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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Kevin T. McCarney dba
Poquito Mas
v.
Una Mas, Inc.

Opposition Nos. 91107026 and 91107748
to application Serial Nos. 75214266 and 75154590

Robert V. Vickers of Fay, Sharpe, Fagan, Minnich & McKee,
LLP for Kevin T. McCarney.

David J. Brezner of Dorsey & Whitney LLP for Una Mas, Inc.

Before Seeherman, Chapman, and Drost, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

Una Mas, Inc. (applicant) applied to register two marks
on the Principal Register for "restaurant services" in
International Class 42.¹ The first application² is for the

¹ Applicant filed an amendment after publication to amend the identification of services in Serial No. 75214266 to read "Mexican restaurant services." Applicant's request is granted. TBMP § 514.01 (2d ed. 2003). However, we will continue to refer to the services as "restaurant services" as the parties have done.

² Serial No. 75214266. The application was filed on December 17, 1996, and it contained an allegation of a date of first use and first in commerce of September 1991.

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mark UNA MAS (typed) and the second application³ is for the mark ONE IS GOOD, BUT UNA MAS IS BETTER (typed). Both applications indicate that the term "Una Mas" is translated as "one more."

Kevin T. McCarney, dba Poquito Mas (opposer) has opposed the registration of applicant's marks. In his notices of opposition, opposer alleges that he is the owner of a registration⁴ for the mark POQUITO MAS (typed) for restaurant services in International Class 42 and that applicant's marks when used in connection with restaurant services are likely to cause confusion, mistake, or deception. Applicant denied the salient allegations of the notices of opposition.⁵

The Record

The record consists of the following items: the files of the involved applications; the trial testimony deposition of opposer, Kevin T. McCarney, with accompanying exhibits; the trial testimony deposition of applicant's founder and former President, Richard Hamner, with accompanying exhibits; the trial testimony deposition of Christine P. Peters, a paralegal for applicant's counsel, with

³ Serial No. 75154590. The application was filed on August 22, 1996, and it contains an allegation of a date of first use and first use in commerce of May 28, 1996.

⁴ Registration No. 1,892,451 issued May 2, 1995; Section 8 and 15 affidavits accepted and acknowledged, respectively.

⁵ On March 27, 1998, the Board granted opposer's motion to consolidate these opposition proceedings.

accompanying exhibits; the trial testimony deposition of Lynne Mobilio who designed applicant's survey, with accompanying exhibits; and Notices of Reliance containing printouts of articles referring to applicant and opposer, dictionary definitions, discovery responses, and the discovery deposition of opposer.

Preliminary Matters

Opposer, in his opening brief, also asserted that he is the owner of two additional registrations.



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Both registrations are also for restaurant services in International Class 42. Applicant argues that only Registration No. 1,892,451 was pleaded in the Notices of Opposition and opposer "therefore cannot rely on any other marks in this [consolidated] opposition proceeding." Brief

⁶ Registration No. 2,026,811 issued December 31, 1996, and affidavits under Sections 8 and 15 have been accepted and acknowledged, respectively. The registration contains a disclaimer of the words "Taco Stand" and it also contains a claim of acquired distinctiveness of the phrase "The Original Baja Taco Stand."

⁷ Registration No. 2,212,685 issued December 22, 1998. The words in the mark are POQUITO MAS THE ORIGINAL BAJA TACO STAND. It is also registered with a claim of acquired distinctiveness of the phrase "The Original Baja Taco Stand" and a disclaimer of the words "Taco Stand."

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at 9. We agree with applicant that it was not put on notice of these registrations by the Notices of Opposition.

