

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

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Hearing:

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June 11, 2003

PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Applebee's International, Inc.

v.

Societe Des Produits Nestle S.A., by
Assignment from The Stouffer Corporation

Opposition No. 111,517
to application Serial No. 75/301,628
filed on June 2, 1997

J. David Wharton and Constance M. Jordan of Stinson
Morrison Hecker LLP for Applebee's International, Inc.

Robert V. Vickers of Vickers, Daniel, and Young for
Societe Des Produits Nestle S.A.

Before Simms, Cissel and Hairston, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Societe Des Produits Nestle S.A., a Swiss
corporation, seeks to register SKILLET SENSATIONS as a
trademark for

"frozen prepared dinner mix consisting of meat, vegetables and potatoes with rice or pasta."¹

Registration has been opposed by Applebee's International, Inc. under Section 2(d) of the Trademark Act. Specifically, opposer alleges that since long before the filing date of applicant's application, opposer has been engaged in the restaurant, bar and carry-out food business;

that opposer is presently the nation's largest casual dining restaurant chain; that opposer has, since prior to the filing date of applicant's application, used the trademark SKILLET SENSATIONS in stylized form for prepared entrees served in restaurants consisting primarily of meats, poultry or fish with vegetables; that opposer has filed an application to register SKILLET SENSATIONS for prepared entrees served in restaurants consisting primarily of meats, poultry or fish with vegetables, Serial No. 75/308,648, filed June 17, 1997,

¹ Application Serial No. 75/301,628, filed June 2, 1997, based on an allegation of a bona fide intention to use the mark in commerce. The word "SKILLET" has been disclaimed apart from the mark as shown. Although the application was filed by The Stouffer Corporation, it was assigned to Societe Des Produits Nestle S.A. The assignment has been recorded with the

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with a claimed first use date in interstate commerce of November 4, 1996; that since November 4, 1996, opposer has made continuous use of the mark SKILLET SENSATIONS; that action on opposer's application has been suspended pending disposition of applicant's involved application which bears an earlier filing date than opposer's application; and that applicant's mark, if applied to the identified goods, so resembles opposer's mark SKILLET SENSATIONS as to be likely to cause confusion.

Applicant, in its amended answer, denied the salient allegations of the notice of opposition. Further, as affirmative defenses, applicant asserted that opposer has abandoned the mark SKILLET SENSATIONS in stylized form which is the subject of opposer's pending application S.N. 75/308,648; that opposer does not have prior use of SKILLET SENSATIONS in block letters; and that "[o]pposer has not used the words 'skillet sensations' as a trademark by merely using such words to describe a meal prepared and served by a restaurant in a skillet."

Outstanding Motions and Evidentiary Matters

Before turning to the merits of the case, there are several outstanding motions and evidentiary matters we must resolve.

Assignment Branch of the U.S. Patent and Trademark Office at

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On February 19, 2002, applicant filed a paper styled "Motion to add exhibits." The motion is actually a motion to reopen applicant's testimony period in order to introduce copies of opposer's 2002 and Fall 2001 menus. Applicant states that it believed opposer would introduce copies of the menus during opposer's rebuttal testimony period, thus making it unnecessary for applicant to introduce the menus during its testimony period. However, according to applicant, opposer did not do so, and "[t]his change of tactics precluded applicant from introducing the new Applebee's menus."

Opposer has filed a brief in opposition to the motion on March 12, 2003.

As opposer points out in its brief, menus are not the type of materials which may submitted by notice of reliance. See Trademark Rule 2.122(2)(e). Further, applicant may not rely on the fact that opposer did not introduce the menus during opposer's testimony period in order to excuse applicant's failure to introduce the evidence during its own testimony period. In view of the foregoing, applicant's motion to reopen its testimony period for this purpose is denied.

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On May 15, 2003, opposer filed a motion to reopen its testimony period in order to introduce newly discovered evidence, namely a letter sent by applicant's Canadian counsel to opposer wherein it is asserted that opposer's use of SKILLET SENSATIONS in Canada infringes applicant's Canadian registration for the mark SKILLET SENSATIONS for frozen meals. Opposer states that it received the letter on March 11, 2003, and thus was unable to make it of record during its testimony period; and that the letter should be considered an admission against interest.

