

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

MARCH 12, 98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Pierre Fabre Sante

Serial No. 74/735,962

Gordon W. Hueschen and G. Patrick Sage of The Firm of Gordon W. Hueschen for applicant.

Dominick J. Salemi, Trademark Examining Attorney, Law Office 107 (Thomas Lamone, Managing Attorney).

Before Seeherman, Hairston and Walters, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Pierre Fabre Sante, a corporation of France, has filed a trademark application to register the mark PHYTAROMA for "medicated preparations for skin care, hygiene and diseases, for the prevention and treatment of respiratory and digestive problems and diseases, antalgic preparations, digestive and circulatory tonics, dietary food supplements"

in International Class 5.¹ The application originally included "cosmetics and cleaning preparations; namely, skin balms, creams and lotions" in International Class 3. However, following the issuance of a final refusal to register, applicant deleted the goods in International Class 3 from the application.

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 resembles the mark PHYTARÔMES and design, as shown below, previously registered for "essential oils for personal use,"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.



applicant and the
refs, but an oral hearing
refusal to register.

In the analysis of likelihood of confusion in this case, two key considerations are the similarities between the marks and the similarities between the goods. *Federated*

¹ Serial No. 74/735,962, filed September 29, 1995, under Section 44(e) of the Trademark Act, 15 U.S.C. 1126(e), based on French Registration No. 1,505,763.

² Registration No. 1,607,925, issued July 31, 1990, to Sharon Christie TA Sharon Christie Ltd., Clinical Baby Care, in International Class 3. Sections 8 and 15 affidavit accepted and acknowledged, respectively.

Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). As discussed herein, while we have found the commercial impressions of applicant's and registrant's marks to be substantially similar, we cannot find, on this record, that the identified goods are related such that the use of similar marks on the parties' respective products is likely to cause confusion.

Considering, briefly, the marks, we find that the word portion of registrant's mark is dominant, as the design element in registrant's mark is merely an outline that serves to emphasize the word portion of registrant's mark and to distinguish the two syllables comprising the word portion of the mark. Comparing applicant's mark to the word portion of registrant's mark, we find the words PHYTARÔMES³ and PHYTAROMA to be equivalent in meaning and connotation⁴ and substantially similar in appearance and sound. We find that the overall commercial impressions of these two marks are substantially similar.⁵

³ We judicially notice the definition from the *Modern French-English Dictionary* (Librairie Larousse, undated) submitted with applicant's brief of "arôme" indicating it is a French word meaning, in English, "aroma, favour; fragrance."

⁴ Except under certain circumstances not indicated herein, in considering the meaning and connotation of a mark in the context of a determination of likelihood of confusion, there is no distinction between English terms and their foreign equivalents, despite the fact that the foreign term may not be commonly known to members of the general public in the United States. See, *In re Atavio Inc.*, 25 USPQ2d 1361 (TTAB 1992) and cases cited therein.

⁵ In reaching this conclusion, we were not persuaded by applicant's argument that registrant's mark is highly suggestive and, thus, entitled

Turning to the goods, we note that the parties' goods need not be identical or even competitive in order to support a finding of likelihood of confusion. However, it is necessary that the parties' goods are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could 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 producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

We judicially notice the definition of "essential oil,"⁶ the goods identified in the cited registration, as follows:

n. Any of a large class of odoriferous oils of vegetable origin that impart to plants odor and often other characteristic properties, that are obtained from various parts of the plant (as flowers, leaves or bark) by steam distillation, expression, or extraction, that are usually mixtures of compounds . . . and that are used often in the form of essences in perfumes, flavoring materials, and pharmaceutical preparations.

to a limited scope of protection. A registered mark is presumed valid and is entitled to protection against the registration of confusingly similar marks, regardless of whether the registered mark is suggestive. Nor will we entertain applicant's contention that registrant's mark is merely descriptive of the identified goods. Such an assertion is essentially an attack on the validity of the registration which is properly addressed in an inter partes cancellation proceeding, not in an ex parte appeal.

⁶ Webster's Third New International Dictionary, 1976.

The Examining Attorney contends that applicant's goods "are the kind that a purchaser would associate with the manufacturer of essential oils as most drugstores and cosmetic houses often sell both medicated and non-medicated skin care and cosmetics side by side." However, the Examining Attorney has not provided any evidence to show that the registrant's identified essential oils for personal use and applicant's identified medicated preparations travel in the same channels of trade or are purchased by the same class of consumers. Indeed, the Examining Attorney has not made any evidence of record in this application. The only information we have as to the goods are the identifications recited in the application and the cited registration, and the dictionary definition of "essential oil" which we have judicially noticed.

It would appear from the dictionary definition that "essential oils for personal use" would be used as essences in perfumes and pharmaceutical preparations and, therefore, would be purchased by the manufacturers of such products. There is no evidence in this record from which we can conclude that registrant's goods would be purchased directly by the public or that, as the Examining Attorney contends, these goods are, in and of themselves, a cosmetic that would be sold in the same stores and in close proximity to medicated skin care products. On the other hand, it would

appear that medicated preparations, as identified in this application, could be purchased by the general public as well as by the medical community for the treatment of patients.⁷

While the commercial impressions of applicant's mark, PHYTAROMA, and registrant's mark, PHYTARÔMES and design, may be substantially similar, in view of the lack of evidence of any overlap in channels of trade or classes of customers, we find that the Examining Attorney has failed to prove that applicant's and registrant's goods are related such that the contemporaneous use of the marks herein on the identified goods is likely to cause confusion as to the source or sponsorship of such goods. Thus, we must reverse the refusal to register.

We hasten to point out that our decision rests on the evidence of record and that, in this case, the Examining Attorney had not made any evidence of record. Thus, if we were presented with a different record, for example, in an

⁷ We have not been persuaded by applicant's argument that the parties' goods are different because they are classified in different International Classes. The classification of goods and services in trademark applications is for the administrative ease of the PTO and is neither relevant to, nor determinative of, likelihood of confusion. *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992). Thus, the fact that applicant's goods are classified in International Class 5 (Pharmaceuticals) does not somehow render them distinguishable from registrant's products, which are classified in International Class 3 (Cosmetics). Likewise, we have not been persuaded by applicant's allegations regarding the alleged scope of registrant's business and registrant's intent, or lack thereof, to expand into other fields.

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inter partes proceeding, we might arrive at a different conclusion.

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

E. J. Seeherman

P. T. Hairston

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board