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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Griffith Laboratories International, Inc.

Serial No. 78290739

Barry W. Sufrin of Gardner Carton & Douglas LLP for
Griffith Laboratories International, Inc.

Scott Oslick, Trademark Examining Attorney, Law Office 108
(Andrew Lawrence, Managing Attorney).

Before Quinn, Kuhlke and Walsh, Administrative Trademark
Judges.

Opinion by Walsh, Administrative Trademark Judge:

On August 21, 2003, Griffith Laboratories
International, Inc. ("applicant") applied to register the
mark ULTIMA in standard-character form on the Principal
Register for goods now identified as "food flavorings, not
being essential oils," in International Class 30. The
application claims both first use anywhere and first use in
commerce in November of 2002.

The examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of three current registrations, specifically:

Reg. No. 1966568, issued April 9, 1996, owned by Cargill, Inc., for the mark ULTIMA PREMIUM in standard-character form for "shortening and cooking oils" in International Class 29. "PREMIUM" is disclaimed. The cited registration specifies a date of first use anywhere and a date of first use in commerce of August 1, 1993. The cited registration is active; the registrant has filed renewal papers which are awaiting action.

Reg. No. 2565089, issued April 30, 2002, owned by Catania-Spagna Corp., for the mark ULTIMA SUN in standard-character form for "sunflower oils" in International Class 29. The cited registration specifies a date of first use anywhere and a date of first use in commerce of July 3, 2000. The cited registration is active.

Reg. No. 2179432, issued August 4, 1998, owned by Catania-Spagna Corp., for the mark CATANIA ULTIMA in standard-character form for "edible oils" in International Class 29. The cited registration specifies a date of first use anywhere and a date of first use in commerce of February 1998. The cited registration is active.

The examining attorney issued a final refusal and applicant appealed. Both applicant and the examining attorney have filed briefs. Applicant did not request an oral hearing. We affirm the refusals based on the ULTIMA PREMIUM and ULTIMA SUN registrations and reverse as to the CATANIA ULTIMA registration.

Section 2(d) of the Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office . . . as to be likely, when used on or in connection with the goods of the applicant, to cause confusion . . ." 15 U.S.C. § 1052(d). To determine whether there is a likelihood of confusion, we must consider all evidence of record bearing on the factors delineated in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977). Here, as is often the case, the crucial factors are the similarity of the marks and the similarity of the goods of the applicant and registrant. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In addition to those factors, we will also address applicant's argument that the purchasers of the goods are sophisticated, and as such, less likely to be confused.

Comparison of the Goods

Applicant argues that there are differences between the goods of applicant and registrants. In this regard, Applicant states, "Applicant's goods have a different application and utility from the goods of the cited registrants, making confusion even more unlikely." (citations omitted) Applicant adds, "While Applicant's food flavorings are added to food to enhance their savor,

the cited registrants' edible oils, sunflower oil and shortening and cooking oil are added to food to affect its texture. As such, the distinct application and functionality of the products makes confusion between the marks unlikely."

The examining attorney argues, on the other hand, that, "The fact that the goods of the parties differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular goods, but the likelihood of confusion as to the source of these goods." (citations omitted) The examining attorney argues further, "Thus, the conditions surrounding the marketing and usage of the goods is such that the same potential consumers could encounter the goods and believe that they come from a common source."

First, we must concur with the examining attorney's caution that our focus must be the likelihood of confusion as to the source of the goods, not confusion as to the goods themselves. In re Rexel Inc., 223 USPQ 830, 831 (TTAB 1984).

At the outset we also note that each of the three cited registrations includes an item in the identification of goods which encompasses or is encompassed by at least one item in each of the other two. Those items are:

"edible oils," "cooking oils," and "sunflower oils." That is, "edible oils" encompasses "cooking oils" and "sunflower oils," and "cooking oils" likewise encompasses "sunflower oils." In fact, the only other item covered by the registrations is "shortenings" which is obviously closely related functionally and otherwise to all of the other items identified in the cited registrations. Accordingly, we will compare applicant's goods "food flavorings, not being essential oils" to the goods in the registrations as a group.

To support his position that the goods are related the examining attorney has provided copies of several third-party registrations claiming use of the same mark on both types of goods, those identified in the application and those identified in the cited registrations. The following are among those registrations:

Reg. No. 1879937 for WETCO covering, among other things, "shortening" and "food flavoring extracts, not being essential oils";

Reg. No. 2333616 for JULIUS MEINL covering, among other things, "flavoring extracts for baking and cooking, which are nonessential oils" and "edible oils";

Reg. No. 2564995 for BAKEMARK covering, among other things, "shortening," "vegetable oil," and "food flavoring extracts not being essential oils";

Reg. No. 2706262 for NESWELL covering, among other things, "edible oils" and "extracts used as flavoring,

namely, extracts of coffee substitutes," "preparations for making ice cream, namely, . . . food flavorings and sugar," and "seasonings"; and

Reg. No. 2783040 for PRIMA TASTE (with a design) covering, among other things, "edible oils and fats for the preparation of foodstuffs," "food flavorings being essential oils," "powdered spice ginger," "seasonings" and "spices."

