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Mailed: December 26, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Treats Unleashed, Inc.
v.
Treats Unleashed, Inc.

Cancellation No. 92044770
to Registration No. 2810061
issued on February 3, 2004

Alpa V. Patel of Hiscock & Barclay for petitioner, Treats Unleashed, Inc.

Annette P. Heller of Heller & Associates for respondent, Treats Unleashed, Inc.

Before Quinn, Walters and Bucher, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Treats Unleashed, Inc.¹ ("petitioner") filed its petition to cancel the registration of Treats Unleashed, Inc.² ("respondent") for the mark shown below for "retail store services featuring pet food and gift products such as tote bags, frames, stationery and jars; on-line retail store

¹ A New York corporation.

services featuring pet food and gift products such as tote bags, frames, stationery and jars," in International Class 35.³ The registration includes a disclaimer of the exclusive right to use "TREATS" and "BAKERY AND BOUTIQUE" apart from the mark as shown.



As grounds for the petition, petitioner asserts that respondent's mark, when used in connection with respondent's services so resembles petitioner's previously used mark TREATS UNLEASHED for "retail store services and online retail services promoting and selling pet supplies, including pet foods, pet conditioning, handling and training products, and a variety of gift products" (petition ¶2) as to be likely to cause confusion, under Section 2(d) of the Trademark Act.

Respondent, in its answer, denied the salient allegations of the claim.

The Record

The record consists of the pleadings; the file of the involved registration; the testimony deposition by

² A Missouri corporation.

petitioner of Ann McClain, petitioner's president and owner, with accompanying exhibits; and petitioner's notice of reliance on printed publications that are also exhibits to Ms. McClain's testimony. Respondent filed no testimony or other evidence. Both parties filed briefs on the case.

Findings of Fact

Petitioner incorporated as Treats Unlimited, Inc. in May 1998 and opened its retail store selling pet products and related items on December 18, 1998, in the Buffalo, New York area. Petitioner's first advertising and sales outside of New York State were in 1999. In 2000, petitioner established its website, located at www.treatsunlimited.com. Respondent's website is www.treats-unlimited.com. Petitioner's retail services have been continuous to at least the time of trial. The products petitioner sells include dog biscuits manufactured by petitioner, gifts for people and pets, pet accessories, nationally-branded foods, supplements and treats for pets; and tote bags, frames and stationery.

In 1998, petitioner began advertising in local area newspapers and, in 1999, in telephone books. Over the years since 1998, petitioner's advertising and promotions have included at various times local newspaper advertising, local phone book advertising, advertising at local colleges and

³ Registration No. 2810061, issued February 3, 2004, from an application

universities, attendance and booths at two to four nationally attended dog shows per year, distribution of business cards and fliers, and, recently, local advertising on television. Petitioner has always used the mark TREATS UNLIMITED in its advertising and on its website. At some point after the launch of its website in 2000, petitioner also began using a design mark incorporating TREATS UNLIMITED on its website and in its advertising.

Petitioner's sales are primarily to customers from the local area, defined by petitioner's president, Ann McClain, as the Buffalo area, Ft. Erie, Niagara Falls and the closer areas of Canada. However, petitioner receives orders by phone or email from purchasers outside the local area and outside New York State, including from Ohio, Michigan, Pennsylvania, Virginia and West Virginia; and ships orders to other states at least once or twice a week. These out-of-state customers include people who visited petitioner's website, former local residents, acquaintances of petitioner's president, and people who met petitioner's president or visited petitioner's booth at dog shows. Petitioner has shipped or delivered products to customers in other states since at least 1999. Petitioner uses its mark in all advertising, invoices, business cards and on packaging for its shipped goods.

Since at least November, 2002, petitioner has periodically received emails from consumers and vendors that were clearly intended for respondent, as well as orders from vendors that were clearly intended for respondent.

Parties' Arguments

Petitioner contends that its mark is inherently distinctive; that it has priority; that the distinctive element of respondent's mark is identical to petitioner's word mark and that the design element and font used in respondent's mark are very similar to petitioner's design mark; that the parties offer the same services; and that actual confusion has occurred and has been ongoing since respondent began its business. Petitioner also contends that the trade channels and types of advertising for the parties services are identical, noting that their web addresses differ by only one character; that the products both parties sell are relatively inexpensive and are purchased without substantial consideration.

Respondent contends that due to the local nature of the parties' businesses, confusion is unlikely, especially in view of the fact that consumers cannot purchase goods from petitioner's website and petitioner's mark is not famous. Respondent also contends that the evidence of misdirected emails and vendor shipments demonstrates typographical or human errors rather than actual trademark confusion.

Petitioner makes the following statements in its brief (pp. 9 and 5 respectively):

Although the marks are similar in appearance and sound, and both marks are used in association with similar services, there have been no verifiable instances of actual confusion due to petitioner's limited and purely local use of its non-famous mark over the past nine years.

