

Hearing:  
May 18, 1999

Paper No. 10  
CEW

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB NOV. 23, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Gardner Resources, Inc.

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Serial No. 75/198,089

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Douglas J. Katich of Katich, Werse & Petillo for applicant.

Michael Moore, Trademark Examining Attorney, Law Office 104  
(Sidney Moskowitz, Managing Attorney).

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Before Seeherman, Walters and Chapman, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Gardner Resources, Inc. has filed a trademark  
application to register the mark BLAIR'S DEATH for "hot  
sauce."<sup>1</sup>

The Trademark 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 so

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<sup>1</sup> Serial No. 75/198,089, in International Class 30, filed November 14,  
1996, based on use in commerce, alleging a date of first use and first  
use in commerce as of January 1, 1994.

resembles the mark shown below, previously registered on the Supplemental Register for "food flavoring extracts and fruit flavorings used for food purposes; pie filling mix comprised principally of cornstarch, sugar and egg yolk, table syrup flavoring, and spices,"<sup>2</sup> that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs and an oral hearing was held. We reverse the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See, In re E. I. duPont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion in this case, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities

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<sup>2</sup> Registration No. 574,107, in International Class 30, issued May 5, 1953, and renewed for a second time for a term of ten years from May 5, 1993, currently owned by Tri-Tech Laboratories, Inc.

between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Considering, first, the marks, the Examining Attorney argues that the BLAIR'S portion of applicant's mark is identical to registrant's mark and it is the dominant portion of applicant's mark; that, in both marks, BLAIR connotes a person's name; that there is no evidence that BLAIR is a weak mark; and that the DEATH portion of applicant's mark is "suggestive of the fiery nature of the applicant's hot sauce."

Applicant contends that BLAIR'S DEATH identifies "the given name of the hot sauce's creator and, allegorically, [describes] the experience of digesting the hot sauce"; and that applicant has a family of hot sauce and hot spice products identified by marks that incorporate the term DEATH, e.g., AFTER DEATH hot sauce, DEATH RAIN, hot spice, and SUDDEN DEATH hot sauce.<sup>3</sup> Applicant contends, further, that, while its mark shares the word BLAIR in common with the cited mark, BLAIR is "relatively weak and does not have inherent or acquired distinctiveness; that the word DEATH is the dominant portion of applicant's mark; and that the

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<sup>3</sup> Applicant has not established that it has a family of DEATH marks, although such a finding would not entitle applicant to a registration of another "DEATH" mark if such mark were likely to cause confusion with another's registered mark. See, *Baroid Drilling Fluids, Inc. v. Sun Drilling Products*, 24 USPQ2d 1048 (TTAB 1992).

connotations and overall commercial impressions of the marks are substantially different, noting the possessive form of BLAIR in BLAIR'S DEATH.

In considering the marks, the question is whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. In this case, the registered mark, BLAIR in a stylized script, is on the Supplemental Register and, thus, at least at the time of registration, BLAIR was apparently considered primarily merely a surname. In the absence of evidence to the contrary, we find the registered mark to be a weak mark. In applicant's mark, BLAIR'S DEATH, the word BLAIR can be perceived as either a given name<sup>4</sup> or a surname; and BLAIR appears in the possessive form in reference to the word DEATH. We agree with applicant to the extent that the word DEATH in applicant's mark is significant and creates, in combination with BLAIR'S, a connotation and commercial impression that is distinctly different from the stylized registered mark, BLAIR.

Regarding the goods, the Examining Attorney contends that applicant's goods are closely related to the goods

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<sup>4</sup> We take judicial notice of the definition in the *Random House Dictionary of the English Language*, unabridged (2d ed. 1987), of Blair as "n. a male or female given name."

identified in the cited registration. In particular, he argues that "hot sauce is typically used to flavor food and is derived from pepper extracts," and that one of the items in the registration is food flavoring extracts.

The Examining Attorney also notes that neither applicant's nor registrant's identification of goods contains limitations and, therefore, the goods of applicant and registrant are presumed to travel in the normal channels of trade and to the usual consumers for goods of the types described.

Applicant contends, on the other hand, that the product identified herein "is a highly specialized gourmet food product, which is sold in specialty shops dedicated to the sale of hot sauces and related hot pepper products [and] sold exclusively through such specialty outlets and through direct sales to customers via the Internet." Applicant argues that the products are substantially different because registrant's products are in the "baking" category of foods, whereas applicant's product is a gourmet condiment.

While applicant characterizes its product as a "gourmet condiment" and identifies specific trade channels, the identification of goods is not so limited. Thus, as the Examining Attorney correctly stated, we must presume

that the goods of applicant encompass all types of hot sauce and are sold in all of the normal channels of trade to all of the usual purchasers for such goods. See *Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Nor does the fact that its product is a "condiment" as opposed to a "baking product" necessarily distinguish applicant's goods from those of registrant.

In support of his position, the Examining Attorney submitted copies of third-party registrations of marks registered for hot sauces and a variety of other products. Of the seven third-party registrations in the record, at least three registrations are for marks that appear to be store brands identifying a broad range of food items. As such these registrations are not indicative of any relationships among the many listed goods. Of the remaining four registrations, two are owned by the same party and include hot sauce, mixes for bakery goods and food additives used for flavoring; one includes hot sauce and "extracts effervescent"; and another includes hot sauce and extracts for food purposes. While apparently similar to registrant's recited "food flavoring extracts," it is not entirely clear the extent to which "additives" and "extracts effervescent" are the same as or related to

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registrant's goods. At most, these registrations provide some, although not strong, evidence that consumers might believe that goods of the type involved herein come from the same source.

In conclusion, we find that in view of the substantial differences in the commercial impressions of applicant's mark, BLAIR'S DEATH, and registrant's stylized mark, BLAIR, and the tenuous relationship between the respective goods, the contemporaneous use of applicant's and registrant's marks on the goods involved in this case is not likely to cause confusion as to the source or sponsorship of such goods.

*Decision:* The refusal under Section 2(d) of the Act is reversed.

E. J. Seeherman

C. E. Walters

B. A. Chapman  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board