

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

9/3/99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Hormel Foods Corporation
v.
Lee Valley Foods Inc.

Opposition No. 106,856
to application Serial No. 74/609,724
filed on September 22, 1994

Hormel Foods Corporation
v.
Lee Valley Foods Inc.

Cancellation No. 26,436

Louis T. Pirkey and William G. Barber of Arnold White &
Durkee for Hormel Foods Corporation.

Daniel P. Joyce of Hirsch & Joyce for Lee Valley Foods Inc.

Before Hohein, Chapman and Bucher, Administrative Trademark
Judges.

Opinion by Chapman, Administrative Trademark Judge:

This consolidated case¹ involves Hormel Foods
Corporation's (hereinafter Hormel or opposer) opposition to

¹ Opposer/petitioner originally filed a consolidated notice of
opposition and petition to cancel.

an application filed by Lee Valley Foods Inc. (hereinafter Lee Valley or applicant), a Canadian corporation, and Hormel's petition for cancellation of a registration owned by Lee Valley. The application² is for the mark shown below



and the registration³ is for the mark FEAST & EASY, both for "prepackaged Chinese-style stir fry food, namely, vegetables, seafood, beef and pork."

Both the notice of opposition and the petition for cancellation are based on priority and a likelihood of confusion under Section 2(d) of the Trademark Act of applicant's marks with opposer's mark FAST'N EASY for precooked meats.

In its answer, Lee Valley denied the salient allegations of the consolidated opposition and petition.

The record consists of the pleadings; the files of the involved application and registration; and the "stipulated findings of fact" (with exhibits) submitted by the parties

² Application Serial No. 74/609,724, filed September 22, 1994. The claimed dates of first use and first use in commerce with the United States are March 1, 1994 and May 2, 1994, respectively. Applicant disclaimed the words "quick cuisine."

³ Registration No. 1,965,241, issued April 2, 1996. The claimed dates of first use and first use in commerce are March 1, 1994 and May 2, 1994, respectively.

on September 4, 1998.⁴ Both parties filed briefs on the case. An oral hearing was not requested.

Hormel owns two registrations for the mark FAST'N EASY, one for "precooked meats,"⁵ and one for "precooked meats, poultry, bacon, and pork sausages."⁶ According to the stipulated facts, opposer's products include precooked dinner meats, such as roasted chicken breast filet, lemon herb chicken, and roast pork chop, as well as broiled hamburgers, precooked bacon and pork sausage patties and links. Total sales for 1995-1997 exceeded \$85 million. Opposer sells nationwide in food service trade channels, to retail delis and convenience stores. In 1981 and 1982, opposer sold to grocery stores and supermarkets, and opposer intends to again sell its precooked meats under its mark in the retail market, including grocery stores and supermarkets, "within the next three to six months." Hormel's precooked meats have been promoted through trade journals in the restaurant industry and through trade shows of the National Restaurant Association, and promotional

⁴ In the parties' joint motion to resume proceedings (filed concurrently with the stipulated findings of fact), they stated as follows: "The parties have agreed to submit this case to the Board on the accompanying Stipulated Findings of Fact, in lieu of taking testimony or presenting any other evidence."

⁵ Registration No. 1,257,709, issued November 1983, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The claimed dates of first use and first use in commerce are both March 5, 1980.

⁶ Registration No. 2,144,741, issued March 17, 1998. The claimed dates of first use and first use in commerce are both March 5, 1980.

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programs are offered to opposer's customers. Hormel also advertises its products sold under the FAST'N EASY marks on its Internet website. Three examples of opposer's policing of its rights in this mark are also set forth in the stipulated facts.

Lee Valley uses its marks, FEAST & EASY and FEAST & EASY QUICK CUSINE and design, for frozen stir-fry vegetable kits including sauce, and some including shrimp, scallops, beef and chicken. Applicant's products are sold in retail supermarkets and grocery stores; its total sales in 1997 were \$226,464; and applicant has not advertised in the United States using the mark FEAST & EASY. Prior to adopting its marks, Lee Valley conducted no search or name clearance; but prior to filing its applications, it did conduct a search in 1994, and after this consolidated proceeding was commenced it conducted a subsequent search in 1998.

