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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Apollo Oil & Warehouse Distributors, Inc.

Serial No. 75/338,025

David E. Fleenor of Stoll, Keenon & Park for applicant.

John E. Michos, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Simms, Walters and Holtzman, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Apollo Oil & Warehouse Distributors, Inc. has filed a
trademark application to register the mark APOLLO OIL for
"automotive oils, greases, lubricants; motor fuels, namely,
gasoline and diesel fuel."¹ The application record includes
a disclaimer of OIL apart from the mark as a whole.

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

¹ Serial No. 75/338,025, filed August 8, 1997, in International Class 4,
based on use in commerce, alleging first use and first use in commerce
as of 1972.

resembles the mark APOLLO, previously registered for "industrial lubricants," in International Class 4,² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See, In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). 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 Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is

² Registration No. 2,029,459, issued January 14, 1997, to Apollo Chemical Corporation. The registration also includes goods identified

not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See, *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In this case, the first word in applicant's mark is identical to the registered mark in its entirety. The second word in applicant's mark, OIL, is clearly merely descriptive in connection with all of applicant's goods and generic in connection with several. On the other hand, there is nothing in this record to indicate that APOLLO is other than arbitrary in connection with both applicant's

in International Class 1, which the Examining Attorney has not

and registrant's goods. Viewed in its entirety, we find that APOLLO is the dominant portion of applicant's mark; and that the overall commercial impressions of applicant's mark, APOLLO OIL, and registrant's mark, APOLLO, are substantially similar.

Turning to consider the goods involved in this case, applicant's principal contention regarding the goods in the cited registration is that the registered mark is used only in connection with textile industry lubricants. However, the question of likelihood of confusion must be determined based on an analysis of the goods identified in applicant's application vis-à-vis the goods identified in the registration, rather than what the evidence shows the goods actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Thus, applicant's argument is not well taken because the industrial lubricants in International Class 4 in the cited registration are not limited to the textile industry, so we must consider the identified goods to encompass all industrial lubricants.

considered as part of the Section 2(d) refusal.

Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some 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 therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

"Industrial lubricants," as the goods are identified in the cited registration clearly encompass both lubricants used by industry and lubricants of an industrial type or nature, which could be used by a broad range of purchasers, e.g., including, among others, large and small industrial operations, small machinery shops and operators of heavy machinery. Applicant's goods, automotive oils, greases and lubricants, and its motor fuels, are similarly broadly identified so that use may occur across a broad range of purchasers, e.g., including, among others, private consumers, auto repair and machinery businesses, operators

of heavy equipment, and large and small industry that operates trucks and other motor-driven mechanical devices. Thus, it is very likely that there are common purchasers of both applicant's and registrant's products.

Moreover, the Examining Attorney has made of record copies of twelve third-party registrations in support of his position that applicant's and registrant's goods are closely related. Each of these registrations includes, in its identification of goods, both industrial and automotive lubricants. Third-party registrations which cover a number of differing goods, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). All of the third-party registrations in this case are based on use in commerce.

We find that applicant's goods are sufficiently related to the goods in International Class 4 in the cited registration that, if identified by confusingly similar marks, confusion as to the source of the goods is likely.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, APOLLO OIL, and registrant's mark, APOLLO, their contemporaneous use on the related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Finally, to the extent that we have any doubt concerning our conclusion that confusion is likely, we are obligated to resolve such doubt in favor of the registrant. See *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); and *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed Cir. 1988).

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

R. L. Simms

C. E. Walters

T. E. Holtzman
Administrative Trademark Judges,
Trademark Trial and Appeal Board