

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 18, 1998

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Wild Birds Unlimited, Inc.
v.
Jeanette Davis dba Birdwatchers' Country Store

Opposition No. 96596
to application Serial No. 74/333,714
filed on November 23, 1992

E. Victor Indiano of Bose, McKinney & Evans for opposer
Jeanette Davis, *Pro Se*

Before Sams, Simms and Walters, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Wild Birds Unlimited, Inc. filed its opposition to the
application of Jeanette Davis, doing business as
Birdwatchers' Country Store, to register the mark shown
below for "retail store services featuring: bird feeding
supplies; birdbaths; bird houses; bird watching and bird
calling equipment and field guides; books, prerecorded audio
and video recordings relating to birds; and, greeting cards,
note cards, art pieces, gifts, collectibles, jewelry,
clothing, housewares and general merchandise related to

birds."¹ The application includes a disclaimer of BIRDWATCHERS' COUNTRY STORE apart from the mark as a whole.



Birdwatchers' Country Store

As grounds for opposition, opposer asserts that applicant's mark, when applied to applicant's goods, so resembles opposer's two previously registered marks, as shown below, as to be likely to cause confusion under Section 2(d) of the Trademark Act.

Registration No. 1,846,773 for "bird feeders and birdhouses, in International Class 21; birdfood, in International Class 31; and retail store services specializing in nature related products, in International Class 42"²:



¹ Application Serial No. 74/333,714 , filed November 23, 1992, based upon an allegation of use of the mark in commerce in connection with the identified goods alleging first use and first use in commerce as of March 5, 1985.

² Registration No. 1,846,773, issued July 26, 1994, and filed as an application on August 18, 1993. The registration includes a disclaimer of the design of the bird apart from the mark as shown.

Registration No. 1,311,042 for "newsletter advertising its products and services and containing information about the feeding and care of birds, in International Class 16; and retail store services specializing in the feeding and care of birds, in International Class 42"³:



Noting the dates of use asserted in its two pleaded registrations, opposer alleges prior use of its mark WILD BIRDS UNLIMITED and design, in Registration No. 1,311,042; and use of its chickadee design mark, in Registration No. 1,846,773, prior to the filing date of the application herein. Opposer alleges that its two pleaded marks are used in connection with goods and services "sold from approximately 196 retail store locations throughout the United States, and in parts of Canada"; that "applicant's trading area is confined to the greater Missoula, Montana, area comprising the area within an approximately 35 mile radius of the applicant's retail store location"; and that applicant is aware of opposer's use of its pleaded marks and

³ Registration No. 1,311,042, issued December 25, 1984. Sections 8 and 15 affidavits accepted and acknowledged, respectively. The registration includes a disclaimer of "WILD or BIRDS" and "the individual bird designs" apart from the mark as shown.

"has made allegations to the opposer that [such marks] are likely to be confused with the applicant's mark."

On May 17, 1995, applicant filed her answer and, on May 25, 1995, opposer filed its objection to the sufficiency of applicant's answer on the ground that it contained extraneous statements. The Board construed opposer's filing as a motion to strike, determined that applicant's answer was "informal," and gave applicant time in which to file a sufficient pleading. However, applicant failed to file her answer. Thus, the Board issued an order to applicant to show cause why judgment in default should not be entered against her; and applicant responded. Also, opposer filed a motion for default judgment which was entered in the file subsequent to the Board's aforementioned order. Considering both parties' filings, the Board denied opposer's motion and vacated its own notice of default, finding that applicant's failure to file her answer was neglectful but without any willful conduct or bad faith intent to delay the proceeding; and set a time for applicant's answer to be filed. Thereafter, applicant filed her answer.

Applicant, in her answer, admitted, *inter alia*, that "applicant has made allegations to the opposer that the [chickadee design] mark shown in [Registration No. 1,846,733] is likely to be confused with the applicant's mark"; and that opposer adopted, used and registered the

[WILD BIRDS UNLIMITED and chickadees design] mark in Registration No. 1,311,042 prior to applicant's adoption and use of its mark. Applicant otherwise denied the salient allegations of the likelihood of confusion claim.

The Record

The record consists of the pleadings and the file of the involved application. Neither opposer nor applicant took any testimony or filed any evidence during their respective testimony periods. Only opposer filed a brief on the case. With its brief, opposer filed a notice of reliance on evidence specified therein. However, Rule 2.122(e) of the Trademark Rules of Practice, 37 CFR 2.122(e), mandates that the notice of reliance shall be filed during the testimony period of the party filing the notice. As such, opposer's notice of reliance and the evidence submitted therewith are not timely filed and have not been considered herein.⁴

Analysis

In view of the lack of testimony or other evidence in the record, the determination in this case must be based entirely on the sufficiency of opposer's pleading and on

⁴ Further, we note that opposer's exhibits A and B to the notice of reliance would be of no persuasive value in any event as they are excerpts, from a commercial database, of information pertaining to opposer's pleaded registrations. As specified in Trademark Rule 2.122(d), 37 CFR 2.122(d)(2), opposer's pleaded registrations will be received into evidence through the filing of a notice of reliance during opposer's testimony period only by way of copies prepared and issued by the PTO showing current status of and title to the registrations.

applicant's admissions. We address the issues of priority and likelihood of confusion with respect to each of opposer's pleaded marks separately herein.

Registration No. 1,846,773 (chickadee design)

Opposer has not established in this record either prior use of the mark which is the subject of the pleaded Registration No. 1,846,773 or the registration thereof. Thus, the opposition must fail with respect to this pleaded mark.

Registration No. 1,311,042 (WILD BIRDS UNLIMITED and chickadees design)

In view of applicant's admissions of opposer's prior adoption, use and registration of the WILD BIRDS UNLIMITED and design mark, we find that there is no issue with respect to opposer's priority for this pleaded mark.

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. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Two key considerations in this case are the similarities between the goods and the similarities between the marks. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). This is especially true in cases where, as here, there is little

evidence bearing on the other factors enumerated in the *duPont* case.

With respect to the goods and services of the parties, we observe that the parties' retail store services are essentially identical. Nor do we think there is any question that opposer's identified newsletter relating to birding information, products and services is closely related to the identified retail store services. Thus, we conclude that the goods and services of the parties are identical and closely related.

Both identifications of goods and services are broadly worded. Therefore, we must presume that the goods and services of applicant and opposer 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 and services of applicant and opposer are sold through the same channels of trade to the same classes of purchasers.

Turning to the marks, comparing the marks in their entireties, we find that there is no similarity in appearance, sound or commercial impression between either the word or design portions of the parties' marks. Regarding the designs, applicant's design is a single chickadee, whereas opposer's design is an oval reminiscent

of the sun or a full moon, with the branches of a tree in front of the oval. Among the branches are several small birds. We find that when opposer's and applicant's marks are considered in their entirety, they engender distinctly different overall commercial impressions.

Therefore, we conclude that in view of the significant differences in the commercial impressions of opposer's mark in Registration No. 1,311,042, WILD BIRDS UNLIMITED and design, and applicant's mark, BIRDWATCHERS' COUNTRY STORE and design, regardless of the identity and related nature of the parties' goods and services, there is no likelihood of confusion as to the source or sponsorship of such goods and services.

Decision: The opposition is dismissed.

J. D. Sams

R. L. Simms

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