary definitions:
 - **gourmet** ... Food expert: somebody who has an expert knowledge and an enjoyment of good food and drink.

ENCARTA WORLD ENGLISH DICTIONARY (North American edition) (online version) (3/31/2005);
 - **culinary** ... relating to cooking: relating to food or cooking.

ENCARTA WORLD ENGLISH DICTIONARY (North American edition) (online version) (10/14/07) (submitted with brief);
 - **culinary** ... having to do with cooking

LITTLE OXFORD ENGLISH DICTIONARY 162 (9th ed. 2006) (submitted with brief);
- Thirty-five third-party registrations, submitted to demonstrate the relationship between applicant's goods and the cited registrant's services.

Applicant submitted the following evidence in support of registration:

- A page from applicant's website purportedly showing that its goods "are sold to consumers in high end food markets such as WHOLE FOODS, INC., WILD OATS and others." Response to Office Action, p. 2.
- A page from registrant's website purportedly showing that "Registrant provides information identifying sponsors such as AMAZON and others.... It is noted that retail food markets are not identified as sponsors and thus Registrant's products listed in its identification is limited to information and not consumable products such as" applicant's. Response to Office Action, p. 2.
- The definition of "culinary[:]" as "of, or relating to a kitchen or to cookery."

Applicant's Br. at 6, citing AMERICAN HERITAGE DICTIONARY. See discussion *infra*.

B. Evidentiary Issues

Both the examining attorney and applicant raised evidentiary issues in their briefs. As noted above, the examining attorney requested that we take judicial notice of two dictionary definitions of the word "culinary."

In addition to the evidence submitted during examination, applicant requests in its brief that the Board take judicial notice that "[a]pproximately 2,400 live registrations contain the term GLOBAL. Of these live registrations, about 36 are associated with a description of the goods or services that includes the word 'food.'" Applicant also refers to and cites the definition of

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"culinary" from the American Heritage Dictionary in its brief. Applicant's Br. at 7.

The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

The examining attorney furnished a copy of the two definitions in question, both of which come from printed dictionaries or online versions of printed dictionaries. We therefore grant the examining attorney's requests for judicial notice of the two definitions of "culinary" attached to her brief.

On the other hand, applicant did not supply a copy of the definition of "culinary" it cited in its brief, nor did it explicitly request that we take judicial notice of it. The examining attorney has objected to consideration of this definition. While applicant did not explicitly request judicial notice, we think that is a fair interpretation of applicant's quotation and citation of the definition in its brief. And while applicant should have furnished a copy of the definition, this is clearly a fact which is "capable of accurate and ready determination by resort to sources whose

accuracy cannot reasonably be questioned." Under these circumstances, we will take notice of this definition.

Finally, we note that applicant offered no evidence to substantiate its statements about third-party registrations. We have long held that we will not take judicial notice of third-party registrations. *In re Carolina Apparel*, 48 USPQ2d 1542, 1542 n.2 (TTAB 1998); *In re Duofold*, 182 USPQ 638, 640 (TTAB 1974). Accordingly, applicant's request for judicial notice is denied, and we will not further consider the existence of these registrations or the registrations themselves.³

III. Issues on Appeal

A. Identification of Goods

The examining attorney maintains that applicant's identification of goods remains indefinite. We consider applicant's proffered identifications in turn.

1. Application as Filed

When it filed the subject application, applicant listed its goods as "[m]eat products."

By her first office action, the examining attorney noted that the original identification was unacceptable, and required amendment. Specifically, the examining attorney found that

³ We add that we do not believe this evidence would require a different result.

[t]he wording "products" in the identification of goods needs clarification because it is overly broad. Applicant must specify the common commercial name for the meat products. TMEP § 1402.01. Applicant may adopt the following identification, if accurate: meat products, namely, meat, in Class 29.

2. First Proffered Amendment

In response to the examining attorney's office action, applicant submitted an amendment of the identification of goods to "[a]ll natural meat products."

