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CEW

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

MAY 18, 98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re VITA SOURCE

Serial No. 74/662,708

L. S. Van Landingham, Jr., Esq. for applicant.

Michael Hamilton, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Cissel, Hohein and Walters, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

VITA SOURCE has filed a trademark application to register the mark LIGHTNING 828 for "herbal and botanical dietary supplements, and dietary supplements containing extracts, concentrates, metabolites and constituents of herbs and botanicals."¹

¹ Serial No. 74/662,708, in International Class 5, filed April 18, 1995, based on an allegation of a bona fide intention to use the mark in commerce.

The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the marks GREEN LIGHTNING² and LIQUID LIGHTNING,³ previously registered by the same party for, respectively, a powdered dietary supplement and a liquid dietary supplement, that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs and an oral hearing was held. We affirm the refusal to register.

In any analysis of likelihood of confusion, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning first to the goods, we find that the goods of the parties are very similar, if not identical, as the goods of both applicant and the registrant are dietary supplements. While there is no evidence in the record in this regard, our conclusion that the goods are identical or

² Registration No. 1,706,211 issued August 11, 1992, to Natural Organics, Inc., in International Class 5. The registration includes a disclaimer of GREEN apart from the mark as a whole.

³ Registration No. 1,776,201 issued June 15, 1993, to Natural Organics, Inc., in International Class 5. The registration includes a disclaimer of LIQUID apart from the mark as a whole.

very similar would remain the same even if the record established that the parties' dietary supplements are in different forms or are made of different ingredients.

Additionally, neither the application nor the cited registrations contain limitations as to the identifications of goods. Rather, the identifications of goods are broadly worded. We must presume that the goods of applicant and registrant are sold in all of the normal channels of trade to all of the normal purchasers for goods of the type identified. *See Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). That is, we must presume that the goods of applicant and registrant are sold through the same channels of trade to the same classes of purchasers.

Turning to the marks, we note the well-established principle that, while the marks are compared in their entirety, in articulating reasons for reaching a conclusion on the issue of likelihood 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 entirety." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Considering, first, registrant's marks, we find that LIGHTNING is the dominant portion of both marks, GREEN

LIGHTNING and LIQUID LIGHTNING. Particularly in view of the disclaimers of, respectively, GREEN and LIQUID, it is likely that GREEN would be perceived as merely descriptive of the color of the identified dietary supplement, and that LIQUID would be perceived as merely descriptive of the form of the identified dietary supplement. There is no evidence in this record that suggests that LIGHTNING has any significance with respect to dietary supplements and, thus, it is an arbitrary term in connection with these products.⁴

Similarly, we agree with the Examining Attorney that LIGHTNING is the dominant portion of applicant's mark, LIGHTNING 828. Applicant contends, on the other hand, that 828 is the dominant portion of the mark in relation to the identified goods as it is intended to mean "eight o'clock to eight o'clock" and is suggestive of the duration of the product's efficacy. Applicant alleges, further, that it owns a family of 828 marks in connection with dietary supplements and that, thus, 828 is the dominant portion of its applied-for mark.⁵ Even if we were to assume that applicant's allegations regarding the significance of 828 and its ownership of a family of 828 marks are true, our

⁴ Even if we were to determine that LIGHTNING is somewhat suggestive of the efficacy of the identified product, we would still find it to be the dominant portion of the mark.

⁵ Applicant has not established that it has a family of 828 marks and we agree with the Examining Attorney that such a line of reasoning is not relevant to our consideration herein. See, *Baroid Drilling Fluids, Inc. v. Sun Drilling Products*, 24 USPQ2d 1048 (TTAB 1992).

conclusion that LIGHTNING is the dominant portion of applicant's mark would remain the same. As we discussed in relation to registrant's marks, LIGHTNING is an arbitrary term in connection with the goods identified herein. Since 828 follows the word LIGHTNING, it is likely to be perceived by consumers as either indicating one of several numeric designations signifying different types of LIGHTNING dietary supplements or indicating, as applicant contends, the duration of the efficacy of the LIGHTNING dietary supplements.