Inasmuch as the issue was not tried by consent, we agree that the issue of likelihood of confusion will be determined by comparing applicant's marks with opposer's POQUITO MAS registration.⁸

Priority

Priority is not an issue here to the extent that opposer relies on his ownership of a federal registration for the mark POQUITO MAS. See King Candy Co. v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).⁹

Likelihood of Confusion

Obviously, we analyze the issue of likelihood of confusion under the principles set forth by the Court of Customs and Patent Appeals, one of the predecessor courts of the Court of Appeals for the Federal Circuit, in In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). See also In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003);

⁸ We also observe that the '811 and '685 registrations would not determine the outcome of these proceedings inasmuch as if there is no confusion between applicant's marks and opposer's POQUITO MAS registration, there would also be no confusion with the same words and the additional non-similar matter in these registrations. Similarly, if applicant's marks were confusingly similar to opposer's POQUITO MAS registration, there would be little to gain by comparing applicant's marks with opposer's additional registrations.

⁹ Applicant also concedes priority. Applicant's Brief at 8.

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Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

We begin our discussion by identifying factors for which there can be no serious dispute. One important factor in any likelihood of confusion analysis is the similarity or dissimilarity of the goods and/or services. When we compare the services of applicant and opposer, we must compare the services as described in the applications and the registration to determine if there is a likelihood of confusion. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Even if this was not the rule, we note in this case the services of applicant and opposer are not only legally identical, they are, in fact, identical. The services in the applications and registration were both identified as "restaurant services."¹⁰ Indeed, the marks are actually used in connection with similar Mexican restaurant services that feature burritos and tacos among other items for similar prices (most items under \$6). See McCarney Exhibits 20 and 26. Because the involved marks are all for restaurant services, there is a greater likelihood that when similar marks are used in this situation, confusion would be likely. Century 21 Real Estate Corp. v. Century Life of America, 970

¹⁰ As discussed earlier, applicant's amendment to specify that its services are "Mexican restaurant services" has been granted.

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F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) ("When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines").

In addition to the identical nature of the services, we are unable to discern any significant differences between the parties' channels of trade or prospective purchasers¹¹ other than the fact that at the time of the deposition, applicant's restaurants were located in Northern California in the San Francisco area, and opposer's restaurants were located in Southern California, in the Los Angeles area. See Opposer's Brief at 32; McCarney dep. at 12-14 and Exhibit 10 at 00015. Inasmuch as the parties have not geographically restricted the scope of their applications and registration, the geographic separateness of the parties is not relevant.¹² Furthermore, applicant concedes that the marks will be "used in connection with the same services, namely restaurant services in class 42, and will be marketed and used in the same channels of trade and to the same consumers." Brief at 8.

We now come to the area where there is a significant disagreement between the parties. This concerns the

¹¹ There is also no evidence that the purchasers of these restaurant services would be careful or sophisticated purchasers.

¹² The geographic separateness does undercut applicant's argument that the marks have co-existed for ten years without any actual confusion. Applicant's Brief at 26.

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similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. Opposer submits that applicant's marks "are substantially similar to POQUITO MAS in sight, sound, meaning and commercial impression." Brief at 29. Regarding the comparison of POQUITO MAS with UNA MAS, opposer relies on the fact that both marks consist of two Spanish words with the same last word "mas." Opposer also argues that the "meaning and commercial impression ... are virtually identical. A literal translation of POQUITO MAS is 'little more.' A literal translation of UNA MAS is 'one more...' The phrases 'little more' and 'one more' mean essentially the same thing." Brief at 24.

On the other hand, applicant maintains that the marks are dissimilar in appearance, sound and connotation. Applicant points out that the only similarity between the marks "is the second word 'Mas.'" Brief at 10. Applicant also argues that the words are totally dissimilar in sound and appearance. Furthermore, applicant maintains that the marks have different connotations because they are translated "little more" and "one more."

Applicant's mark and registrant's mark are for the Spanish words, POQUITO MAS and UNA MAS. Even a cursory look at these involved marks reveals that they are not identical. It is well settled that it is improper to dissect a mark and

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that marks must be viewed in their entirety. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993). However, more or less weight may be given to a particular feature of a mark. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Looking at the similarity of the appearances of the marks, it is clear that they are substantially different. The marks begin with different words, "Poquito" and "Una," that bear no similarity. The second and common word in the marks is the three-letter word, "Mas." This word is not so significant that it dominates the mark. Looking at the similarity of the pronunciation, we again are left with the conclusion that the marks would be pronounced differently.

