

THIS DISPOSITION IS NOT
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Paper No. 7
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Genesis Leverage Development Corporation¹

v.

Ulker Gida Sanayi Ve Ticaret A.S.

Opposition No. 91150425
to application Serial No. 76282197
filed on July 9, 2001

Stephen P. McNamara of St. Onge Steward Johnston & Reens
LLC for Genesis Leverage Development Corporation.

Howard Natter of Natter & Natter for Ulker Gida Sanayi Ve
Ticaret A.S.

Before Cissel, Bottorff and Rogers, Administrative
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

¹ The caption of the notice of opposition also names Smilk, Inc. as a party plaintiff, and includes an allegation that Smilk, Inc. "is the exclusive licensee of the Genesis LDC trademarks." However, the filing fee submitted with the notice of opposition was sufficient to cover only one party plaintiff. The Board's January 15, 2002 order instituting the opposition named only Genesis Leverage Development Corporation as party plaintiff.

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Applicant seeks registration on the Principal Register of the mark S'MILK (in typed form) for goods identified in the application as "chocolate bars and chocolate-based candies," in Class 30.²

Opposer filed a timely notice of opposition to registration of applicant's mark. As its ground of opposition, opposer alleged that applicant's mark, as applied to applicant's goods, so resembles opposer's previously-used and registered mark SMILK as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d). Applicant filed an answer by which it denied the salient allegations of opposer's claim.

At trial, opposer submitted the following evidence via two notices of reliance: a status and title copy of its pleaded Registration No. 1,631,788, which is of the mark SMILK (in typed form) for "fruit flavored flavorings, other than essential oils, for milk beverages" in Class 30;³ a status and title copy of its

² Serial No. 76282197, filed July 9, 2001. The application is based on applicant's asserted bona fide intention to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b).

³ Registration No. 1,631,788, issued January 15, 1991. Section 8 affidavit accepted, Section 15 affidavit acknowledged. Renewed for a term of ten years from January 15, 2001.

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pleaded Registration No. 1,921,052, which is of the mark SMILK (in typed form) for "flavored milk" in Class 29;⁴ an electronic archive copy of an article from the November 25, 1996 issue of Time magazine, entitled "Milk Shakes It Up"; and one of its product labels.⁵ Applicant submitted no evidence.

Opposer filed a brief on the case, but applicant did not. Neither party requested an oral hearing.

In view of opposer's submission of status and title copies of its pleaded registrations, we find that opposer has established its standing to oppose. *See, e.g., Lipton Industries, Inc. v. Ralston Purina Company*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). We further find that opposer's Section 2(d) priority is not in issue as to the goods identified in opposer's registrations. *See King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). We turn, then, to a determination of opposer's likelihood of confusion claim.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the

⁴ Registration No. 1,921,052, issued September 19, 1995. Section 8 affidavit accepted.

⁵ This label is not the type of evidence which may be submitted by notice of reliance. *See* Trademark Rule 2.122(e), 37 C.F.R. §2.122(e). However, applicant has not objected to its

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probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *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 §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).

We turn first to the question of whether applicant's mark and opposer's mark, when compared in their entirety in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. 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 impression that confusion as to the source of the goods 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

submission, and we therefore have considered it for whatever probative value it may have.

impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

We find that applicant's mark, S'MILK, and opposer's mark, SMILK, are identical in terms of sound, and similar in terms of appearance. However, we find that the marks have different connotations.⁶ Opposer's mark is likely to be viewed as a combination of the words "smile" and "milk." That opposer intends the mark to have this connotation is evidenced by the product label opposer has made of record, which includes the wording "SMILK is milk with a SMILE." Likewise, the Time magazine article made of record by opposer refers to opposer's product as "Smilk (that's 'smile' plus 'milk')."

