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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Dubliner, Inc.
v.
The Irish Dairy Board Co-Operative Limited

Opposition No. 91164315
Cancellation No. 92044189

Joseph D. Lewis of Barnes & Thornburg, LLP for Dubliner,
Inc.

Anthony R. Masiello of Holland & Knight LLP for The Irish
Dairy Board Co-Operative Limited.

Before Rogers, Drost, and Mermelstein, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On February, 15, 2005, Dubliner, Inc. filed an
opposition to the registration of Application Serial No.
75922820 for the mark shown below.



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The application identifies the words in the mark as DUBLINER IRISH CHEESE PUBLIC BAR. The application also indicates that applicant has disclaimed the words "Irish Cheese" and "Public Bar" and that the stippling in the drawing is for shading purposes only. The goods are identified as "cheese" in Class 29 and the application's date of first use anywhere is listed as April 30, 1996, and the date of first use in commerce is listed as June 1, 1998. The application, filed February 17, 2000, is owned by The Irish Dairy Board Co-Operative Limited, an Irish corporation.

On February 14, 2005, Dubliner, Inc. also filed a petition to cancel a registration (No. 2,319,632 issued February 15, 2000) also owned by The Irish Dairy Board Co-Operative Limited. The mark in the registration is for the words DUBLINER IRISH CHEESE PUBLIC BAR KERRYGOLD in the design shown below:



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The goods in the registration are identified as "cheese" in Class 29 and the registration contains a disclaimer of the words "Irish Cheese" and "Public Bar." The underlying application was filed on September 20, 1995, as an intent to use application and the date of first use anywhere is listed as April 30, 1996, and the first use in commerce date is June 1, 1998. An affidavit under Section 8 of the Trademark Act has been accepted.

Dubliner, Inc. asserts ownership of two registrations. Registration No. 1,179,613 issued November 24, 1981 for the mark THE DUBLINER AN IRISH PUB in the design shown below:



The services in the registration are identified as "restaurant and bar services" in Class 42 and the words "Irish Pub" are disclaimed. The underlying application was filed on February 19, 1980, and the dates of first use anywhere and in commerce are listed as January 1975. A first renewal of the registration was filed in 2001.

The second registration (No. 2,724,229) is for the word DUBLINER in typed or standard character form and lists the following goods, services, and dates of first use:

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Apparel, namely, t-shirts, sweatshirts, jackets and hats in Class 25

First use anywhere/in commerce: 1975

Beer and ale in Class 32

First use anywhere/in commerce: 1991

Restaurant and bar services in Class 43^[1]

First use anywhere/in commerce: March 8, 1974

The registration issued June 10, 2003, and it is based on an underlying application that was filed on April 30, 2002.

Inasmuch as Dubliner, Inc. is petitioner in one proceeding and opposer in the other proceeding, we will refer to Dubliner as plaintiff. Similarly, we will refer to The Irish Dairy Board Co-Operative Limited, which is both the respondent in the cancellation proceeding and the applicant in the opposition proceeding, as defendant.

In its notice of opposition, plaintiff alleges likelihood of confusion between its marks and the marks in defendant's application and registration. In addition, plaintiff alleges that defendant "has not used the mark shown in Respondent's Registration No. 2319632, since at least as early as January 1, 2002." Petition to Cancel at 3. Defendant has denied the salient allegations of plaintiff's notice and petition.

¹ The International Classification of "restaurant services" has changed since plaintiff's first application was filed.

The Record

The record consists of the files of the opposition and cancellation proceedings; plaintiff's notices of reliance on status and title copies of its registrations, third-party registrations, defendant's response to plaintiff's requests for admissions, plaintiff's response to defendant's interrogatories 1 and 10, and plaintiff's responses to defendant's requests for admissions; and defendant's notice of reliance on printed publications and plaintiff's answers to interrogatories and admission requests.

Evidentiary Objection

Defendant submitted a notice of reliance on plaintiff's response to three of defendant's interrogatories. The interrogatories and responses are set out below.

INTERROGATORY NO. 2

Provide the complete address of each restaurant, bar, or other service establishment at which Opposer or any person authorized by Opposer now provides or ever has provided any service under the service mark DUBLINER in the United States.