Thus, we conclude that the dominant portions of the parties' marks are identical. Generally, while we must look at the marks in their entireties, if the dominant portions of both parties' marks are the same, then confusion may be likely notwithstanding peripheral differences, especially where the respective goods are identical or very similar. Two exceptions to this rule are where the common portion is not likely to be perceived as distinguishing source due to its mere descriptiveness or the commonness of its use, and where the marks in their entireties convey significantly different commercial impressions. *In re Denise*, 225 USPQ 624 (TTAB 1985) (PERRY'S PIZZA held confusingly similar to PERRY'S). We find that neither exception applies in this case. Further, viewing the marks in their entireties, we

believe that consumers are likely to perceive LIGHTNING 828 as part of a line of dietary supplements, *i.e.*, a twelve-hour or twenty-four-hour supplement, that is related to the registrant's existing GREEN LIGHTNING and LIQUID LIGHTNING supplements, each serving a different dietary purpose but emanating from the same source. Thus, we find that the overall commercial impressions of the parties' marks are significantly similar.

We are not convinced otherwise by applicant's contention that LIGHTNING is a "common" mark in view of third-party registrations for marks incorporating the term LIGHTNING. In support of its argument, applicant listed in its response two third-party registrations,⁶ which the Examining Attorney then made of record to show, and we agree, that the goods identified in those registrations are entirely unrelated to the goods in this case and, thus, those registrations are of little persuasive value. Applicant then submitted, with its brief, a print-out of a summary of computerized search results which identified only the marks. This submission is wholly inadequate and, in this case, untimely.⁷ Further, as it is impossible to

⁶ Registration No. 1,427,647 for the mark LIGHTNING pertains to pet sprays and Registration No. 1,724,925 for the mark GREEN LIGHTNING pertains to toilet bowl cleaning preparations.

⁷ In order to make registrations of record, soft copies of the registrations themselves, or the electronic equivalent thereof, *i.e.*, printouts of the registrations taken from the electronic records of the Patent and Trademark Office's (PTO) own data base, must be submitted.

determine the relevance of those registrations to the case before us, no conclusion regarding the issue of likelihood of confusion between the applicant's mark and each of the cited registrations, as applied to the respective goods, can be drawn from the co-existence on the register of the third-party registrations. See, *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 642 (TTAB 1984). As stated in *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973), "little weight is to be given such registrations in evaluating whether there is likelihood of confusion. The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive."

Finally, we are not persuaded by applicant's contention that its goods are purchased by sophisticated consumers. There is absolutely no evidence in the record regarding the purchasers of dietary supplements or the degree of care involved in such purchases. However, it would appear that such items are relatively low cost items purchased by the

See, *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992). Further, applicant did not comply with the established rule that the evidentiary record in an application must be complete prior to the filing of the notice of appeal. See 37 CFR 2.142(d); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994).

general consumer. Moreover, even if we were to conclude that the goods of the parties are purchased by knowledgeable consumers after careful consideration, we note that even discerning purchasers are not immune from confusion when the marks are as similar as these marks and the goods with which they are used are the same. See, *In re General Electric Company*, 180 USPQ 542 (TTAB 1973).

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, LIGHTNING 828, and registrant's marks, GREEN LIGHTNING and LIQUID LIGHTNING, their contemporaneous use on the same or very similar goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

While we do not have any doubt regarding our decision that a likelihood of confusion exists herein, we note the well established principle that one who adopts a mark similar to the mark of another for the same or closely related goods or services does so at his own peril, and any doubt as to likelihood of confusion must be resolved against the newcomer and in favor of the prior user or registrant. *W.R. Grace & Co. v. Herbert J. Meyer Industries, Inc.*, 190 USPQ 308 (TTAB 1976); and *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed Cir. 1988).

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Decision: The refusal under Section 2(d) of the Act is affirmed.

R. F. Cissel

G. D. Hohein

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board