Status and title copies of Hormel's two registrations were attached to the stipulated facts. Because Hormel owns valid and subsisting registrations for its pleaded mark, the issue of priority does not arise in the opposition. See *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108(CCPA 1974); and *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125 (TTAB 1995). Moreover, according to the stipulated facts, Hormel has

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continuously used its mark on precooked bacon since March 1980, well prior to Lee Valley's filings and its first use in 1994. See *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, at footnote 13 (TTAB 1993); and *American Standard Inc. v. AQM Corporation*, 208 USPQ 840 (TTAB 1980).

Thus, the only issue before the Board is likelihood of confusion. In determining the issue of likelihood of confusion, we must base our analysis of all the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

In the present case, the goods, while not identical, are substantially similar. In determining the question of likelihood of confusion, the Board is constrained to compare the goods as identified in defendant's application/registration with the goods as identified in plaintiff's registration. If the plaintiff's goods and the defendant's goods are described so as to encompass or overlap, then defendant cannot properly argue that, in reality, the actual goods of the parties are not similar. See *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198

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(Fed. Cir. 1983); and *Peopleware Systems, Inc. v. Peopleware, Inc.*, 226 USPQ 320 (TTAB 1985).

Both Hormel's precooked meats and Lee Valley's prepackaged Chinese-style stir-fry foods consist of or may include meat; and both parties' goods are intended to make meal preparation quick and simple. Lee Valley's products and some of Hormel's products (e.g., Hormel's lemon herb chicken, roast pork chop, broiled hamburgers) are intended to be eaten as meal entrees.

Neither parties' goods as identified are restricted in any way. Lee Valley's argument that the term "prepackaged" essentially relates to retail distribution is not convincing because there is no evidence that bulk institutional foods could not be "prepackaged."

In any event, it is well settled that goods need not be identical or even competitive to support a finding of likelihood of confusion, it being sufficient instead that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See *In re Peebles Inc.*, 23 USPQ2d 1795 (TTAB 1992); and *In re International Telephone and Telegraph Corporation*, 197 USPQ 910 (TTAB 1978).

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Regarding the trade channels, even if Hormel does not currently sell its products to retail grocery stores and supermarkets, there is no restriction to the channels of trade in the involved application or any of the registrations. Therefore, the Board must assume that the products move through all the ordinary and normal channels of trade for such goods to all the usual purchasers for such products. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Because the Board must consider the goods as identified, Lee Valley's argument that the analysis of the trade channels should be based on the facts presented by the parties' joint stipulation is simply inapposite.

In this case, the goods of both parties could be encountered by purchasers in circumstances that would give rise to the belief that both parties' goods come from or are associated with the same source. See *Dan Robbins & Associates, Inc. v. Questor Corporation*, 599 F.2d 1009, 202 USPQ 100 (CCPA 1979).

Turning next to the marks, Lee Valley's two involved marks are FEAST & EASY QUICK CUISINE and design and FEAST & EASY, and Hormel's mark is FAST'N EASY. We will consider the similarity or dissimilarity of Hormel's mark with Lee

Valley's two marks separately, although we note that both FEAST & EASY and FAST'N EASY consist of three words and both end in "and easy."⁷ The marks are similarly constructed and are similar in sound.

In terms of the connotation of the FEAST & EASY and FAST'N EASY marks, clearly the word FEAST and the word FAST are different by only one letter. Moreover, during the ex parte prosecution of Lee Valley's application, which matured into Registration No. 1,965,241, it successfully argued before the Examining Attorney that the cited registration (for the mark EASY FEAST) should be withdrawn. On unnumbered page 3 of applicant's September 18, 1995 response to an Office action, it stated the following in explaining the intended connotation and meaning of its mark FEAST & EASY: "The Applicant's mark is intended to convey a play on words on the expression 'Fast & Easy', since the goods consist of prepared and prepackaged stir-fry vegetables for fast and convenient use. Just like in the A-OK case, the connotation of 'fast & easy' is entirely lost when FEAST & EASY is transposed to EASY FEAST." Later, on the same page, Lee Valley stated: "In that regard, the customer is forced to pause and reflect not only on the play on words 'fast and easy'...." Taking applicant's statements as illustrative of the "shade and tone" in the total picture, we find the

⁷ Hormel's use of "'N" and Lee Valley's use of "&" for the word

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connotation of both parties' marks relate, at least in part, to food that takes little time and is easy to prepare. See *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151 (CCPA 1978).

