

Hearing:
November 4, 1999

Paper No. 15
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THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MAY 5,00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Black Like Me Design Company (Proprietary) Limited

Serial No. 75/214,375

Kenneth R. Glaser and John M. Cone of Akin, Gump, Strauss,
Hauer & Feld, L.L.P for Black Like Me Design Company
(Proprietary) Limited.

Christine Baker, Trademark Examining Attorney, Law Office
106 (Mary I. Sparrow, Managing Attorney).

Before Quinn, Hairston and Chapman, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Black Like Me Design Company (Proprietary) Limited has
filed an intent-to-use application to register the mark
shown below

for "toiletries, namely, colognes, perfumes; skin soap;

mascara, lipstick; hair perming solutions and lotions" in Class 3.¹

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, if used on its goods, would so resemble the previously registered mark shown below

for "skin lotions, skin creams, sun block, sun tan lotions, mouth wash, pre moistened cosmetic wipes, nail polish, nail polish remover, personal deodorant, hair shampoo, cotton swabs for cosmetic purposes, puffs for cosmetic purposes, shaving cream, after shaving lotion, denture cleaners, sold only in retail supermarket stores" in Class 3,² as to be likely to cause confusion, mistake or deception.

¹ Application Serial No. 75/214,375, filed December 17, 1996, based on applicant's assertion of a bona fide intention to use the mark in commerce. The application includes a statement that "The stipling (sic) in the mark is for shading purposes only."

² Registration No. 2,068,338, issued June 10, 1997. The claimed date of first use and first use in commerce is August 31, 1991. (The registration also includes goods in Classes 5 (e.g., douches, laxatives, rubbing alcohol, various cold and allergy and anti-diarrhea medications, sold in retail supermarket stores), 8 (razor blades), and 21 (cotton balls), but the arguments of both the Examining Attorney and applicant's attorney are directed to the Class 3 goods.)

When the refusal was made final, applicant appealed. Briefs have been filed. An oral hearing was held before this Board on November 4, 1999.

Upon consideration of the pertinent factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), for determining whether a likelihood of confusion exists, we find that confusion is likely.

Turning first to a consideration of the parties' respective goods, it is well settled that goods need not be identical or even competitive to support a finding of likelihood of confusion, it being sufficient instead that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See *In re Peebles Inc.*, 23 USPQ2d 1795 (TTAB 1992); and *In re International Telephone and Telegraph Corporation*, 197 USPQ 910 (TTAB 1978). Also, it is not necessary that a likelihood of confusion be found as to each item included within applicant's identification of goods. See *Alabama Board of Trustees v. BAMA-Werke Curt Baumann*, 231 USPQ 408, footnote 7 (TTAB 1986).

While applicant's colognes, perfumes, skin soap, mascara, lipstick, and hair perming solutions and lotions vis-a-vis the cited registrant's skin lotions, skin creams, hair shampoo, nail polish, personal deodorant, after shave products, etc. are obviously specifically different products, it is clear that they are related personal grooming products. See *In re American Safety Razor Co.*, 2 USPQ2d 1459 (TTAB 1987); *Royal Hawaiian Perfumes, Ltd. v. Diamond Head Products of Hawaii, Inc.*, 204 USPQ 144 (TTAB 1979); and *Frances Denney v. ViVe Parfums Ltd.*, 190 USPQ 302 (TTAB 1976). See also, *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989).

It has been repeatedly held that, when evaluating the issue of likelihood of confusion in Board proceedings regarding the registrability of marks, the Board is constrained to compare the goods as identified in the application with the goods as identified in the registration. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Even though the trade channels for the cited registrant's goods are restricted in Class 3 (and Class 5)

to "retail supermarket stores," nonetheless, there is no restriction in applicant's identification of goods; and therefore applicant's unrestricted trade channels encompass the specific trade channel listed in the registration. In fact, applicant acknowledges that its goods "would be sold through various channels of trade" (brief, p. 7). Further, there is no restriction to the types of purchasers in either the application or the registration, and therefore applicant's argument that its goods are directed specifically to African Americans is unpersuasive. The Board must assume that applicant's goods could move through all the ordinary and normal channels of trade for such goods (including retail supermarkets), and would be offered to all the usual purchasers (i.e., the general public) for such products. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, supra, at 1787; and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, we are dealing here with relatively inexpensive personal grooming products and the average purchaser may exercise less care in the purchasing decision.

We turn next to a consideration of the marks. Both applicant's mark and the cited registered mark are for the identical words PERFECT CHOICE. The stylized lettering of

the registered mark and the stylized lettering and design feature in applicant's mark do not offer sufficient differences to create a separate and distinct commercial impression. That is, the stylistic differences are not sufficient to overcome the likelihood of confusion. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Further, the words PERFECT CHOICE in both marks, i.e., the portion utilized in calling for the goods, are most likely to be impressed in the purchaser's memory and to serve as the indication of origin. See *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd* (Fed. Cir., June 5, 1992); and *Consumers Building Marts, Inc. v. Mr. Panel, Inc.*, 196 USPQ 510 (TTAB 1977).

We find that these marks are similar in sound, connotation and commercial impression.

Applicant's argument that the words PERFECT CHOICE are "highly suggestive" and should be afforded only a narrow scope of protection is not substantiated in the record. Applicant's listing of six third-party registrations³ for

³ Mere typed listings of third-party registrations are not an appropriate way to enter such material into the record. See *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974); and *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992). However, the Examining Attorney did not object thereto, and treated the list as of record. Accordingly, the Board has considered the list of third-party registrations.

the mark PERFECT CHOICE indicate the registrations are for tea, coffee, bakery goods, nutritional food packs, grass seed and bird feed, respectively. Applicant did not submit any third-party registrations of the mark PERFECT CHOICE in the relevant field, personal grooming products; and in any event, third-party registrations are not evidence of third-party use or that the purchasing public is aware of these marks.

Even if applicant had shown that the cited mark is weak, such marks are still entitled to protection against registration by a subsequent user of the same or similar mark for the same or closely related goods. See *Hollister Incorporated v. Ident A Pet, Inc.*, 193 USPQ 439 (TTAB 1976).

Accordingly, because of the high degree of similarity of the parties' marks; the relatedness of the parties' goods; and the overlap of the trade channels to the same purchasers; we find that there is a likelihood that the purchasing public would be confused if applicant uses PERFECT CHOICE and design as a mark for its goods.

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Decision: The refusal to register under Section 2(d)
is affirmed.

T. J. Quinn

P. T. Hairston

B. A. Chapman
Administrative Trademark
Judges, Trademark Trial and
Appeal Board