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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Creative Cookie, ETC, LLC

Serial No. 76301290

Sherry H. Flax of Saul Ewing LLP for Creative Cookie, ETC, LLC.

Georgia Ann Carty, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Hohein, Bucher and Drost, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Creative Cookie, ETC, LLC seeks registration on the Principal Register for the mark shown below:



for "fortune cookies" in International Class 30.¹

This case is now before the Board on appeal from the final refusal to register based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining Attorney has held that applicant's mark, when used in connection with the identified goods, so resembles the mark CREATIVE CROISSANTS, which is registered for "baked goods, namely croissants, rolls, breads, muffins, buns, cookies and pastries sold for consumption on or off the premises," also in International Class 30,² as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney have fully briefed this appeal but applicant did not request an oral hearing.

We affirm the refusal to register.

Applicant contends that the United States Patent and Trademark Office has registered numerous marks in International Class 30 having the word "Creative" in the marks; that applicant sells pre-packaged fortune cookies through card and gift shops, so that the goods and channels

¹ Application Serial No. 76301290 was filed on August 20, 2001 based upon applicant's claim of use in commerce since at least as early as December 1, 1979. Applicant has voluntarily disclaimed the word "Cookie" apart from the mark as shown.

² Registration No. 1562410, issued on October 24, 1989; Section 8 affidavit accepted. The word "Croissants" is disclaimed apart from the mark as shown.

of trade are easily distinguishable; that registrant's and applicant's respective goods have coexisted for almost twenty years without any confusion; and finally, that the Trademark Examining Attorney has not proven that the registered mark is famous.

In turn, the Trademark Examining Attorney argues that the marks are confusingly similar because the words "cookie" and "croissants" are generic, applicant's design feature is not especially distinctive as applied to these goods, and the one literal element used to call for both of these goods is identical; that registrant's goods include "cookies," which must be read to include "fortune cookies"; and that applicant has failed to demonstrate that the word "Creative" is weak as applied to these goods.

Our determination under Section 2(d) is based upon an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. 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 relationship of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

When considering the relatedness of the respective goods, we look first to registrant's goods as listed in the identification of goods in the cited registration. That listing of "baked goods" includes "cookies." Contrary to applicant's arguments, when analyzing this prong of the Federated Foods pair of interrelated factors, the explicit listing of "cookies" among the goods on which the mark is used is in no way diminished by the fact that registrant's mark includes the word "Croissants." Furthermore, even if "fortune cookies" may not be the first image conjured up for many consumers upon hearing the word "cookies," we agree with the position of the Trademark Examining Attorney that registrant's "cookies" must be read to include "fortune cookies." Accordingly, for purposes of our likelihood of confusion analysis, the goods herein must be deemed to be identical.

Applicant argues that it actually sells its pre-packaged fortune cookies in card and gift shops. Hence, applicant contends, consumers can easily distinguish its goods from a variety of freshly-baked goods, and that applicant is moving its goods through distinctly different channels of trade than those used by registrant. However, as noted by the Trademark Examining Attorney, neither registrant nor applicant has placed any restrictions on how

the goods are packaged or into which channels of trade the goods are placed. As a result, in the absence of any specific limitations, we must presume that both applicant's cookies and registrant's cookies will be moving in all of the usual channels of trade for such goods. In re Elbaum, 211 USPQ 639 (TTAB 1981).

We turn next to the du Pont factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound and connotation. As our principal reviewing court, the Court of Appeals for the Federal Circuit, has pointed out, "[w]hen 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). In summarizing her comparison of the involved marks, the Trademark Examining Attorney argues that these two marks are "substantially similar" as to overall commercial impression.

While we compare the marks in their entireties, the Court of Appeals for the Federal Circuit has also held that in articulating reasons for reaching a conclusion on the question of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or

less weight has been given to a particular feature or portion of a mark. That is, one feature of a mark may have more significance than another. See Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987), and In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). In this vein, the Trademark Examining Attorney argues that inasmuch as the words "Cookie" and "Croissants" are generic and hence disclaimed, one should accord little weight to these terms as distinguishing elements of the two marks. That leaves the identical word "Creative" as the only remaining literal element that would be used to call for both of these goods. Moreover, the background image of a fortune cookie in the mark herein, as applied to fortune cookies, is to be accorded limited weight as a distinguishing element of the composite mark.

