

5/10/02

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 23
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Kellogg Company
v.
The Green Turtle Bay Vitamin Co., Inc.

Opposition No. 113,043
to application Serial No. 75/380,936
filed on **October 27, 1997**

Jeffrey H. Kaufman of Oblon, Spivak, McClelland, Maier &
Neustadt, P.C. for Kellogg Company.

Ralph Fucetola III for The Green Turtle Bay Vitamin Co., Inc.

Before Cissel, Hanak and Hohein, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

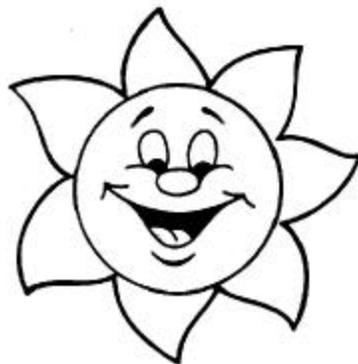
By the above-identified application, The Green Turtle
Vitamin Co., Inc. seeks registration of the mark shown below



sunnie

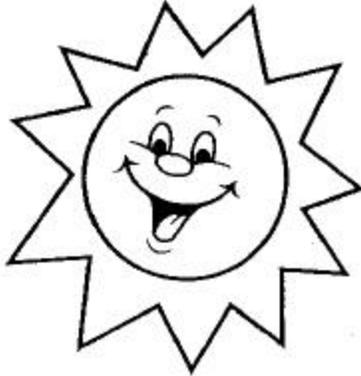
on the Principal Register for "vitamin/mineral/herbal supplements," in Class 5. The application is based on the claim of use of the mark in connection with these goods in interstate commerce since July 15, 1997.

A timely Notice of Opposition was filed by Kellogg Company on December 30, 1998. As grounds for opposition, opposer alleged that since prior to applicant's claimed date of first use, opposer has engaged in the manufacture, distribution, sale, advertising and promotion in interstate commerce of food products and promotional items; and that since prior to applicant's claimed date of first use, opposer has used the trademark "SUNNY" in connection with promotional items used to promote opposer's food products in commerce; that since prior to applicant's claimed date of first use, opposer has used sun designs as trademarks in connection with its food products; and that opposer owns three federal trademark registrations for the two marks shown below.



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Reg. No. 1,270,151, issued March 13, 1984; Affidavits under Sections 8 and 15 received and accepted.



Reg. Nos. 1,718,488 and 2,077,663, issued September 22, 1992 and July 8, 1997, respectively. With respect to the former, affidavits under Sections 8 and 15 were received and accepted.

The goods and services listed in these registrations are, respectively, "cereal-derived food product to be used as a breakfast food, snack food or ingredient for making food"; "processed cereal for use as a breakfast food, snack food and ingredient for making confections and baked goods"; and "entertainment services, namely, participating in professional auto races."

Opposer further pleaded that the mark applicant seeks to register so resembles opposer's marks that confusion is likely. In its answer, applicant denied the essential allegations set forth in the Notice of Opposition.

A trial was conducted in accordance with the Trademark Rules of Practice. Both parties filed main briefs. Opposer

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also filed a reply brief, but an oral hearing was not requested.

The parties submitted, and the Board approved, a stipulation for the introduction of evidence by way of affidavit or declaration. Opposer made of record by Notice of Reliance two declarations, with exhibits, of David A. Herdman, its Corporate Counsel-Trademarks;¹ the declaration, with exhibits, of James A. Melliush, Associate Director of the Ready-to-Eat Cereal Division of Kellogg Company; and portions of applicant's responses to opposer's discovery requests. In accordance with the stipulation, applicant submitted a certified statement by Karen Horbatt, applicant's president, along with several exhibits.

The predecessor to our primary reviewing Court listed the principal factors to be considered in determining whether confusion is likely in the case of *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Chief among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression and the similarity of the goods.

¹ Applicant's objection to our consideration of Mr. Herdman's statements in the declaration and the exhibit consisting of opposer's web page is not well taken. This evidence was timely submitted in accordance with the Trademark Rules of Practice and the agreement of the parties. We have considered this evidence because its submission was proper rebuttal to applicant's arguments

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Opposer states that "Kellogg bases this opposition on its prior and superior rights in its SUN DESIGN marks," and therefore that "the only issue is whether Applicant's SUNNIE and Sun design mark for vitamin/mineral/herbal supplements is likely to be confused with Kellogg's SUN DESIGN marks, registered and used for cereals, cereal-derived foods, and related promotional items and entertainment services."

