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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mana Products, Inc.

Serial No. 75/859,262

A. Thomas Kammer of Hoffman & Baron, LLP for Mana Products, Inc.

Laura Gorman Kovalsky, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Seeherman, Hanak and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

Mana Products, Inc. (applicant) filed an application under the intent to use provision of the Trademark Act to register on the Principal Register the mark COLOR THERAPY (in typed form) for goods ultimately identified as "cosmetics, namely eye shadow, eye liner, mascara, eye pencils, blush, lipstick, lip gloss, nail polish, makeup,

face powder, skin foundation, and concealer used on the skin" in International Class 3.¹

The examining attorney has refused to register applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because of the registration of the mark ESSENTIAL COLOR THERAPY (in typed form) for "hair treatment preparations, namely shampoo for color treated hair" in International Class 3.²

The examining attorney argues that the marks both encompass the same words "color therapy" and that the word "essential" in applicant's mark "serves merely as an adjective here and does not sufficiently alter the overall commercial impression of the marks." Br. at 4. In addition, the examining attorney submitted twenty third-party registrations to show that a single mark is registered for both shampoo and various cosmetic products. The examining attorney also submitted Internet printouts to show that applicant's and registrant's goods have similar trade channels. Because of the relatedness of the goods and the similarities of the marks, the examining attorney concluded that there would be a likelihood of confusion.

¹ Serial No. 75/859,262 filed November 29, 1999.

² Registration No. 1,965,226 issued April 2, 1996. Section 8 and 15 affidavits have been accepted and acknowledged, respectively.

Applicant submits that the examining attorney's evidence shows that registrant's shampoo and applicant's cosmetics fall "under the very broad classification 'health and beauty aids.'" Reply Br. at 2.³ As for the marks, applicant argues (Br. at 4) that:

[T]he commercial impression of ESSENTIAL COLOR THERAPY, as used in connection with shampoo for color-treated hair, is that of an essential and specialized product for such hair... In contrast, the mark COLOR THERAPY as used on color cosmetic products is suggestive of imparting color to the skin, as such cosmetics are known to do.

After the examining attorney made the refusal final, this appeal followed. Both applicant and the examining attorney filed briefs.

We reverse.

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in

³ Applicant's evidence submitted with its Appeal Brief is untimely and it will not be considered. 37 CFR § 2.142(d).

the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We start by addressing the issue of whether the marks are similar in sound, appearance, or meaning such that they create similar overall commercial impressions. "When it is the entirety of the marks that is perceived by the public, it is the entirety of the marks that must be compared." Opryland USA Inc. v. Great American Music Show Inc., 970 F.2d 847, 23 USPQ 1471, 1473 (Fed. Cir. 1992). However, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). We are also cognizant of the requirement not to ignore elements in marks in order to find that there is a likelihood of confusion. In re Hearst Corp., 982 F.2d 493, 25 USPQ2d 1238, 1239 (Fed. Cir. 1992).

Clearly, both applicant's and registrant's marks contain the same words "Color Therapy" in typed form. The only difference between applicant's mark and registrant's mark is the fact that applicant's mark does not include the word "Essential." However, when we compare the marks, we cannot dismiss the absence of the term "essential" from

applicant's mark as merely an adjective that does not alter the commercial impression. First, the word "color," which appears in both marks, is at the very least highly suggestive when applied to "shampoo for color-treated hair" and cosmetics that apply color, such as lipstick and nail polish. Next, we note that the term "therapy" is defined as "healing power or quality."⁴ Thus, the term "therapy" for a hair treatment preparation for color-treated hair has a suggestive connotation. Indeed, "color therapy" suggests a shampoo that has some healing quality or property for hair that has been damaged by coloring. Thus, it would not dominate the registered mark such that the other word in the mark would be considered subordinate matter. While "essential" may also have some suggestive or laudatory connotations, the term still has significance in the registrant's mark and in the comparison between applicant's and registrant's marks. In particular, it is the first word of the cited mark, and as such is noticeable in terms of appearance and pronunciation.

Applicant, on the other hand, intends to use the mark COLOR THERAPY alone on products distinct from shampoo for

⁴ *Webster's II New Riverside University Dictionary* (1984). We take judicial notice of this dictionary definition. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

color-treated hair. Registrant's identification of goods makes the connection between registrant's mark and goods more apparent, i.e., registrant's shampoo suggests a hair treatment that has some healing power or quality for color-treated hair. On the other hand, applicant's COLOR THERAPY mark suggests that the make-up products bring the correct color to the wearer's face or helps the wearer's looks through the use of color. Therefore, the marks would have different suggestive meanings to prospective purchasers, i.e., healing color damaged hair versus selecting the best color make up. Thus, the overall commercial impressions of the marks are different. See Champagne Louis Roederer S.A. v. Delicato Vineyards, 148 F.3d 1373, 47 USPQ2d 1459, 1460 (Fed. Cir. 1998) ("CRISTAL and CRYSTAL CREEK evoke very different images in the minds of relevant consumers").

Inasmuch as there are differences in sound, appearance, and meaning between the marks and the commercial impressions of the mark would be different, we find that, when the marks are considered in their entireties, their differences outweigh their similarities.

Next, we compare the goods of applicant and the registrant. Here again, there are differences. Registrant's goods are limited to hair treatment products, namely shampoo for color-treated hair. We must determine

the question of likelihood of confusion based on the identification of the goods in the application and the registration. In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1493, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

While the examining attorney has submitted some evidence in the form of registrations to show that a single mark is sometimes used on the same general goods as those in the cited registration and the application, this evidence is not conclusive. Although there is some relationship between the goods of applicant and registrant, the relationship is not so close that these marks with different commercial impression could not co-exist without a likelihood of confusion. See, e.g., Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) ("When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines"). There are significant differences between a shampoo for color-treated hair and applicant's various cosmetic products. While there is some evidence

that shampoo and cosmetics are sold on the same Internet site in the health and beauty section or personal care section, this does not prove that potential purchasers would expect that these products would come from the same source if they were sold under similar marks. The fact that the Target® website lists "Dental, Grooming, Haircare, Massage, Water/Air Purification, Cosmetics and Fragrances" links on the same page does not mean that all these goods are related. Similarly, it is not especially significant that other websites identify such general categories of goods as "Bath Basics, Body Cleansers, Body Moisturizers, Body Treatments, Hair Care, Sun, Mother & Baby, and Bath & Body Sets" and specifically sell shampoo and makeup. It is not unusual for a large store or a website to sell a variety of different products. This evidence, by itself, does not demonstrate that the goods sold on these websites and in these stores would be expected to come from the same source.

Given the differences in the marks and the suggestive nature of the common term COLOR THERAPY, which results in the cited registration being entitled to a limited scope of protection for that term, we conclude that there is no likelihood of confusion.

Ser No. 75/859,262

Decision: The refusal to register is reversed.