

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JULY 15, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Maharishi Ayur-Ved
Products International

Serial No. 75/159,603

James C. Nemmers for Maharishi Ayur-Ved Products
International, Inc.

Tina L. Snapp, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney)

Before Simms, Seeherman and Wendel, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Maharishi Ayur-Ved Products International, Inc. has
appealed the refusal of the Trademark Examining Attorney to
register on the Supplemental Register HEALTHY HAIR & NAILS
for "herbal dietary supplement." The application was
originally filed on September 3, 1996 on the Principal
Register, claiming dates of first use of May 1996. When

the Examining Attorney made final refusals to register the mark pursuant to Section 2(d) and 2(e)(1) of the Trademark Act, the latter ground for the reason that the mark is merely descriptive of the identified goods, applicant amended its application to the Supplemental Register on April 13, 1998. This amendment was accepted by the Examining Attorney, who thereupon withdrew the refusal based on Section 2(e)(1). Accordingly, the only ground for refusal which is the subject of this appeal is Section 2(d). It is the Examining Attorney's position that applicant's mark so resembles the mark HEALTHY HAIR, as depicted below, registered on the Supplemental Register for vitamins and food supplements,¹ as to be likely to cause confusion or mistake or to deceive. The registration indicates that the words HEALTHY HAIR have been disclaimed.

Applicant and the Examining Attorney have filed briefs; an oral hearing was not requested.

¹ Registration No. 1,316,295, issued January 22, 1985, partial Section 8 affidavit accepted. The registration originally included goods in Class 3, namely, hair shampoos and liquid hair conditioners, but this class was cancelled for failure to file a Section 8 affidavit with respect to the goods in that class.

We affirm the refusal.

In determining the issue of likelihood of confusion, we must consider all relevant du Pont² factors. Turning first to the goods, we find that herbal dietary supplements are at the very least highly similar to vitamins and food supplements, if not encompassed within the category of food supplements. In this connection, we note that the list of ingredients of applicant's product, as shown in the specimens, include licorice, basil and winter cherry.

Further, the third-party registrations made of record by the Examining Attorney show that entities have registered their marks for both vitamins and nutritional dietary supplements;³ nutritional and dietary supplements of vitamins and herbs;⁴ and vitamin and nutritional supplements for the hair.⁵ Third-party registrations which individually cover a number of different items serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. **In re Albert Trostel & Sons Co.**, 29 USPQ2d 1783 (TTAB 1993).

Because applicant's identified goods and the goods of the cited registration are so closely related, if not, in

² **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

³ Registration NO. 1,697,329.

⁴ Registration No. 1,711,119.

⁵ Registration No. 1,668,204.

part, identical, they must be deemed to travel in the same channels of trade. Applicant argues that its goods are "sold almost exclusively by direct mail and through natural food stores where you will not find the 'main stream' products [presumably registrant's vitamins and food supplements] which are sold through your typical retail stores." Brief, p. 4. There are several difficulties with this argument. First, applicant's goods are not restricted as to trade channels, and therefore must be presumed to travel in all appropriate channels for goods of this type. Second, even if the identification were so restricted, the identification in the cited registration is not limited to supermarkets and drug stores, the typical retail stores where applicant asserts the registrant's goods would be sold. It is common knowledge that vitamins, food supplements and herbal dietary supplements can be found, inter alia, in natural or health food stores as well as in stores devoted to vitamin and nutritional supplements.

The classes of consumers for both applicant's and registrant's goods include the public at large. Although people purchasing herbal dietary supplements or vitamins and food supplements may be concerned about their health, we cannot regard them as sophisticated purchasers. Members of the general public are not likely to make a careful

analysis of the trademarks of their purchases; rather, if the marks are very similar, and are used on virtually identical or closely related products, they will assume that the products come from the same source.

This brings us to a consideration of the marks. The cited mark is HEALTHY HAIR in stylized form; applicant's mark is HEALTHY HAIR & NAILS. Obviously applicant's mark consists of the cited mark, to which the descriptive words "& NAILS" have been added. The commercial impression of the marks, however, remains the same. Consumers who are aware of registrant's use of its HEALTHY HAIR mark for vitamins and food supplements and who encounter applicant's mark HEALTHY HAIR & NAILS for an herbal dietary supplement are likely to assume that the latter product is simply an extension of registrant's product line, and that HEALTHY HAIR & NAILS is merely a variation of registrant's HEALTHY HAIR mark.

Obviously a major factor in our analysis in this case is the strength of the marks. The cited mark is registered and applicant's mark has been applied for on the Supplemental Register, and both marks are presumptively descriptive of the goods. Therefore, we acknowledge that the cited registration is not entitled to a broad scope of protection. Nonetheless, applicant's mark is so similar to

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the registered mark, and the respective goods are closely related, if not identical, that confusion is likely to result if applicant's mark were to be used on a herbal dietary supplement.

Two other arguments by applicant require comment. Applicant has pointed out that the cited registration includes a disclaimer of the words HEALTHY HAIR, and that this mark is shown in stylized form while applicant's is not. With respect to the first point, it is well established that consumers are not aware of what resides in the records of the Patent and Trademark Office; while they presumably would understand HEALTHY HAIR to be a descriptive term, the words still form part of the mark and applicant's mark, which incorporates these words, is likely to cause confusion with the registrant's mark. As for the second point, applicant's mark is depicted as a typed drawing; this means that applicant has not limited its rights to a particular typestyle, and a registration for this mark could encompass a typestyle similar to the registered mark.

Finally, we note applicant's argument that it is unaware of any instances of actual confusion. Aside from the facts that we do not know what the registrant's experience has been, and that evidence of actual confusion

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is notoriously difficult to obtain, in this case we have no information regarding the amount or geographic area of applicant's or the registrant's sales, such that we could ascertain whether there has been an opportunity for confusion to occur. Thus, we cannot conclude that this factor weighs in favor of applicant.

Decision: The refusal of registration is affirmed.

R. L. Simms

E. J. Seeherman

H. R. Wendel
Administrative Trademark Judges
Trademark Trial and Appeal Board