Opposer argues that the words "have clear Spanish connections. This in view of the use by both Opposer and Applicant in connection with Mexican-style food will clearly convey the Spanish origin to the consumer of these services." Opposer's Brief at 24. It hardly seems surprising that both parties use Spanish words with Mexican-style restaurants. It is not clear how consumers would conclude that marks with the words POQUITO MAS and UNA MAS were similar simply because both involve Spanish words used to identify Mexican-style restaurants.

Whether the marks have similar meanings or connotations is a closer question. When both marks are foreign words, we

consider their foreign meanings. In re Lar Mor International, Inc., 221 USPQ 180, 181 (TTAB 1983) ("It seems to us that the fact that both marks may be comprised of foreign words should not mean that we can disregard their meanings"). Opposer's registration translates the mark POQUITO MAS as "little more"; the applications translate the mark UNA MAS as "one more." Again, it is clear that the marks' connotations are not identical. Furthermore, "little more" and "one more" are hardly arbitrary terms when applied to restaurant services. See Opposer's Brief at 12 ("Often, a person will request 'a little more of this' or 'one more of that'"); Hamner dep. at 14 ("Una Mas is what you say when you want another beer").

Applicant points out that the expression "little more" can actually have "a negative connotation, as in 'his nachos are little more than chips with processed cheese.'" Brief at 11. Even if the indefinite article "un" or "a" is assumed to be present before "little more" so that the mark translates as "a little more," we are not convinced that this meaning would make these otherwise different looking and sounding marks similar. "It has frequently been held that trademarks, comprising two words or a compound word, are not confusingly similar even though they have in common one word or part which is descriptive or suggestive of the nature of the goods to which the marks are applied, or of

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the use to which such goods are to be put." Smith v. Tobacco By-Products & Chemical Corp., 243 F.2d 188, 113 USPQ 339, 340 (CCPA 1957) (BLACK LEAF and GREEN LEAF not confusingly similar for the same goods).

Opposer also argues that "Applicant has failed to provide evidence that the consumer of the services of these proceedings would be sufficiently fluent in the Spanish language to distinguish between the slight differences in the meaning of these phrases." Reply Brief at 7. To the extent that purchasers are not fluent in Spanish, the marks would have even fewer similarities because their meanings would be unclear and they would have significant differences in appearance and sound.¹³ In addition, their overall commercial impressions would not be similar.

When we compare the marks in their entirety, we find that the marks POQUITO MAS and UNA MAS are not significantly similar in appearance, sound, and meaning, and we find that their overall commercial impression would be different. We note that applicant's other mark, ONE IS GOOD, BUT UNA MAS IS BETTER, contains additional wording that makes that mark even less similar to opposer's mark.

¹³ We do not find that the evidence supports opposer's statement that the "consumer of Opposer's and Applicant's services at least generally recognizes the English equivalent of both POQUITO MAS and UNA MAS." Opposer's Brief at 13. The mere fact that the restaurants' marks are translated in several restaurant reviews does not equate to general consumer recognition of the translation of the Spanish words.

