

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing:
January 11, 2007

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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Champion Performance Products, Inc.
v.
Sara Lee Global Finance, LLC

Cancellation No. 92040440

Randall B. Bateman of Bateman IP Law Group for Champion
Performance Products, Inc.

Joshua S. Bish of Reed Smith, LLP for Sara Lee Global
Finance LLC.

Before Hairston, Kuhlke and Mermelstein, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

A petition has been filed by Champion Performance
Products, Inc. to cancel a registration owned by Sara Lee
Global Finance, LLC for the mark CHAMPION LYTE for "sports
drinks, sugar-free sports drinks, non-carbonated soft drinks
and sugar-free non-carbonated soft drinks."¹

¹ Registration No. 2460374, issued June 12, 2001 from an
application filed August 30, 1999, claiming first use and first
use in commerce on May 7, 2000. The term "LITE" (sic) has been
disclaimed apart from the mark as shown.

As grounds for cancellation, petitioner asserts that since September 1987 it has continuously used the mark CHAMPION NUTRITION in connection with dietary and nutritional supplements; that it is the owner of application Serial Nos. 76336173 and 75865995 for the marks CHAMPION NUTRITION (in standard character form) and CHAMPION NUTRITION (stylized), respectively, both for "dietary and nutritional supplements"; that by virtue of assignment, it also is the owner of a registration for the mark CHAMPION PROFLEX for "dietary food supplements, namely, vitamins and mineral supplements"²; that the date of first use of the CHAMPION PROFLEX mark is well prior to respondent's date of first use of the CHAMPION LYTE mark; and that respondent's CHAMPION LYTE mark, when used on sports drinks, so resembles petitioner's CHAMPION NUTRITION and CHAMPION PROFLEX marks, as to be likely to cause confusion.

Respondent, in its answer to the petition to cancel, has denied the essential allegations thereof.

The record consists of the pleadings and the file of respondent's subject registration. In addition, petitioner submitted the testimony, with exhibits, of its president and CEO Michael Zumpano, and an employee Paul Klinger.

² Registration No. 1963221, issued March 19, 1996 from an application filed March 31, 1995, claiming first use and first use in commerce on August 8, 1994; renewed.

Respondent submitted the testimony, with exhibits, of its vice-president Larry B. French, and assistant marketing manager Amber Lewis; and a notice of reliance on many of its registrations for the mark CHAMPION for clothing.

Both parties filed briefs; only petitioner's counsel appeared at the oral hearing.

Michael Zumpano formed petitioner as Champion Foods in 1983 to develop and sell dietary and nutritional supplements. Champion Foods first used the mark CHAMPION NUTRITION on dietary and nutritional supplements in the form of bars, capsules, tablets and drinks in 1987. In 1988 Champion Foods incorporated and changed its name to Champion Performance Products, Inc. Petitioner currently uses the CHAMPION NUTRITON mark on dietary and nutritional supplements in the form of bars, drinks, and capsules. Petitioner spends approximately \$1 million each year in advertising and promoting its products. Petitioner's products have been advertised on the ESPN television network, and in major sports and fitness magazines. Among the athletes who promote petitioner's products are Lance Armstrong, Mark McGuire and Randy Johnson. Petitioner's products are sold at health food stores, gyms, health clubs, bicycle shops, grocery stores, kiosks, and at websites.

Respondent is a manufacturer of clothing, including athletic wear, and food. In 1989 respondent obtained the

business of what is now its Champion Athleticwear division. At that time, respondent also acquired a number of CHAMPION marks and it currently owns over twenty-five federal registrations for CHAMPION marks for clothing and related goods. The mark CHAMPION was first used on athletic clothing as early as the 1960's. Around April 3, 2003 respondent acquired the registration which is the subject of this proceeding as part of a settlement between it and ChampionLyte, Inc. ChampionLyte, Inc. first used the CHAMPION LYTE mark in connection with the goods identified in the registration at least as early as May 7, 2000. Respondent sells its CHAMPION LYTE products at convenience stores and gyms.

