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Hearing:
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Mahir Gida Sanayi Ve Ticaret Anonim Sirketi
v.
Merter Helva Sanayi Ve Ticaret Anonim Sirketi

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Cancellation No. 92044273

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Howard Natter of Natter & Natter for Mahir Gida Sanayi Ve Ticaret Anonim Sirketi.

John S. Egbert of Egbert Law offices for Merter Helva Sanayi Ve Ticaret Anonim Sirketi.

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Before Quinn, Walsh and Bergsman, Administrative Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

Mahir Gida Sanayi Ve Ticaret Anonim Sirketi (petitioner) has petitioned to cancel a registration owned by Merter Helva Sanayi Ve Ticaret Anonim Sirketi (respondent), specifically, Registration No. 2672394 for the mark shown below (the registered KOSKA mark) for goods identified as, "crushed sesame seeds, jam, peanut butter, hazelnut butter, glaceed (sic) fruit, candied dried fruit, and chestnut glacee (sic)" in International Class 29 and "bakery goods, namely, halvah and Turkish delight; fruit

topping syrup, honey, sweet pastries, candy, milk candy, fruit candy, lemon candy, strawberry candy, orange candy, caramel, fondant, cacao candy, chocolate candy, toffee, coffee candy, aromatic candy, peppermint candy, cream candy, almond candy, coconut candy, sugar candy and crystallized sugar" In International Class 30.

The registration claims use of the mark in commerce on May 29, 1998 for both classes. The registration states, "The mark consists of the wording 'KOSKA HELVACISI MERTER' and a design of a chef." The registration states further, "The stippling shown in the drawing is a feature of the mark and is not intended to indicate color." The registration issued on January 7, 2003. The application to register the registered KOSKA mark was filed on August 4, 1997.

Petitioner and respondent filed briefs and appeared at an oral hearing in the case on May 6, 2008.

In the petition to cancel petitioner also sought to cancel Registration No. 2398775 for the mark KOSKA in standard characters on the Supplemental Register, also owned by respondent. On July 28, 2007, this registration was canceled under Trademark Act Section 8, 15 U.S.C. § 1058,

during the trial period of this proceeding. In its brief petitioner noted the cancellation and stated that "… the current proceeding with respect to this registration is therefore moot." Petitioner's Brief at 1, fn. 1. When a registration which is the subject of a proceeding is canceled during the proceeding, we may issue a show-cause order requiring respondent to show why we should not enter judgment against respondent as to the canceled registration. Trademark Rule 2.134(b), 37 C.F.R. § 2.134(b). *See* TBMP § 602.02(b) (2d ed. rev. 2004). If respondent does show good cause, we then dismiss the proceeding as moot. In this case, in view of petitioner's position characterizing the proceeding as moot with respect to this registration, and due to the late stage of the proceeding, we elect not to issue a show-cause order. Instead, we dismiss the cancellation with regard to this registration as moot. Cf. *C. H. Guenther & Son Inc. v. Whitewing Ranch Co.,* 8 USPQ2d 1450 (TTAB 1988).

The Grounds

As grounds for cancellation, petitioner asserts priority and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). Specifically, petitioner asserts that it used the KOSKA mark in commerce with respect to certain food products before the filing date of the application resulting in Registration No. 2672394, that is,

before August 4, 1997. Petitioner also asserts that certain terms in the registered mark are not distinctive and that respondent committed fraud in the procurement of the subject registration by not disclosing the nature of those terms during the examination of the application.

Respondent has denied the salient allegations in the petition to cancel.

We hasten to add at the outset that, although the respective briefs of both parties suggest that the issue in this proceeding is the right to use the KOSKA mark in the United States, the Board does not have jurisdiction over such issues. See Petitioner's Brief at 4; Respondent's Brief at 3. The Board's authority is limited to determining the right to register marks. See TBMP § 102.01 (2d ed. rev. 2004).

The Record

By rule, the record in this proceeding first consists of the application/registration file for the registered KOSKA mark and the pleadings. In addition, petitioner has submitted a notice of reliance and trial testimony of two witnesses, Ahmet Mahir Dindar, petitioner's principal owner, and Teoman Seyithanoglu, an attorney practicing law in Turkey. Respondent submitted a notice of reliance only and no testimony.

There are objections to the evidence which we will address here because they have a direct bearing on our decision in this case.