Applicant, in opposition to the motion, contends that the motion to reopen is untimely and that the letter is irrelevant because it pertains to a controversy in a foreign country.

We find applicant's opposition to the motion to reopen to be well-taken. Inasmuch as the letter pertains to the use of SKILLET SENSATIONS outside the United States, it has no bearing on this proceeding. In view thereof, opposer's motion to reopen its testimony period for this purpose is denied.

Applicant has moved to strike the portions of the discovery depositions of opposer's employees Liz Holmes and Robert T. Steinkamp, which were submitted by way of

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opposer's rebuttal notice of reliance. Applicant argues that Fed. R. Civ. P. 32(a) provides that such discovery depositions may be used only by applicant, the adverse party. However, Trademark Rule 2.120(j)(4) provides that if only part of a discovery deposition is submitted and made part of the record by a party entitled to offer the deposition in evidence, an adverse party may introduce under a notice of reliance any other part of the deposition which should in fairness be considered so as to make not misleading what was offered by the submitting party. In this case, since applicant relied upon portions of the discovery depositions of Ms. Holmes and Mr. Steinkamp, opposer is allowed to introduce portions which it believes, in fairness, should be considered. In view thereof, applicant's motion to strike the portions of the discovery depositions relied on by opposer is denied.

Further, applicant has moved to strike the portions of the discovery depositions of Paul DeVries and Angelo Iantosca, which were submitted by way of opposer's notice of reliance, as "improper use of discovery depositions." Applicant, however, has failed to state what is "improper" about the "use" of portions of these discovery depositions. Trademark Rule 2.120(j)(1) provides that

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the discovery deposition of a party or anyone who, at the time of taking the deposition, was an officer, director, or managing agent of a party, may be offered in evidence by any adverse party. Inasmuch as Mr. DeVries and Mr. Iantosca are officers of applicant, opposer is permitted to offer into evidence portions of these discovery depositions. In view thereof, applicant's motion to strike the portions of the discovery depositions is denied.

Opposer made many objections during the testimony depositions of applicant's witnesses, all of which it has "reserved" in its brief. These objections are obviously too numerous to allow individual rulings thereon. In reading the record, we considered the testimony and accompanying exhibits in light of opposer's objections. Where we have relied on testimony or exhibits to which an objection was raised, it should be apparent to the parties that in doing so, we implicitly considered the material to be admissible.

Lastly, both parties have designated many of their evidentiary submissions, including a number of testimony depositions in their entireties, as confidential. The parties were advised in the Board's June 29, 2001 order (page 6, fn. 3) to file under seal only those portions of

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the evidence that is truly confidential matter. It is apparent that some of this information is not truly confidential because the parties have referred it in their briefs, and no portions of the briefs were designated as confidential. In any event, and keeping in mind the parties' stipulated protective agreement, we have made every effort not to disclose information that would be considered proprietary or confidential.

The Record

The record therefore consists of the following: the file of the involved application; the testimony depositions of opposer's witnesses Robert J. Reeder, Randy T. Webb, and Robert T. Steinkamp (with exhibits); portions of the discovery depositions of Radhika Zaveri, Angelo Iantosca, Paul Bakus, Liz Holmes, Robert T. Steinkamp, Karen Eadon, and Paul DeVries (with exhibits); certain of applicant's responses to opposer's interrogatories; and dictionary excerpts submitted by way of opposer's notice of reliance.

Applicant submitted the testimony depositions of its witnesses Tyrone O. Albert, Steven Luebkehan, William J. O'Connor; Paul DeVries; Brett A. White, Jack D. Wyatt, Angelo Iantosca, and Gregory S. Vickers (with exhibits); six notices of reliance on portions of the discovery

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depositions of Liz Holmes, Randy Webb, Robert Steinkamp, Karen Eadon, and Julia Stewart (with exhibits); copies of third-party registrations; and the file wrapper and contents of several applications. In addition, various documents and materials were submitted pursuant to the parties' stipulation.

Both parties filed briefs on the case and were represented by counsel at an oral hearing held before the Board.