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Opposer has also argues that his mark "is well-known and is known to represent a chain of restaurants that sell quality Mexican-style food. The many favorable reviews have also helped to strengthen the Opposer's POQUITO MAS mark." Brief at 30. Case law recognizes that "a mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark." Kenner Parker Toys v. Rose Art Industries, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

We start by observing that opposer has six restaurants in Studio City, North Hollywood, Burbank, West Hollywood, Los Angeles, and Valencia, California. McCarney dep. at 11-13. These restaurants have received numerous favorable restaurant reviews. For example, the *Zagat Survey, Los Angeles So. California Restaurants* (1998) describes opposer's restaurants as: "A 'healthy, tasty, friendly, fast' Mexican food chain that has locals crying 'bring me more' of the 'best burritos and tacos' by far; boosters say they're 'proof that fast food can be good,' even in a space that's 'charmingly tacky.'" McCarney Exhibit 37. A *Los Angeles Times* (August 2, 1996) article describes the restaurant as follows: "Speaking of shrimp, I have come to require semi-regular doses of Poquito Mas's grilled shrimp tacos, squirted with lime, with or without added guacamole. In fact, just about everything at this upscale taco stand is

as good as it gets: grilled ahi tacos, creamy beans, mushroom and steak quesadillas, a worthy *vegetariano* burrito." An article in *Daily Variety* (September 9, 1995) reports about Michael Rosen, a chef who prepared food at a presidential fundraiser: "for quickie fast food stuff, Rosen drops in at Poquito Mas in the valley." While opposer's restaurants have received some primarily local attention¹⁴ in the media, there is little other evidence to demonstrate the fame of opposer's mark.¹⁵ Therefore, we cannot say that the evidence of record demonstrates that opposer's mark is famous or is even a particularly strong mark.

Another factor that opposer argues supports a determination of likelihood of confusion is opposer's claim that there has been actual confusion. Evidence of actual confusion is normally very persuasive evidence of likelihood of confusion. Exxon Corp. v. Texas Motor Exchange, Inc., 628 F.2d 500, 208 USPQ 384, 389 (5th Cir. 1980) ("The best evidence of likelihood of confusion is provided by evidence of actual confusion"). Opposer's evidence of alleged actual

¹⁴ Mr. McCarney also testified (p. 111) that "Food TV did a segment on us a couple of years back."

¹⁵ For example, opposer describes his advertising as follows:
Q. "What type or types of advertising has Poquito Mas done over the years?"

A. On the print side, normally, we don't do any print advertising unless it's a small charitable ad... As far as the radio, we've done about a half to a dozen different little radio spots... In regards to television, in a marketing aspect, we have -

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confusion consists of conversations opposer's principal had with a passenger on an airplane and a cashier at a retail store on trips to Northern California. Opposer's Brief at 32. In both conversations, the other person is reported to have responded to the witness's identification of his business as Poquito Mas by assuming it was Una Mas. McCarney at 96-97. Opposer could not identify either person. Opposer also testified that "on another trip, there was a lady¹⁶ who asked me the same question. And then subsequently, there was a couple other people on the plane trips." McCarney at 96.

Courts and this Board have found vague evidence of actual confusion such as misdirected phone calls hearsay and inadmissible. Duluth News-Tribune v. Mesabi Publishing Co., 84 F.3d 1093, 38 USPQ2d 1937, 1941 (8th Cir. 1996) ("[V]ague evidence of misdirected phone calls and mail is hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender regarding the reason for the 'confusion.'"); Hi-Country Foods Corp. v. Hi Country Beef Jerky, 4 USPQ2d 1169, 1172 (TTAB 1987) ("[T]estimony from opposer's deponent, Mr. Harlan, that he received a phone call asking for beef jerky is, apart from being inadmissible hearsay, vague and

- we have licensed the Michael Richard Show to use our likeness and our logo in the TV show." McCarney dep. at 60-61.

unclear. The identity of the caller is unknown and the circumstances surrounding the incident are unexplained"). However, if it is otherwise reliable, employee testimony on the subject of misdirected calls can be admissible. Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 217 USPQ 145, 149 n. 10 (5th Cir. 1982) (Testimony of plaintiff's employees about purchasers attempting to reach defendant admissible because it was either not used "to prove the truth of the matter asserted" (Fed. R. Evid. 801(c)) or was relevant under the state of mind exception (Fed. R. Evid. 803(3))); CCBN.com Inc. v. c-call.com Inc., 53 USPQ2d 1132, 1137 (D.C. Mass. 1999) ("[S]tatements of customer confusion in the trademark context fall under the 'state of mind exception' to the hearsay rule. See Fed. R. Evid. 803(3)").