Answer

4 F Street, N.W., Washington DC 20001

INTERROGATORY NO. 4

Provide the names, addresses and other contact information for the top five (by sales volume) distributors, retailers and other sellers of Opposer's Goods.

Answer

None.

INTERROGATORY NO. 13

To the extent of Opposer's knowledge, identify each person or entity, including licensees and third parties, that uses or has used in the United States a trademark or service mark that consists of or includes

the designation DUBLINER in connection with the marketing of any goods or services, and describe Opposer's relationship to such persons and entities.

Answer

Opposer is aware of a bar in Philadelphia that used the mark DUBLINER. Opposer has no official relationship with this organization.

In response, plaintiff has submitted copies of its responses to Interrogatories 1 and 10 because they are "needed to clarify the answers relied upon by Applicant and to help avoid any improper inference from the responses relied upon by Applicant, that the Opposer itself (as opposed to other retailers, distributors or sellers) did not use the mark continuously since use began, on the range of goods and services identified in response to interrogatory no. 1." Opposer's notice of reliance at 1.

INTERROGATORY NO. 1

Identify each product and service which Opposer or its agents have marketed under or by reference to the mark DUBLINER and provide dates indicating the periods of time during which such products and services were offered under or by reference to the mark DUBLINER.

Answer

Beer and ale, food products, beverages, restaurant services, bar services, adult and juvenile apparel, glassware, golf balls and souvenirs. Opposer has marketed its services and food and beverage products with reference to the mark DUBLINER since 1974. Opposer's apparel products and souvenirs were marketed at least as early as 1975, with various products added to the line at a later date. A DUBLINER brand of

beer/ale has been available since at least as early as 1991.

INTERROGATORY NO. 10

With respect to each product and service identified in Interrogatory 1, state the dates of each period of time during which Opposer ceased commercial use of the trademark DUBLINER for more than six months, and describe the circumstances under which commercial use of the trademark DUBLINER ceased, was suspended and/or resumed.

Answer

None.

Trademark Rule 120(j)(5), 37 CFR 2.120(j)(5), provides:

An answer to an interrogatory, or an admission to a request for admission, may be submitted and made part of the record by only the inquiring party except that, if fewer than all of the answers to interrogatories, or fewer than all of the admissions, are offered in evidence by the inquiring party, the responding party may introduce under a notice of reliance any other answers to interrogatories, or any other admissions, which should in fairness be considered so as to make not misleading what was offered by the inquiring party. The notice of reliance filed by the responding party must be supported by a written statement explaining why the responding party needs to rely upon each of the additional discovery responses listed in the responding party's notice, failing which the Board, in its discretion, may refuse to consider the additional responses.

Plaintiff argues that "having relied on three of the Opposer's answers to interrogatories, Applicant must tolerate the Opposer's reliance on additional answers which should, in fairness, be considered so as to make not misleading what was offered by the Applicant." Reply Brief at 7. Furthermore, "Applicant appeared to be attempting to raise the inference that the Opposer's goods were never sold. Reliance on Interrogatories 1 and 10 counteracted

such an inference, by clarifying that Opposer itself, as opposed to third-party resellers, has sold the goods." *Id.*

Despite plaintiff's arguments, we cannot conclude that plaintiff's submission of Interrogatory Nos. 1 and 10 was necessary to avoid having defendant's submission be misleading. First, defendant is not arguing that plaintiff has not used its mark on the identified goods or services and it certainly has not petitioned to cancel plaintiff's registrations. Second, defendant's interrogatories were clearly directed to determining where plaintiff's establishment(s) were located and whether any other entities including third parties and licensees were using the same mark. Interrogatory Nos. 1 and 10, dealing with the dates of use of plaintiff's goods and services, are not needed to clarify interrogatories 2, 4, and 5. Far from clarifying the matter, they raise additional questions about common law use of the mark on goods that are not identified in the registrations. Therefore, we will not consider plaintiff's submission of its own answers to interrogatories.²

Priority

Priority is not an issue in the opposition proceeding because plaintiff is relying on two registrations for the mark DUBLINER and THE DUBLINER AN IRISH PUB and design. See

² We add that as our subsequent discussion on the merits reveals, our determination would not have changed even if we had considered plaintiff's responses to the interrogatories.