Priority

We turn first to the issue of priority. During the testimony of its witness Mr. Zumpano, petitioner introduced a certified status and title copy of its Registration No. 1963221 for the mark CHAMPION PROFLEX for "dietary food supplements, namely, vitamins and mineral supplements." This registration is prima facie evidence of the use of the mark shown therein for the goods identified in the registration since the filing date of the application which matured into the registration. *Andrea Radio Corp. v. Premium Import Co., Inc.*, 191 USPQ 232 (TTAB 1976).

Further, with respect to petitioner's use of the mark CHAMPION NUTRITION (in standard character form), Mr. Zumpano testified as follows:

Q. And when did you first use the Champion Nutrition mark?

A. We used this about the middle of 1987.

...

Q. How broadly is the Champion Nutrition trademark used on products?

A. It's been used on every product that we sell, and it's displayed on the principal display panel, and it always has been since we began using it.

Q. And what type of products would it be used on?

A. Bars, nutrition drinks, dietary drinks, capsules, ready-to-drink beverages, although not currently, sports drinks.

(Zumpano dep. at 15 and 31).

In addition, Mr. Zumpano identified a label of the type first used on its products, which bears the mark CHAMPION NUTRITION. (Exhibit 10).

Oral testimony, even of a single witness, if "sufficiently probative," can suffice to prove priority. *Powermatics, Inc. v. Global Roofing Products Co., Inc.*, 341 F.2d 127, 144 USPQ 430 (CCPA 1965). In this case, Mr. Zumpano's testimony regarding petitioner's first use of the mark CHAMPION NUTRITION was not characterized by contradictions, inconsistencies or indefiniteness. Also,

Mr. Zumpano's testimony was accompanied by a documentary exhibit. We conclude, therefore, that petitioner has presented competent evidence regarding its use of the mark CHAMPION NUTRITION on dietary and nutritional supplements at least as early as 1987.

The registration sought to be canceled sets forth a date of first use anywhere and a date of first use in commerce of May 7, 2000, and respondent has not attempted to prove an earlier date of first use. Rather, respondent challenges petitioner's claim of priority, arguing that it has prior rights (since the 1960's) in the mark CHAMPION for athletic clothing, and that dietary and nutritional supplements are within the natural expansion of respondent's athletic clothing business. However, the evidence offered by respondent, namely copies of its registrations for the mark CHAMPION for various athletic clothing, falls far short of the type of evidentiary showing which would be necessary to establish priority of use under the doctrine of natural expansion. See *Mason Engineering and Design Corp. v. Mateson Chemical Corp.*, 225 USPQ 956 (1985). In other words, respondent has failed to prove that dietary and nutritional supplements, on the one hand, and athletic clothing, on the other hand, are of such a nature and character that purchasers generally expect these goods to emanate from the same source.

Thus, the earliest date of first use on which respondent can rely is May 7, 2000. This date is subsequent to both the filing date of the application which resulted in petitioner's registration for the CHAMPION PROFLEX mark and petitioner's proven date of first use for the CHAMPION NUTRITION mark. Under the circumstances, we find that priority rests with petitioner.³

Likelihood of confusion

Our determination of the issue of likelihood of confusion 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). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

³ In view of our finding in this regard, we need not address respondent's argument that petitioner did not establish priority in the CHAMPION NUTRITION mark for "sports drinks" in particular. In other words, it was not necessary that petitioner also prove priority with respect to these goods.

At the outset, we note that petitioner, in its brief, has directed most of its discussion to the issue of likelihood of confusion between its CHAMPION NUTRITION mark for dietary and nutritional supplements and respondent's CHAMPION LYTE mark for sports drinks.⁴ Thus, we also will focus on these marks and goods. Petitioner argues in its brief that its CHAMPION NUTRITION mark is famous within the dietary and nutritional supplements industry. The fame of a plaintiff's mark, when fame is shown on the record, is an important factor in the likelihood of confusion determination. However, we find that the evidence submitted by petitioner is not sufficient to demonstrate that its mark is famous. We recognize that petitioner has used its CHAMPION NUTRITION mark for approximately 20 years, and it spends approximately \$1 million annually on advertising. In addition, the record shows that petitioner's products are promoted by several well known athletes. However, there is no evidence in the record as to the size of the dietary and nutritional supplements market or as to petitioner's share or prominence in that market. Indeed, petitioner offered no information with respect to its sales. Also, petitioner's advertising figures are not of the degree that would

⁴ We note that if likelihood of confusion is established as to any one of the goods identified in respondent's registration, the petition to cancel will be granted as to all the goods in the registration. See *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981).

normally establish fame. Thus, we cannot conclude on this record that petitioner's mark is famous.

