

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB

AUG 27, 98

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Lander Co., Inc.

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Serial No. 75/005,294

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Harriet E. Perkins of Seidel, Gonda, Lavorgna & Monado, P.C.  
for Lander Co., Inc.

Cheryl Butler, Trademark Examining Attorney, Law Office 107  
(Thomas Lamone, Managing Attorney).

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Before Seeherman, Quinn and Hairston, Administrative  
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Lander Co., Inc. to  
register the mark LANDER APPLE ESSENCE for "shower and bath  
gel."<sup>1</sup>

The Trademark Examining Attorney has refused  
registration under Section 2(d) of the Trademark Act on the  
ground that applicant's mark, when applied to the identified  
goods, so resembles the previously registered mark shown

below for "hair curling kit comprised of shampoo concentrate, pre-rolling conditioner, curling lotion, conditioning neutralizer, moisturizing gel curl and moisturizing hair sheen spray,"<sup>2</sup> as to be likely to cause confusion.

**applesence**

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs on the case.

Turning first to the goods, it is not necessary that the goods be identical or even competitive in nature to support a finding of likelihood of confusion. It is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that could give rise, because of the marks employed on the goods, to the mistaken belief that they originate from or are in some way associated with the same producer. In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978).

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<sup>1</sup> Application Serial No. 75/005,294, filed October 13, 1995; alleging dates of first use of July 25, 1995. The words "APPLE ESSENCE" have been disclaimed apart from the mark as a whole.

<sup>2</sup> Registration No. 1,341,753 issued June 11, 1985 on the Supplemental Register; Section 8 affidavit filed.

In this connection, we readily acknowledge that applicant's shower and bath gel and registrant's hair curling kit are specifically different. Nonetheless, these products all relate to personal grooming, and travel in the same channels of trade and are purchased by the same classes of purchasers. See e.g., *Alberto Culver Company v. Michael Duval, Inc.*, 158 USPQ 56 (TTAB 1968) [hair care products and toiletries such as spray bath oil are closely related products sold through the same channels of trade to the same customers]; and *In re Helene Curtis Industries, Inc.*, 363 F.2d 936, 150 USPQ 668 (CCPA 1966) [hair permanent waving lotion and perfume and cologne are related products]. In addition, the Examining Attorney submitted several third-party registrations showing that entities have registered a single mark for bath and/or shower gels, on the one hand, and hair shampoos, hair conditioners and/or hair styling preparations, on the other hand. The Examining Attorney also submitted excerpts from two catalogues to support the contention that the goods are related. Although not conclusive, the evidence serves to suggest that the goods involved herein are of a type which may emanate from a single source under a single mark. *In re Albert Trostel & Sons and Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (1988). Under the circumstances, we find applicant's shower and bath gel and

registrant's hair styling kit to be sufficiently related that when sold under substantially similar marks, confusion would be likely to occur among purchasers.

Considering then the marks, we agree with the Examining Attorney that when considered in their entirety, the marks APPESENCE in stylized letters and LANDER APPLE ESSENCE are substantially similar in sound, appearance, and meaning. Applicant's mark is essentially a combination of its house mark with a term which is virtually identical to the registered mark. Where marks are otherwise virtually the same, the addition of the house mark is more likely to add to the likelihood of confusion than to aid in distinguishing the marks. *Key West Fragrance & Cosmetic Factory, Inc. v. Mennen Co.*, 216 USPQ 168 (TTAB 1982). As to meaning, the marks convey the same connotation, namely, the scent of apples. Further, it must be remembered that under actual marketing conditions, consumers do not have the luxury to make side-by-side comparisons between marks, and instead they must rely on hazy past recollections. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255 (TTAB 1980). This is particularly true in this case, because the goods can be relatively inexpensive and bought off the shelf in drug stores and mass merchandisers, under conditions in which consumers will not take great care in making their purchases. In sum, the similarities in the marks are such

that, as applied to applicant's shower and bath gel and registrant's hair curling kit, confusion as to origin or sponsorship of the products is likely to occur.