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King Candy Co. v. Eunice King's Kitchen, 496 F.2d 1400, 182
USPQ 108, 110 (CCPA 1974).

In the cancellation proceeding, because both parties
have registrations, priority is determined differently.

Of course, petitioner or respondent may rely on its
registration for the limited purpose of proving that
its mark was in use as of the application filing date.
Thus, a petitioner -- whose application filing date was
earlier than respondent's application filing date --
could take its chances and elect to make of record
simply a copy(s) of its registration. Trademark Rules
2.122(d)(1) and 2.122(d)(2). By so doing,
petitioner's proven first use date of its mark would
then be the filing date of the application. However,
if respondent thereafter proved an actual first use
date pre-dating petitioner's filing date, the issue of
priority, and hence petitioner's Section 2(d) claim,
would be resolved in favor of respondent.

Brewski Beer Co. v. Brewski Brothers Inc., 47 USPQ2d 1281,
1284 (TTAB 1998).

Inasmuch as neither party has submitted evidence of a
date of first use,³ priority will be determined by the
underlying applications' respective filing dates.

Defendant's application for its registration (No. 2,319,632)

³ We have not considered plaintiff's reliance on its own answers
to defendant's interrogatories to establish a date of first use.
We note that "oral testimony, if sufficiently probative, is
normally satisfactory to establish priority of use in a trademark
proceeding." *Powermatics, Inc. v. Globe Roofing Products Co.*,
341 F.2d 127, 144 USPQ 430, 432 (CCPA 1965) (emphasis added)
However, such testimony should "not be characterized by
contradictions, inconsistencies and indefiniteness but should
carry with it conviction of its accuracy and applicability."
B.R. Baker Co. v. Lebow Bros., 150 F.2d 580, 66 USPQ 232, 236
(CCPA 1945). Plaintiff's discovery responses are not oral
testimony, and the conclusory statements in its responses, even
if we considered them, would not meet this standard.

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was filed on September 20, 1995. Plaintiff's first registration (No. 1,179,613) is based on an application filed on February 19, 1980. Plaintiff's second registration (No. 2,724,229) is based on an application filed April 30, 2002. Clearly, plaintiff has priority because of its '613 registration that was based on an application filed on February 19, 1980, while the priority date of defendant's registration is September 20, 1995.

Thus, we will consider both of plaintiff's registrations when addressing defendant's application and plaintiff's first registration when addressing defendant's registration. However, as our discussion of defendant's application indicates, the outcome would not be different even if we considered both registrations in assessing the likelihood of confusion issue involving defendant's registration.

Discussion

There are two questions that we must resolve in this case. The broader question concerns the likelihood of confusion between plaintiff's and defendant's marks when used on the identified goods and services. The narrower question concerns whether defendant has abandoned its registration (No. 2,319,632) through non-use. We will address the latter issue first.

Abandonment

Plaintiff argues that it "requested that Applicant admit that it has not used the mark in the form depicted in Reg. No. 2319632 during the years 2005, 2004, and 2003. Applicant did not deny these Requests for Admission. Instead, Applicant presented its legal position and attempted to avert the legal effect of the non-use by denying that 'it has abandoned use of the mark as registered.'" Brief at 14 (citation to record omitted).

Defendant responds by arguing that plaintiff's "entire claim of abandonment is built upon the following statement of Applicant: 'Applicant denies that it has abandoned use of the mark as registered. Applicant has made continuous use of the mark substantially in the form depicted in the registration....' There is no reasonable way in which Applicant's statement can be interpreted as such an admission." Brief at 23.

In response, plaintiff maintains (Reply Brief at 7) that:

Applicant argues that it did not admit that it had abandoned its mark. However, Opposer has not claimed that Applicant made an admission of the legal conclusion of abandonment. The connection between the admitted fact of "non-use" and the legal conclusion of "abandonment" comes from the Trademark Act ... Therefore, based on the admission of non-use, Opposer has established a *prima facie* case of abandonment.

Plaintiff points out that, in its response to an earlier request for admission, defendant had simply denied

that the mark had not been used during 2001. Brief at 14 n.6. But for the years 2003-2005, defendant asserted that it had not abandoned its mark and that it "has made continuous use of the mark substantially in the form depicted" in the registration.

