

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB NOV. 19, 98
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Stinson Seafood Company, L.P.

v.

Triton Seafood Company

Opposition No. 96,313
to application Serial No. 74/384,650
filed on April 30, 1993

Gordon H. S. Scott of Eaton, Peabody, Bradford & Veague for
Stinson Seafood Company, L.P.

Richard M. Saccocio for Triton Seafood Company.

Before Quinn, Walters and Wendel, Administrative Trademark
Judges.

Opinion by Wendel, Administrative Trademark Judge:

Triton Seafood Company has filed an application to
register the mark NEPTUNE'S for "fresh or frozen, cooked or
uncooked seafood products, namely, conch chowder, clam
fritters, ground conch, chopped conch, conch fritters and
conch fillets."¹

¹ Ser. No. 74/384,650, claiming first use dates of May 24, 1990.

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Stinson Seafood Company, L.P., has filed an opposition to registration of the mark under Section 2(d) of the Trademark Act, 15 USC § 1052(d), on the ground of likelihood of confusion. Opposer alleges ownership of a registration for the mark NEPTUNE for "canned sardines";² the similarity of opposer's and applicant's marks; the use of both marks for products which would be considered seafood by consumers; and the distribution of the goods of both through the same channels of trade, namely, retail grocery stores.

Applicant, in its answer, has denied the salient allegations of the notice of opposition.

The record consists of the file of the involved application and the trial testimony taken by both parties, with accompanying exhibits. Both parties filed briefs on the case, but no oral hearing was requested.

Opposer has established that, through several predecessors-in-interest, opposer has continuously used the mark NEPTUNE for canned sardines since about August 1899. The original registration for the mark which issued in 1927³ was inadvertently allowed to lapse in 1987, but a new

² Reg. No. 1,583,811, issued Feb. 20, 1990, claiming first use dates of Aug. 1899; combined Sections 8 and 15 declaration filed and accepted.

³ Reg. No. 226,618, issued Apr. 12, 1927 for the mark NEPTUNE for "canned fish, specifically canned sardines"; twice renewed until Apr. 12, 1987.

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registration (the pleaded registration) was obtained in 1990. The mark is used on an expensive, select grade of sardines and sales of the NEPTUNE brand constitute from 3 to 4% of the total sales of sardines under several marks by opposer, running from around \$800,000 to \$1,000,000 annually in the years 1990-1995. Advertising is mostly carried out indirectly by means of co-op advertising programs with retailers. Advertising expenditures for the NEPTUNE product were approximately \$61,000 in 1995. The goods are sold predominately in the states of New York, Ohio, Indiana, Kentucky and Texas. According to opposer's president, Richard Klingman, opposer has plans to expand its use of the NEPTUNE mark to cover a product line purchased from Gorton's Company, which includes canned clams, codfish cakes, clam juice and chowders.

Applicant's president, Alfredo Alvarez, testified to use of the name "Neptune" for types of seafood other than those presently being sold in predecessor companies owned by him since 1978 and the incorporation of the present company for the sale of the products recited in the identification of goods in 1987. Applicant purchases conch from importers who obtain the product from Honduras and sells its goods under the NEPTUNE'S mark almost exclusively to food service distributors who in turn sell to restaurants. Products such

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as conch fritter batter are sold in five pound plastic tubs. Applicant's NEPTUNE'S conch fritters and conch chowder received awards from the Chefs in America Awards Foundation in 1992 and its products are said to be considered the top quality brand in the industry. Applicant does extensive promotion of its products through trade shows and has a marketing manager who carries out further promotional activities by working with the distributors and their restaurant customers. Its advertising expenses in 1996 were \$42,000 plus \$10,000-12,000 for brochures. Applicant sells its products mostly in the Southeast, and predominately in Florida. Its sales volume in 1996 was approximately \$1,800,000 and has been increasing at a rate of 15-25% per year. Applicant has started some direct sales to grocery stores in Miami (less than 1% of its total sales), selling its conch fritter mix and salted cod fritter mix in smaller packaging to retail customers. Its objective is to expand retail sales to the Caribbean area, since its conch products have the greatest appeal to the Spanish population.

Priority is not an issue in view of opposer's proof of ownership of a valid and subsisting registration for its mark NEPTUNE. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Accordingly, we look to the du Pont factors which are most relevant to the determination of likelihood of

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confusion under the present circumstances. See *In re du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). We find that the most weight must be given to the similarity or dissimilarity of the marks, the similarity or dissimilarity of the goods, and the trade channels for the respective products.

Applicant argues that opposer's mark NEPTUNE and applicant's mark NEPTUNE'S create different commercial impressions, in that applicant's use of the possessive coupled with a picture of the god Neptune results in an association with the god, whereas opposer's NEPTUNE only results in an association with the sea. We do not agree. In the first place, the design feature which applicant is presently using is not part of the mark sought to be registered. Neither is the trident which opposer uses on its labels.⁴ Instead, we are limited to a comparison of the words alone. Since the display of either of the marks might be changed at any time, a present display cannot be relied upon to establish the dissimilarity of the commercial impressions created by the marks. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991). While trade dress may be considered as evidence that a confusingly similar commercial impression may be created, it cannot be relied upon to prove

⁴ The "trident" is known as the "three-pronged spear carried by the classical god of the sea, Neptune." The American Heritage Dictionary, 1976.

the contrary. See *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984). Thus, we find the marks to be virtually identical not only in appearance and sound, but also to create virtually identical commercial impressions. Applicant's use of the possessive is a minimal distinction, which is not likely to be noticed or, if it is, to be remembered by consumers. Whether the commercial impression is that of the god Neptune or simply an association with the sea, either mark is open to either interpretation. Further, since Neptune is the god of the sea in Greek mythology, this is not a viable distinction.