In reaching our decision, we have not overlooked applicant's argument that the cited mark is entitled to only a limited scope of protection inasmuch as it issued on the Supplemental Register and the words APPLE ESSENCE in applicant's mark have been disclaimed. However, we should point out that this record is devoid of any other uses of the term "Apple Essence." Also, even though applicant has disclaimed the words APPLE ESSENCE apart from its mark, prospective purchasers would not be aware of this. In any event, highly suggestive or merely descriptive marks are entitled to some measure of protection against the registration of marks that may conflict therewith. In re The Clorox Company, 578 F.2d 305, 198 USPQ 337 (CCPA 1978) and Matsushita Electric Industrial Co., Ltd. v. National Steel Construction Co., 442 F.2d 1383, 170 USPQ 98 (CCPA 1971). Here, the registered mark is entitled to protection against a subsequent user of a substantially similar mark for related personal grooming products.

Finally, to the extent that applicant's arguments raise any doubt on the issue of likelihood of confusion, it is settled that such doubt must be resolved in favor of

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registrant. Giant Food, Inc. v. Nation's Foodservice, Inc.,  
710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983).

Decision: The refusal to register is affirmed.

T. J. Quinn

P. T. Hairston  
Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board

Seeherman, Administrative Trademark Judge, dissenting:

I must respectfully dissent from the majority's decision to affirm the refusal of registration on the ground of likelihood of confusion. Although the relationship of the goods and the similarities in the marks would be persuasive to me in a case where the terms involved were arbitrary or even suggestive, in this case the only term which the marks share, APPLE ESSENCE, is descriptive of the registrant's and applicant's goods. Specifically, the cited mark is registered on the Supplemental Register, a recognition by the registrant that it is descriptive. Further, in response to the Examining Attorney's requirement, applicant has disclaimed the words APPLE ESSENCE in its mark, again an acknowledgment of the descriptiveness of the term. These admissions by the registrant and applicant would be sufficient to show the descriptiveness of APPLE ESSENCE, but in addition the Examining Attorney has made of record dictionary definitions of the term "essence,"<sup>3</sup> and third-party registrations for goods similar to applicant's and the registrant's in which the words ESSENCE or APPLE have been disclaimed. Thus, there is no question that "apple essence" is merely

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<sup>3</sup> "A substance that keeps, in concentrated form, the flavor, fragrance, or other properties of the plant, drug, food, etc. from which it is extracted; essential oil" and "a perfume."

descriptive of both applicant's and the registrant's products, being the name of an ingredient in those products.

It is well established that a weak mark is entitled to a limited scope of protection. It follows that the scope of protection for a descriptive term registered on the Supplemental Register is the smallest accorded any registered mark, since the only mark weaker than a descriptive one is a generic term, which is not registrable at all.

There is no question that applicant's identified goods are related to the goods identified in the cited registration. However, they are not identical. Applicant's goods are shower and bath gel. The registrant's goods are a hair curling kit which contains shampoo concentrate, pre-rolling conditioner, curling lotion, conditioning neutralizer, moisturizing gel curl and moisturizing hair sheen spray. As the majority has noted, these goods are specifically different. A hair curling kit, in particular, is a specialized kind of product which would only be bought by certain purchasers for a specific purpose.

Further, because APPLE ESSENCE is the name of an ingredient in cosmetics products in general, and applicant's and registrant's products in particular, consumers are unlikely to believe that all cosmetics products bearing marks which contain the term APPLE ESSENCE emanate from the

same source. Although normally the addition of a house mark to a registered mark is more likely to cause confusion than to avoid it, in this case, because of the descriptiveness of APPLE ESSENCE, the impression created by applicant's mark is that LANDER'S is the source-identifying portion of the mark, which is followed by a descriptive term, not that this is LANDER'S hair curling kit which is sold under the product mark APPLE ESSENCE.

Accordingly, I believe the cumulative differences in the goods and the marks are, in this situation where the registrant's mark is admittedly descriptive, sufficient to avoid confusion. Therefore, I would reverse the refusal of registration.

E. J. Seeherman  
Administrative Trademark  
Judge, Trademark Trial and  
Appeal Board