We agree with plaintiff that as the party seeking cancellation, it must rebut the presumption of a registration's validity by a preponderance of the evidence. *West Florida Seafood Inc. v. Jet Restaurants Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1662 (Fed. Cir. 1994); *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989); *Martahus v. Video Duplication Services Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1850 (Fed. Cir. 1993). The "challenger's burden of proof in both opposition and cancellation proceedings is a preponderance of the evidence." *Eastman Kodak Co. v. Bell & Howell Document Management Products Co.*, 994 F.2d 1569, 26 USPQ2d 1912, 1918 (Fed. Cir. 1993).

However, defendant's answer to plaintiff's request for admission by itself does not make out a prima facie case of abandonment. Even if we read the admission broadly, it at best suggests that there might have been some change in defendant's mark. In and of itself, that does not mean that defendant's use of the mark has been discontinued. "A mark can be modified or changed without abandonment or loss of

priority if done in such a way that the continuing common element of the mark retains its impact and symbolizes a continuing commercial impression." *McCarthy on Trademarks and Unfair Competition* (4th ed. June 2007) § 17.26. See also *Van Dyne-Crotty Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 17 USPQ2d 1866, 1869 (Fed. Cir. 1991) (Our "inquiry must focus on both marks in their entirety to determine whether each conveys the same commercial impression"). Inasmuch as there is no other evidence on any differences in the marks or that otherwise supports plaintiff's argument that defendant has abandoned its mark, we deny plaintiff's petition to cancel on the ground of abandonment.

Likelihood of Confusion

The remaining question concerns whether there is a likelihood of confusion. In likelihood of confusion cases, we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003) and *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

We will begin by comparing the goods and services in the application and the registrations to determine if they are related. Defendant's goods in both the application and registration are simply identified as "cheese." Plaintiff's

goods and services are identified as restaurant and bar services as well as beer, ale, t-shirts, sweatshirts, jackets, and hats.

The first issue we must consider is whether restaurant and bar services are related to cheese. In cases involving restaurant services, the Court of Customs and Patent Appeals has held that: "To establish likelihood of confusion a party must show *something more* than that similar or even identical marks are used for food products and for restaurant services." *Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982) (emphasis added). The Federal Circuit has emphasized that restaurant services and beer are not related simply because there is evidence that restaurants also sell private label beer. *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) ("While the evidence produced by the examining attorney shows that some restaurants brew or serve their own private label beer, that evidence does not support the Board's conclusion that consumers are likely to conclude that beer and restaurant services with similar marks emanate from the same source"). The only evidence that might demonstrate a relationship between cheese and restaurant services consists of the wording in the marks themselves (i.e., "Irish Cheese" and "Public Bar") and third-party registrations, each showing that a single entity

uses a common mark for cheese and restaurant services. In *Coors Brewing*, the Federal Circuit did not find that the third-party registrations were sufficient to support a conclusion that beer and restaurant services are related.

It is not unusual for restaurants to be identified with particular food or beverage items that are produced by the same entity that provides the restaurant services or are sold by the same entity under a private label. Thus, for example, some restaurants sell their own private label ice cream, while others sell their own private label coffee. But that does not mean that any time a brand of ice cream or coffee has a trademark that is similar to the registered trademark of some restaurant, consumers are likely to assume that the coffee or ice cream is associated with that restaurant.

Id. at 1064.

The Court has cautioned against setting the *Jacobs* requirement for "something more" too low. "[I]n light of the very large number of restaurants in this country and the great variety in the names associated with those restaurants, the potential consequences of adopting such a principle would be to limit dramatically the number of marks that could be used by producers of foods and beverages."

Id. at 1064. Here, plaintiff's submitted third-party registrations, which often include a wide variety of food items, would result in almost all food items being related to restaurant services and thus virtually overrule the *Jacobs* requirement.

