

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

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Opposition No. 106,486

Jan. 6, 00 THIS DISPOSITION IS  
NOT CITABLE AS PRECEDENT OF THE TTAB

Country Club Animal  
Hospital, Inc.

v.

Innopet Brands Corp.

Before Simms, Hairston, and McLeod,  
Administrative Trademark Judges

By the Board:

Country Club Animal Hospital, Inc. ("opposer") has  
opposed the application of Innopet Brands Corp.  
("applicant") to register the mark shown below for "pet  
food."<sup>1</sup>

As grounds for the opposition, opposer contends that since  
April 7, 1990, it has used the mark shown below in

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<sup>1</sup> Application Serial No. 75/132,237, filed on July 12, 1996,  
based on applicant's bona fide intent to use the mark in

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connection with its animal hospital and kennels, veterinary services, premium pet foods, supplies and equipment, professional grooming, obedience and protection training, 24-hour supervision, bath/dips and skin treatments and imported European fully trained dogs in the State of Florida and in interstate commerce; that it owns State of Florida service mark Registration No. T15291, for the same mark for veterinary services, namely, general medical, surgery, orthopedics, laboratory, dentistry, polishing, vaccinations, avian exotic medicine, flea and pest control, bathing, grooming and boarding;<sup>2</sup> that applicant's mark, INNOPET BRANDS and design, is highly similar to its mark; that the public is likely to associate applicant's goods with opposer's services under their respective asserted marks; and that a likelihood of confusion exists under Trademark Act Section 2(d) between its previously used mark and the mark in the application at issue.

Applicant, in its answer, denies the salient allegations of the notice of opposition. In addition, applicant asserts certain affirmative defenses.

This case now comes before the Board for consideration of opposer's motion for summary judgment and applicant's

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commerce. Applicant did not file an amendment to allege use prior to publication of the mark.

cross-motion for summary judgment, both on the ground of likelihood of confusion under Trademark Act Section 2(d). Both parties submitted responses to the respective motions for summary judgment.<sup>3</sup>

We note as a preliminary matter that the parties' motions for summary judgment are untimely inasmuch as opposer's testimony period opened in this proceeding on January 5, 1998; opposer filed its motion for summary judgment on February 4, 1998; and applicant filed its cross-motion for summary judgment on March 4, 1998. See Trademark Rule 2.127(e)(1). We further note, however, that in their stipulation (filed January 8, 1998) to extend trial dates, the parties indicate that they seek to limit their expenses by agreeing to "limit the issues in this matter to likelihood of confusion between the designs of Applicant's mark and Opposer's mark, and that Opposer shall file a Motion for Summary Judgment directed to said issue..." (Parties' January 8, 1998 stipulation, pp. 1-2) Moreover, in its motion for summary judgment, opposer states (in footnote 1) that the "parties have agreed to submit the

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<sup>2</sup> State of Florida Registration No. T15291, issued December 4, 1991, reciting April 7, 1990 as a date of first use in Florida in connection with the services.

<sup>3</sup> We have considered opposer's March 27, 1998 filing both in response to applicant's cross-motion for summary judgment and further in reply to applicant's opposition to opposer's motion for summary judgment because it clarifies the issues and aids us in coming to a just decision on the motion. See Trademark Rule 2.127(a).

issue of likelihood of confusion between the designs of the marks to the Board for determination in the form of a Motion for Summary Judgement..." and requests that the Board accept the untimely motion.

The Board generally will consider motions for summary judgment filed after the first trial period commences only if they involve matters of res judicata (claim preclusion) or collateral estoppel (issue preclusion); are submitted by agreement of the parties (prior to the taking of any testimony); or are not opposed by the nonmoving party (at least on the basis of untimeliness). *See, for example, Bausch & Lomb Inc. v. Leupold & Stevens Inc.*, 1 USPQ2d 1497 (TTAB 1986), and *Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428 (TTAB 1985).

In the instant case, neither party has objected on the basis of untimeliness to the other party's motion for summary judgment. Furthermore, from the record it appears that the parties have agreed as a cost-saving measure to the disposition of this matter on summary judgment. In view thereof, we are exercising our discretion to consider the parties' cross-motions for summary judgment filed in this proceeding.

We turn first to opposer's motion for summary judgment. In support of its motion, opposer argues that applicant's mark is highly similar to opposer's pleaded mark; that

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opposer uses the design portion of its mark alone as a logo on the doors of the examination rooms at its animal hospitals; that opposer has used, and registered in the State of Florida, its mark prior to the filing date of the application at issue; that applicant's goods, namely, pet food, are closely related to opposer's services, which include offering premium pet food for sale at its animal hospitals; and that applicant's goods and opposer's services will be available in the same channels of trade to the same classes of purchasers, namely, pet owners.

In support of its position, opposer has submitted its first request for production of documents; a copy of its pleaded State of Florida registration; and its responses to applicant's first set of interrogatories and document requests.

In response to opposer's motion for summary judgment, and in support of its own cross-motion for summary judgment, applicant maintains that its mark is sufficiently different from that asserted by opposer in appearance, sound, connotation, and commercial impression that no likelihood of confusion exists; that the design portion of opposer's mark is descriptive of opposer's services and thus entitled to limited trademark protection; that nothing in the record supports opposer's claim that it has established a strong association between the design portion of its mark and its

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services; that dog and cat designs are commonly used in the pet industry and thus are weak elements of marks used to identify pet-related goods and services; that applicant's goods and opposer's services differ and, moreover, move in different channels of trade.