We turn then to the goods of the parties. It is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

To establish a relationship between petitioner's dietary and nutritional supplements and respondent's sports drinks, petitioner submitted copies of twenty-four use-based third-party registrations that cover dietary and nutritional supplements, on the one hand, and sports drinks, on the other hand. See In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) [Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is

familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"]. See also *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

In addition, we note that the involved goods serve somewhat similar purposes, namely, to replenish or provide nutrients to the body.

Further, in the absence of any limitations in the identification of goods in respondent's registration, we must assume that respondent's goods travel in all the normal channels of trade for goods of this type to all the usual purchasers. Thus, respondent's sports drinks and petitioner's dietary and nutrition supplements may be offered in some of the same channels of trade (e.g., grocery stores and health food stores) to the same class of purchasers, namely, ordinary consumers. Indeed, the record shows that both parties sell their respective goods at gyms.

Under the facts of this case, we conclude that petitioner's dietary and nutritional supplements and respondent's sports drinks are related goods.

With respect to the marks, we must determine whether petitioner's mark and respondent's mark, when compared in

their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Although the marks 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). Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their commercial impression that confusion as to the source of the goods and/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).

In comparing the marks, we first note that each of the involved marks is dominated by the identical term CHAMPION. The terms NUTRITION and LYTE, as evidenced by the disclaimers thereof, are descriptive of petitioner's and respondent's goods, respectively. Although the marks are dominated by the identical term, we must, of course, consider the marks in their entireties. In doing so, we

find that the marks are similar in sound, appearance and meaning.

Further, when petitioner's mark and respondent's mark are considered in their entirety, the marks engender sufficiently similar overall commercial impressions so that, when related goods are offered thereunder, confusion would be likely to occur among consumers. Consumers familiar with petitioner's CHAMPION NUTRITION dietary and nutritional supplements may well view CHAMPION LYTE as identifying a new line of products originating from petitioner.

Lastly, while we have considered the evidence with respect to alleged instances of actual confusion, we do not find it to be entitled to much weight. For example, one of the instances cited by petitioner involves a March 2004 promotional flyer of Nature's Best, a distributor of both petitioner's and respondent's goods. Petitioner's witness Mr. Zumpano testified that petitioner's products typically appear in the Nature's Best flyers under the heading "Champion," and that the products of respondent's predecessor, Champion Lyte, typically appeared under the heading "Champion Lyte." According to Mr. Zumpano, petitioner's products did not appear in the March 2004 flyer. Yet, in this same flyer, the products of respondent's predecessor appeared under the heading "Champion" instead of "Champion Lyte." Apart from the fact

that there is no testimony from the originator of the flyer as to why this "mix-up" occurred, this is not particularly relevant inasmuch CHAMPION is not the mark relied on by petitioner herein, and there is no indication in the record that any consumers were actually confused due to the flyer. Suffice it to say that the other alleged instances of actual confusion are inadmissible hearsay and/or vague.

Although we have given little or no weight to the instances of alleged actual confusion, we nevertheless believe that confusion is likely. The test under Section 2(d) is whether confusion is likely, and not whether confusion has or has not occurred. In consideration of all the evidence of record and particularly in view of the similarities between the marks and related nature of the goods at issue, we conclude that consumers aware of petitioner's CHAMPION NUTRITION dietary and nutritional supplements would be likely to believe, upon encountering respondent's CHAMPION LYTE sports drinks, that the goods originate from or are somehow associated with or sponsored by the same source.

Decision: The petition to cancel is granted and the registration will be canceled in due course.