

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB OCT. 29, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Marthe Dare, d.b.a. Dare Enterprises

Serial No. 75/026,172

William H. Pavitt, Jr. of Beehler & Pavitt for Marthe Dare,
d.b.a. Dare Enterprises.

Tomas Vlcek, Trademark Senior Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Cissel, Hohein and Bottorff, Administrative
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant has filed an application by which she seeks
to register the mark 21st CENTURY MANNA, in the stylized
lettering shown below,

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for goods identified in the application as "nutritional herbal supplements to be taken internally as a digestive aid for intestinal disturbances to both detoxify the system and stimulate efficient removal of waste products from the colon."¹

The Trademark Senior Attorney has refused registration pursuant to Trademark Act Section 2(d), 15 U.S.C. §1052(d), citing two registrations as bars to registration of applicant's mark. The first registration is of the mark 21st CENTURY and design, depicted below, for goods identified as "vitamins, herbal remedies and nutritional supplements."²

The second cited registration is of the mark FOODFORM MANNA, in typed form, for goods identified in the

¹ Serial No. 75/026,172, filed November 30, 1995. The application is based on use in commerce; applicant has alleged August 9, 1995 as the date of first use of the mark anywhere and August 15, 1995 as the date of first use of the mark in commerce.

² Registration No. 1,790,110, issued on August 31, 1993 to Twenty First Century Nutritional Products, Inc. Combined §§8 and 15 affidavit accepted and acknowledged.

registration as "dietary food supplements for human consumption."³

When the refusals were made final, applicant filed this appeal. Applicant and the Trademark Senior Attorney have filed main briefs, and applicant has filed a reply brief. No oral hearing was requested. After careful consideration of the evidence and arguments offered by applicant and the Trademark Senior Attorney, and for the reasons discussed below, we affirm the refusal to register which is based on Registration No. 1,790,110, but we reverse the refusal which is based on Registration No. 1,983,524.

As to each of the refusals, our determination under Section 2(d) is 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. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

³ Registration No. 1,983,524, issued on July 2, 1996 to IntraCell Nutrition Inc.

Registration No. 1,790,110.

The goods identified in applicant's application, i.e., "nutritional herbal supplements to be taken internally as a digestive aid for intestinal disturbances to both detoxify the system and stimulate efficient removal of waste products from the colon" are encompassed within, and thus are legally identical to, the "herbal remedies" and "nutritional supplements" identified in Registration No. 1,790,110. See *In re Diet Center Inc.*, 4 USPQ2d 1975 (TTAB 1987).

Furthermore, because applicant's goods and registrant's goods are legally identical, and in the absence of any express limitations in either applicant's or registrant's identification of goods, we must presume that applicant's goods and registrant's goods move in the same trade channels and that they are marketed to and purchased by the same classes of purchasers. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). The catalog and advertising evidence attached to the Trademark Senior Attorney's December 20, 1996 final office action further supports this conclusion.

In short, applicant's goods, trade channels and classes of customers are legally identical to the registrant's goods, trade channels and classes of

customers. These facts support a finding of likelihood of confusion in this case.

We turn next to the issue of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, because applicant's goods are legally identical to registrant's goods, the degree of similarity between the marks that is required to support a finding of likelihood of confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in

determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). We find that the literal portion of the registered mark, "21st CENTURY," is the dominant feature of the registered mark, inasmuch as it is more likely than the design element of the mark to be remembered and used by purchasers in identifying and calling for the goods. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). We are not persuaded by applicant's argument that "21st CENTURY" lacks inherent distinctiveness as applied to registrant's goods, or that it is not the dominant feature of registrant's mark. "21st CENTURY" does not describe the goods in any way, nor is there any evidence that the distinctiveness of the designation has been weakened by any third party use of the designation in connection with such goods.

Applicant also uses the designation "21st CENTURY" prominently in her mark. Applicant has added the word MANNA, a word connoting food or nourishment which is, at the least, somewhat suggestive as applied to applicant's goods, as applicant herself has acknowledged. (Applicant's brief at 7.) We take judicial notice of the definition of "manna" set forth in Webster's Ninth New Collegiate Dictionary (1990), at 724:

manna 1 a: food miraculously supplied to the Israelites in their journey through the wilderness **b:** divinely supplied spiritual nourishment **c:** a usu. sudden and unexpected source of gratification, pleasure, or gain **2 a:** the sweetish dried exudate of a European ash (esp. *Fraxinus ornus*) that contains mannitol and has been used as a laxative and demulcent **b:** a similar product excreted by a scale insect (*Trabutina mannipara*) feeding on the tamarisk

Comparing applicant's and registrant's marks in their entireties, we find that, despite the presence of the design element in registrant's mark and the word MANNA in applicant's mark, the marks are similar in terms of their overall commercial impressions because they both include the designation "21st CENTURY." The marks are sufficiently similar that, when they are used on the legally identical goods involved in this case, confusion is likely to result.

