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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Kellogg Company

v.

Dorothy Cullars Waugh

Opposition No. 113,611
to application Serial No. 75/490,462
filed on May 26, 1998

Jeffrey H. Kauffman and Jordan S. Weinstein of Oblon,
Spivak, McClelland, Maier & Neustadt, P.C. for Kellogg
Company.

George M. Thomas of Thomas, Kayden, Horstemeyer & Risley for
Dorothy Cullars Waugh.

Before Cissel, Seeherman and Hohein, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Kellogg Company has opposed the application of Dorothy
Cullars Waugh to register SUPER START as a trademark for

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"mixed whole grain breakfast cereal."¹ As grounds for opposition, opposer has alleged that since prior to the filing of applicant's application, opposer has used SMART START as a trademark in connection with breakfast cereals and cereal bars; that it owns a registration for SMART START for "cereal-derived food product to be used as breakfast food, cereal bar, snack food or ingredient for making food";² that applicant's mark so resembles opposer's mark that, if used on the identified goods, it is likely to cause confusion or mistake or to deceive; and that the bona fides of applicant's intent to use are not apparent from materials of record, and therefore opposer challenges such intent to use.

Applicant has denied the salient allegations of the notice of opposition in its answer.

The record includes the pleadings; the file of the opposed application; and notices of reliance submitted by opposer and applicant. The parties stipulated that testimony could be submitted in the form of an affidavit or declaration, and such stipulation was approved by the Board. The evidence submitted by opposer consists of the testimonial declarations, with exhibits, of Andrew

¹ Application Serial No. 75/490,462, filed May 26, 1998, based on an asserted bona fide intention to use the mark in commerce.

² Registration No. 1,555,954, issued September 12, 1989; Section 8 affidavit accepted.

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Weinstein, David Herdman and James Melliush; applicant's responses to certain of opposer's interrogatories and requests for admission; and portions of the discovery deposition of applicant.³ Applicant's evidence consists of the testimony declaration, with exhibits, of Gina Silverio.

The case has been fully briefed. An oral hearing was originally requested by opposer, but opposer later advised the Board that it would not appear at the hearing. Only applicant appeared at the oral hearing.

The record shows that opposer began using the mark SMART START in 1979, and that this mark has been used since that time for both packaged breakfast flake cereal and for cereal bars. Sales of the SMART START products exceeded \$35 million in 2000, and exceeded \$120 million for the period from 1979 to 1999. During that same period, opposer's promotional and advertising expenditures exceeded \$38 million, and in 2000 they exceeded \$9 million. Opposer's promotional activities include print advertising in such national magazines as "Prevention," "Family Circle,"

³ The entire portions of the discovery deposition submitted are under seal. However, a review of the correspondence accompanying the deposition shows that not all of the material submitted contains confidential information. Because of the importance of public access to the records of the U.S. Patent and Trademark Office, only those portions of the discovery deposition which truly contain confidential information should be filed under seal. Accordingly, opposer is allowed thirty days from the date of this decision in which to submit a copy of the relevant non-confidential portions of the discovery deposition which will be part of the public record.

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"Cosmopolitan," "Entertainment Weekly," "Sports Illustrated," "Newsweek" and "Parade"; free standing inserts; television commercials broadcast nationwide; and sponsorship of the 1999 New York City Marathon. Opposer's SMART START cereal has also received free publicity through mentions in a variety of newspaper articles appearing in papers published throughout the United States.

Applicant is an individual who developed her SUPER START cereal as a result of her attempts to find a cereal that was nutritious. The product was developed over a ten-year period, as she would combine different cereal products she found in the grocery store to create a mix that was a satisfactory combination of taste and balanced nutrition. In approximately 1998 she started thinking about a name for this cereal. Although she has not begun advertising or selling the cereal, she envisions that it will be sold in grocery stores, and that it will be marketed to the general public, to be eaten by people from age three to "as old as you want to go." Deposition, p. 29.

Priority is not in issue because opposer has made of record status and title copies of its registrations for SMART START for "cereal-derived food product to be used as breakfast food, cereal bar, snack food or ingredient for making food" and for "providing general information over a global computer network in the fields of news,

entertainment, recipes and nutrition."⁴ **King Candy Company v. Eunice King's Kitchen, Inc.**, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Moreover, opposer has established that it began using its mark on its cereal products long prior to the filing date of applicant's intent-to-use application, the earliest date on which applicant is entitled to rely.

This brings us to the issue of likelihood of confusion. Our determination of this issue is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Turning first to the goods, we find that they are legally identical, a point which applicant does not contest. As a result, they must be deemed to travel in the same channels of trade and be sold to the same classes of consumers. In fact, the evidence shows that opposer's cereal products are sold, inter alia, in grocery stores, and that applicant intends to sell its cereal in grocery stores, too. The evidence also shows that opposer's goods are sold to the public at large, primarily to adults, and that

⁴ Registration No. 2,332,452, issued March 21, 2000. Although this registration was not pleaded in the notice of opposition, having issued after the notice of opposition was filed, it was made of record during opposer's testimony period, and applicant did not object to it. Accordingly, we have treated the pleadings to have been amended to include this registration. See Fed. R. Civ. P. 15(b). In any event, whether or not this registration is deemed to form part of the pleading has no effect on the outcome of this proceeding.

applicant's goods are also intended to be sold to the general public. Further, although applicant has described her goods as being for everyone over the age of three, the cereal is a low sugar item that will appeal more to adults than to children.