Non-pleaded Ground

Opposer, in its brief on the case, seeks to assert an additional ground for opposition, namely that the involved intent-to-use application is void ab initio because the assignment from The Stouffer Corporation to Societe Des Produits Nestle S.A. was impermissible. Opposer maintains that 15 U.S.C. §1060 requires that where an intent-to-use application is assigned prior to the filing of a verified statement of use, there must be evidence that the assignee succeeded to the business of the assignor. Opposer contends that there is no evidence that Societe des Produits Nestle S.A. succeeded to the business of The Stouffer Corporation. Opposer states that it learned of the basis for this ground during the testimony of applicant's witness Jack Wyatt.

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Applicant, on the other hand, argues that opposer should not be permitted to assert the ground for opposition at this late stage of the proceeding. Further, applicant argues that even if opposer had asserted the ground in a timely manner, such ground is not well-taken. Applicant states in its brief, at p. 22:

Even if the claim were properly pleaded, however, [o]pposer has not carried its burden of proof. The subject application was filed by [a]pplicant June 2, 1997 based upon an intent to use. On February 24, 1998, the mark was published for opposition. Once that occurred, it was too late to file an amendment to allege use, yet it was too soon to file a verified Statement of Use. Significantly, on June 22, 1998 a use application was filed by [a]pplicant for the same mark. On March 29, 1999, [a]pplicant assigned both applications, along with almost all of the other Stouffer trademarks to a related holding company, Societe des Produits Nestle, S.A. (footnote omitted).

Although opposer states that it learned of the basis for this ground during the testimonial deposition of applicant's witness Jack Wyatt, opposer did not seek leave to amend the notice of opposition during trial to plead the ground. Moreover, we conclude that this issue was not tried with the implied consent of applicant, because the record does not show that applicant was fairly apprised, during the trial period, that opposer intended to assert this additional ground for opposition. See, in this regard, TBMP §507.03(b) (2d ed. June 2003)

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and cases cited therein. Opposer's cross-examination of Mr. Wyatt was not of a nature so as to put applicant on notice that opposer intended to assert that applicant's involved application was void ab initio as the result of the assignment.²

Thus, the grounds for opposition in this case are limited to priority of use and likelihood of confusion.

Priority

We consider first the issue of priority of use. An applicant, in the absence of any evidence, is limited to the filing date of the application as the earliest use of the mark on which it may rely. See *Safe-T-Pacific Co. v. Nabisco, Inc.*, 204 USPQ 307 (TTAB 1979). As previously

² We should point out that it appears from the record that Societe des Produits Nestle, S.A. was not a successor-in-interest to the business of The Stouffer Corporation as required by 15 U.S.C. §1060. Thus, had the ground been timely pleaded, it may have barred registration of the involved application. See e.g., *The Clorox Co. v. Chemical Bank*, 40 USPQ2d 1098, 1106 (TTAB 1996). ["Accordingly, the assignment to respondent, prior to the filing of the verified statement of use, of the intent-to-use application which matured into the registration at issue was not only invalid under Section 10 of the statute, since there was no transfer to respondent of the assignor's ongoing and existing business under the [involved] mark, but the resulting registration for such mark was also rendered void"].

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indicated, applicant's intent-to-use application was filed June 2, 1997. However, in this proceeding, applicant asserts that two in-home use tests conducted on its behalf in January 1997 and March 1997 "constituted dates of use," and that it has " ... A Priority Date." (Brief, pp. 24-25). Further, applicant argues that to the extent that opposer used the mark SKILLET SENSATIONS in stylized form, it has now abandoned the mark. Thus, applicant maintains that it has priority.

Opposer, on the other hand, claims first use of the mark SKILLET SENSATIONS in block letters and stylized form in November 1996 and continuous use of the mark since that date. Further, opposer argues that it has priority because applicant has not established a date of actual use earlier than June 2, 1997, the filing date of applicant's intent-to-use application.

Opposer's evidence

Opposer took the testimony of Robert J. Reeder, who from 1994 to January 2000 was employed by opposer, first as a franchise marketing consultant, and later as manager of print production. According to Mr. Reeder, Apple South, opposer's largest franchisee, first conducted a "Skillet Sensations" promotional campaign in November 1996. Mr. Reeder testified that the original idea for

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the campaign was "a collaborative effort between opposer and Apple South." According to Mr. Reeder, it was Apple South who came up with the name "Skillet Sensations" for the campaign and it was Apple South's advertising agency that developed the advertising for the campaign. Opposer also took the testimony of Randy Webb, its Research and Development Manager and Executive Chef, who testified that Apple South contacted him in 1996 prior to launching the "Sensational Skillets" campaign.

