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THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In Re Munky Bars USA, Inc.¹

Serial No. 78506899

Earl L. Martin III of Boehl Stopher & Graves, LLP for applicant.

Kelly McCoy, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

Before Holtzman, Cataldo, and Mermelstein, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Chardogs USA, Inc. filed an application to register the mark shown below on the Principal Register for "frozen confections," in International Class 30.²

¹ During the course of examination, the mark and application were assigned from Chardogs USA, Inc. to Munky Bars USA, Inc. The heading reflects current ownership of the mark and application.

² Serial No. 78506899, filed October 27, 2004, based on an allegation of a bona fide intention to use the mark in commerce. Applicant has disclaimed the wording "BARS REAL CHOCOLATE REAL PEANUT BUTTER" apart from the mark as shown.



The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the mark MONKEY BARS, previously registered for "frozen confections,"³ that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the examining attorney have filed briefs.⁴ We affirm the refusal to register.

³ Registration No. 2629651, issued October 8, 2002, to Tofutti Brands, Inc.

⁴ The Examining Attorney objected to three web pages attached to applicant's main brief on appeal, but not previously submitted. The first page is from the website of the Securities and Exchange Commission, and consists of a filing apparently made by the cited registrant. The second page appears to be from the website of the cited registrant, and the third page is an entry from the Merriam-Webster OnLine dictionary on "monkey bars." All three web pages were cited in applicant's response to the examining attorney's first office action, and applicant directly quoted from the first two. The examining attorney did not inform the applicant at the time that the cited evidence had not been properly submitted into evidence, nor did he object to the otherwise unsupported factual statements.

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Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. 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 Company, 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).

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*

"The record in the application should be complete prior to the filing of an appeal." Trademark Rule 2.142(d). Because the first and second web pages were not offered during examination of the application, they may not be submitted on appeal. On the other hand, the third web page is of the type of evidence of which we may take judicial notice, and we do so in this case. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006) (Board may take judicial notice of online versions of printed dictionaries). Accordingly, the objection is sustained as to the first two web pages, and overruled as to the third.

While we have not considered the first two web pages themselves in reaching this decision, we have considered applicant's statements in its December 6, 2005, response to the first office action which cited the excluded web pages for support. These statements were not objected to during examination as lacking in support and applicant was never advised that it must submit a copy of the web pages during examination as a prerequisite to

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Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209 (TTAB 1999), and the cases cited therein.

Comparison of the Goods

We first consider the goods involved in this case. We begin by noting that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually may be. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

The goods identified in the application and registration, "frozen confections," are identical. Applicant's attempts to distinguish its goods from those of the registrant are unavailing because our analysis is constrained to a comparison of the goods recited in the cited registration with those in the application. *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Applicant makes the following argument:

consideration. The examining attorney has thus waived any objection to these statements which might have been made.

To the extent that the descriptions of goods and services are similar, the Applicant submits such similarity is due to the preferred descriptions of goods and services prescribed by the U.S. Patent and Trademark Office guidelines. The Applicant informed the Examining Attorney that it would not object to amending the description of the goods to which the mark applies for a more narrow clarification, if the Examining Attorney should request that be done. Applicant submits to the Board that such an amendment might cure the concerns expressed by the Examining Attorney with respect to any commonality between the class of goods to which the marks apply.

Appl. Br. At 7-8.

As an aid to applicants and the examining corps in considering identifications of goods and services, the USPTO maintains an online Acceptable Identification of Goods and Services Manual. TMEP § 1402.04 (4th ed. 2005). However, it is the applicant's responsibility to accurately and acceptably identify its goods or services. Having chosen an identification of its goods that was accepted by the USPTO, applicant cannot now argue that its own identification is inaccurate or too broad.

Applicant suggests that it would be willing to discuss with the examining attorney limiting its goods if the examining attorney requests such an amendment. However, any amendment to the identification of goods should have been made during examination or in a timely-filed request for reconsideration. As a general matter, once an appeal commences, examination and the time for proffering

amendments is closed. Trademark Rule 2.142(d) ("The record in the application should be complete prior to the filing of an appeal."). Further, any amendment to narrow applicant's identification of goods to name some species of product within the genus of "frozen confections," would be unavailing. The cited registration includes all frozen confections, so any specific frozen confection would, by necessity, be identical to at least some of the goods covered by the cited registration.

Finally, as noted, *see supra* note 4, we have not considered the web pages attached to applicant's brief, in comparing the goods of the applicant to those of the prior registrant, although we have considered the following statements made by applicant in its response to the first office action for which the web pages were cited as authority:

TOFUTTI BRANDS INC. is principally involved in the development, production and marketing of TOFUTTI brand soy-based, dairy-free frozen desserts and soy-based, dairy-free food products which contain no butterfat or cholesterol.

Response to office action, Dec. 6, 2005, *citing*

www.sec.gov/Archives/edgar/data/730349/000091066205000598/ex99_1.txt.

Stick novelties that feature a rich chocolate center surrounded by peanut butter flavored TOFUTTI, dipped in a rich chocolate coating. They are available in most health food stores.

Id., citing www.tofutti.com/sticks.0.html (describing the cited registrant's goods).