Also, the wording "Public Bar" and the design that could be considered a pub is simply not enough to provide

the "something more" to show that the cheese and restaurant services are related. We must consider the marks that defendant has actually applied to register. In the marks, the words "Public Bar" are very small and difficult to read. It is unlikely that purchasers will study the mark so closely that these words in small type and the rather nondescript drawing of a building will cause consumers to suddenly believe that cheese and restaurant and bar services are related. Considering defendant's marks as a whole, the words "Public Bar" appear to invoke an Irish street scene, rather than to indicate an association between defendant's goods and plaintiff's restaurant and bar services. Therefore, we conclude that plaintiff has failed to show that restaurant and bar services and cheese are related.

Regarding plaintiff's clothing and beer and ale, it has attempted to show that these goods are related to defendant's cheese by also submitting copies of trademark registrations.⁴ Concerning the relationship between cheese

⁴ We have not considered those examples that involve expired registrations, pending or abandoned applications, or additional marks from the same entity. *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] canceled registration does not provide constructive notice of anything") and *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002) ("While applicant also submitted a copy of a third-party application ..., such has no probative value other than as evidence that the application was filed"). Furthermore, we give less weight to those registrations that are based on registrations that include a wide variety of goods and services. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

and beer, plaintiff specifically points to three registrations. Brief at 9. Two of the registrations (the third registration is expired) include a common mark that is registered for goods that include beer and cheese. The first registration (No. 2,516,284) is for the mark CHIMAY PERES TRAPPIST and design, which is translated "Trappist Monks" and the owner is identified as Abbaye de Scourmont. The second (No. 2,823,640) is owned by a Swedish company, although it alleges use in the United States, and it includes a wide variety of food items including frozen sandwiches with reindeer meat, non-medicated lozenges, and tapioca. While the registrations may suggest that beer and cheese are related, this minimal evidence does not persuade us that consumers are likely to believe that these common, yet very different, items would come from a common source.

Regarding cheese and clothing items, plaintiff has submitted several registrations that show that these goods are at least associated in some way. See, e.g.. Registration Nos. 2,274,822 (YOU'LL LOVE IT, WE SWEAR for, inter alia, cheese, horseradish and cocktail sauce, T-Shirts, and aprons); 2,320,404 (BLASER'S PREMIUM CHEESE for, inter alia, cheese, T-Shirts, hats, aprons, ceramic plates, and ceramic figurines); 1,994,942 (FOX'S for, inter alia, cheese, processed mushrooms, hats, caps, aprons, T-shirts, pizza dough, and hoagie sandwiches); and 1,559,965 (TREE OF

LIFE for, inter alia, T-shirts, aprons, cheese, raisins, honey, and fruit and vegetable juices). We find that this evidence provides a stronger suggestion that cheese and T-shirts are related. *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001).

The next question we must address is whether the marks of the parties, in their entireties, are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). We take judicial notice of the fact that "Dublin" is the "capital and largest city of Ireland" and that the suffix "-er" designates a "person who is born in or lives in a place." *The American Heritage Student Dictionary* (1998).⁵ As such, the term DUBLINER refers to the city of Dublin in Ireland and its inhabitants. We note that defendant is an Irish corporation and that it has disclaimed the term "Irish cheese" in its marks. Also, plaintiff's '613 registration contains the disclaimed terms "Irish pub." Thus, the commercial impression of both parties' marks suggest that the goods or services are associated with Ireland and that

⁵ We take judicial notice of these definitions. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). We decline plaintiff's request that we take judicial notice that "pubs and restaurants serve cheese." Brief at 8. This fact should have been established during the trial.

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the term DUBLINER, which refers to the largest and capital city of Ireland, is not an arbitrary or fanciful term when used with the identified goods and services. It is very suggestive of Irish cheese or an Irish-style pub, beer, or ale. It certainly is not arbitrary when used on a shirt in a manner that may suggest that the shirt or the wearer of the shirt is either from Ireland or has some affinity with Dublin, Ireland. See, e.g., *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1781 (Fed. Cir. 2003) ("The words MONTANA SERIES and PHILADELPHIA CARD are displayed prominently on MBNA's promotional materials. The appeal to regional pride and loyalties is a significant feature of MBNA's method of promoting and marketing these affinity credit cards as well as of the services themselves").

Defendant has submitted evidence that the term "Dubliner" is often used in publications to refer to Irish style food or restaurants.

Logan, formerly of St. Paul, was born in London. His parents were Irish and raised him in Dublin.. A reception will follow at the Dubliner, 2162 University Av., St. Paul.
Star Tribune (Minneapolis, MN), October 27, 1996.