The November 1996 "Skillet Sensations" campaign was promoted by way of some 3.7 million freestanding inserts which were placed in newspapers; over 40,000 table tents which were displayed on tables at the approximately 200 participating restaurants; and by way of radio and television advertisements.

A review of the materials used in this campaign reveals that the inside pages of the newspaper insert depicted SKILLET SENSATIONS in the stylized form shown below,

Skillet sSensations!

(hereinafter referred to as SKILLET SENSATIONS in stylized form) surrounded by four entrees named "Sicilian

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Skillet," "N'Awlins Skillet," "Tex-Mex Skillet," and "Pepper Steak Skillet." Also, the back page of the insert shows pictures of gift certificates and the following wording:

Always give a gift that you'd enjoy getting. How about giving someone the opportunity to try one of our new Skillet Sensations, or any other delicious dish from the menu. Maybe they'll return the flavor.

The table tent depicts SKILLET SENSATIONS in stylized form with pictures of four entrees and the corresponding names. The television advertisement depicts SKILLET SENSATIONS in block letters, with an announcer saying the words "SKILLET SENSATIONS".

In view of the success of the November 1996 Apple South campaign, opposer launched a national "Skillet Sensations" promotional campaign in its Applebee's restaurants in April and May 1997. As ways of promoting this campaign, opposer used table tents, promotional menus, and in-store posters. These materials depict SKILLET SENSATIONS in block and slightly stylized letters. In addition, opposer used in its restaurants metal lids over the SKILLET SENSATIONS entrees when served to customers. The metal lids had SKILLET SENSATIONS imprinted thereon in block letters.

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Mr. Reeder testified that the April/May 1997 national campaign was a success in terms of increased sales and "traffic." As a result of the success of this campaign, SKILLET SENSATIONS entrees were placed on opposer's menus as regular items. Opposer used SKILLET SENSATIONS in block and slightly stylized letters in its Spring 1998, Fall 1998 and 1999 menus. Opposer's Spring 2000 and Fall 2000 menus carry the heading "GRILLS & SKILLET SENSATIONS" in block letters along with an expanded list of entrees. A special menu used by opposer in 2001 carries the heading "Fiesta del Grill" with one of the entrees being "Southwest Steak Skillet" and the following language:

Experience one of our Skillet Sensations™
with 11 ounces of grilled sirloin steak ...

Also, since 1999 the menu appearing at opposer's home page has included the heading SKILLET SENSATIONS and a list of entrees.

Opposer also took the testimony of Robert Steinkamp, its vice-president, general counsel and corporate secretary. He identified a copy of the standard franchise agreement used by opposer with its franchisees, including Apple South. Mr. Steinkamp testified that under the terms of the agreement, "[o]pposer has taken the position that all products are to be sold or offered

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under [opposer's] trademarks." (Dep., 18). He also pointed to Section 8.5 of the franchise agreement, which states that "all advertising copy and other materials employed by Franchisee in local promotional activities shall ... receive the prior approval of Franchisor." In addition, he testified that opposer has sold sauces, seasonings and marinades in grocery stores under the "Applebee's" trademark. Opposer discontinued selling these products around 1997-1998 because of problems with the manufacturer of the products.

Applicant's evidence

Applicant took the testimony of Steven Luebke, senior vice-president of A. C. Nielsen BASES, a marketing research company that specializes in sales forecasting for new products. Applicant retained this company to conduct a study to project sales for applicant's new frozen dinner mix. The study was conducted by interviewing consumers at shopping malls in approximately twenty cities between the period of January 13-January 20, 1997. The consumers were told about applicant's new frozen dinner mix and shown a card with seven possible names for the product, including SKILLET SENSATIONS. An "in-home use" test was conducted in that if a consumer expressed interest in the product, the consumer was given

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a sample product to take home and use. The consumer was then telephoned to determine his or her opinion of the product.

Applicant also took the testimony of Tyrone O. Albert, president of Guidelines Chicago, a firm that conducts studies of retail products to be introduced into the market.

