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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Patricia Dwyer-Bell and Richard Bell, dba Source One Feeds, Source One Naturals, Design One and Source One Design

Serial No. 75/718,242
Serial No. 75/718,243

Erin M. Clarke of Owen, Wickersham & Erickson, P.C. for applicant.

Brian D. Brown, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Chapman, Wendel and Rogers, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On June 1, 1999, Patricia Dwyer-Bell and Richard Bell, dba Source One Feeds, Source One Naturals, Design One and Source One Design[1] filed two applications for the Principal Register, both based on applicant's claimed dates of first

[1] In application Serial No. 75/718,242, applicant's name did not include the "dba" name "Source One Design."

use and first use in commerce, and both for the following goods: "animal dietary supplements" in Class 5. Application Serial No. 75/718,242 is for the mark SOURCE ONE NATURALS, and applicant disclaimed the term "naturals." Application Serial No. 75/718,243 is for the mark SOURCE ONE FEEDS, and applicant disclaimed the term "feeds."

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of two prior registrations on the Principal Register issued to the same entity, Source, Inc. The first is the mark shown below[2]

for "dietary supplement for horsefeed, composed of vitamins, minerals, trace elements and various other micronutrients" in Class 5. The second is the mark SOURCE[3] for "dietary food supplement for animal feed, composed of vitamins, minerals, trace elements and other

[2] Registration No. 1,092,632, issued June 6, 1978, Section 8 affidavit accepted, Section 15 affidavit acknowledged, renewed. The registration includes the following statement: "The dotted background is a design feature of the mark, and does not indicate shading or color."

[3] Registration No. 1,255,764, issued November 1, 1983, Section 8 affidavit accepted, Section 15 affidavit acknowledged.

micronutrients, not intended for human consumption," also in Class 5.

Applicant has appealed, and briefs have been filed in each application. Applicant did not request an oral hearing in either application.

In view of the common questions of law and fact which are involved in these two applications, and in the interests of judicial economy, we have consolidated the applications for purposes of final decision. Thus, we have issued this single opinion.

We affirm the refusal to register in each application as to both of the cited registrations. In reaching this conclusion, we have followed the guidance of the Court in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

The Examining Attorney contends that the involved identified goods are "essentially identical" (brief, p. 3); that there are no restrictions therein as to purchasers or channels of trade and thus it is presumed they move through all the normal channels of trade to all the usual classes of purchasers; that each of applicant's marks creates a similar overall impression to that of both cited marks; that the word SOURCE is the dominant feature in all of the marks; that the marks share the identical term SOURCE,

which is “the most important literal portions of the marks” (brief, p. 5); that the word portion of the cited registration for a composite mark is the portion most likely to be utilized by purchasers in calling for the goods, and is the primary source identifier; that applicant has taken the registrant’s mark SOURCE and merely added the words “one naturals” in one application, and the words “one feeds” in its other application, but these do not result in the creation of dissimilar marks; and that any doubt must be resolved in favor of registrant.

Applicant urges reversal on the basis that the Examining Attorney improperly dissected each mark, looking only at the word “SOURCE,” while ignoring the design in one of the cited registrations, as well as the words “ONE NATURALS” and “ONE FEEDS” in applicant’s applied-for marks; that applicant’s marks, when each is considered in its entirety and compared with the marks in the cited registrations, are not similar in appearance, sound, or connotation to registrant’s marks; that the term “SOURCE” in registrant’s marks connotes the starting point for a river or stream, whereas in applicant’s marks “source” and “one” are viewed together such that “source” connotes “a point of origin or procurement: supplier” and “one” connotes “the first in a series or set” (brief, p. 4); and

that because there are other pending applications and registrations for marks including the term “SOURCE” for goods in the relevant field, it is inconsistent for the Examining Attorney to maintain that applicant’s marks will result in a likelihood of confusion.

The parties’ goods are virtually identical -- animal dietary supplements on the one hand and dietary supplements for animal feed (or in one registration specifically “horsefeed”). Applicant did not argue to the contrary. Obviously, virtually identical goods are presumed to be offered through all the same channels of trade to similar potential purchasers.

We turn next to a consideration of the involved marks, beginning with the admonition by our primary reviewing Court that “when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.” Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

It is true that merely because the marks share the term SOURCE does not, by itself, determine whether the involved marks are similar under the du Pont case. However, it is not improper to give more weight to a dominant feature of a mark, provided the ultimate

conclusion rests on a consideration of the marks in their entireties. See In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Here the only word in registrant's marks is the word SOURCE, and we find SOURCE to be the dominant feature of registrant's word and design mark, as purchasers would generally call for the goods by utilizing the word rather than describing the design feature. While applicant's marks do include the additional term "ONE" as well as, respectively, the descriptive/generic terms "naturals" or "feeds," the differences between these marks are not sufficient to overcome the likelihood of confusion.