While we do not strike the witness's testimony on this point as applicant requests (Brief at 24), we cannot give it much weight.¹⁷ The testimony of actual confusion is vague. We do not even know if the strangers on the plane or the cashier in the store are potential customers. Therefore,

¹⁶ The witness provided a photocopy of the person's business card (McCarney Exhibit 42), but the person did not testify.

¹⁷ The description of the incidents of alleged actual confusion apparently involved opposer's witness orally communicating the mark to others. Opposer, when challenging applicant's telephone survey (discussed subsequently herein), acknowledges that simply considering the sound of the marks in this case is of little relevance. Opposer's Brief at 11 ("The fact that the test takers, who are relying on only sound, likely never had a chance to fully appreciate the commercial impression of these marks further shows that the survey should be given little or no weight").

the evidence on the factor of actual confusion does not provide much support for either party in this case.

Opposer also argues that "Applicant's use of a virtually identical trade dress as used by Opposer, is further evidence that the UNA MAS mark projects a confusingly similar impression." Brief at 20. Trade dress may "provide evidence of whether the word mark projects a confusingly similar commercial impression." Specialty Brands, Inc. v. Coffee Bean Distributors, 748 F.2d 669, 223 USPQ 1281, 1294 (CCPA 1984). However, a review of the photographs in evidence of opposer's and applicant's restaurants (McCarney's Exhibits 14, 15, and 19-23) reveals only the most general of similarities such as yellow walls.¹⁸ These similarities would be the type found in many casual restaurants.¹⁹ The fact that both parties use the word "more" in their advertising also does not somehow make dissimilar terms similar.

Another issue concerns a survey that applicant introduced to show that there was no likelihood of

¹⁸ Apparently, even this color is not consistent in opposer's restaurants. McCarney's dep. at 17 ("We have yellow or light-colored walls where we don't have brick as part of the concept") and 18-19 (Q. Do you use the same color for walls in all of your restaurants? A. Not in all the restaurants as of to date. This is the newest restaurant. We have, I believe, this color in at least two or three of the restaurants").

¹⁹ Applicant points out that the restaurant opposer relies on to show that the parties' trade dress is similar was built in 1999, two years after the opposition was filed. Applicant's Brief at 33; McCarney's dep. at 17.

confusion. Opposer objects to the survey on the ground that applicant has not shown that the survey's designer, Ms. Mobilio, is an expert. In addition, even if the survey is admitted into evidence, opposer argues that "it includes many flaws and should be given little or no weight." Reply Brief at 9.

We start by noting that opposer's objection should have been raised earlier. Opposer did not raise these objections to the survey in his opening brief, and for that reason, opposer's objection to the survey will not be sustained. TBMP § 707.03(c) (A "party should maintain the objection in its brief on the case"). However, in any event, we must address the survey to determine how much weight it should be given. Ms. Mobilio has a degree in Social Psychology and a Ph.D. in Education with a minor in Statistics. Mobilio Ex. 1. Ms. Mobilio estimates that she has designed approximately 165 surveys. Mobilio dep. at 7. While she has provided some advice about consumers' beliefs concerning a name of a company, she had never before "been called upon to perform or design research intended to assess the strength of a trademark." Mobilio dep. at 42. Ms. Mobilio appears to meet the minimum qualifications as an expert in trademark surveys and we will not exclude the survey from consideration. Compare Helene Curtis Industries v. Suave Shoe Corp., 13 USPQ2d 1618 (TTAB 1989) (Defendant's witness

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who was a professor of statistics and psychology qualified as a survey expert) with Albert v. Warner-Lambert Co., 234 F. Supp.2d 101 (D. Mass. 2002) (Court questioned whether expert could be shown to be a expert when he had delegated the design and execution of the survey to his daughter).