Turning to the goods of the parties, we cannot accept applicant's argument that opposer's canned sardines would not be considered "seafood" in the same manner as applicant's fresh and frozen conch products. Although opposer's canned fish is not likely to be sold in the same section of a supermarket as fresh or frozen seafood, the products all fall within the definition of seafood, regardless of whether they are canned, fresh or frozen.⁵ As such, the goods are closely related and their origination

⁵ We take judicial notice of the definition of "seafood" in Webster's Third New International Dictionary (1976) as "marine fish and shellfish to be used as food."

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from a single source would be a reasonable assumption on the part of purchasers.

Applicant attempts to draw an even greater distinction between the products of the parties on the basis of the respective channels of trade. As is evident from the testimony introduced by applicant, applicant's customers are predominantly distributors who in turn sell to restaurants or the like. At the present time, only a minimal amount of its products is offered to the general public. Applicant argues that it is clear that its products are intended for restaurant use and that it is obvious from the recitation of goods that these are the "usual customers" for the conch products, citing *Saab-Scania Aktiebolag v. Sparkomatic Corp.*, 26 USPQ2d 1709 (TTAB 1993).

Opposer, on the other hand, strongly contends that there are no limitations in the application which would restrict the purchasers or the channels of trade for applicant's products. Opposer argues that the fact that applicant presently sells its products in five pound tubs to distributors that serve restaurants and other food service establishments is irrelevant to the determination of likelihood of confusion.

In *Saab-Scania*, supra at 1711, we set forth the well established principle that, in the absence of limitations in the application or registration, we must assume that the

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products move through all the ordinary and usual channels of trade for such goods to the usual customers for the products. Evidence as to limitations in the present trade channels and/or customers must be disregarded, without similar restrictions in the recitation of goods.

Here there are no specific limitations in the application as to the channels of trade or purchasers of applicant's seafood products. The fact that the products are mainly conch products, which may have more appeal to certain ethnic groups, or which are normally encountered by most of the general public in restaurants, cannot serve to restrict the open-ended identification of goods in the application. We find no basis for assuming that the "usual customers" for applicant's products would inherently be limited to its present customers. Furthermore, applicant has admitted that it has plans to further expand the marketing of its products on the retail level, to the general public.

In the same manner, although opposer has not so argued, since opposer's registration does not contain any limitations as to channels of trade, we must operate on the assumption that its seafood products, namely, canned sardines, may be sold to restaurants or other food servers, as well as to the general public. See *Castle & Cooke, Inc. v. Robzens', Inc.*, 189 USPQ 555 (TTAB 1976) [since neither

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opposer's "canned and fresh frozen fish" nor applicant's "fresh and frozen meats" restricted in identification of goods, goods of each assumed to travel to both retail outlets and to commercial and institutional users].

Consequently, we find the potential channels of trade and range of customers for the seafood products to be the same for both parties.

Applicant further argues that neither the mark NEPTUNE nor NEPTUNE'S is strong; that registrations for NEPTUNE for oils for cooking seafood and frozen chicken parts (later cancelled) have issued since the issuance of opposer's registration; and that "Neptune" is a commonly used word. But applicant has failed not only to introduce copies of these alleged third-party registrations, but also to prove on-going use of these marks. The fact that "Neptune" may be a well-recognized word or mythological figure is irrelevant to consideration of the arbitrary/suggestive nature of these trademarks in connection with the identified goods. Furthermore, applicant's argument that opposer's mark is weak, because opposer uses it only for one grade of sardines, which represents a small percentage of its total sardine sales under several marks, is misdirected. It is the extent of use of a similar mark by third parties for similar goods which may lead to the conclusion that a mark is weak, not use by a party of other marks for other

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products or different grades of a single product. Moreover, even if applicant had proven NEPTUNE to be a weak mark, which it has not, weak marks nevertheless are entitled to protection against the registration by a subsequent user of the same or a similar mark for the same or closely related goods. See *Hollister Incorporated v. Ident A Pet, Inc.*, 193 USPQ 439 (TTAB 1976); *The Sterling China Co. v. Sigma Marketing Systems, Inc.*, 180 USPQ 671 (TTAB 1973).

We find no other du Pont factor which might be weighed in applicant's favor. The fact that there has been no actual confusion, despite opposer's long use of its mark and applicant's increasing sales, can readily be understood, in view of the geographic separation in the present marketing areas of the respective products.

Accordingly, we find that use by the parties of the nearly identical marks NEPTUNE and NEPTUNE'S on the seafood products recited in the registration and application will result in the likelihood of confusion.

Decision: The opposition is sustained and registration is refused to applicant.

T. J. Quinn

C. E. Walters

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H. R. Wendel
Trademark Administrative Judges,
Trademark Trial and Appeal Board