In support of its position, applicant has submitted the affidavit of its attorney, Elaine M. Laflamme; examples of third-party printed advertisements demonstrating use of silhouette designs of dogs, cats, and other pets in connection with pet-related goods and services; examples of third-party Internet advertisements demonstrating use of silhouette designs of dogs, cats, and other pets in connection with pet-related goods and services; and copies of a third-party registration and application demonstrating use of silhouette designs of dogs and cats in connection with pet-related goods and services.<sup>4</sup>

In response to applicant's cross-motion and in reply to applicant's opposition to its motion, opposer essentially argues that the design element of its asserted mark is suggestive, not descriptive, of its services; that none of the third-party marks presented by applicant is confusingly similar to opposer's mark; that the design elements of both applicant's and opposer's marks are their dominant features; and that the design features of the marks are confusingly

similar. In support of its response, opposer has submitted a graphical representation of the third-party advertisements submitted by applicant with its combined cross-motion and response to opposer's motion.

As has often been stated, summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of demonstrating the absence of any genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). A factual dispute is genuine, if, on the evidence of record, a reasonable finder of fact could resolve the matter in favor of the non-moving party. See *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992), and *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). The evidence must be viewed in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. See *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993), and *Opryland USA*, *supra*.

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<sup>4</sup> Applicant's notice of cross-motion and corrected affidavit

We note initially that priority of use is not at issue in this proceeding inasmuch as applicant does not dispute that the dates of use alleged by opposer are earlier than applicant's constructive date of first use, and furthermore that the parties have agreed, as noted above, to limit the matter under consideration in this proceeding to likelihood of confusion between the marks.

Turning to the statutory ground of likelihood of confusion, in determining whether there is any genuine issue of material fact relating thereto, we must consider all of the probative facts in evidence which are relevant to the factors bearing on likelihood of confusion, as identified in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). As noted in the *du Pont* decision itself, each of the factors may from case to case play a dominant role. Indeed, our principal reviewing court and this Board frequently have held, in appropriate cases, that a single *du Pont* factor may be dispositive of the likelihood of confusion analysis. *See, for example, Kellogg Co. v. Pack'em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*. 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

The factor which we consider dispositive of this case is discussed below. After a careful review of the record in this case, we find that there is no genuine issue of

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(filed March 25, 1998) are noted and have been made of record.

material fact relating to this factor. Moreover, even if there was a genuine issue for trial on the summary judgment motion, we are deciding this case as if it had been submitted to us on this record inasmuch as the parties appear to have agreed thereto.

We believe that the first *du Pont* factor, namely the dissimilarity between the marks, is dispositive of this case. While it is not proper to dissect a mark, if one feature of a mark is more significant than another feature, it is proper to give greater force and effect to that dominant feature for purposes of determining likelihood of confusion. See *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). When the marks at issue comprise both wording and a design, greater weight is often accorded to the wording, which would be used by purchasers in requesting the goods or services. See *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987). Our primary reviewing court has cautioned, however, that "[t]here is no general rule as to whether letters or designs will dominate in composite marks; nor is the dominance of letters or design dispositive of the issue." *In re Electrolyte Laboratories Inc.*, 929 F.2d 645, 647, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990). Accordingly, the comparison of composite marks must be done on a case-by-case basis without reliance on mechanical rules of

construction. See, for example, *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984), and *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974).

In this case, opposer's asserted mark comprises the wording COUNTRY CLUB ANIMAL HOSPITAL and the design of a silhouette of the heads of a dog and cat superimposed over a square grid.<sup>5</sup> The mark in the application at issue comprises the wording INNOPET BRANDS and the design of a silhouette of the heads of a dog and cat superimposed over an incomplete, single line square. The word portions of the two marks are entirely dissimilar. In regard to the designs, we note that applicant has introduced evidence in the form of a third-party registration and application, as well as examples of third-party advertisements, featuring animal silhouette designs appearing in connection with pet-related goods and services. Third-party registrations and advertisements, without evidence of actual use, are of extremely limited value in the determination of the question of likelihood of confusion. Nevertheless, third-party registrations and related evidence are entitled to some weight when they are offered to show the sense in which a

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<sup>5</sup> While opposer asserts in its motion for summary judgment that it uses the design portion of its mark "as a logo" appearing on the doors of the examination rooms in its animal hospitals, opposer has failed to demonstrate that it uses said design

term, word, prefix or other feature of a mark is used in ordinary parlance. They may show that a particular term has descriptive or suggestive significance as applied to certain goods or services. *See, generally, Sams: Third Party Registrations in TTAB Proceedings*, 72 TMR 297 (1982). *See also, Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976). As the Court stated in that case, third-party registrations are entitled to weight to show the meaning of a mark in the same way that dictionaries are used. *See also, United Foods Inc. v. Simplot Co.*, 4 USPQ2d 1172 (TTAB 1987). As such, the evidence proffered by applicant indicates that silhouette designs of animals, particularly cats and dogs, are commonly used and have a suggestive significance as applied to pet-related goods and services. Accordingly, we are of the opinion that the marks as a whole differ so substantially in appearance, sound, and connotation that there is no likelihood of confusion as a matter of law. We would be of this opinion even if opposer offered evidence at trial that the involved goods and services are purchased casually rather than with care, and/or that COUNTRY CLUB ANIMAL HOSPITAL and design is a well known and famous mark.

We find therefore that applicant has carried its burden of proof that no genuine issues of material fact remain as

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portion as a mark, or that the consuming public would recognize

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to likelihood of confusion and that applicant is entitled to judgment as a matter of law. In view thereof, applicant's cross-motion for summary judgment is granted. Opposer's motion for summary judgment is denied.

Decision: The opposition is dismissed.

R. L. Simms

P. T. Hairston

L. K. McLeod

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Judges, Trademark Trial  
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the design portion alone as such.