These third-party registrations are not evidence that these marks are in use, but they are of some probative value and do indicate that the goods of applicant and registrants are of a type which may emanate from the same source. In re TSI Brands Inc., 67 USPQ2d 1657, 1659 (TTAB 2002); In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993).

The registrations provided by the examining attorney also indicate more broadly that the same mark has been registered for a wide range of foods and food ingredients. In sum, this evidence indicates that the goods of applicant and registrants are related.

The examining attorney has also submitted evidence consisting of recipes which call for the use of both types of goods, that is, food flavorings, as well as shortenings or oils. For example, the examining attorney has provided several recipes from the web site of the US Highbush Blueberry Council, including: a recipe for "Blueberry Buns" calling for, among other ingredients, "High Ratio

Shortening," "Lemon Flavoring" and "Vanilla Flavoring"; and a recipe for "Blueberry Cinnamon Rolls" calling for "flavoring (butter, vanilla or almond)" and "shortening"; a recipe for "Blueberry Muffins" calling for "shortening" and "lemon flavor."

The examining attorney has also provided a recipe from e-CookBooks at www.e-cookbooks.net for "Red Velvet Cake" calling for "shortening" and well as "butter-flavored extract" and "vanilla extract," as well as a series of recipes from www.greentab.com for cakes, including a recipe for "Apple Pecan Cake" calling for both "vegetable oil" and "vanilla."

In addition the examining attorney has provided a series of recipes from www.heartstonebakery.com for several types of breads, many calling for both vegetable oils and flavoring, for example, the recipes for "Challa" (Egg Bread), "Cinnamon Raisin," and "Cinnamon Swirl," each call for "vegetable oil" and "vanilla." This evidence indicates that the goods of the applicant and registrants, though different in some sense, are used by the same persons, at the same time in performing the same task. This is further evidence that the goods are related.

Accordingly, we conclude that the goods of the applicant and registrants are related.

Channels of Trade and Sophistication of Purchasers

Applicant essentially combines arguments which address both the channels of trade and the sophistication of the purchasers. In doing so applicant does not distinguish among the cited registrations. Applicant states, "The purchasers of Applicant's ULTIMA products, which include food manufacturers, lab technicians and food scientists, are highly sophisticated, discriminatory purchasers that are unlikely to be confused between Applicant's mark and the cited marks."

With regard to the channels of trade, we must consider the goods as identified in the application and registrations and, in the absence of any restrictions in the channels of trade, assume that the goods travel in all trade channels appropriate for such goods. CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991).

Applicant submitted the affidavit of its Director of Worldwide Marketing Research, Steve Graef, as evidence regarding applicant's actual trade channels and the sophistication of its customers. Mr. Graef indicates that Griffith's products include, "seasoning blends, dry mixes, coating systems, dough blends, crumbs, flavorings, sauces,

and food bases."¹ He also indicates that applicant sells its products "directly to businesses, and its customers include food processors and restaurant operators." Mr. Graef indicates further that applicant does "not sell its products directly to retailers for placement on grocery store shelves, nor does it sell its products directly to consumers." With regard to products sold under the ULTIMA mark he states, "Likewise the ULTIMA food flavorings are sold only to flavor companies, food processors, ingredient manufacturers, and restaurant operators. The ULTIMA food flavorings are never sold directly to retail customers."

However, neither the application nor the registrations at issue here include any restrictions as to the channels of trade. Accordingly, we cannot take into account the asserted limitations in the actual trade channels of applicant. In re Bercut-Vandervoort & Co., 229 USPQ 763, 764 (TTAB 1986)(extrinsic evidence and argument suggesting trade-channel restrictions not specified in application rejected). We must assume that applicant's "food flavorings, not being essential oils," and registrants' "shortening and cooking oils," "edible oils" and "sunflower

¹ Applicant's own description of the range of its products lends further support to the proposition that a variety of food ingredients and products may emanate from the same source.

oils" would travel in all normal trade channels for such products and reach all potential purchasers of such products. All of these products are common ingredients for food which are widely available for purchase and used by the general public, as well as the narrower class of purchasers identified by applicant. Therefore, we conclude that applicant's goods and registrants' goods could travel through the same trade channels and could reach the same purchasers. Furthermore, those purchasers would include individuals of varying degrees of sophistication, including the general public.

Even Mr. Graef's affidavit indicates the customers for applicant's products sold under the ULTIMA mark include "restaurant operators," a class which may include purchasers of varying levels of sophistication, some, no doubt, less sophisticated than "food manufacturers, lab technicians and food scientists."

Even if we were to assume that applicant's customers were limited to "food manufacturers, lab technicians and food scientists," as applicant argues, we must assume that these same individuals are potential purchasers of registrants' goods, again in the absence of any restriction in the registrations. Furthermore, even sophisticated purchasers such as those identified by applicant are not

immune from trademark confusion. In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983). In addition, even sophisticated purchasers may not be aware of the range of products offered by a party. In re Decombe, 9 USPQ2d 1812, 1815 (TTAB 1988). Accordingly, we conclude that the sophistication of relevant purchasers does not diminish the likelihood of confusion in this case as to any of the three cited registrations.