Applicant relies heavily on a document entitled CONSENT AGREEMENT, which was executed by her and by the owner of the cited Registration No. 1,790,110 on August 21, 1996, after applicant received the Trademark Senior Attorney's Section 2(d) refusal. However, we find that this agreement is not entitled to dispositive weight in our likelihood of confusion analysis in this case. In its entirety, the text of the agreement reads as follows:

CONSENT AGREEMENT

21st Century Nutritional Products, 2445 W. 12th Street, Suite 2, Tempe, AZ 85281, owner of the trademark "21st Century" for vitamins, herbal remedies, and nutritional supplements (Registration Number: 1790110), does hereby agree to license the right to use of the name "21st Century" to Dare Enterprises, 270 No. Canon Drive, Suite 2046, Beverly Hills, CA, 90212, based upon the following agreement entered into between Dare Enterprises and 21st Century Nutritional Products. In consideration of this use, Dare Enterprises will pay the sum of one dollar annually to 21st Century Nutritional Products.

Dare Enterprises agrees to cooperate with 21st Century Nutritional Products on all future packaging of products to ensure that in no way does 21st Century Manna duplicate or give the commercial impression of emanating from 21st Century Nutritional Products.

For good and valuable consideration receipt of which is acknowledged, the parties have signed the agreement below.

This agreement cannot be construed as registrant's consent to registration of applicant's mark. As the Trademark Senior Attorney has pointed out, by its very terms the agreement instead appears to be a license to use the mark, granted by registrant to applicant for a fee. The agreement therefore is quite similar to the agreement rejected by the Court in the case of *In re Wilson Jones Company*, 337 F.2d 670, 143 USPQ 238 (CCPA 1964). The Court stated:

While we have held that an agreement by the owner of a reference registration giving express consent to register should have an important persuasive effect in determining registrability, that situation is not here. The agreement here conveys only the right to use the *reference* mark. We do not see that this agreement supports the inference that the owner of the reference mark thought confusion between the marks *sought to be registered* and the *reference* mark to be unlikely.

143 USPQ at 239. (Emphasis in original; internal citation omitted). See also J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition (4th Ed.) at §23:85. Likewise, in the present case, the agreement does not include registrant's express consent to applicant's registration of the mark "21st CENTURY MANNA" for the goods identified in applicant's application. Registrant merely has licensed to applicant, for a fee, "the right to use of the name '21st Century.'" Accordingly, this case is distinguishable from the cases relied on by applicant involving consent agreements which have been found to be acceptable, such as *In re Four Seasons Hotels Limited*, 987 F.2d 1565, 26 USPQ2d 1071 (Fed. Cir. 1992).

Applicant argues that the agreement should not be deemed to be a license because it fails to include any provisions for registrant's control over the nature and quality of the goods on which applicant uses the mark.

However, the issue is not whether the agreement is effective as a license agreement, but rather whether it is effective as a consent to register. Clearly, it is not.

Applicant further argues that the agreement was prepared by the applicant and registrant themselves, without the assistance of intellectual property counsel, and that any technical deficiencies in the agreement accordingly should be overlooked. However, applicant has been on notice since the Trademark Senior Attorney's issuance of the first final Office action on December 20, 1996 that the Office deemed the agreement to be deficient as a consent agreement. Applicant has been represented by counsel in this matter since at least as early as May 2, 1997, and has had ample time to submit a substitute agreement which, under the case law cited by applicant in her briefs, would constitute a valid and persuasive consent agreement. For reasons which are not apparent from the record, applicant has not obtained and submitted such a substitute consent agreement. She will not now be heard to argue that the deficiencies in the agreement (which are substantive, not merely technical in nature) should be overlooked or excused on account of her previous pro se status.

After considering all of the evidence of record with respect to the relevant *du Pont* factors, including, for whatever it is worth, the so-called "consent agreement," we find that a likelihood of confusion exists as between applicant's mark and the mark in Registration No. 1,790,110. Accordingly, we affirm the Section 2(d) refusal which is based on that registration.

Registration No. 1,983,524

However, we reverse the Trademark Senior Attorney's Section 2(d) refusal which is based on Registration No. 1,983,524, of the mark FOODFORM MANNA for "dietary food supplements for human consumption." Although applicant's goods are encompassed within, and thus legally identical to, the goods identified in the cited registration, we find that the marks are sufficiently dissimilar that confusion is not likely to result.

As discussed above, the term MANNA is somewhat suggestive as applied to these goods. The other features of the respective marks, i.e., the word FOODFORM in registrant's mark and the designation 21st CENTURY in applicant's mark, are quite dissimilar in terms of appearance, sound and connotation. This dissimilarity is sufficient to give the marks different overall commercial

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impressions, despite the presence of the word MANNA in both marks.

Decision: The refusal to register based on Registration No. 1,983,524 is reversed. The refusal to register based on Registration No. 1,790,110 is affirmed.

R. F. Cissel

G. D. Hohein

C. M. Bottorff

Administrative Trademark Judges
Trademark Trial and Appeal Board