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Paper No. 10
CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Turtle Mountain, Inc.

Serial No. 75/635,762

Allan I. Zackler of Zackler & Associates for Turtle Mountain, Inc.

Jon Schiffrin, Trademark Examining Attorney, Law Office 115 (Tomas Vlcek, Managing Attorney).

Before Walters, Wendel and Bucher, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Turtle Mountain, Inc. has filed a trademark application to register the mark SOY DELICIOUS for, as amended, "frozen soy-based non-dairy confections."¹ The record includes a disclaimer of SOY apart from the mark as a whole.

The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark DELICIOUS, previously registered on the Supplemental Register for "ice cream, ice milk, frozen

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yogurt and sherbet,"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

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 considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in

¹ Serial No. 75/635,762, in International Class 30, filed February 5, 1999, based on use in commerce, alleging first use and use in commerce as of July 15, 1998.

² Registration No. 1,640,081 issued April 2, 1991, to Driggs Farms of Indiana, Inc., in International Class 30. [Section 8 affidavit accepted; renewal application filed.]

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 or services 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).

The Examining Attorney contends that the marks are "very similar"; that applicant merely added the descriptive term SOY to registrant's mark; and that the commercial impressions of applicant's mark, SOY DELICIOUS, and registrant's mark, DELICIOUS, are substantially similar.

Applicant contends, essentially, that it is the descriptive, informational, significance of SOY that distinguishes its mark from the registered mark, especially for consumers seeking a non-dairy frozen confection. Applicant also alleges that DELICIOUS is a weak mark. In support of this allegation, applicant submitted a list of registered marks containing the term DELICIOUS.³

³ Although this list of marks is from the trademark database of the United States Patent and Trademark Office (PTO), it is merely a list of registration numbers and marks. This is not proper evidence of these registrations. However, the Examining Attorney did not object to this

There is no question that the term "delicious" is laudatory in connection with food items and, thus, weak as a source identifier. We note, in this regard, that registrant's mark is on the Supplemental Register. However, even marks registered on the Supplemental Register are entitled to protection under Section 2(d) of the Trademark Act. *In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49 (Fed. Cir. 1986); and *In re Clorox*, 578 F.2d 305, 198 USPQ 337 (CCPA 1978).

Contrary to applicant's contentions, we find that the additional descriptive term SOY does not adequately distinguish applicant's mark from registrant's mark. We conclude that applicant's mark, SOY DELICIOUS, and registrant's mark, DELICIOUS, engender substantially similar commercial impressions.

Turning to consider the goods involved in this case, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under

evidence until the brief and, in fact, addressed the content of the list in the final refusal. Therefore, we have considered this list as part of the record of this application. Having so concluded, we add that this evidence is of little probative value because we can determine almost nothing about the registrations from this list.

circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

While both applicant's and registrant's goods are frozen confections, applicant correctly points to a difference in the goods. Registrant's ice cream, ice milk, frozen yogurt and sherbet are, by their very nature, dairy-based products. By contrast, applicant's goods are limited to soy-based products.⁴ However, this difference does not automatically lead us to the conclusion that confusion as to source is unlikely.

One of applicant's principal contentions is that the respective goods are "legally" different and consumers "seek out non-dairy based frozen desserts." While there is no question that the goods are not identical, applicant has submitted no evidence regarding channels of trade, classes of purchasers or consumer habits and perceptions of different categories of frozen desserts.

On the other hand, the Examining Attorney has submitted evidence of third-party marks that are registered for both

⁴ Applicant submitted evidence with its brief, which is manifestly untimely and has not been considered. We note that even if we had considered this evidence as part of the record, it would not alter our decision on the issue of likelihood of confusion.

dairy and non-dairy frozen confections. Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

In this case, both applicant's goods and registrant's goods are frozen confections and the record indicates that such goods, even if dairy and non-dairy products, may be identified by the same mark and emanate from the same source. Thus, the goods herein are closely related for purposes of determining likelihood of confusion.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, SOY DELICIOUS, and registrant's mark, DELICIOUS, their contemporaneous use on the closely related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is affirmed.