Comparison of the Marks

In comparing the marks we must consider the appearance, sound, connotation and commercial impression in each instance. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In this case, we must compare applicant's mark to each of the cited marks separately to determine whether it is confusingly similar to any of the cited marks.

Applicant argues as follows with regard to the marks:

The respective marks appear and sound differently and make distinctly different commercial impressions because each of the cited marks contains an additional term which distinguishes the cited marks from Applicant's mark. Applicant's mark, ULTIMA, is an arbitrary term not commonly recognized by consumers, thus consumers encountering Applicant's mark will not attach a specific meaning to the bare term "ULTIMA" (as used in Applicant's mark). Conversely, the cited marks contain additional terms that have clear meanings.

On the other hand, the examining attorney argues that the additional elements in the cited marks are insufficient to distinguish the marks. He states, "The marks at issue in the present appeal are highly similar in sound, meaning, appearance and overall commercial impression." He argues that ULTIMA is the dominant element in the ULTIMA PREMIUM and ULTIMA SUN marks, and he argues that "CATANIA" is not sufficient to distinguish the CATANIA ULTIMA mark from applicant's mark, apparently because he regards "CATANIA" as the name of "the company providing the goods."

First with regard to applicant's ULTIMA mark and the cited ULTIMA PREMIUM mark, the marks are highly similar in all respects. "ULTIMA" is the first and only distinctive element in both marks, and therefore, the dominant element in both marks. In this case, as in many others, the first term in the mark is most important in evaluating similarity. Palm Bay Imports, Inc. v. Veuve Clicquot, 73 USPQ2d at 1690. See also Presto Products v. Nice-Pak Products, 9 USPQ2d 1895, 1897 (TTAB 1998) ("It is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.").

The only difference between the marks is the inclusion of "PREMIUM" in the registered mark. The Merriam-Webster's

Collegiate Dictionary (Eleventh Ed. 2003) defines "premium" as "of exceptional quality or amount; also : higher-priced."² This descriptive meaning applies in numerous fields, including foods. Thus, "PREMIUM" is descriptive as used in registrant's mark. While we are obligated to view the marks overall, and we have, it is appropriate to consider the relative impact of distinct elements within a mark. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 750 (Fed. Cir. 1985). In this case, the addition of the descriptive term "PREMIUM," which is disclaimed, does nothing to differentiate the marks in appearance, sound, connotation or commercial impression. Consequently, we conclude that ULTIMA and ULTIMA PREMIUM are similar.

Furthermore, when we consider the marks in conjunction with all other relevant factors here, including the goods and the sophistication of the purchasers, we conclude that there is a likelihood of confusion between ULTIMA for "food flavorings, not being essential oils," and ULTIMA PREMIUM for "shortening and cooking oils."

Secondly, with regard to applicant's ULTIMA mark and the cited ULTIMA SUN mark, here also the marks are highly

² We take judicial notice of this definition. See University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983) and other authorities referenced in TBMP § 1208.04 (2d ed. rev. 2004).

similar in all respects. "ULTIMA" is the first and most distinctive element in both marks, and therefore, the dominant element in both marks. As we noted above, the first term in the mark is often most important in evaluating similarity. Palm Bay Imports, Inc. v. Veuve Clicquot, 73 USPQ2d at 1690. See also Presto Products v. Nice-Pak Products, 9 USPQ2d at 1897.

The only difference between the marks in this case is the inclusion of "SUN" in the registered mark. In this case "SUN" is highly suggestive of the goods, "sunflower oils." As noted previously, while we must view the marks overall, it is appropriate to consider the relative impact of distinct elements within a mark. In re National Data Corp., 224 USPQ at 750. In this case, the addition of the highly suggestive term "SUN" is insufficient to differentiate the marks in appearance, sound, connotation or commercial impression. Consequently, we conclude that ULTIMA and ULTIMA SUN are similar.

Furthermore, here too when we consider the marks in conjunction with all other relevant factors, including the goods and the sophistication of the purchasers, we conclude that there is a likelihood of confusion between ULTIMA for "food flavorings, not being essential oils," and ULTIMA SUN for "sunflower oils."

Lastly, with regard to applicant's ULTIMA mark and the cited CATANIA ULTIMA mark, the marks are sufficiently distinct in all respects to conclude that the marks are not confusingly similar. In concluding so we note that "CATANIA" is the first and the most distinctive, and therefore, the dominant element in the cited, registered mark. Contrary to the examining attorney's argument, we have no basis to conclude here that relevant consumers would perceive CATANIA as a company name or that such a perception would lead to a likelihood of confusion in this case. Furthermore, when we consider the similarity of the marks here, along with the other relevant du Pont factors, including the distinction between the goods, we conclude that there is not a likelihood of confusion between ULTIMA for "food flavorings, not being essential oils," and CATANIA ULTIMA for "edible oils."

Decision: The refusal to register applicant's mark based on the ULTIMA PREMIUM and ULTIMA SUN registrations is affirmed; the refusal to register applicant's mark based on the CATANIA ULTIMA registration is reversed. The application is refused.