First, petitioner has objected to Exhibits B and C to respondent's notice of reliance. Respondent identifies Exhibit B as "Copy of an invoice (November 3, 1990) and customs exit declaration (November 2, 1990) showing first use in commerce" and Exhibit C as "Copies of invoices, certificates of origin, and customs exit declarations for Registrant dated between May 20, 1998 and June 17, 2002 showing continued use in commerce." Petitioner objects to these exhibits because they are not proper subject matter for submission under a notice of reliance, that is, because they are not self-authenticating, because they are in a foreign language and no translation has been provided, and because they are only partially legible. Respondent argues that the objections are untimely because petitioner failed to raise the objections before the filing of briefs.

All of the stated objections are well taken, and therefore we sustain the objection and exclude from the record Exhibits B and C to respondent's notice of reliance. Most importantly, the documents in question do not fall within any of the categories of documents which are self-authenticating under Trademark Rule 2.122(e), 37 C.F.R.

§ 122(e), or elsewhere in the rule. We exclude the documents on this ground alone. In fact, these documents illustrate why testimony is necessary not only to authenticate the documents, but also to establish their relevance and significance. In the absence of testimony as a foundation, we would be unable to consider these documents.

As to the additional grounds, the documents, in fact, are not in English, and they are illegible, at least in part. While it is arguable that these objections as to form should have been raised earlier, the timing of the objection is not material in view of our exclusion of the documents on substantive grounds. Furthermore, it should have been obvious to respondent that we would be unable to consider these documents as a practical matter due to these conspicuous obstacles.

Separately, petitioner also objects to Exhibits D, E, F and G to respondent's notice of reliance on the same grounds respondent raised with respect to Exhibits B and C. Again, respondent argues that the objections are untimely. Respondent identifies these documents as follows:

> Exhibit D – Copies of advertisements for goods bearing Registrant's Marks.
>
> Exhibit E – Copies of published articles concerning Registrant.

> Exhibit F – Copies of official documents from the Republic of Turkey's Ministry of Agriculture and Rural Affairs.
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> Exhibit G – Copies of catalogs of goods for Registrant.

Respondent's Notice of Reliance.

Once again, other than Exhibit E, the documents in question do not fall within any of the categories of documents which are self-authenticating under Trademark Rule 2.122(e), 37 C.F.R. § 122(e), or elsewhere in the rules. Accordingly, we sustain the objection as to Exhibits D and G on the grounds that the documents in question are not proper subject matter for a notice of reliance, and therefore we exclude these documents from the record. They are not self-authenticating.

With respect to Exhibit F, the purported copies of official documents from the Republic of Turkey's Ministry of Agriculture and Rural Affairs, Trademark Rule 2.122(e) provides that copies of official records "whose authenticity has been established under the Federal Rules of Evidence" may be introduced into evidence through a notice of reliance. Pursuant to Fed. R. Evid. 902(3), a foreign public document must be accompanied by a "final certification as to the genuineness of the signature and

official position" of the executing authority.[1] Accordingly, because the "foreign official documents" appear not to be accompanied by a "final certification," they are not admissible into evidence.

Furthermore, in the absence of testimony regarding their relevance and significance as a foundation, we are unable to consider Exhibits D, F and G.

Also, as a practical matter, here too we are not able to consider Exhibits D and G because they are not in English, and Exhibit F is in English only in part.

As to Exhibit E, while we overrule the substantive objection as to the documents in this exhibit, only one of the articles is in English, an article entitled, "Publisher's Letter – Welcome to 2002," from an undated publication apparently entitled *The Guide*. It appears that the article appeared in early 2002. The "Publisher's Letter" simply indicates that there is an article in the issue concerning KOSKA, apparently referring to a company in Turkey. We have considered this article, but we fail to see any probative value it possesses with respect to any issue

[1] Alternatively, if there has been a reasonable opportunity for all parties to investigate the authenticity and accuracy of the documents, we may, for good cause, order that the documents be treated as authentic "without final certification or permit them to be evidenced by an attested summary." Fed.R.Evid. 902(3). Because there is no evidence that respondent produced these documents during discovery and because the documents have not been accompanied by "an attested summary," we decline to treat the documents as authentic.

in this case. As a practical matter we are unable to consider any of the remaining documents in Exhibit E simply because they are not in English and respondent has not provided a translation.

Finally we note, as we discuss below, that respondent has failed to introduce any competent evidence regarding its use of the registered KOSKA mark, or any other KOSKA mark, in commerce in the United States. In the end, this failure dictates our determination that petitioner, and not respondent, has priority with regard to the right to register the KOSKA mark in the United States.