Actually, applicant does not spend much time arguing that these marks are not similar in overall commercial impression. Rather, applicant argues that "the PTO [United States Patent and Trademark Office] has registered numerous marks containing the word 'CREATIVE' for goods in International Class 30." In support of its position that there are "numerous marks" on the federal trademark register, applicant has set forth in its brief a listing of

five (5) third-party registrations containing the word "CREATIVE" within composite marks where the mark is applied to goods classified in International Class 30.

However, the Trademark Examining Attorney has correctly objected to this proffer of evidence inasmuch as applicant has not properly made copies of these registrations part of the record and we have not considered them as evidence in reaching our decision herein. The Board does not take judicial notice of third-party registrations and so the mere citation to such purported registrations "is insufficient to make them of record." See *In re Hub Distributing, Inc.*, 218 USPQ 285 (TTAB 1983) and *In re Duofold, Inc.* 184 USPQ 638, 640 (TTAB 1974). The proper procedure, instead, for making information concerning third-party registrations of record is to submit either copies of the actual registrations or the electronic equivalents thereof, i.e., printouts of the registrations which have been taken from the USPTO's own computerized database. See *In re Consolidated Cigar Corp.*, 35 USPQ2d 1290, 1292 n. 3 (TTAB 1995); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 n. 3 (TTAB 1994); and *In re Melville Corp.*, 18 USPQ2d 1386, 1388 n. 2 (TTAB 1991).

Nonetheless, even if we were to consider these third-party registrations, it would clearly not change our

decision. As noted by the Trademark Examining Attorney, when carefully making her arguments in the alternative, only three of the five registrations listed by applicant are still live registrations. Of these three [CREATIVE CREPES for "crepes," CREATIVE CAKERY for "custom cakes," and THE CREATIVE INGREDIENT for "special food ingredients ... for the ice cream, bakery, confectionary and snack food industries"], the listed goods are all distinctly different from cookies. Moreover, in the latter two registrations, the nature of the vendor's interaction with the consumer is different and/or the channels of trade are quite different from those of registrant. Finally, as was correctly noted by the Trademark Examining Attorney, these registrations do not indicate actual use of the marks in the marketplace by the respective registrants, and this Trademark Examining Attorney cannot be held responsible for any actions taken by other Trademark Examining Attorneys in earlier cases, whose earlier judgments we cannot assess inasmuch as these records are not before us herein.

We turn next to the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion. Applicant argues that in considering the du Pont factors in this case, we should consider that registrant's and applicant's

respective goods have coexisted for almost twenty years without any confusion. However, the absence of any instances of actual confusion is a meaningful factor only where the record indicates that, for a significant period of time, an applicant's sales and advertising activities have been so appreciable and continuous that, if confusion were likely to happen, any actual incidents thereof would be expected to have occurred and would have come to the attention of one or both of these trademark owners. See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992). Such evidence is not a part of this record. Moreover, we have not had opportunity to hear from the registrant on this point. Therefore, applicant's claim that no instances of actual confusion have been brought to its attention is not indicative of an absence of a likelihood of confusion, and we find that this factor favors neither the position taken by applicant nor that of the Trademark Examining Attorney.

Finally, we note applicant's argument that the Trademark Examining Attorney has not shown that the cited marks is famous. It is true that given the nature of this *ex parte* proceeding, we have no information about the fame of registrant's mark. Of course, neither is it incumbent upon the Trademark Examining Attorney to make such a

showing in this context. Because there is simply no evidence either way as to this particular du Pont factor, this factor favors neither the position taken by applicant nor that of the Trademark Examining Attorney.

In conclusion, we find a likelihood of confusion herein inasmuch as these two marks have the same overall commercial impressions as applied to identical and otherwise closely-related goods. We have no reason to believe the cited mark is weak and hence should be accorded a narrow scope of protection, nor, on the other hand, do we have evidence that it is a famous mark. We also do not find it determinative that applicant alleges almost two decades of contemporaneous use without reports of actual confusion.

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