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**THIS DISPOSITION
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Paper No. 12
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Europeenne De Produits de Beaute

Serial No. 75/934,127

Mary Ann DeCarolis for Europeene De Produits de Beaute.

Brett M. Tolpin, Trademark Examining Attorney, Law Office
107 (Thomas Lamone, Managing Attorney).

Before **Simms**, Cissel and Holtzman, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On February 24, 2000, applicant, a French corporation,
filed the above-referenced application to register the mark
"NUTRIACTIVE" on the Principal Register for "facial scrub,
make-up remover, skin toner, astringent, moisturizing
cream, lotions and gels, anti-wrinkle cream, skin toners
and astringents, skin cleansers, make-up remover¹," in Class

¹ We are unable to discern why applicant was not required to delete one of the two references to "make-up remover," but that issue is not before us in this appeal. We note, however, that if applicant were to prevail in an appeal of our ruling in this

3. The basis for filing the application was applicant's assertion that it possessed a bona fide intention to use the mark in commerce in connection with the identified goods.

The Examining Attorney refused registration under Section 2(d) of the Lanham Act, 15 U.S.C. Section 1052(d), on the ground that if applicant were to use the mark it seeks to register in connection with the goods specified in the application, applicant's mark would so resemble the mark "NUTRI-ACTIVES," which is registered² for "herbal concentrates for dietary supplement; vitamin supplements of herbal or organic compounds," in Class 5, that confusion would be likely.

In support of the refusal to register, the Examining Attorney included copies of excerpts retrieved from an automated search of publications. She argued that this evidence establishes that the goods are related. The first article indicates that skin toner, cologne and skin cream contain vitamins. The second article contains recipes for skin care products based on fruits and vegetables. A third article discusses exfoliating skin creams which contain

appeal, the application would have to be remanded to the Examining Attorney for appropriate amendment prior to publication.

² Reg. No. 2,153,555 issued on the Principal Register to Organic Diversions, Inc. on April 28, 1998, based on a claim of use in commerce since May 21, 1996.

vitamins. The next article mentions that particular vitamins are ingredients in a skin cream for use with skin that has been damaged by wind, sun or shaving. Another excerpt notes that a particular company sells vitamins and nutritional supplements in addition to skin care products.

Applicant responded to the refusal to register by arguing that confusion would not be likely because the goods specified in its application are completely unrelated to those set forth in the registration cited as a bar to registration of applicant's mark.

The Examining Attorney was not persuaded by applicant's arguments, and made the refusal to register final in the second Office Action. Submitted with that action in support of the final refusal were copies of a number of third-party trademark registrations on the Principal Register based on use. In each registration, the list of goods includes skin care products similar to those recited in the instant application, and dietary or vitamin supplements, which are the goods listed in the registration cited as a bar to the registration of the mark applicant seeks to register. Nine such third-party registrations were included, but the Examining Attorney stated that these were only a representative sampling from a larger number of such registrations revealed by his search.

Applicant filed a Notice of Appeal with the Trademark Trial and Appeal Board, along with a request for reconsideration addressed to the Examining Attorney. In the latter, applicant basically restated the unsupported arguments previously presented in its response to the refusal to register. In an apparent concession that the marks closely resemble each other, applicant again limited its argument to its contention that the goods specified in the cited registration are unrelated to those listed in the application.

The Examining Attorney again found these arguments unpersuasive, and he issued an Office Action to that effect. The Board instituted the appeal and both applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing before the Board.

Accordingly, we have considered this appeal based on the written record in the application and the written arguments presented in the appeal briefs. After careful consideration of these materials, we hold that the refusal to register must be affirmed.

As applicant points out, in any likelihood of confusion analysis, two key considerations are the similarities of the goods and the similarities of the marks. *Tricia Guild Associates Ltd. v. Crystal Clear*

Industries Inc., 38 USPQ2d 1313 (TTAB 1994). Consistent with its previous arguments to the Examining Attorney, applicant does not argue that the marks in question in this case are not similar. Instead, applicant focuses on distinctions it draws between the goods identified in the application, facial scrub, make-up remover, skin toner, astringent, moisturizing cream, lotions and gels, anti-wrinkle cream, skin toners and astringents and skin cleansers, and the goods specified in the cited registration, "herbal concentrates for dietary supplement" and "vitamin supplements of herbal or organic compounds." Applicant draws distinctions with regard to how these products are used, their fundamental characteristics, and the channels of trade through which these products move. Significantly, applicant submitted no evidence in support of any of these contentions.

We agree with the Examining Attorney and applicant that the critical question in the case before us centers on the relationship between the goods. The marks are very similar in sound, appearance and connotation. The commercial impressions these two marks create are very similar. Contrary to the arguments presented by applicant, we find that the record in this appeal clearly establishes that the goods set forth in the application are related to

those identified in the cited registration in such a way that the use of such similar trademarks in connection with both is likely to cause confusion.

It is well settled that the third-party registrations listing both goods like those set forth in the application and those listed in the cited registration establish a proper basis for concluding that these goods are commercially related. In re Mucky Duck Co., 6 USPQ2d 1467 (TTAB 1998); In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). As noted above, applicant has repeatedly argued that the goods with which intends to use its mark are unrelated to those listed in the cited registration, but applicant has presented no evidence in support of this argument. The Board thus has no basis upon which to adopt applicant's position. Moreover, even if applicant had somehow created doubt as to whether confusion would be likely in the case at hand, any such confusion would necessarily be resolved in favor of the prior user and registrant. J & J Snack Foods v. McDonalds Corp., 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); MSI Data Corp. v. Microprocessor Systems, Inc., 220 USPQ 655 (TTAB 1983).

DECISION: The refusal to register based on Section 2(d) of the Lanham Act is affirmed.

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