With regard to Lee Valley's second involved mark, FEAST & EASY QUICK CUSINE and design, marks are considered in their entireties, but 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 or portion of a mark. That is, one feature of a mark may have more significance than another. See *In re National Data Corporation*, 753 F.2d 1056 224 USPQ 749 (Fed. Cir. 1985). We find the dominant portion of this mark is neither the design nor the descriptive (and disclaimed) words "quick cuisine," but rather is the words FEAST & EASY. During the ex parte prosecution of this application, Lee Valley (in its response filed September 18, 1995) made the same statements with regard to the intended connotation of its mark relating to "fast and easy" as quoted above, and, in addition, stated as follows: "However, that ignores the connection between the word "quick" and the word "fast' as a suggestive connotation of the word "feast" in the intended play on words "fast & easy."

"and" is an insignificant difference.

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We find that the parties' involved marks are similar in overall commercial impression in that, specifically, they engender quick, easy meal preparation. The emphasis in determining likelihood of confusion, moreover, is not on a side-by-side comparison of the marks, but rather must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of the many trademarks encountered, and the purchaser's fallibility of memory over a period of time must also be kept in mind. See *Spoons Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), aff'd unpubl'd, Appeal No. 92-1086 (Fed. Cir. June 5, 1992); and *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973).

Lee Valley argues that Hormel has a weak mark. However, this argument is not supported by the record as there are no third-party registrations and/or examples of third-party usages in the record. The stipulated findings of fact include an exhibit which consists of copies of the results of applicant's 1994 and 1998 search reports. However, mere lists of registrations (e.g., the printout of the results of a search service) are not credible evidence of the registrations listed in the report. See *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992). Also, the 1998 report lists only the purported marks, with no further information. This evidence is not convincing that Hormel's

mark is a weak mark in its field.⁸ To the contrary Hormel has established use of the mark FAST'N EASY for 18 years with sales for 1995-1997 of more than \$85 million.

Even if Lee Valley had proven that Hormel's mark is weak, such marks are still entitled to protection against registration by a subsequent user of the same or similar mark for the same or closely related goods. See *Hollister Incorporated v. Ident A Pet, Inc.*, 193 USPQ 439 (TTAB 1976).

Lee Valley's argument that there is no evidence of actual confusion is also not persuasive. In this case, Lee Valley does not advertise its FEAST & EASY marks in the United States; it only commenced use of its marks in 1994, and its 1997 sales in the United States of \$226,4641 are somewhat de minimis. Moreover, the test is not actual confusion, but likelihood of confusion. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

Finally, it is well settled that any doubt on the question of likelihood of confusion must be resolved against the newcomer as the newcomer has the opportunity of avoiding confusion, and is obligated to do so. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir.

⁸ Lee Valley refers in its brief (at p. 12) to the case of *United Foods Inc. v. United Airlines Inc.*, 41 USPQ2d 1653 (TTAB 1995). The Board disregards citation to any non-precedential decision (unless, of course, it is asserted for *res judicata*, law of the case, or other such issues). See *General Mills Inc. v. Health Valley Foods*, 24 USPQ2d 1270, at n. 9 (TTAB 1992).

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1988); and *Hilson Research Inc. v. Society for Human Resource Management*, supra, at 1440.

Accordingly, because of the similarity of the parties' marks; the similarity of the parties' goods; and the similarity of the trade channels and purchasers; we find that confusion is likely between Lee Valley's marks and Hormel's mark when used on the respective goods of the parties.

Decision: The opposition is sustained, and registration to applicant is refused. The petition to cancel is granted, and Registration No. 1,965,241 will be cancelled in due course.

G. D. Hohein

B. A. Chapman

D. E. Bucher
Administrative Trademark Judges,
Trademark Trial and Appeal Board