. . .

Although there is no question that petitioner received emails that were clearly intended for [respondent], to characterize these consumers and vendors as being confused is wholly without merit.

Analysis

In a cancellation proceeding, "a presumption of validity attaches to a service mark registration, and the party seeking cancellation must rebut this presumption by a preponderance of the evidence." *West Florida Seafood Inc. v. Jet Restaurants Inc.*, 31 F.3d 1122, 31 USPQ 1660, 1662 (Fed. Cir. 1994). *See also Cervecería Centroamericana S.A. v. Cervecería India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[I]n a [trademark registration] cancellation for abandonment, as for any other ground, the petitioner bears the burden of proof. Moreover, the petitioner's burden is to establish the case for cancellation by a preponderance of the evidence"). As discussed below, we hold that petitioner has met its burden.

Regarding its standing, because petitioner has properly submitted evidence of its use of the mark TREATS UNLEASHED in connection with retail and online services offering pet

products and gifts, and because petitioner's likelihood of confusion claim is not frivolous, we find that petitioner has established its standing in this cancellation proceeding. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

In order to establish its priority, petitioner must first establish that its mark is inherently distinctive or that it has acquired distinctiveness. If the latter, our determination of priority is based on the date petitioner's pleaded mark acquired distinctiveness. Petitioner must establish its priority by a preponderance of the evidence. See *Otto Roth & Co. v. Universal Foods Corp.*, *supra*.

We agree with petitioner that its mark TREATS UNLEASHED is inherently distinctive and respondent does not contend otherwise. In fact, respondent's registration is on the Principal Register and this portion of its mark is neither disclaimed nor the subject of a claim under Section 2(f) of the Trademark Act.

Regarding priority, the earliest date upon which respondent can rely on this record is the filing date of its underlying application, i.e., November 5, 2002. Petitioner has established that it began using its mark in connection with its noted retail services as early as December 18,

1998, long before respondent's application filing date.

Clearly, petitioner has established its priority.

Respondent's arguments alleging that petitioner has not engaged in selling its services beyond New York state and that the parties operate in different regions of the country are not only unsupported by the facts, but are legally irrelevant to the issue of priority herein. First, a petitioner is not required to use its mark in interstate commerce in order to establish priority of use in a cancellation proceeding. Second, respondent's registration is not geographically restricted and, thus, extends to the entire United States.

Our determination of likelihood of confusion under Section 2(d) must be based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he 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." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). See also *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. In addition, actual confusion is a relevant factor that we consider in this case.

With respect to the services of the parties, we observe that there is a substantial overlap in the services identified in the subject registration and in connection with which the mark is used by petitioner. Both parties offer retail services through a bricks-and-mortar store selling pet supplies and related products and gifts. Respondent notes that prospective customers can actually purchase items from its website, but they cannot do so from petitioner's website. However, this is an immaterial distinction. Petitioner has established that it obtains customers through its website who telephone or email their orders to petitioner. Each party has a retail store and a website through which they offer pet products and related items. The evidence establishes that the parties even have some of the same vendors. In other words, their services are essentially identical.

There is no evidence indicating any limitations as to channels of trade (except that both have a retail store and website through which their goods are offered) or classes of purchasers. From the evidence of petitioner's use and the scope of respondent's identification of goods, it is clear that the parties' channels of trade are the same, as are the class of purchasers, i.e., the general consumer.

Turning to the marks, we note that while we must base our determination on a comparison of the marks in their entireties, we are guided, equally, by the well established principle that, in articulating reasons for reaching a conclusion on the issue of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

While petitioner has stated in its brief that it uses a design mark in addition to its word mark, we focus herein on the pleaded word mark, TREATS UNLEASHED. Considering respondent's design mark, we note that the fonts used are of minimal design significance and the phrase TREATS UNLEASHED is by far the central and predominant portion of the mark. TREATS UNLEASHED is significantly larger than the other wording and it is underlined. GOURMUTT BAKERY AND BOUTIQUE

appears in small letters below TREATS UNLEASHED and consists of the descriptive and disclaimed wording BAKERY AND BOUTIQUE. TREATS UNLEASHED is further emphasized in respondent's mark by the fact that the dog design is leaning on the "T" in TREATS. While TREATS is descriptive of at least some of the products offered by both parties, the unitary phrase TREATS UNLEASHED is the dominant portion of respondent's mark and it is identical to petitioner's mark in its entirety. We find that the parties' marks are substantially similar in sight, sound, connotation and overall commercial impression.

In conclusion, in view of the substantial similarity in the commercial impressions of respondent's mark and registrant's mark, their contemporaneous use on the essentially identical services involved in this case is likely to cause confusion as to the source or sponsorship of such services.

Decision: The petition to cancel is granted.