Standing

Petitioner has asserted and shown that it used the KOSKA mark in commerce prior to respondent, as discussed below. Thus, petitioner has established an interest which is more than sufficient under the liberal standard for standing which applies in this proceeding. See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987). Accordingly, we conclude that petitioner has established its standing.

Priority

In this case, because respondent has not submitted any evidence of an earlier priority date, the earliest date upon

which respondent can rely for priority purposes is the filing date of the application which resulted in Registration No. 2672394 for the registered KOSKA mark, that is, August 4, 1997. *Intersat Corp. v. International Telecommunications Satellite Organization*, 226 USPQ 154, 156 n. 5 (TTAB 1985) ("The earliest date of first use upon which Intelsat can rely in the absence of testimony or evidence is the filing date of its application").

Ahmet Mahir Dindar, the principal owner of petitioner, testified that petitioner shipped certain products bearing the KOSKA mark, including diabetic halva and Turkish delight (bakery goods), from Turkey to the United States for sale at least as early as October 16, 1996. Ahmet Mahir Dindar Test. at 13. Mr. Dindar also provided an invoice as further evidence to support the fact that petitioner made this shipment. *See Id.*, Exh. 5. Although petitioner also testified that petitioner had used the mark in similar shipments since 1984, we need not rely on those shipments to determine priority in this case. Mr. Dindar also testified that the catalogs which he made of record showed the KOSKA mark as it appeared on the goods shipped to the United States in 1996. *See Id.* at 17, Exh. 10. The KOSKA mark appears on these goods in an oval or banner with KOSKA displayed prominently within the oval or banner. The KOSKA

mark appears on both outer boxes and packaging for individual servings of the goods pictured in the catalog.

Respondent argues that we should reject the evidence petitioner submitted to show petitioner's use and priority. We have considered those arguments and find them unpersuasive. Respondent's principal argument is that petitioner submitted catalogs from a later date to show how the mark appeared on the goods shipped in 1996. Respondent also argues that testimony alone should be insufficient to establish use. In fact, we may rely on appropriate testimony alone to conclude that petitioner used the mark on the dates claimed. *Powermatics, Inc. v. Globe Roofing Products Co.,* 341 F.2d 127, 144 USPQ 430, 432 (CCPA 1965). *See also National Bank Book Co. v. Leather Crafted Products, Inc.,* 218 USPQ 826, 828 (TTAB 1993); *Liqwacon Corp. v. Browning-Ferris Industries, Inc.,* 203 USPQ 305, 316 (TTAB 1979); *GAF Corp. v. Anatox Analytical Services, Inc.,* 192 USPQ 576, 577 (TTAB 1976). Mr. Dindar's testimony, based on personal knowledge, would have been sufficient here by itself. In this case, we also have supporting invoices and the catalogs. We find the catalogs competent and useful, even though they are of recent vintage, because respondent's witness has testified from personal knowledge that the catalogs reflect the mark as it was used in the 1996 shipment.

Accordingly, we conclude that petitioner has met its burden and established its priority by a preponderance of the evidence by showing use of the KOSKA mark in shipments to the United States at least as early as October 16, 1996. See, e.g., *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) ("[t]he burden of proof rests with the opposer … to produce sufficient evidence to support the ultimate conclusion of [priority of use] and likelihood of confusion").

Likelihood of Confusion

In its brief respondent states, "Registrant [respondent] concedes that Petitioner's alleged KOSKA mark is essentially identical to the mark at issue in this proceeding. Therefore, the important issue in this case is priority, which the evidence will show favors Registrant." Respondent's Brief at 6. Thus respondent effectively concedes that there is a likelihood of confusion. Nevertheless, for completeness we will analyze the evidence to determine, or rather confirm, that there is a likelihood of confusion in this case.

The opinion in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977) sets forth the factors to consider in determining likelihood of confusion. *See also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Here, as is often

the case, the crucial factors are the similarity of the marks and the similarity of the goods of the parties. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Petitioner's mark is KOSKA. The registered mark, shown above, is described as follows: "The mark consists of the wording 'KOSKA HELVACISI MERTER' and a design of a chef." As displayed, KOSKA is the most prominent element in the registered mark. With its notice of reliance petitioner submitted a copy of a response wherein respondent admitted petitioner's Request for Admissions No. 4, which states, "An English translation of the term 'helvacisi' is manufacturer of halvah." "Halvah" is among the goods listed in the registration. Respondent also admitted petitioner's Request for Admissions No. 1, which states, "Respondent is a Turkish manufacturer and exporter of food products located in Merter, Istanbul, Turkey." Petitioner's Notice of Reliance.