It is generally accepted that when a composite mark incorporates the arbitrary mark of another for closely related goods or services, the addition of suggestive or descriptive words or other matter is generally insufficient to avoid a likelihood of confusion as to source. See The Wella Corp. v. California Concept Corp., 558 F.2d 1019, 194 USPQ 419 (CCPA 1977).

Under actual market conditions, consumers generally do not have the luxury of making side-by-side comparisons. The proper test in determining likelihood of confusion is

not a side-by-side comparison of the marks, but rather must be based on the similarity of the general overall commercial impressions engendered by the involved marks. See Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation, 206 USPQ 255 (TTAB 1980).

In this case, the addition of the words “ONE NATURALS” and “ONE FEEDS” in applicant’s two respective applications does not serve to distinguish applicant’s marks from registrant’s cited marks. Moreover, it is the first part of a mark which is most likely to be impressed upon the mind of a purchaser and be remembered by the purchaser. See Presto Products Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895, 1897 (TTAB 1988). Purchasers are unlikely to remember the specific differences between the marks due to the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of the many trademarks encountered. That is, the purchaser’s fallibility of memory over a period of time must also be kept in mind. See Grandpa Pidgeon’s of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and Spoons Restaurants Inc. v. Morrison Inc., 23 USPQ2d 1735 (TTAB 1991), aff’d unpub’d (Fed. Cir., June 5, 1992).

In terms of connotation, applicant argues the marks carry very different connotations because registrant’s mark

SOURCE relates to the starting point for a river or stream, while applicant's mark SOURCE ONE NATURALS connotes the primary supplier of some natural product and applicant's mark SOURCE ONE FEEDS connotes the primary supplier of some type of food or the service of feeding others. There is no evidence regarding purchasers' and/or potential purchasers' understanding of either applicant's or registrant's marks. We acknowledge that the seahorse design in one of registrant's marks may connote something about water, but we find nothing to support the specific meaning asserted by applicant. In fact, the Board takes judicial notice[4] of The American Heritage Dictionary definition of "source" as "n. 1. a place or thing from which something comes or derives: point of origin. 2. A spring, lake or other body of water at which a steam or river originates...." It seems plausible that the term SOURCE in both applicant's and registrant's marks could connote the place or thing from which something comes; and applicant's marks simply connote the primary or first or best source for the products. Further, we do not agree that the term "feeds," as used in one of applicant's marks, and considered in the context of

[4] See University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). See also, TBMP §712.01.

applicant's goods, would be perceived as referring to a service of feeding others.

In any event, purchasers familiar with registrant's goods sold under the registered marks SOURCE and SOURCE and design may, upon seeing applicant's marks SOURCE ONE NATURALS and SOURCE ONE FEEDS on virtually identical goods, assume that applicant's goods come from the same source as registrant's, or are somehow sponsored by or approved by registrant, or that applicant's marks are revised versions of registrant's SOURCE marks.

We find each of applicant's marks -- SOURCE ONE NATURALS and SOURCE ONE FEEDS -- is very similar in sound, appearance, connotation and overall commercial impression with the registered mark SOURCE. We find each of applicant's marks is similar in sound, connotation and overall commercial impression with the registered mark SOURCE and design. See Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000).

Finally, applicant's argument that "it is inconsistent" (reply brief, p. 4) to maintain this refusal when there are other pending applications and registrations for marks which include the word SOURCE for dietary

supplements and animal products, is unpersuasive.[5] Applicant first raised this argument and presented a typed listing of five registrations (one of which is one of the two cited registrations and one of which is not for a relevant mark—presumably a typographical error) in its October 3, 2000 response to the first Office action. Typed listings are not an appropriate way to enter such information into the record. See In re Duofold Inc., 184 USPQ 638 (TTAB 1974). However, applicant attached USPTO database printouts of one application (not previously referenced) and three registrations (previously in applicant's typed listing) to its brief on appeal. While the Examining Attorney could have objected to the printout regarding the newly referenced application, he did not. Rather, he did not refer to the printout for the application at all, and he argued that third-party registrations are of little weight on the question of likelihood of confusion.

The USPTO strives for consistency of examination, but as often noted by the Board, each case must decided on its own merits. The printout of the pending application is of

[5] Applicant made clear in its reply brief (p. 4) that it "is not arguing that the term SOURCE is weak, nor is it asking the Board to consider what is happening in the marketplace or to acknowledge that the public is familiar with the use of the marks cited by Applicant." (p. 4)

no probative value of anything other than that the application was filed. We are not privy to the records of the three third-party registration files, and moreover, the determination of registrability of those particular marks by trademark Examining Attorneys cannot control the merits in the case now before us. See In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)

Decision: The refusal to register under Section 2(d) is affirmed in each application as to both cited registrations.