

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Rose Packing Company, Inc.
Serial No. : 86/839,908 Examiner: Brandon N. Marsh, Esq.
Filed : December 4, 2015 Law Office: 112
Mark : ROSE

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

APPLICANT'S RESPONSE TO OFFICE ACTION DATED MARCH 30, 2016

The Examining Attorney has refused registration of Applicant's ROSE mark ("Applicant's Mark") in Class 29 on the grounds that the mark is confusingly similar to



registrations for the marks for canned meats, pork brains, potted meat, Vienna sausage and beef tripe in Class 29 by Violet Sanford Holdings, LLC, ROSA for dry sausage in Class 29 by Hormel Foods, LLC and



for meatballs, Italian sausage with peppers and onions in sauce and beef or pork based pizza topping in Class 29 by Rosina Food Products, Inc. (hereinafter collectively referred to as the "Cited Marks"). Applicant respectfully disagrees with the Examiner's findings and its substantive arguments are set forth below. Accordingly, Applicant requests that the Application be passed to publication for the reasons that follow.

I. AMENDMENT OF GOODS

Applicant hereby amends the description of goods in Class 29 to read as follows:

“Sausages, meat burger patties, pork rolls, meatballs, smoked bone-in pork loin centers, bone-in hams, boneless hams, pork roasts, pork tenderloins, pork back ribs, pork spare ribs, shredded pork, pork shoulder roasts, pepperoni, salami, bacon, belly bacon, chicken kiev and chicken cordon bleu.”

Applicant hereby adds the following goods to Class 30 to read as follows:

“Burritos and enchiladas.”

II. APPLICANT’S MARK IS NOT CONFUSINGLY SIMILAR TO THE CITED MARKS

Applicant respectfully contends that an examination of the relevant factors under TMEP §1207 and *In re E.I. du Pont de Nemours & Co.*, 177 USPQ 563, 567 (C.C.P.A. 1973), warrants the conclusion that Applicant’s Mark cannot be said to so resemble the Cited Marks that it is likely to cause confusion, or to cause mistake, or to deceive given careful consideration of the differences between: (i) the parties’ respective marks; (ii) the channels of trade; and (iii) the widespread co-existence of ROSE and similar marks already on the register in Class 29.

A. Applicant’s Mark is Not Confusingly Similar to the Cited Marks

It is well-settled that marks should be viewed in their entirety. *See, J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition*, §23.41.

When Applicant’s Mark is viewed in its entirety it is clear that it is dissimilar from the Cited Marks ROSA and ROSINA in both sound and commercial impression. Phonetically, the ROSA and ROSINA marks are pronounced with an emphasis on the last syllable whereas Applicant’s Mark is just one syllable. Moreover, the marks make different commercial impressions as both ROSA and ROSINA are used primarily as first names for women and conjure the image of a woman, while ROSE has several meanings, including the name of a color, a type of wine and also a women’s name but ROSE is primarily associated by consumers as the

name of a popular flower given by one person to another as a sign of romantic love (ie. red roses) or friendship (ie. yellow roses).

Visually, the differences between Applicant's Mark and the Cited Marks are particularly apparent as Applicant's Mark consists of one word, ROSE, while two of the Cited Mark consists



of highly stylized designs: and . It

is clear that these highly stylized design marks are not visually similar enough to Applicant's word mark ROSE to cause confusion among consumers. The third Cited Mark, ROSA, differs from Applicant's Mark as it ends with the letter "A" not an "E". No consumer would mistakenly assume that the goods sold under Applicant's Mark and the goods sold under the Cited Marks originate from a common source, or that a connection or sponsorship between the parties exists, particularly given the differences between how consumers encounter the marks in the marketplace.

In addition, Applicant already owns several registrations for marks containing ROSE, including a registration for ROSE alone, which is proof that consumers are conditioned to associate meat products containing the word ROSE with Applicant. Applicant's registrations for meat products in Class 29 include ROSE (Reg. No. 2808945), MILL ROSE FARMS (Reg. No. 1743374) and DAISY ROSE (Reg. No. 2360424).