In her final Office action, the examining attorney maintained the requirement for a more specific identification of goods:

The wording "products" in the identification of goods needs clarification because it is overly broad. Applicant must specify the common commercial name for the meat products. TMEP § 1402.01. The addition of "all natural" to the identification does not clarify the "products." Applicant may simply indicate that its goods are meat, e.g., "organic meat," or it must specify the common commercial name for each type of meat product. Applicant may adopt the following identification, if accurate: All natural meat products, namely, organic meat, in Class 29.

3. Second Proffered Amendment

Applicant did not file a request for reconsideration (or a request for remand while the appeal was pending). Instead, applicant has submitted an "amendment" to its identification of goods in its brief:

In response to the Examining Attorney's requirement, [applicant] hereby amends the description of the goods to the following: "all natural meat products, namely, sausage, bratwurst, meatballs, bacon, hot dogs, hamburgers, turkey,

ham, chicken bites, pepperoni snack sticks and natural meals consisting of frozen meat entries [sic]"

In her responsive brief, the examining attorney objected to this amendment as untimely, and further maintained that this version of applicant's identification of goods is also unacceptable because

the wording '[h]amburgers' could refer to items in multiple classes, e.g., hamburger sandwiches in Class 30 or hamburger meat in Class 29. The term 'bites' is indefinite and the term 'frozen meat entries' is a bit indefinite. In this regard, the term "entries" appears to be a misspelling of "entrees."

Ex. Att. Br. n.5.

4. Discussion

We agree with the examining attorney that the amendment proffered in applicant's brief is untimely. Trademark Rule 2.142(d) ("The record in the application should be complete prior to the filing of an appeal.") If applicant desired an opportunity to respond to the examining attorney's final refusal or to submit another amendment, the proper procedure would have been to file a request for reconsideration with the examining attorney prior to appeal or a request that the Board suspend the appeal and remand the application for further examination prior to briefing. *Id.* Accordingly, the amendment proffered in applicant's brief will not be considered.

We further find that the examining attorney's requirement for amendment of the original identification of goods and her rejection of applicant's first proffered amendment were both appropriate. As a general matter, "[i]t is within the discretion of the PTO to require that one's goods be identified with particularity." *In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1544 (Fed. Cir. 2007) (quotation marks and citation omitted).

Here, the USPTO has enunciated a policy regarding the acceptability of words like "products":

The identification should state common names for goods or services, be as complete and specific as possible and avoid indefinite words and phrases. The terms "including," "comprising," "such as," "and the like," "and similar goods," "products," "concepts," "like services" and other indefinite terms and phrases are almost always unacceptable.

TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP)

§ 1402.03(a) (5th ed., 2007).

Moreover, as the examining attorney notes, terminology that includes items in more than one class is indefinite. TMEP § 1402.01, *citing In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541 (Fed. Cir. 2007).

As the examining attorney points out in her brief, the word "products" makes the original and amended identification indefinite. While "meat" would have been acceptable, a "meat product" has no understood meaning, and may refer to anything made out of meat. For instance, as

the examining attorney argues, meat paste and meat pies both seem to be "meat products," although the former is in Class 29, while the latter is in Class 30. Because neither "meat products" nor "all natural meat products" have a specific meaning confined to one class, the examining attorney's requirement for an acceptable identification of goods was correct.

B. Likelihood of Confusion

1. Similarity of the Marks

Applicant's mark is GLOBAL GOURMET, while the mark in the cited registration is THE GLOBAL GOURMET. We find these marks to be virtually identical in appearance, sound, meaning and commercial impression. The only difference between them is the word "the" in THE GLOBAL GOURMET.

Applicant argues that "[w]here the common portion of two marks is weak, otherwise minor differences in the remaining portions could make for marks which are overall not confusingly similar." Applicant's Br. at 8. Although we have not taken judicial notice of the trademark registrations advanced by applicant, we recognize that both marks are suggestive of food or food-related products from around the world. We also recognize that as a general matter, weaker portions of marks are less likely to make a strong impression on purchasers, and that customers are

likely in such cases to place more emphasis on other elements of the mark.