In contrast, the presence of the apostrophe in applicant's mark S'MILK makes it unlikely that the mark would be viewed as being derived from or as referring to the word "smile." Rather, the most likely connotation purchasers would attribute to applicant's mark is that it is a play on "s'mores," the generic name of the well-known chocolate, marshmallow and graham cracker treat.⁷

⁶ Opposer offers no argument on the issue of whether the marks have similar connotations.

⁷ Webster's New World Dictionary of Culinary Arts (2d ed. 2001), at 426, defines "s'mores" as "confections made by sandwiching milk chocolate and marshmallows between graham crackers and heating the sandwich, often over an open fire, until the

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This is especially so since applicant's goods are identified as chocolate bars and chocolate-based candies.

On balance, we find that the marks have different connotations, but they are somewhat more similar than dissimilar in terms of their overall commercial impressions.

We turn next to a consideration of the similarity or dissimilarity between the parties' goods, under the second *du Pont* factor. It is not necessary that the respective goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. See *In re Martin's Famous Pastry*

chocolate melts." The Board may take judicial notice of dictionary definitions. See, e.g., *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); *Continental Airlines Inc. v. United Air Lines Inc.*, 53 USPQ2d 1385, 1393 (TTAB 1999).

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Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978).

Applying these principles in the present case, we find that opposer has failed to present any evidence upon which we might base a finding that applicant's goods and opposer's goods are sufficiently related that confusion is likely to result from the parties' use thereon of their respective marks. It is not apparent on this record what marketplace relationship, if any, exists between the goods identified in opposer's Registration No. 1,631,788, i.e., "fruit flavored flavorings, other than essential oils, for milk beverages,"⁸ and applicant's "chocolate bars and chocolate-based candies." The identification of goods in opposer's Registration No. 1,921,052, i.e., "flavored milk," is worded broadly enough that we must presume it to include "chocolate-flavored milk," and it thus could have "chocolate" in common with applicant's goods. However, there is no

⁸ We note that in the notice of opposition and again in its brief on the case, opposer incorrectly refers to the goods covered by this registration as "flavored flavorings..." rather than "fruit flavored flavorings..." thereby omitting a significant characteristic of the goods and impermissibly expanding the registration's scope.

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evidence in the record which establishes that chocolate-flavored milk and "chocolate bars and chocolate-based candies" are goods which purchasers would assume to originate from a single or related source.

In its brief, opposer asserts that opposer's goods and applicant's goods are related because "[t]rademarks such as HERSHEY'S and NESTLE are in used [sic - use] in the market for both milk beverages, powdered and syrup flavorings for milk, and candies and snacks." (Brief at 2.) However, there is simply no evidence in the record to support this factual assertion,⁹ nor is it the type of fact of which we can take judicial notice. See, e.g., *Los Angeles Bonaventure Co. v. Bonaventure Associates*, 4 USPQ2d 1882 (TTAB 1987)(no judicial notice taken as to whether other companies have expanded from restaurant services to hotel services under a single mark); *Abbott Laboratories v. Tac Industries, Inc.*, 217 USPQ 819 (TTAB 1981)(no judicial notice taken as to use of antimicrobial agents in the floor covering industry). See also *In re Carolina Apparel*, 48 USPQ2d 1542, 1542 n.2 (TTAB 1998)(no judicial notice taken of third-party registrations);

⁹ Opposer made this same factual allegation in its notice of opposition, and applicant denied it in the answer, thereby putting opposer on notice that it would be required to prove the allegation with evidence at trial. Opposer has failed to do so.

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Cities Service Co. v. WMF of America, Inc., 199 USPQ 493 (TTAB 1978)(no judicial notice of third-party registrations and listings in trade directories, where copies not made of record).

After careful consideration of the evidence in the record, we cannot conclude that applicant's goods and opposer's goods are related in the marketplace in such a manner that confusion is likely to result from the parties' use of their respective marks. Although the marks are somewhat similar, the absence of evidence establishing a marketplace relationship between the goods precludes us from concluding that a likelihood of confusion exists.

Decision: The opposition is dismissed.