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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Gilster-Mary Lee Corporation

Serial No. 75/423,447

Simor L. Moskowitz of Jacobson Holman PLLC for Gilster-Mary Lee Corporation.

Karen M. Strzyz, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Hairston, Chapman and Bottorff, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Applicant has filed an application to register on the Principal Register the mark FRUITY BLASTS for "breakfast cereal."¹

¹ Application Serial No. 75/423,447, filed January 23, 1998. The application is based on applicant's assertion of a bona fide intention to use the mark in commerce. Applicant disclaimed the word "fruity."

The 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, when applied to its goods, so resembles the registered marks, COCOA BLASTS² and COOKIE BLAST,³ both for "breakfast cereal," as to be likely to cause confusion, mistake or deception.

Applicant appealed, and briefs have been filed. Applicant requested and later withdrew its request for an oral hearing.

It is obvious that the identified goods are identical, as are the channels of trade and the purchasers. "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). Moreover, these are inexpensive, impulse purchases made by the general public.

² Registration No. 1,781,628, issued July 13, 1993, to Stokely-Van Camp, Inc., and was later assigned to The Quaker Oats Company in September 1996 (Reel 1505 Frame 0259); Section 8 affidavit accepted, Section 15 affidavit acknowledged, renewed. The word "cocoa" is disclaimed.

³ Registration No. 2,093,615, issued September 2, 1997 to The Quaker Oats Company. See Section 8(c)(1) of the Trademark Act, 15 U.S.C. §1058(c)(1). The word "cookie" is disclaimed.

Looking then to the marks, when comparing applicant's mark to each of the two cited marks, in their entireties, we find that applicant's mark FRUITY BLASTS is similar to each of the cited registered marks, COCOA BLASTS and COOKIE BLAST.

The marks share the word BLAST or BLASTS, and all begin with a word relating to a flavor used in the breakfast cereal -- "fruity," "cocoa" and "cookie," respectively. That applicant's mark and one of the registered marks include "BLASTS" in plural form, and the second cited registered mark includes "BLAST" in singular form, is not significant in terms of the likelihood of confusion of purchasers. See *In re Pix of America, Inc.*, 225 USPQ 691 (TTAB 1985). (Likewise, whether viewing the terms "blast"/"blasts" as either a noun or a verb is not a significant source-indicating difference.) Further, while the first word in each of the marks is clearly a different word, each one names a flavor of breakfast cereal.

These minor differences do not obviate the likelihood of confusion in the minds of purchasers because they 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 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).

Further, even if purchasers noticed and recalled the specific differences in the marks, purchasers familiar with registrant's cereal sold under the registered marks COCOA BLASTS and COOKIE BLAST, upon seeing applicant's mark FRUITY BLASTS on identical goods, would assume that applicant's goods come from the same source as registrant's goods, and merely refer to a new flavor thereof.

The Examining Attorney submitted several third-party registrations to support her contention that "it is common in the breakfast cereal industry to have both a FRUITY and COCOA [and other] flavored version[s] of a particular cereal. The makers of the cereal often use these terms in their marks by adding the term FRUITY, COCOA and other flavor indications to the main mark. ... Thus, a consumer will conclude that applicant's FRUITY BLASTS cereal is the fruit flavored version of registrant's COCOA and COOKIE "BLAST" cereals." (September 23, 2002 denial of applicant's request for reconsideration, unnumbered pp. 2-

3.)⁴ Examples include the following: FRUITY SPECKLES and COCOA SPECKLES, both for breakfast cereal, and both issued to Weetabix Company, Inc. (Registration Nos. 2,494,840 and 2,494,844); FRUITY MARSHMALLOW KRISPIES, COCOA KRISPIES, FROSTED KRISPIES, MARSHMALLOW KRISPIES and KRISPIES, all

⁴ Applicant requested in its brief (pp. 19-20) and its reply brief (pp. 6-8) that the Board strike the Examining Attorney's evidence regarding the practice of the breakfast cereal industry. Specifically, applicant contends that this material was offered "post-appeal"; that it is prejudicial to applicant because it is now unable to offer opposing evidence; and that the Examining Attorney's offer of this argument and evidence is outside the scope of the issue argued in applicant's request for reconsideration as explained in TMEP §1504.05 and TBMP §1207.02.