In March 1997 Guidelines Chicago conducted an in-home use test for applicant. Approximately 600 persons at shopping malls in twelve major U.S. cities were provided with one or more of applicant's frozen dinner mixes that were referred to by the name SKILLET SENSATIONS. The participants in the in-home use test were told:

The sponsor of this research is interested in learning more of what you as a consumer think of this new frozen meal and has arranged for us to give you a free Lean Cuisine Skillet Sensations product to use during the next couple of days.

Following product usage, the participants were called by telephone to obtain their reaction to the product.

We consider first the earliest date on which applicant may rely for priority purposes. It is clear from the testimony of applicant's witnesses and the accompanying exhibits that the first in-home use test of applicant's frozen dinner mix was conducted in January 1997. However, because the consumers in this study were

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shown seven possible names for the frozen dinner mix, there was not a sufficient association of SKILLET SENSATIONS with applicant to establish January 1997 as an actual date of first use of SKILLET SENSATIONS. However, in the next in-home use test conducted in March 1997, 600 consumers were given one or more of the varieties of applicant's frozen dinner mixes which were referred to as SKILLET SENSATIONS. Further, the record shows that applicant began selling its frozen dinner mixes after this test. We find therefore that the earliest applicant may claim rights in the trademark SKILLET SENSATIONS is March 1997. See *General Mills, Inc. v. Frito-Lay, Inc.*, 176 USPQ 148 (TTAB 1972) [General Mills may claim rights in the mark "ONYUMS" since February, 1969, when boxes of the onion flavored snack featuring the mark "ONYUMS" were shipped to six cities throughout the United States and distributed to the purchasing public in these cities along with a display board featuring the "ONYUMS" trademark. Notwithstanding that this distribution of the product was for market testing purposes, it was a public use and display of the mark and constitutes use of the mark in commerce as defined in Section 45 of the Statute; and it was followed up by a sale in May 1969 and national

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distribution in September, 1969.] (footnote and citations omitted).

Considering next the earliest date on which opposer may rely for priority purposes, we find that opposer is entitled to rely on its franchisee Apple South's use of SKILLET SENSATIONS in block letters and stylized form for prepared entrees in November 1996, when the first "Skillet Sensations" promotional campaign was launched.

Although we have carefully reviewed opposer's franchise agreement and have not found a provision that covers the specific situation in this case regarding a franchisee's use of a mark, we nonetheless find that the circumstances surrounding the development of the "Skillet Sensations" campaign and the relationship between opposer and Apple South are of a nature such that Apple South's use of SKILLET SENSATIONS inures to opposer. In this regard, opposer's witness Mr. Webb testified that Apple South contacted opposer prior to launching the Skillet Sensations campaign. Further, opposer's witness Mr. Reeder testified that the campaign was a collaborative effort between opposer and Apple South. In addition, opposer's witness Mr. Steinkamp testified that all products sold by a franchisee of opposer are done so under opposer's trademarks.

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Further, Apple South's use of SKILLET SENSATIONS in stylized form on table tents in its restaurants in November 1996 constitutes trademark use of the term in connection with prepared entrees served in restaurants. In addition, Apple South's use of SKILLET SENSATIONS in block letters on newspaper inserts and in television advertising during the same month constitutes, at the very least, analogous trademark use in connection with prepared entrees served in restaurants. These uses were of such a nature and extent as to create a public identification of the term with prepared entrees served in restaurants. See T.A.B. Systems v. PacTel Teletrac, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996).

In view of the foregoing, we find that opposer may rely on November 1996 as its priority date, when the first "Skillet Sensations" promotional campaign was launched.

We consider next whether opposer has made continuous use of the mark SKILLET SENSATIONS in block letters and stylized form since November 1996, or has abandoned the mark as applicant maintains. The record shows that in opposer's nationwide 1997 "Skillet Sensations" promotional campaign, SKILLET SENSATIONS was used in block and slightly stylized letters on table tents,

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promotional menus, in-store posters, and metal lids that covered the prepared entrees. Similarly, opposer used SKILLET SENSATIONS in block and slightly stylized letters in its 1998 and 1999 menus. Opposer's 2000 menu uses the heading "GRILLS & SKILLET SENSATIONS" with a list of entrees, and its special 2001 menu contains "Skillet Sensations" within other text.