The problem with applying this line of reasoning in this case is that the only difference between these marks - the definite article "the" at the beginning of the registrant's mark - is of far less significance than the identical portion "GLOBAL GOURMET." It is highly unlikely that prospective purchasers would perceive "the" to have any meaningful source-identifying function, let alone provide enough distinctive difference between these marks to distinguish them. The Board has had a number of occasions to consider the significance of the article "the" in a variety of contexts. The word has been repeatedly found to have little or no trademark significance when used as it is in the prior registration. See *Citadel v. Army and Air Force Exch. Serv.*, 21 USPQ2d 1158 (TTAB 1991) ("The marks are clearly very much alike. Notwithstanding the fact that opposer is always referred to by using the definite article "THE" before the word "CITADEL", it would be difficult to conclude that if the parties sold similar products under "CITADEL" and "THE CITADEL," respectively, confusion would not be likely."); *In re Narwood Prod., Inc.*, 223 USPQ 1034 (TTAB 1984) (fact that applicant's mark includes definite article "the" is "obviously insignificant" to likelihood of confusion analysis); *U.S. Nat. Bank of Or. v. Midwest Sav.*

and Loan Ass'n, 194 USPQ 232, 236 (TTAB 1977) ("THE' ... adds little distinguishing matter because the definite article most generally serves as a means to refer to a particular business entity or activity or division thereof....").

We agree with applicant that the marks at issue are suggestive, and therefore not intrinsically strong. Both marks suggest that the respective goods and services are rendered to customers who are (or like to think they are) knowledgeable about food and the enjoyment of food, and that such goods and services relate to food from around the world. As such, the marks are not entitled to a particularly broad scope of protection.

Nonetheless, even relatively weak marks are entitled to protection, *King Foods, Inc. v. Town & Country Food Co., Inc.*, 159 USPQ 44 (TTAB 1968), and the marks at issue are highly similar; the only distinction between them is itself of little or no distinctiveness. Accordingly, we conclude that the marks are virtually identical in every meaningful respect.

This factor strongly supports the refusal to register.

2. Channels of Trade, Classes of Purchasers, and Limitation of Goods and Services

Applicant submitted copies of its web page and that of the cited registrant in an effort to show the actual nature

of the respective goods and services, and the customers to whom they are sold. Applicant contends that its goods

are sold to consumers in high end food markets such as WHOLE FOODS, INC., WILD OATS and others.... Registrant on the other hand provides an interactive computer data base featuring information about culinary products and services. Registrant provides information identifying sponsors such as AMAZON and others listed in its website.... It is noted that retail food markets are not identified as sponsors and thus the Registrant's products listed in its identification is [sic] limited to information and not consumable products such as all natural meat products sold and available in food markets.

Resp. to Office action at 2.

Applicant essentially invites us to limit the registrant's services, as well as the channels of trade, and the classes of customers with respect to its application and the cited registration. However, we cannot consider its evidence for this purpose because the identifications in the application and the cited registration are not limited.

It is well-established that our analysis of the goods, the channels of trade, and the classes of customers must be determined by the identifications of goods set out in the application and in the cited registration. Where those goods or services are identified broadly, we must construe them as such, even if evidence is proffered to show that the applicant or registrant is engaged in more limited activities than would be covered by its application or registration. *E.g., Can. Imperial Bank of Commerce, N.A. v.*

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Wells Fargo Bank, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1717 (TTAB 1992). When the goods or services are not limited, the goods must be construed to (1) move in all of the usual channels of trade for such goods; and (2) be purchased by the full range of potential purchasers for goods of that type. *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139, 139-40 (CCPA 1958).

We therefore consider applicant's goods without limitation to their being sold through "high end" food stores, and we do not consider registrant's current activities (even if applicant's information is correct) to limit the scope of the cited registration.

So considered, there is an overlap in the customers for applicant's goods and the registrant's services. We must assume that applicant's goods are sold through such channels as online sales, like those recited in the cited registration. We note that the third-party registrations submitted by the examining attorney include several which specifically identify both meat items and online ordering services specifically related to those goods. See discussion at p. 16. Accordingly, we consider online ordering services (such as the registrant's) to be one of the usual channels of trade for meat products (such as

applicant's), and conclude that, at least to that extent, both the class of prospective purchasers and the relevant channels of trade overlap.