Under Trademark Rule 2.142(d) the record must be complete prior to the filing of an appeal. If applicant files a request for reconsideration under Trademark Rule 2.64(b) and the case is with the TTAB, the case will be remanded to the Examining Attorney for further consideration and at this point the Examining Attorney is free to include additional evidence in support of his/her position, if the refusal is maintained. See TMEP §715.03(a) (3d ed. 2002). The prosecution ends at this point, however, and applicant is allowed no further opportunity to introduce new evidence, absent a request for remand under Trademark Rule 2.142(d). The appeal goes forward on the evidence of record; and neither applicant nor the Examining Attorney may introduce new evidence in connection with the briefs.

In this case applicant filed a request for reconsideration along with its notice of appeal, and thus, the application was still in the pre-appeal stage and the Board automatically sent the application to the Examining Attorney without a requirement for applicant to make a showing of cause to do so. Once the file is returned to the Examining Attorney because applicant filed a request for consideration, the Examining Attorney may introduce additional evidence directed to the issue(s) for which reconsideration is sought. See TBMP §1204 (2d ed. June 2003). Applicant's reading of the "issue" in the case is too narrow as the issue herein is likelihood of confusion under Section 2(d) of the Trademark Act. Applicant was free to request a remand if it needed to further address this issue. It did not do so.

Applicant's request that the Board strike the evidence submitted by the Examining Attorney with her denial of applicant's request for reconsideration is denied.

for breakfast cereal, and all issued to Kellogg Company (Registration Nos. 1,640,680, 744,938, 1,318,448, 1,270,148 and 1,535,620); FRUITY WHIRLS and APPLE WHIRLS, both for breakfast cereal, and both issued to Gilster-Mary Lee Corporation (Registration Nos. 1,403,355 and 2,273,760); and FRUIT DOTS, COCOA DOTS and PEANUT BUTTER DOTS, all for breakfast cereal, and all issued to Weetabix Company, Inc. (Registration Nos. 1,550,379, 1,653,338 and 2,507,516).

The minor differences in the marks do not offer sufficient differences to create separate and distinct commercial impressions. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). We find that these marks, considered in their entireties, are similar in sound, appearance, connotation and commercial impression.

Applicant strongly urges that there are about 20 third-party applications and about 30 third-party registrations of marks which include the word "BLAST" in connection with cereal and/or related food products" (brief, p. 6) which "should lead to the inescapable conclusion that the term 'BLAST' is sufficiently diluted, or otherwise suggestive of some characteristic of the foods and beverages for which the term is used as a trademark, to permit registration of more than one mark by more than one

party for identical, similar, or related products, so long as the marks are sufficiently distinguishable in toto" (brief, p. 10); that the cited registered marks should be accorded a narrow scope of protection; and that these third-party registrations show there is a well-established USPTO practice for these types of goods (brief, p. 11).

Applicant's submission of photocopies of third-party records from the USPTO's Trademark Electronic Search System (TESS) includes references to pending applications, cancelled and expired registrations. The third-party applications are evidence of nothing except that each was filed on a particular date. Assuming arguendo the establishment, as applicant argues, that all the goods in these third-party registrations are related, nonetheless this evidence does not compel a different result herein. Most of the marks in the third-party registrations create a different commercial impression from that of applicant's mark and the two cited registered marks. See, for example, BAZOOKA BLASTS for chewing gum (Registration No. 2,166,452); TRIPLE BLAST for hard candy with chewing gum centers (Registration No. 1,886,678); Q&V CHEESE BLAST and design for snack foods, namely, cheese-flavored puffed corn snacks (Registration No. 2,055,861); THE TASTE IS A BLAST for cereal-based snack foods (Registration No. 1,783,559);