Based on this evidence, we conclude that KOSKA is not only the most prominent wording in the mark, but also the most distinctive wording in the mark. "Helvacisi" appears to be merely descriptive or generic, and "merter," which is displayed very small lettering, appears to identify a place. Furthermore, KOSKA is also dominant relative to the design element. Accordingly, due to the overall dominance of KOSKA in the registered mark, neither the additional wording, nor the design element, is sufficient to distinguish the marks. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Thus, we conclude, as respondent did, that the marks are similar.

The goods of applicant and the registrant need not be identical to find a likelihood of confusion under Trademark Act Section 2(d). They need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods originate from or are associated with the same source. *See On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Here, the goods are, in fact, identical, at least in part. The goods in the registration include "halvah and Turkish delight"; the record shows that petitioner used the KOSKA mark in connection with "diabetic halvah and Turkish

delight." We note that, because the registration specifies no limitation, we must assume that the registration covers diabetic products." *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."). Therefore, we conclude that the goods of the parties are identical, or otherwise closely related. Even if the registration included a limitation excluding diabetic products, we would still find the goods of the parties closely related because they would still be different versions of the same products.

Finally, we conclude that there is a likelihood of confusion between petitioner's KOSKA mark when used in connection with diabetic halvah and Turkish delight and the registered KOSKA mark when used with the goods identified in the registration, which include halvah and Turkish delight.

Other Arguments and Grounds

Both petitioner and respondent have devoted much space and attention in their respective briefs to the owner of the KOSKA mark in Turkey, as well as a registration for the

KOSKA mark in Turkey owned by that party, and to the licenses each of the parties received from that owner to use the KOSKA mark. *See* Seyithanoglu Test. Exhs. 1 and 2. Both parties concede that the mark and the related registration in Turkey are owned jointly by three members of the same family. In fact, the principal owner of petitioner is one of those family members and the principal owners of respondent are the other two family members making up the joint owner. Neither party in this proceeding claims to be the owner of the KOSKA mark or the related registration in Turkey. These facts and documents are allegedly relevant for our purposes to the ownership of the KOSKA mark, and to a lesser extent to the claim of fraud.

On January 25, 2007, the Board denied petitioner's motion to amend the petition to cancel to add a ground asserting that respondent was not the owner of the registered KOSKA mark. Consequently, the ownership question is not before us in this proceeding. In any event, the establishment of trademark rights in another country does not, by itself, establish priority or rights in the United States. *Mother's Restaurants Inc. v. Mother's Other Kitchen, Inc.*, 218 USPQ 1046, 1048 (TTAB 1983). And in this case, neither party even claims to be the owner of the mark in Turkey.

As to the license agreements, petitioner properly introduced them into evidence through the testimony of Teoman Seyithanoglu. Respondent objects to our consideration of the agreements principally on the ground that the agreements are irrelevant because they relate only to the right to use the KOSKA mark in Turkey. We agree with respondent.

The Board rejected petitioner's attempt to amend the petition to assert lack of ownership as a ground in this proceeding. If anything, the agreements would only be relevant to the ownership issue. As we stated, that issue is not before us in this proceeding. Furthermore, the agreements are silent as to the right to use or register the KOSKA mark in the United States. Seyithanoglu Test. Exhs. 1 and 2. Therefore, even if ownership in the United States were at issue here, we fail to see what bearing these agreements would have on the issue. We reject petitioner's arguments, based on Mr. Seyithanoglu testimony, urging that we interpret this silence in petitioner's favor.

We have ventured beyond the issues before us here to a limited extent only to emphasize, as we stated at the outset, that our jurisdiction is limited to matters related to the registration of marks in the United States. In that regard, we have determined the issues of priority and likelihood of confusion based on the relevant evidence which

is properly before us. We have concluded that petitioner has established that Registration No. 2672394 should be canceled based on petitioner's claim of priority and likelihood of confusion. In view of that determination, we need not and do not determine the additional ground of fraud.

Decision: We grant the petition to cancel Registration No. 2672394 based on priority and likelihood of confusion, and this registration will be canceled in due course. We dismiss the petition to cancel Registration No. 2398775 as moot.