(Opposer's brief, p. 1) Although, as we noted above, the Notice of Opposition pleaded priority and likelihood of confusion with opposer's alleged word mark "SUNNY," the evidence and testimony proffered by opposer do not establish use or registration of this mark in connection with any products prior to the filing date of the opposed application. Opposer, apparently aware of this deficiency, in its brief restricted the issue before us in this proceeding to the likelihood of confusion with its registered sun design marks and did not include the previously pleaded "SUNNY" word mark.

In view of the certified copies of opposer's unchallenged pleaded registrations, priority is not in issue in this proceeding.

With regard to whether confusion is likely, we find that when the differences between opposer's registered sun design marks and the mark applicant seeks to register are considered

concerning opposer's use of the word "SUNNY" in connection with its

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in light of the differences in the products and services with which the parties use their respective marks, opposer has not established that confusion is likely.

We begin with the marks. Whereas applicant attempted to show that third parties use design marks which are representations of the sun in connection with goods which compete with the goods involved in this case, the evidence applicant submitted in support of this conclusion does not show what applicant argues it shows. Ms. Horbatt discusses nine examples of what she contended are third-party uses of sun design marks for related goods, but as opposer points out, the witness had no idea where most of the photocopy exhibits came from or when or to what extent the designs presented therein had been used or promoted to consumers. This evidence therefore cannot be the basis for us to conclude that opposer's marks are weak because consumers in the field of breakfast cereals or dietary supplements are exposed to many such marks in the marketplace for these products.

We do not, however, need to find that sun designs are weak in source-identifying significance in order to determine that opposer's marks are not so similar to applicant's mark that when these marks are used in connection with the goods

products.

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and services of the parties, confusion is likely. The design features of the two registered marks are not "nearly identical" to applicant's mark, as opposer would have it. (Brief, p. 10) Applicant's mark, when considered in its entirety, is not so similar to either of the registered marks that when the differences among the goods and services are considered, confusion is likely.

Opposer's marks show a personified cartoon-style presentation of a sun design, wherein the details of the smiling face, complete with a representation of a tongue, are presented to combine to form a jolly looking, fat-faced humanoid character with his smiling mouth open. The drawing shows only outlines of the facial features and the sun ray design surrounding the face, which is shown as eleven straight-sided rays in one of opposer's marks and as seven curvy rays in the other.

Applicant's mark, on the other hand, is not such a cartoon-style representation of a human face. We would not go as far as applicant does in calling it an "Aztec" face, but it is obvious that the face in applicant's mark is drawn in a very different style, with much less of a cartoon-style presentation of the eyes, nose and smile. Moreover, the rays of sun surrounding applicant's face are shown in heavy black, as are the eyes, the closed mouth and dimples on the cheeks.

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Although the rays on the top of the drawing are cut off to give a flat top to the mark, there appear to be at least twenty sun ray designs in applicant's mark, many more than there are in either of opposer's marks.

In addition to the obvious graphic differences among the face portions of the designs of the parties, applicant's mark includes the name "sunnie" beneath the design, whereas neither of opposer's marks has any lettering at all.

Although "sunnie" is unquestionably related to the sun shown in the rest of applicant's mark, the name is not just a literal reiteration or amplification of the sun design, as the word "SUN" would be. In this sense, it is a distinguishing feature not present in either of opposer's marks.

As noted above, all in all, we find that there are enough differences between applicant's mark in its entirety and the marks of opposer that when the differences in the goods and services are also considered, confusion is not likely. This is particularly so for the registration claiming use in connection with entertainment services provided by participating in professional auto races. Nothing in this record could lead us to conclude that professional auto racers also market dietary supplements using the same marks under which they race.

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In a similar sense, nothing in this record persuades us that consumers have a basis for mistakenly believing that processed cereal and cereal-derived food products are sold by the same businesses under the same or similar marks under which they market vitamin/mineral/herbal supplements. Opposer admits that prior to publication of applicant's mark in the Official Gazette, opposer had never heard of applicant or its product. (Brief, p. 15) Opposer takes five lines in its sixteen-page brief to argue that "the parties' products overlap, and are interrelated" because both are "nutritional products that provide essential vitamins and minerals," but opposer does not cite to any testimony or evidence to this effect. While the record does show that the boxes in which opposer's cereal is sold provide listings of the vitamins and minerals with which the cereal is fortified, opposer has not established that consumers would expect similar marks used on both kinds of goods to be an indication that a single source is responsible for both cereal products and vitamin/mineral/herbal supplements.

When this factor is considered in light of the differences between applicant's mark and the marks registered by opposer, we simply cannot conclude that opposer has met its burden of establishing that confusion is likely.

Accordingly, the opposition is dismissed.

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