

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed:
May 16, 2003

Paper No. 23
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Kendro Laboratory Products GmbH**

Serial No. 75/435,249

Request for Reconsideration

Before **Seeherman, Hairston and Bottorff**, Administrative
Trademark Judges.

Opinion by **Bottorff**, Administrative Trademark Judge:

Applicant has requested reconsideration of the Board's October 29, 2002 decision affirming the Trademark Examining Attorney's Section 2(d) refusal in the above-captioned application. We have carefully considered applicant's arguments, but we are not persuaded that our previous decision was in error. Specifically, and notwithstanding applicant's arguments to the contrary in its request for reconsideration, we remain of the opinion that applicant's identified goods ("incubators for laboratory purposes" and

"temperature and climatic cabinets for general industrial applications") and registrant's identified goods ("autoclaves") are sufficiently related that confusion is likely to result from use of the highly similar marks involved in this case (CYTOMAT (stylized) and CITOMAT).

Applicant, citing *In re Donnay International, Societe Anonyme*, 31 USPQ2d 1953 (TTAB 1994), argues that the two third-party registrations upon which we relied (under *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993), and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988)) are an insufficient evidentiary basis for finding that applicant's and registrant's goods are related. However, we do not read *Donnay* as holding that there is a minimum number of third-party registrations which is required, in all cases, to support a finding of likelihood of confusion. Although two third-party registrations was found to be an insufficient number to support a likelihood of confusion finding in *Donnay*, that case is readily distinguishable from this case because the applicant in that case had obtained and submitted a consent to register from the owner of the cited registration. The Board found that the consent "tipped the scales" in applicant's favor, and that it trumped the usual rule that doubts as to the existence of likelihood of confusion must be resolved

against the applicant. Clearly, the key to the Board's determination of no likelihood of confusion in *Donnay* was the existence of the consent, not the fact that there were only two third-party registrations. No such consent exists in the present case to tip the scales in applicant's favor, or to preclude our application of the general rule that doubts as to the existence of likelihood of confusion must be resolved against the applicant.

Applicant also argues that its incubators and registrant's autoclaves are dissimilar and unrelated because they serve different purposes and are not complementary or competitive. Applicant notes that incubators are used to "cultivate life," while autoclaves are used for sterilization and thus to "destroy life." We are not persuaded. First, as a legal matter, it is settled that the respective goods need not be competitive or complementary in order to find that they are related under the *second du Pont* factor. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978).

Second, as a factual matter, the evidence of record belies applicant's contention that "life-cultivating"

laboratory instruments would not originate from the same source as "life-destroying" laboratory instruments. As noted in footnote 9 of the Board's decision, there are four third-party registrations in the record which include in their respective identifications of goods both "incubators" and "sterilizers." This evidence suggests that these types of goods may originate from a single source under a single mark, notwithstanding the fact that one "cultivates life" while the other "destroys life."¹

It is settled that the greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983). We remain of the opinion that, given the high degree of similarity between applicant's and registrant's

¹ We did not expressly rely on these four additional third-party registrations in our decision, because we could not assume that the "sterilizers" identified therein necessarily included autoclaves. Nonetheless, although these additional registrations might not directly support our finding that applicant's incubators and registrant's autoclaves are sufficiently commercially related to support a determination that confusion is likely, they certainly do not detract from that finding.

marks, the evidence of record establishes that applicant's goods and registrant's goods are sufficiently related that confusion is likely to result. Any doubt as to that conclusion must be resolved against applicant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: Applicant's request for reconsideration is denied.²

² The time for filing an appeal of the Board's decision in this case expires two months from the mailing date of this decision denying applicant's request for reconsideration. See TBMP §§902.02 and 903.04.