Although there are many weaknesses in the survey, we will not exclude it, but we will not give it much weight. Sports Authority Inc. v. Abercrombie & Fitch Inc., 965 F. Supp. 925, 42 USPQ2d 1662, 1667 (E.D. Mich. 1997) ("Even though the survey was leading and apparently lacked objectivity, and although the Court lacks sufficient knowledge of the survey population, total exclusion is inappropriate"). The "proponent of a consumer survey has the burden of establishing that it was conducted in accordance with accepted principles of survey research." Id., quoting, National Football League Properties v. New Jersey Giants, 637 F. Supp. 507, 513, 228 USPQ 785 (D.N.J. 1986). We are concerned about the fact that the survey was a telephone survey. While telephone surveys may be appropriate in some circumstances, in this case, we have non-English words. The appearance of the mark is important and the failure to address this issue limits the reliability of the survey. Other deficiencies include the fact that the survey included participants who had not eaten or intended

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to eat at a Mexican restaurant (Mobilio Ex. 2. p. ii)²⁰; the interviewers were instructed to pronounce the common word in the mark "mas" as "moss," which is somewhat different from the Spanish pronunciation (Mobilio Ex. 2, p. iv) and Ms. Mobilio had no opinion "as to what would happen in the future if Poquito Mas stores were to begin to open in neighborhoods where there are Una Mas Stores."²¹ Mobilio dep. at 79.

Finally, we note that applicant has introduced some evidence that there are other Mexican-style restaurants that use the word "mas" in their names. This evidence consists of the testimony of a paralegal of applicant's counsel who called several Mexican or Latin American-style restaurants with the word "mas" in their names and obtained the menus from those restaurants.²² See Peters dep. Ex. 1 and attached exhibits 1 (Dos Mas), 2 (Mas Amigos), 3 (Mas), and 5 (Enchiladas Y Mas). The witness also testified that several other restaurants using the word "mas" in their names were also in operation. Peters dep. Ex. 1 at 2-3.

²⁰ See Sports Authority, 42 USPQ2d at 1667, citing Manual for Complex Litigation, § 21.493 (3rd ed. 1995).

²¹ Despite this statement by the witness, we note that the survey itself was not predicated on the parties' restaurants being located in different geographical areas (applicant in Northern California and opposer in Southern California).

²² Opposer's objections to this testimony are overruled. The fact that the witness did not ascertain the exact type of services the restaurant provided does not make this testimony inadmissible. Also, the witness's statement that she received a menu by fax after calling a telephone number for a restaurant is not hearsay.

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However, these uses of the word "mas" with Mexican- or Latin American-style restaurants do not appear to be extensive, and applicant's evidence does not suggest otherwise. Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125, 1131 (TTAB 1995) ("[T]he pictures of these restaurants tend to indicate that the operations are small and local in nature"). Therefore, we do not give this evidence much weight in deciding whether there is a likelihood of confusion in this case.²³

Conclusion

When we compare applicant's and opposer's marks in their entireties as used on applicant's and opposer's restaurant services and all the other factors on the issue of likelihood of confusion, we are convinced that there is no likelihood of confusion in this case.

DECISION: The oppositions are dismissed.

²³ To the extent that applicant relies on a trademark search report, we have not considered this report to demonstrate use of the listed marks or the weakness of opposer's mark. AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ("We have frequently said that little weight is to be given such registrations in evaluating whether there is likelihood of confusion. The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive'); Weyerhaeuser Co. v. Katz, 24 USPQ 1230, 1231 (TTAB 1992) (A "trademark search report is not credible evidence of the existence of the registrations listed in the report"); Humana Inc. v. Humanomics Inc., 3 USPQ2d 1696, 1699 (TTAB 1987) (The "only probative value of the third-party registrations introduced by applicant here, absent a showing that the marks subject of the

third-party registrations are in use, is to show the meaning of a mark").