Opposer's use of SKILLET SENSATIONS in block and slightly stylized letters in its 1997, 1998 and 1999 menus is clearly trademark use of the term. Moreover, opposer's continued use of the term, albeit with other wording in its 2000 and 2001 menus, evidences opposer's intent not to abandon the mark. We find therefore that opposer has made continuous use of the mark SKILLET SENSATIONS.

We should note that even if Apple South had not made analogous trademark use of SKILLET SENSATIONS in block letters in November 1996, opposer would nonetheless be permitted to tack Apple South's trademark use of SKILLET SENSATIONS in stylized form in November 1996 to opposer's subsequent trademark use of SKILLET SENSATIONS in block and slightly stylized letters. There is no question that the mark SKILLET SENSATIONS in stylized form is the legal equivalent of the mark SKILLET SENSATIONS in block and

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slightly stylized letters. See, e.g., *Van Dyne-Crotty Inc. v. Wear-guard Corp.*, 926 F.2d 1156, 17 USPQ2d 1866, 1868 (Fed. Cir. 1991) and *Jimlar Corp. v. Army & Air Force Exchange Service*, 24 USPQ2d 1216, 1221 (TTAB 1992). Purchasers and potential buyers of opposer's prepared entrees would plainly consider them to be the same mark since, for all practical purposes, they are pronounced the same way and project the same continuing commercial impression.

Applicant's remaining argument that opposer may not claim rights in the mark SKILLET SENSATIONS because such term is merely descriptive of opposer's goods in that opposer's prepared entrees are served on a skillet is without merit. We recognize that the word "skillet" has descriptive significance in connection with opposer's prepared entrees served in restaurants, and indeed the word "sensations" is somewhat suggestive of the quality of the goods. However, applicant has not established that the composite mark SKILLET SENSATIONS is merely descriptive of opposer's prepared entrees served in restaurants.

In sum, priority of use of SKILLET SENSATIONS rests with opposer.

Likelihood of Confusion

We turn next to the issue of likelihood of confusion.

Our determination under Section 2(d) is based on an analysis of all the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E.I. duPont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). The facts deemed pertinent in this case are discussed below.

Similarity of the Marks

The marks of the parties in typed/block form are identical. In addition, applicant's mark SKILLET SENSATIONS is highly similar to opposer's mark SKILLET SENSATIONS in stylized form in that the marks would be pronounced the same and create the same commercial impression.

Strength/Weakness of mark

Applicant argues that confusion is not likely because opposer's mark SKILLET SENSATIONS is a weak mark due to the descriptive nature of the word "skillet" and the laudatory nature of the word "sensations." In

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support of its latter contention, applicant submitted a number of third-party registrations of marks that include the word SENSATIONS for food and drinks. In addition, applicant submitted printouts from the Internet of the home pages of restaurants and food retailers that show use of such terms as "salad sensations," "sandwich sensations," "savory sensations," "tasty sensations," and "healthy sensations" in connection with menu items and retail food products. These third-party registrations and uses of marks/designations that contain the word "sensations" indicate that this word was chosen by the trademark owners and businesses to suggest that their products are spectacular or outstanding. However, this fact does not help to distinguish the parties' SKILLET SENSATIONS marks. The word SENSATIONS, as used in both marks, conveys the same suggestive significance, and the additional word SKILLET is the same in both marks. Thus, notwithstanding any alleged weakness in opposer's mark, the fact remains that the parties' marks are identical and convey the same commercial impression.

Relatedness of the Goods

Opposer's goods are prepared entrees served in restaurants and applicant's goods are frozen dinner mixes.

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The parties have spent a considerable amount of time during trial and in their briefs debating the issue of the relationship between these goods. Opposer argues that the goods are closely related. Applicant, however, argues that the goods are not related because there is a fundamental difference in how the goods are sold--opposer's prepared entrees are sold in a restaurant environment, whereas applicant's frozen dinner mixes are sold in grocery stores. In addition, applicant points out that there is no per se rule that all food products are related.

We have carefully considered the parties' arguments and conclude that the respective goods are related. Applicant is correct that there is no per se rule that all food products are related. In this case, however, both parties' goods are in the nature of meals or entrees, albeit one is served in a restaurant and the other is purchased in a grocery store. As noted in the identification of goods in applicant's application, its frozen dinner mixes contain meat, vegetables, potatoes, rice and pasta and the record shows that opposer's prepared entrees contain beef, chicken, and vegetables. Thus, there is considerable overlap in the ingredients in the parties' goods.

