

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JUNE 1, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Health Letter Associates
v.
Your Child's Wellness Newsletter Inc.

Opposition No. 97,046
to application Serial No. 74/430,030
filed on August 26, 1993

Request for Reconsideration

Michael A. Grow of Arent Fox Kintner Plotkin & Kahn, PLLC
for Health Letter Associates.

Robert S. Weisbein of Darby & Darby, P.C. for Your Child's
Wellness Newsletter Inc.

Before Hanak, Quinn and Chapman, Administrative Trademark
Judges.

Opinion by Chapman, Administrative Trademark Judge:

The Board, in its decision, dated March 10, 2000,
dismissed the opposition by Health Letter Associates to the
registration of the mark YOUR CHILD'S WELLNESS NEWSLETTER
owned by applicant, Your Child's Wellness Newsletter Inc.
Opposer has filed, on April 10, 2000 (via certificate of

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mailing), a request for reconsideration. Applicant filed no response thereto. (There is no requirement that a party file a brief in response to a request for reconsideration of a final decision. See TBMP §544.)

Opposer contends that the Board "misapplied the factors to be considered in evaluating likelihood of confusion." Specifically, opposer contends that the Board overlooked "the extraordinary fame" of opposer's mark; that the Board overlooked the fact that "as used by opposer, its mark WELLNESS LETTER creates a separate commercial impression," placing undue emphasis on the fact that the mark WELLNESS LETTER is used with UNIVERSITY OF CALIFORNIA BERKELEY; and that the Board improperly assumed opposer's mark was weakened by the existence of third-party registrations when there was no evidence of third-party use.

Opposer did not establish on the record before us that its registered mark, WELLNESS LETTER, is famous. We disagree with opposer that in the mark as used, UNIVERSITY OF CALIFORNIA AT BERKELEY WELLNESS LETTER, the words WELLNESS LETTER create a separate commercial impression, especially when one views the words as they are actually displayed on the title banner of the newsletter. Finally, as was thoroughly explained in our March 10, 2000 decision (see pages 12-15), the weakness of opposer's mark was demonstrated in the record through dictionary definitions

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and third-party registrations used to show common adoption of a term. The Board did not utilize the third-party registrations as evidence of third-party use, which of course, they would not show.

We find no error in our previous decision that there is no likelihood of confusion in this case. Opposer's request for reconsideration on this issue is denied.

However, opposer raised a second basis for requesting reconsideration, specifically that the Board did not rule on opposer's claim under Section 2(e)(1). Although the Board, at page 12 of its decision, stated, in the context of the likelihood of confusion discussion, that applicant's mark is "descriptive," no explicit ruling was set forth. The Board finds the request for reconsideration on this issue to be well taken.

Opposer's pleading under Section 2(e) was inartfully drawn (e.g., referring to "YOUR CHILD'S" rather than applicant's mark as a whole), and opposer submitted minimal evidence to establish the mere descriptiveness of applicant's mark (e.g., several third-party registrations for various types of publications, including newsletters, wherein the term "your" was disclaimed). Pleadings are to be construed and administered so as to do substantial justice. See Fed. R. Civ. P. 1, 7 and 8(f). A reasonable interpretation of opposer's amended notice of opposition, is

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that it constitutes sufficient notice pleading of a Section 2(e)(1) claim of mere descriptiveness. Further, our review of the record convinces us there was indeed a trial on the issue of descriptiveness.

The overall record before the Board establishes that applicant's mark, YOUR CHILD'S WELLNESS NEWSLETTER, is merely descriptive of applicant's goods ("newsletter relating to health") within the meaning of Section 2(e)(1).

As stated by Professor McCarthy in Vol. 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §11:19 (4th ed. 2000):

To be characterized as 'descriptive,' a term must directly give some reasonably accurate or tolerably distinct knowledge of the characteristics of a product.

In this case, when the mark YOUR CHILD'S WELLNESS NEWSLETTER is viewed in the context of applicant's goods, the purchasing public would immediately understand the nature of the goods, namely, that applicant's newsletter is one covering health issues relating to children.¹ See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Omaha National Corporation*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Intelligent Instrumentation Inc.*, 40 USPQ2d 1792 (TTAB 1996); and *In re Time Solutions, Inc.*, 33

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USPQ2d 1156 (TTAB 1994). See also *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988).

Applicant's mark immediately conveys, without imagination or thought, that the goods are newsletters directed to parents or persons caring for children regarding the health of children. Therefore, applicant's mark is merely descriptive of applicant's goods, and is not registrable absent a showing of acquired distinctiveness under Section 2(f). In this case applicant did not assert a claim of acquired distinctiveness either during the ex-parte prosecution of the application or during this opposition proceeding.

Accordingly, the opposition is sustained on the Section 2(e)(1) ground only, and registration to applicant is refused.

E. W. Hanak

T. J. Quinn

¹ Applicant disclaimed the words "child's wellness newsletter" and the word "your" simply relates to and modifies the other words in the mark.

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B. A. Chapman
Administrative Trademark Judges,
Trademark Trial and Appeal Board