Although we accept these statement as true, they are of little or no relevance. As we have explained, our task is to compare the goods as recited in the application with the goods as recited in the cited registration. Here, the goods are recited identically, *i.e.*, "frozen confections," and neither the applicant nor the cited registrant have limited their goods to any particular type of frozen confection. Even if it is shown that the registrant is currently marketing only one particular type of "frozen confection" under its MONKEY BARS mark, its registration is not so limited, and its use of the mark on any other frozen confection is covered by its registration.

Accordingly, since both applicant and the prior registrant have identified their goods as "frozen confections," we must consider the respective goods to be legally identical.

Comparison Of The Marks

We turn next to a determination of whether applicant's mark and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are

Serial No. 78506899

sufficiently similar in their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant's mark includes the words MUNKY BARS split by a caricature of an anthropomorphized banana on a stick. The phrase REAL CHOCOLATE REAL PEANUT BUTTER appears above MUNKY BARS, and A REVOLUTION IN FROZEN BANANAS! appears below. While the banana design appears in the middle of the wording, MUNKY BARS is set out in a large, eye-catching font in the middle of the mark, physically dominating both the banana design and the other wording in the overall visual impression of the mark. *In re: Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

In addition to being visually dominant, we find - as is so often the case - that the literal elements of applicant's

mark are more likely to be remembered by consumers and used in calling for the goods. *E.g., In re: Appetito Provisions*, 3 USPQ2d at 1554 (“[I]f one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services.”); *Pass & Seymour, Inc. v. Syrelec*, 224 USPQ 845, 848 (TTAB 1984) (“[W]hile respondent's mark does contain a design element, we think the mark is clearly dominated by the verbal portion thereof, since this is the portion by which people would call for the goods and remember them.”). We therefore find that the dominant portion of applicant's mark is the wording MUNKY BARS.

Further, applicant has submitted a disclaimer of the descriptive phrase “REAL CHOCOLATE REAL PEANUT BUTTER,” while the wording “A REVOLUTION IN FROZEN BANANAS!” appears to be suggestive or laudatory in connection with applicant's goods. Descriptive or suggestive matter is relatively weak in its contribution to the overall commercial impression of the mark, and its addition to otherwise similar marks is usually insufficient to avoid a likelihood of confusion. *In re Equitable Bancorporation*, 229 USPQ 709, 711 (TTAB 1986).

The mark in the cited registration is MONKEY BARS, in typed form. Without ignoring other elements of applicant's mark, the striking resemblance between the dominant portion

Serial No. 78506899

of applicant's mark and the whole of the cited registrant's mark is undeniable. The MUNKY BARS portion of applicant's mark, while spelled differently, would likely be pronounced the same way as the cited mark, and is visually nearly identical to it. In this regard, we note that the cited mark was registered as a "typed" mark. As such, the registration covers depictions of the mark in a variety of typefaces, stylizations, and colors, including depictions which may be similar to that used by applicant. See *Phillips Petroleum Co. v. C.J. Webb, Inc.*, 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971) ("The drawing in the instant application shows the mark typed in capital letters, and...this means that [the] application is not limited to the mark depicted in any special form"); Trademark Rule 2.52(a). We find that the commercial impressions of the marks as a whole are substantially similar.

Applicant's arguments to the contrary are unpersuasive. Applicant makes much of the difference in the way the dominant part of its mark and the cited mark are spelled; however, we find that the aural similarities outweigh the minor spelling differences between MUNKY BARS and MONKEY BARS. And given the imperfect recollection of casual purchasers of inexpensive items such as those at issue here, we find that the similarities of the respective marks outweigh their differences. *ESSO Standard Oil Co. v. Sun*

Oil Co., 229 F.2d 37, 108 USPQ 161, 163 (D.C. Cir. 1956) ("the points of similarity are of greater importance than the points of difference" (citation omitted)).

Applicant contends that, as shown in its dictionary definition, *see supra*, note 4, the words "MONKEY BARS" in the cited registration refer to "a child's playground apparatus," but that the wording "MUNKY BARS" in applicant's mark "is a novel construction, and not a part of ordinary language." To the contrary, we find that - notwithstanding the slight difference between MONKEY and MUNKY - the average consumer of such goods would immediately recognize that portion of applicant's mark as identical in meaning and commercial impression to that of the cited prior registrant.

Other Factors

Because neither the goods of the applicant nor those of the registrant are restricted in any way, we find that the applicant's goods and those of the cited registrant would be sold in the same channels of trade and to the same class of purchasers. *In Re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In Re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Applicant argues that the purchasers of the registrant's goods are "very sophisticated" and highly discriminating, thus reducing the likelihood of any confusion. In particular, applicant argues that the registrant's goods are usually purchased by health-conscious

consumers with special dietary needs, who take care in their food purchases. But as noted above, we must consider registrant's goods to be "frozen confections," as recited in its registration, and not limited to the goods applicant claims registrant actually sells. There is no indication in this record that purchasers of "frozen confections" are unusually sophisticated, that the goods are particularly expensive, or that general purchasers of such goods exercise anything more than ordinary care in making purchasing decisions.

Conclusion

As noted, applicant's goods are identical to those identified in the cited registration, and the channels of trade and classes of purchasers are also identical. When the relevant goods are identical or highly similar, a lesser degree of similarity of the marks is necessary to support a finding of likelihood of confusion. *ECI Div. of E-Systems, Inc. v. Env'tl. Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980). We conclude that in view of the substantial similarity in the commercial impressions of applicant's mark and that of the registrant's, their contemporaneous use on the identical goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

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