ARTIC BLAST for frozen soft drink beverages (Registration No. 2,076,635); BLISS BLAST (in stylized lettering) for milk shake comprising milk, flavoring syrups and ice milk for consumption on or off the premises (Registration No. 1,516,566); SONIC BLAST for candied ice milk confections for consumption on or off the premises (Registration No. 1,453,414); POTATO BLAST for spices for use on potatoes and other foods (Registration No. 1,896,383); and MASTER BLASTER for coffee (Registration No. 2,130,597).

We acknowledge that there are a few third-party registrations which are closer in relation to the marks and/or the goods involved in the application now before us.⁵ However, as stated in the TMEP §1207.01(d)(iii) (3d ed. 2002)(Revision 1, June 2002): "Generally, the existence of third-party registrations cannot justify the registration of another mark that is so similar to a previously registered mark as to create a likelihood of confusion, or to cause mistake, or to deceive."

⁵ See, for example, MARSHMALLOW BLASTED for breakfast cereals (Registration No. 2,400,535); and WILD TROPICAL BLAST for toaster pastries and cereal based snack foods (Registration No. 2,237,818) (The latter registration had been referenced by the Examining Attorney in the first Office action as a then prior pending application which may be cited against applicant if it issued as a registration. At the time the prior application for the mark WILD TROPICAL BLAST included "breakfast cereals" in the identification of goods. Although the Examining Attorney did cite it against applicant herein, she later withdrew her refusal on the basis of Registration No. 2,237,818.).

To the extent that applicant is arguing the du Pont factor of "the number and nature of similar marks in use on similar goods," that factor is irrelevant in this case because there is no evidence of any uses of other "BLAST" marks. See *Octocom Systems Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).

To the extent applicant is arguing that the registered marks, COCOA BLASTS and COOKIE BLAST, are diluted in the marketplace due to third-party uses of similar marks, again there is no evidence regarding use in the marketplace. In fact, it is well settled with regard to the weight given to third-party registrations, that these registrations are not evidence of use in the marketplace or that the public is familiar with them. Thus, we cannot assume that the public will (presumably) come to distinguish between them. As the Court of Appeals for the Federal Circuit stated in the case of *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992):

Under *Du Pont*, "[t]he number and nature of similar marks in use on similar goods" is a factor that must be considered in determining likelihood of confusion. 476 F.2d at 1361, 177 USPQ at 567 (factor 6). Much of the undisputed record evidence relates to third party registrations, which admittedly are

given little weight but which nevertheless are relevant when evaluating likelihood of confusion. As to strength of a mark, however, registration evidence may not be given any weight. *AMF Inc. v. American Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (CCPA 1973) ("The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them. ...") (Italics emphasis in original.)

See also, *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989).

To the extent applicant is arguing that these third-party registrations establish that the terms "BLAST" and "BLASTS" have a meaning in the industry, applicant has not set forth what it believes that common meaning might be in relation to food products, and, in particular, breakfast cereal.

The USPTO strives for consistency of examination, but as often noted by the Board, each case must be decided on its own merits. We are not privy to the records of the 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). See also, *In re*

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Kent-Gamebore Corp., 59 USPQ2d 1373 (TTAB 2001); and In re Wilson, 57 USPQ2d 1863 (TTAB 2001).

While we have no doubt in this case, if there were any doubt on the question of likelihood of confusion, it must be resolved against the newcomer as the newcomer has the opportunity of avoiding confusion, and is obligated to do so. See TBC Corp. v. Holsa Inc., 126 F.3d 1470, 44 USPQ2d 1315 (Fed. Cir. 1997); and In re Hyper Shoppes (Ohio) Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed as to both cited registrations.