The overlapping channels of trade and classes of customers are factors supporting the refusal to register.

3. Similarity of the Goods and Services

Applicant's goods are "all natural meat products," while the services in the cited registration are identified as follows:

Providing users of a global computer network with access to an interactive on-line computer database and bulletin board services featuring information about culinary products and services; providing on-line computerized ordering of nutritional, culinary and food-related products and services; providing video recordings and printed information regarding nutritional, culinary and food-related information that may be downloaded from a global computer network.

a. Goods and Services are Closely Related

Among other things, the prior registration covers the provision of "on-line ... ordering of nutritional, culinary and food-related products and services." The examining attorney contends that these services would encompass the ordering of "all natural meat products" and points out that the record copies of pages from applicant's web site indicate that applicant's goods can be ordered online.

Applicant argues that the examining attorney has read the cited registration too broadly. Applicant notes that the services in the cited registration are limited to

"culinary and food-related products," but do not mention any services related to food (such as applicant's goods) itself. Appl. Br. at 6-7. Moreover, applicant contends that the dictionary evidence supports the conclusion that the term "culinary" does not include food.

The various record definitions of "culinary" do not definitively resolve this question; none of them indicates whether "culinary," in this context, includes food. We find it unnecessary to resolve this dispute, because the prior registrant's services relate not only to "culinary and food-related products," but to "nutritional ... products" as well, and this term is a clear reference to food.

Nutritional products are those which provide nutrition, *i.e.*, food. We therefore agree with the examining attorney that the registrant's services include online ordering of "all natural meat products," and that those familiar with the registrant's services would, upon encountering applicant's goods sold under a highly similar mark, likely be confused as the source or sponsorship of those goods.

b. Third-Party Registrations

The examining attorney submitted a number of third-party registrations covering applicant's goods and those of the cited registrant. Third-party registrations which individually cover a number of different items and which are based on use in commerce may serve to suggest that the

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listed goods are of a type that may emanate from a single source. See *In re Albert Trostel & Sons*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd* (unpublished) No. 88-1444 (Fed. Cir. Nov. 14, 1988).

Although applicant urges that its goods and the cited registrant's services are not significantly related, the evidence suggests the contrary. Of the third-party registrations submitted by the examining attorney, there are approximately 24 which identify meat items⁴ on the one hand and online services in the field of "culinary and food-related products" on the other, e.g., Registration Nos. 2329960, 2599010, 2840193, 2329960, and two registrations which cover both meat products and the online provision of "culinary and food-related" information, Registration Nos. 2599010, 2832738. While such third-party registrations are not evidence that the marks are in use, they do tend to suggest that the goods and services are of a type which may emanate from a single source. Consumers used to seeing, for instance, meat and on-line ordering services coming from a single source and under the same mark, may assume that applicant's "all natural meat products," and the

⁴ E.g., meat, beef, ham, sausage, poultry, pork loins, deli loafs, and hamburger. None of the third-party registrations specifically restricts the identified meat items to "all natural meat products," which is understandable given the fact that

registrant's online ordering and information services, sold or offered under virtually identical marks, originate from the same source or that the sources are otherwise affiliated. Based on this evidence, we find that although the goods and services at issue are not specifically the same, they are nonetheless significantly related in the mind of the consumer.

The related nature of the goods is a factor which supports the refusal to register.

IV. Conclusion

After careful consideration of the entire record, we conclude:

(1) The examining attorney's requirement for an amendment to applicant's identification of goods was appropriate, and applicant's identification of goods is unacceptable because it is indefinite.

(2) In view of the nearly identical marks at issue, the related nature of applicant's goods and opposer's services, and the overlapping customers for both, applicant's mark is likely to cause confusion.

Decision: The final requirement for a definite identification of goods, and the refusal to register under Trademark Act Section 2(d) are both AFFIRMED.

applicant's identification has been found to be unacceptable.