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Paper No. 15
EJS

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Golden Apples Candy Company, Inc.

Serial No. 75/471,837

Mark F. Harrington and Geza C. Ziegler Jr. of Perman & Green LLP for Golden Apples Candy Company, Inc.

Fred Mandir, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Seeherman, Bucher and Drost, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Golden Apples Candy Company, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register MOTHER NATURE'S HEALTH POPS for "herbal homeopathic health pops for the treatment of cough and cold, airborne allergies, smoker's withdrawal, premenstrual

syndrome, and stress and anxiety."¹ The words HEALTH POPS have been disclaimed.

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground of likelihood of confusion with the previously registered mark MOTHER NATURE HEALTH PRODUCTS and design, as shown below, with the words NATURE and HEALTH PRODUCTS disclaimed.²



The goods in that registration are identified as "vitamin supplements; nutritional supplements; throat lozenges; medicated mouthwash; preparations of fish products for use as dietary supplements, namely, shark liver oil, squalene and fish oil; preparations of apiary products for use as dietary supplements, namely, royal jelly, royal jelly and bee pollen mixture and propolis." It is the Examining Attorney's position that applicant's mark so resembles the registered mark that, if used on applicant's identified goods, it would be likely to cause confusion or mistake or to deceive.

¹ Application Serial No. 75/471,837, filed April 21, 1998, asserting a bona fide intention to use the mark in commerce.

² Registration No. 2,115,113, issued November 26, 1997.

The appeal has been fully briefed, but an oral hearing was not requested.

We affirm the refusal of registration.

Our determination is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. du Pont de Nemours & 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. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the goods, applicant's identified herbal homeopathic health pops for the treatment of cough and cold are extremely similar, in both their nature and purpose, to the throat lozenges identified in the cited registration. Applicant argues that its goods differ from those of the registrant because its goods are related to medicines and the medical treatment of specific ailments, while registrant's goods are vitamin or nutritional supplements. However, as pointed out by the Examining Attorney, the registrant's throat lozenges and medicated mouthwash could be used for the treatment of coughs and colds, the same ailments that applicant's health pops treat. Applicant's response, that "the consumer seeking

homeopathic medicines will know the difference and is not likely to be confused by throat lozenges and medicated mouthwash," reply brief, pp. 4-5, is not persuasive. The question is not whether consumers will be confused as to the products, but whether they will be confused as to the source of the products. It is well-established that it is not necessary that the goods of the parties be similar or competitive, let alone identical, in order to support a holding of likelihood of confusion. See **In re International Telephone & Telegraph Corp.**, 197 USPQ 910 (TTAB 1978).

Moreover, the evidence shows that applicant's goods are otherwise related to the goods identified in the registration. The Examining Attorney has made of record a number of use-based third-party registrations which show that entities have registered their marks both for goods of the type listed in applicant's application and for goods of the type recited in the registrant's registration.³ Third-

³ See, for example, Registration No. 2,241,235 for dietary, nutritional and herbal supplements; homeopathic pharmaceutical preparations for treating cold and flu symptoms; Registration No. 2,223,243 for dietary supplements, vitamin supplements, mineral supplements and homeopathic tablets for use in the treatment of, inter alia, cold and flu symptoms, allergy symptoms and premenstrual symptoms; Registration No. 2,263,385 for, inter alia, pharmaceutical preparation used in the treatment of coughs, sore throats, nasal congestion and colds; herbal cough drops; medicated lozenges; throat lozenges; and mineral

party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source.

The channels of trade for the goods are also, at least in part, the same. Applicant itself acknowledges that both homeopathic medicines and supplements can be found in health food stores. See response filed September 21, 2000. In addition, because both applicant's health pops and the registrant's throat lozenges can be used for the treatment of coughs, they may be bought by the same class of purchasers. Moreover, homeopathic health pops are purchased by the general public, which are also the purchasers of vitamin and other supplements.

This brings us a consideration of the marks. Applicant, in its reply brief, attempts to claim that its mark is stylized by inserting "reproductions" of its mark and the registrant's. However, the "reproduction" of its mark, as shown at page 2 of its reply brief, is not the mark for which application has been made. The "mark" shown in the brief is in fact a copy of applicant's packaging.⁴

supplements; Registration NO. 2,266,420 for, inter alia, vitamins and supplements and for cough drops.

⁴ Although the application is based on a claimed intent to use the mark, and an amendment to allege use has not been filed, it

But the mark has been applied for in a typed drawing format. Accordingly, if applicant were to obtain a registration for this mark, it would not be limited to the manner in which applicant currently uses the mark on its packaging, with MOTHER NATURE'S on one line, and HEALTH POPS below it and to the right. The protection to be accorded a typed drawing registration would extend to a display of MOTHER on one line, with NATURE'S below it, and HEALTH POPS centered below that, in the same format and typestyle used in the registrant's mark.

We consider, therefore, the similarity between applicant's applied-for mark, MOTHER NATURE'S HEALTH POPS in typed drawing form, and MOTHER NATURE HEALTH PRODUCTS and design. Although marks must be compared in their entirety, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. See **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

The words HEALTH POPS in applicant's mark, and HEALTH PRODUCTS in the cited mark, clearly deserve less weight because they are the name of the products, and have no source-identifying value. Applicant itself acknowledges

appears from applicant's submissions that it may have begun using its mark.

that "a consumer's attention is not likely to be drawn to Registrant's use of the term 'Health Products'" because the use of this term "pales in comparison to Registrant's use of the term 'MOTHER NATURE.'" Reply brief, p. 3.

We also find that the design element in the cited mark is entitled to less weight as we make our overall comparison. In general, when a mark comprises both a word and a design, the word is accorded greater weight because it would be used by purchasers to request the goods or services. **In re Appetito Provisions Co.**,³ USPQ2d 1553 (TTAB 1987). That principle applies to the registered mark. Consumers will view the oval background as only a carrier for the mark, while the flower-like design, which acts as each end of a banner for the generic words HEALTH PRODUCTS, has the effect of emphasizing the words MOTHER NATURE. Thus, the dominant part of the cited mark, the portion that consumers are most likely to note and remember, is the words MOTHER NATURE.

Taken all in all, the marks are strikingly similar. Although specific differences may be found between the marks when they are compared side-by-side, in the marketplace consumers do not have the luxury to make side-by-side comparisons between marks, and instead they must rely on hazy past recollections. **Dassler KG v. Roller**

Derby Skate Corporation, 206 USPQ 255 (TTAB 1980).

Moreover, even if consumers did recall that one mark has a design element and the other does not, the similarities between them are so strong, and the differences so inconsequential, that consumers would likely view the marks as variations of each other, rather than as different marks indicating origin of the goods in separate sources. Thus, the use of HEALTH POPS in applicant's mark, rather than HEALTH PRODUCTS, will not avoid confusion, as applicant contends. Instead, consumers familiar with the registrant's mark MOTHER NATURE HEALTH PRODUCTS and design on variety of nutritional supplements and throat lozenges are likely to assume, upon seeing MOTHER NATURE'S HEALTH POPS on health pops, that registrant is simply using a more specific generic term for this particular product.

Decision: The refusal of registration is affirmed.