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THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MAY 12,00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Manheimer, Inc.

Serial Nos. 75/471,852
and 75/471,853

Myron Amer of Myron Amer, P.C. for Manheimer, Inc.

Ann Kathleen Linnehan, Trademark Examining Attorney, Law Office 114 (Mary Frances Bruce, Managing Attorney)

Before Simms, Cissel and Seeherman, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Manheimer, Inc. has applied to register the marks GYPSY SOUL and GYPSY NIGHTS for perfume and cologne.[1] Registration of both marks has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's marks are likely to cause

confusion with the mark GYPSY BALM ("balm" disclaimed), previously registered for "essential oils in a wax base to be applied to the body."[2]

Applicant has appealed from the final refusals in each application, and the appeals have been fully briefed. Oral hearings were not requested. The Examining Attorney and applicant have recognized that the issue and record in each case is the same. The Examining Attorney has, as applicant has pointed out, filed identical briefs in each appeal, the only difference being the references to the particular mark and serial number, and applicant has submitted a single reply brief for both appeals, thereby indicating the appeals should be consolidated.

We agree that the appeals present common issues of law and fact, and therefore have decided them together.

Our determination is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between

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[1] Application Serial Nos. 75/471,852 and 75/271,853, respectively, both filed April 22, 1998 and both asserting a bona fide intent to use the mark in commerce.

[2] Registration No. 2,113,729, issued November 18, 1997.

the goods. **Federated Food, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the goods, we find that they are closely related. Both are cosmetic products designed to give a pleasant scent to the wearer. Although applicant's perfume and cologne are in liquid form, and the registrant's goods are in the form of a wax to be applied to the body, both serve similar purposes and could be purchased by the same class of consumers.

As for the marks, there are obviously certain similarities in appearance and pronunciation, in that GYPSY NIGHTS, GYPSY SOUL and GYPSY BALM are all two-word marks beginning with the arbitrary word GYPSY. Although the additional elements in each mark cause them to be different from each other, these differences are not sufficient to avoid the likelihood of confusion. Each has the connotation of "Gypsy," referring to an ethnic group which is known for its nomadic way of life.[3] GYPSY BALM suggests

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[3] See The American Heritage Dictionary of the English Language, 3d ed. © 1992: "a member of a nomadic people that arrived in Europe in migrations from northern India around the 14th century, now also living in North America and Australia. Many Gypsy groups have preserved elements of their traditional culture, including an itinerant existence, tribal organization, and the Romany language; one inclined to a nomadic, unconventional way of life." See also, the definitions in Webster's Third New International Dictionary, unabridged, © 1993: "one of a dark Causasoid people coming orig. from India and entering Europe in the 14th or 15th century that are now found chiefly in Turkey,

a salve created by, or based on a Gypsy recipe, while GYPSY NIGHTS conjures up an image of campfires and Gypsy wagons, and GYPSY SOUL suggests the sensibilities and feelings of a Gypsy.

We are not persuaded by applicant's argument that GYPSY NIGHTS would refer to "a vacation on the romantic side, as filled with 'gypsy nights,'" reply brief, p. 3. Certainly, consumers of perfumes, cosmetics and scented body waxes are not likely to engage in an analysis of the marks to mark the subtle distinction which applicant puts forth. Although applicant's position that GYPSY SOUL may be seen as referring to a carefree person has more credibility than its argument with respect to GYPSY NIGHTS, as stated above, consumers are not likely to ascribe the distinctions applicant suggests when they come in contact with the three marks. Rather, consumers who are familiar with GYPSY BALM for essential oils in a wax base for application to the body, upon encountering the marks

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Russia, Hungary, Spain, England, and the U.S., still maintain somewhat their itinerant life and tribal organization, and rare noted as fortune-tellers, horse traders, metalworkers, and musicians; one resembling a Gypsy esp. in appearance, manners, or mode of life." The Board may take judicial notice of dictionary definitions. **University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

GYPSY NIGHTS and GYPSY SOUL for perfume and cologne, are likely to believe that these latter marks are variants of the GYPSY BALM mark, identifying scent products sold by the makers of GYPSY BALM scented body wax.

Finally, we acknowledge that these appeals present close cases. However, it is well established that any doubt on the issue of likelihood of confusion must be resolved against the newcomer and in favor of the prior user or registrant. **In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes**, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusals in Application Serial Nos. 75/471,872 and 75/471,873 are both affirmed.

R. L. Simms

R. F. Cissel

E. J. Seeherman
Administrative Trademark Judges
Trademark Trial and Appeal Board