We turn then to a consideration of the marks, keeping in mind that when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines. **Century 21 Real Estate Corp. v. Century Life of America**, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). We also keep in mind that the goods in question, cereal, is a relatively inexpensive product that is generally purchased without a great deal of care. In this connection, we note applicant's argument that nationally branded products such as opposer's are typically sold at a higher price "than store brands or generic brands." Applicant's brief, p. 9. However, there is no evidence to support this argument. Applicant cannot rely on the statements made in the newspaper article applicant submitted, as such statements would be hearsay. More importantly, there is nothing to show that applicant's cereal would be sold as a store brand or a "generic brand." On the contrary, applicant is not a store, and her identification of goods in no way would limit her cereal to being sold as a "store brand or generic brand."

Opposer's mark is SMART START; applicant's mark is SUPER START. Obviously, both marks consist of two words, with the second word, SMART, being identical. The first words are similar, in that both begin with the letter "S", and contain five letters. Applicant argues that the common word START should be given less weight because it is suggestive, and points to various third-party uses and registrations in support of this contention. A closer look at the third-party marks reveals, however, that EARLY STARTS is registered for prepared breakfast sandwiches; GREAT STARTS is registered for frozen prepared breakfast meals consisting primarily of meat, eggs, cheese, meat extracts, potatoes or other dairy products, or of pancakes or French toast, or burritos or breakfast sandwiches; and QUIKSTART is registered for restaurant services, namely complimentary breakfasts served at motel, hotel, lodge or inn facilities.⁵ Only one registration, for HEALTHY START, is for cereal, and it is for soy-based processed cereals.⁶ Moreover, on this record, we cannot say that this mark is widely known to the

⁵ Applicant also submitted evidence of a third-party application, for GOOD START for "instant breakfast, namely meal replacement beverage mix." Not only does the record show that this application was abandoned in 1990, but third-party applications are evidence only of the fact that they were filed; they have no other probative value.

⁶ At the time applicant submitted the copy of this record, the registration had not yet issued, and applicant referred to it as an application in its brief. However, Office records reveal that the mark was registered on February 19, 2002, and we have therefore treated it as a registration.

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public. Applicant, who testified that she had carefully studied various cereal products for ten years as she was developing her product, admitted during discovery that she was not aware of any company other than opposer that uses START as a source identifier for breakfast cereals, Request for Admission No. 7, and that she was unaware of any third party that uses the word START, alone or together with other words or elements, as a source identifier for breakfast cereals. Response to Interrogatory No. 24.

More importantly, opposer has used its SMART START mark for cereal products for over twenty years, and has made extensive sales and expended substantial sums in promoting its SMART START cereal products. Thus, even if we consider the word START in opposer's mark, or even the mark SMART START as a whole, to have had a suggestive connotation when it was first adopted, at this point we must regard SMART START as a strong mark, and that the ambit of protection to be accorded this mark extends to the use of SUPER START for identical goods.⁷

Although there are clearly specific differences in the marks SMART START and SUPER START, given the overall similarities in appearance, and the fact that the marks are

⁷ However, we do not find the mark to be famous. Opposer has not put its sales figures in any kind of context, such that we can see how the sales of SMART START cereal rank with those of other cereals. Even opposer has not asserted that the mark is famous.

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used on identical goods which are inexpensive, off-the shelf purchases for which the marks are not likely to be the subject of close scrutiny, we find that there is a likelihood that the public will be confused by the use of SUPER SMART for cereal.

Applicant has pointed to the fact that at the time opposer's SMART START mark was registered in 1989 there was already a registration (owned by another entity) for SUPERSTART breakfast cereal on the register, and that no likelihood of confusion between opposer's SMART START mark and that SUPERSTART mark was found. Because the files of each of the registrations is not of record, we do not know why the Examining Attorney chose to allow opposer's mark to register despite the existence of the third-party registration. For example, there may have been a consent agreement. In any case, we are not bound by an Examining Attorney's determination. If that were the case, there would be no point in having an opposition procedure, since obviously in the present case there was a determination by the Examining Attorney that the present applicant's mark is not likely to cause confusion with opposer's mark.⁸

⁸ It is not clear from the file whether the Examining Attorney was even aware of opposer's mark when he allowed applicant's application. The "search strategy" in the file does not show that opposer's mark was ever viewed. Something similar could also have occurred in the prior situation.

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Applicant has also submitted evidence of a number of third-party registrations for SUPER START or SUPERSTART, many for goods very different from cereal products, such as for motor starters, fertilizer and batteries. It is not entirely clear to us what impact applicant believes these registrations have on the subject proceeding. To the extent that these registrations have been submitted to show that SUPER START has a suggestive significance, or is entitled to a limited scope of protection, that would relate to the extent that applicant could stop others from using similar marks. Such conclusions do not have an impact on our decision as to whether opposer's mark, which is SMART START, should have a limited scope of protection.

We also address applicant's argument that opposer's mark should be viewed as KELLOGG'S SMART START, rather than SMART START per se. This position is incorrect. The registration opposer has submitted is for SMART START, not KELLOGG'S SMART START, and the determination of likelihood of confusion must be made on the basis of the mark shown in that registration. See Section 2(d) of the Trademark Act, which prohibits the registration of any mark which is likely to cause confusion with a "mark registered in the Patent and Trademark Office." SMART START is the mark which is registered by opposer. Although opposer may use its house

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mark KELLOGG'S as well as the SMART START mark with its cereal products, it is not required to do so.

Decision: The opposition is sustained. Opposer is allowed thirty days in which to submit a redacted copy of the Waugh discovery deposition, as indicated in footnote 2.