B. Channels of Trade



In determining whether the parties' goods are so related that a likelihood of confusion will result from registration of Applicant's Mark, the practicalities of the commercial world should be guiding. Applicant's goods bearing Applicant's Mark are sold primarily to food




distributors. Consumers can order Applicant’s meat products directly through Applicant’s website www.rosepacking.com, but as a consumer has to actively locate Applicant’s website to order the products, the potential for consumer confusion between Applicant’s Mark and the Cited Marks is very low. Given the commercial reality, it is not just unlikely, but almost inconceivable that the respective relevant consumers would mistakenly believe that the parties’ goods originate from the same source or that a connection or sponsorship exists. Moreover, Applicant was established in 1924 and has used Applicant’s Mark in connection with pork, turkey, chicken and beef products in the marketplace for over ninety years such that Applicant’s food distribution customers have been conditioned to associate Applicant’s Mark solely with Applicant.

C. There are Many Third Party ROSE Marks on the Register

A search of the USPTO records shows that ROSE/ROSA marks are commonly used in connection with food products in Class 29. Consumers are therefore not likely to be confused as to the source of different goods that all bear a mark that incorporate ROSE or a variation thereof. *See, e.g., Puma-Sportschuhfabriken Rudolf Dassler K.G. v. Superga S.p.A.*, 210 USPQ 316 (TTAB 1980); *J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition*, §11:26.

The following are some examples of third party registrations that include ROSE/ROSA that co-exist on the Principal Register in Class 29:

Trademark	Reg. No.	Goods in Class 29	Owner
PLUMROSE	72208957	fresh and canned meats	Plumrose USA, Inc.
ROSEWOOD	4646722	beef and meat	Rosewood Ennis, LLC
	3530614	meats and processed foods, namely, cheeses, meats, olive oils, seafood, tomato paste, and tomato puree	Umberto Derosa
	549127	a variety of canned and prepared foods	

Trademark	Reg. No.	Goods in Class 29	Owner
	4350542	food products, namely, frozen and packaged meats and vegetables; frozen and packaged entrees consisting primarily of meat and/or vegetables	F&R Ip, Inc.
LA VIE EN ROSE	4235671	preserved, dried, crystallized, candied, frozen and cooked fruits and vegetables, fruit peel, fruit jellies, fruit salads, fruit pulp, fruit chips, fruits preserved in alcohol, edible jellies, namely, fruits jellies, jams, marmalades, margarine, butter, cream, namely, butter cream, peanut butter, cocoa butter for food purposes...	La Vie En Rose
 and BELLA ROSA	3342555 and 3302590	cheese	Arthur Schuman, Inc.
	4487545	food products, namely, frozen and packaged meats and vegetables; frozen and packaged entrees consisting primarily of meat and/or vegetables	F&R IP, Inc.

The fact that so many ROSE/ROSA marks already co-exist on the Register is evidence that consumers are able to distinguish between the source of different goods and services which include ROSE or ROSA with or without additional elements.

While Applicant acknowledges that the Trademark Office is not bound by its prior decisions, Applicant is entitled to a certain degree of reliance on treatment of similar marks. In fact, the Court of Appeals for the Federal Circuit encourages the use of a uniform standard in assessing marks. *See, e.g., In re Nett Designs*, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Moreover, a mere possibility of confusion is not sufficient for a finding of likelihood of confusion. Consumer confusion must be probable. *See, e.g., Bongrain International (American) Corporation v. Delice de France, Inc.*, 1 USPQ2d 1775, 1779 (Fed. Cir. 1987). As the Federal Circuit Court has noted, in determining whether a likelihood of confusion exists, “[w]e are not

concerned with the mere theoretical possibilities of confusion, deception or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deals.” *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992). It is well established that “a realistic evaluation of consumer confusion must attempt to recreate the conditions in which buying decisions are made, and the court should try to determine not what it would do, but what a reasonable purchaser in market conditions would” and that a side-by-side comparison is improper if that is not the way the consumers encounter the marks in the marketplace. *See, 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition* §§24:51 and 23:58. As demonstrated above, consumers routinely encounter ROSE marks in the marketplace for meat products such that it is highly unlikely that it would be confused as to the source of the goods offered under the Cited Marks and the goods offered under Applicant’s Mark.

III. CONCLUSION

For all the foregoing reasons, Applicant respectfully requests that the Examining Attorney approve the Application for publication. If any unresolved issues still remain, the Examining Attorney is respectfully requested to telephone the undersigned in order to resolve said issues.

Respectfully submitted,

Dated: August 17, 2016

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