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The goods in this case are relatively inexpensive. Applicant's frozen dinner mixes are priced under \$5.00 and a review of opposer's menus shows that its prepared entrees are in the range of \$6.00 to \$12.00. Further, the parties' goods are purchased by the same class of purchasers, namely average consumers who normally exercise no more than ordinary care in their purchasing decisions. We note that opposer's witness, Mr. Steinkamp, testified that opposer has sold some of its products in grocery stores. Also, the record shows that several other restaurants sell some of their products in grocery stores. This evidence demonstrates that consumers have been exposed to restaurants selling their products in grocery stores.

In view of the foregoing, we find that opposer's prepared entrees served in restaurants and applicant's frozen dinner mixes are related goods.

Expert Testimony

Applicant took the testimony of an expert witness, William O'Connor, who has worked in the field of brand development and marketing for over thirty years. Mr. O'Connor testified that, in his opinion, there is no likelihood of confusion in this case. We have given little weight to the testimony of Mr. O'Connor in our

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likelihood of confusion analysis because of several reasons. His opinion was based in large part on the fact that consumers would not confuse the involved goods, i.e., prepared entrees served in restaurants and frozen dinner mixes purchased in a grocery store. However, the issue to be determined under Section 2(d) of the Trademark Act, in such cases as this, is not whether the goods in question are likely to be confused, but rather whether there is a likelihood that purchasers or potential purchasers thereof will be misled into the mistaken belief that they emanate from the same source. It is for this reason that goods need not be identical or competitive in nature in order to support a finding of likelihood of confusion.

Further, Mr. O'Connor acknowledged on cross-examination that he was not familiar with the duPont likelihood of confusion factors. Finally, it is well settled that the opinions of witnesses, even by persons considered to be experts in a particular field on questions before the Board, are not binding upon the Board. See *The Quaker Oats Company v. St. Joe Processing Company, Inc.*, 232 F.2d 653, 109 USPQ 390 (CCPA 1956).

Actual confusion

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Applicant has pointed to both of the parties being unaware of any instances of actual confusion despite at least three years of concurrent use of the marks. The issue before us, however, is not one of actual confusion, but only the likelihood of confusion. As has often been stated, evidence of actual confusion is hard to obtain. Moreover, neither party indicated that it had a system in place for reporting instances of actual confusion if such were to occur.

In view of the foregoing, we conclude that purchasers and prospective purchasers familiar with opposer's SKILLET SENSATIONS prepared entrees served in opposer's restaurants are likely to believe, upon encountering applicant's SKILLET SENSATIONS frozen dinner mixes, that the goods originate or are associated with the same source.

Other arguments

Several other arguments require comment although they did not affect our decision herein.

Applicant's argument that confusion is not likely because consumers will associate applicant's SKILLET SENSATIONS mark with applicant's house mark "Stouffer's" and opposer's SKILLET SENSATIONS mark with opposer's

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house mark "Applebee's" is not well taken. The Board must compare applicant's mark as depicted in the drawing in the involved application with opposer's mark as actually used. In this case, "Stouffer's" does not appear in the drawing of applicant's mark and opposer's mark is not a composite mark that consists of "Applebee's" and SKILLET SENSATIONS.

As indicated in the notice of opposition, opposer is the owner of application Serial No. 75/308,648 for the mark SKILLET SENSATIONS in stylized form for prepared entrees served in restaurants. The Examining Attorney assigned to opposer's application issued an Office action citing applicant's earlier-filed involved application as a potential bar to registration. Opposer responded to this Office action and argued that there was no likelihood of confusion between the marks. Applicant contends that opposer is estopped from now maintaining that there is a likelihood of confusion between the parties' marks. It is clear that while opposer's earlier position may be considered as evidence, no equitable estoppel results there from. See *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978).

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Lastly, applicant has argued that its SKILLET SENSATIONS mark has become distinctive of its goods as a result of extensive sales and advertising. Inasmuch as mere descriptiveness is not a ground for opposition, the question of whether applicant's mark has become distinctive of its goods is not an issue in this proceeding.

In sum, in view of the identity of the marks, the relatedness of the goods, and the identity of the purchasers, we find that confusion is likely in this case. **Decision:** The opposition is sustained.