The Auld Dubliner Irish Pub at the Pike at Rainbow Harbor, could be open in time for the race.
Long Beach Press Telegram (Long Beach, CA) April 17, 2004.

The Dubliner was named as a toast to the owners, both former residents of the Irish capital who have settled in Texas.. The pub attracts expatriates from Ireland, Scotland and England.
Dallas Morning News, March 17, 2006.

Pub Fare - A guide to Irish bars in the Lowell Area...
The Dubliner
Lowell Sun, March 16, 2006.

In this plate titled the Dubliner, the shrimp turn up quite tasty and the steak flavorful, though chewy in spots.
The Daily News of Los Angeles, November 15, 2002.

McGurk's, Soulard's proudly Irish pub and saloon... The only weak spot I found among the main dishes was the "Dubliner," an open-faced sandwich of shaved roast beef, sautéed onions and mushrooms, and Murphy's amber barbecue sauce.
Riverfront Times (Missouri), November 13, 2002.

The Dubliner is a working-class Irish pub for the ages.
Star News (Wilmington, NC), September 1, 2005.

Pete McCarthy's the Dubliner ... Lively South Side bar with a Dublin theme where young crowds gather to drink, talk and play darts.
Chicago Tribune, March 17, 1989.

Based on the evidence that it is not unusual for the term Dubliner to be associated with restaurants, bars, and food in publications, we determine that the term DUBLINER is not a strong mark, as plaintiff argues (Brief at 11).

Instead the evidence suggests that it is a relatively weak, highly suggestive mark. Thus, while the marks are similar inasmuch as they both contain the same suggestive term "Dubliner," defendant adds a design and other words that ensure that the marks, even if we considered plaintiff's standard character mark, are not identical. Therefore, we conclude that the marks are only somewhat similar.

While "it must be presumed that both the application and the registrations encompass all goods of the type

described," this does not mean, as plaintiff argues, that the "channels of trade certainly overlap." Plaintiff's Brief at 10. These channels of trade would include the sale of cheese and beer and clothing items in certain large retail stores but this does not mean that these channels of trade are closely related. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the consumer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion arising from the use of similar marks on any goods so displayed"). See also *Irwin Auger Bit Co. v. Irwin Corp.*, 134 USPQ 37, 39 (TTAB 1962):

It is common knowledge that there are sold in many hardware, grocery, variety and drug stores an almost unlimited variety of goods including tools, housewares, electrical appliances, seed, fertilizer, furniture and toys. The public being well aware of the diversity of goods to be found in such stores is not going to believe that all of those goods could originate with a single source.

When we consider the other factors such as the channels of trade and the prospective purchasers, we find that they do not strongly support a likelihood of confusion. Accord *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983) (No

likelihood of confusion for cheese and college educational services). We do find that the purchasers of the subject goods and services are likely to overlap to some degree and that the purchasers would be ordinary purchasers who may not necessarily be sophisticated or careful purchasers. *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001) ("There is no evidence in the record from which we might conclude that wine and restaurant services, in general, are necessarily expensive, or that purchasers thereof are necessarily sophisticated and careful in making their purchasing decisions"). However, this overlap in consumers would only be the result of the fact that the purchasers would simply be ordinary consumers who would purchase common consumer items and services. As *Jacobs* and *Coors Brewing* make clear, the fact that consumers may patronize restaurants and buy consumer items does not strongly support an argument that there is a likelihood of confusion.

In this case, the common term in the marks is the term "Dubliner," which is highly suggestive of goods and restaurant services that either originate in Ireland or have an Irish theme. The marks are not identical and most of the goods and services have not been shown to be related. To the extent that there is some relationship between such items as cheese and T-shirts, we do not think that it is likely that more than a de minimis number of purchasers

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would see the word DUBLINER on a T-shirt and assume that there is an association with a cheese that is identified as DUBLINER IRISH CHEESE PUBLIC BAR and design. Certainly, plaintiff has presented no evidence that would permit us to reach that conclusion. Therefore, we hold that there is no likelihood of confusion in this case.

Decision: The opposition is dismissed and the petition to cancel is denied.