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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Mountain Ocean, Ltd.
v.
Ocean 2 Mountain Outdoor Products, Inc.

Opposition No. 91151374
to application Serial No. 76076074

Katina C. Banks of Dorsey & Whitney, LLP for Mountain Ocean,
Ltd.

Theodore C. Max of Mintz, Levin, Cohn, Ferris, P.C. for
Ocean 2 Mountain Outdoor Products, Inc.

Before Quinn, Holtzman, and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On June 23, 2000, Ocean 2 Mountain Outdoor Products,
Inc. (applicant) applied to register the mark shown below
for goods ultimately identified as:

Personal care preparations, namely, sun block, sun
screen, skin emollients, after-sun lotion, skin lotion,
skin moisturizer, skin conditioner, body cream and hand
cream in International Class 3 and

Apparel, namely, beachwear, bottoms, golf shirts, polo
shirts, sport shirts, shorts, T-shirts and tank tops in
International Class 25.



The application (76076074) alleges a date of first use anywhere of 1994 and a date of first use in commerce of October 14, 1999. The application also contains a disclaimer of the words "outdoor products."

Mountain Ocean, Ltd. (opposer) has opposed registration on the ground that applicant's mark for the goods in International Class 3 "is very similar in appearance, sound, and in connotation" to opposer's mark MOUNTAIN OCEAN as to be likely to confuse an ordinary person." Notice of Opposition at 3. Opposer relies on its ownership of Registration No. 1,295,423 for the mark MOUNTAIN OCEAN in typed form for "skin lotion" in International Class 3.¹

Applicant has denied the salient allegations of the notice of opposition.

The Record

The record consists of the file of the involved application; opposer's notice of reliance on status and title copies of its registration; and applicant's notice of reliance on third-party applications and registrations.

¹ The registration issued September 18, 1984, Section 8 and 15 affidavits have been accepted and acknowledged.

Discussion

Opposer, as plaintiff in the opposition proceeding, bears the burden of proving, by a preponderance of the evidence, priority and likelihood of confusion. See Cervecería Centroamericana, S.A. v. Cervecería India Inc., 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989); Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

Priority is not an issue here inasmuch as opposer relies on its ownership of a valid registration for MOUNTAIN OCEAN. See King Candy Co. v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

The only question in this case is whether applicant's and opposer's marks are confusingly similar when used with the goods identified in the application and registration.² 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 Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

² Opposer only opposes the registration of applicant's mark for the goods in International Class 3.

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We start by comparing the goods of opposer and applicant. Applicant's goods in International Class 3 are identified as "personal care preparations, namely, sun block, sun screen, skin emollients, after-sun lotion, skin lotion, skin moisturizer, skin conditioner, body cream and hand cream." Opposer's registration is for a single product "skin lotion." Applicant's and opposer's goods are identical to the extent that both are for "skin lotion." The Federal Circuit has held that when "marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992). Applicant's remaining goods, sun block, sun screen, skin emollients, skin moisturizer, after-sun lotion, skin conditioner, body cream and hand cream, are skin care preparations and many, if not all, of these preparations would also be related to opposer's skin lotion.

We must consider the goods as they are identified in the identification of goods in the application and registration. Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods").

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Applicant argues that opposer has not established that the goods travel in the same channels of trade. However, absent restrictions in the identification, we must assume that the goods travel in "the normal and usual channels of trade and methods of distribution." CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983). See also Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002); Kangol Ltd. v. KangaRoos U.S.A. 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992). There is no basis to conclude that applicant's and opposer's skin lotion do not travel through the identical channels of trade or that many, if not all, of applicant's other skin care products would not move in similar channels of trade to similar customers.

While applicant attempts to differentiate the products based on applicant's selling its products only through mail orders while opposer's sales of its goods are through ordinary retail channels of distribution, in the absence of a restriction in applicant's identification of goods and in the identification of goods in opposer's registrations, the respective goods must be presumed to travel in all channels of trade suitable for goods of that type.

Chesebrough-Pond's Inc. v. Soulful Days, Inc., 228 USPQ 954, 956 (TTAB 1985). See also Genesco Inc. v. Martz, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be

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offered and sold to the same classes of purchasers through the same channels of trade").

Another key issue in likelihood of confusion cases is the similarity or dissimilarity of the marks. When we compare the marks, we must compare them in their entireties, and not simply consider the individual features of the marks. In re Shell Oil, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993). Here, opposer's mark is for the words MOUNTAIN OCEAN in typed form. Applicant's mark is for the mark OCEAN 2 MOUNTAIN OUTDOOR PRODUCTS (stylized). Inasmuch as opposer's mark is presented in typed form, there is no viable difference in the marks based on the stylization of the mark. Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983).

We also consider the disclaimed terminology in applicant's mark "Outdoor Products," but it would not significantly differentiate the marks. Disclaimed matter is often "less significant in creating the mark's commercial impression." In re Code Consultants Inc., 60 USPQ2d 1699, 1702 (TTAB 2001). "Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'" Cunningham v. Laser Golf Corp., 55 USPQ2d at 1846, quoting, In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). In this

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case, the words "Outdoor Products" are clearly displayed in much smaller type and used in a subordinate manner to the other words in applicant's mark.

Next, we look at the words OCEAN 2 MOUNTAIN and MOUNTAIN OCEAN in opposer's and applicant's mark. There are only two differences between these words: the addition of the number "2" by applicant and the fact that the parties reversed the order of the words. The marks look and sound similar to the extent that the identical words are used in both marks. However, merely because marks contain very similar words, if they are used in a different order, the meaning of the marks may be significantly different.³ While we take judicial notice of the definitions that applicant has made of record, we cannot agree with its conclusion that the "marks create substantially different commercial impressions." Applicant's Brief at 8.

In this case, we find that there is not enough difference in meaning to distinguish the marks. First, the terms "mountain ocean" or "ocean mountain," for most people, would not be significantly different.⁴ They could appear to be an arbitrary arrangement of words with no particular

³ See, e.g., In re Akzona Inc., 219 USPQ2d 94 (TTAB 1983) (SILKY TOUCH and TOUCH O' SILK not confusingly similar).

⁴ Applicant "does not dispute the fact that consumers may transpose elements of trademarks in their minds and, as a result, become confused as to the source of the goods or services offered under certain circumstances." Applicant's Brief at 6.

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meaning. Applicant's addition of the number "2" may be interpreted as the phonetic equivalent of the word "to" so that its mark would be interpreted as "ocean to mountain." Even if applicant's mark is understood in this manner, it is not significantly different from opposer's MOUNTAIN OCEAN mark especially since in this interpretation the order of the words "mountain to ocean" or "ocean to mountain" does not effect the meaning of the phrase. Therefore, both applicant's and opposer's marks would have the same connotation, i.e., that the product is intended for use in association with a variety of outdoor activities.⁵

When we consider the marks MOUNTAIN OCEAN and OCEAN 2 MOUNTAIN OUTDOOR PRODUCTS (stylized), we conclude that they are similar in appearance, sound, and meaning, and that their commercial impressions would likewise be similar. We keep in mind that a "[s]ide by side comparison is not the test," Grandpa Pigeon's of Missouri, Inc. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973), and that human memories are not infallible, In re Research and Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986). Here, it is likely that prospective customers who are familiar with opposer's MOUNTAIN OCEAN mark would likely

⁵ Another possible significance of the number "2" would be to indicate "the second" of something. This meaning would likely increase the likelihood of confusion because prospective purchasers may simply view applicant's products as being a new line of products from opposer.

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believe that there is at least some association with the source of applicant's mark OCEAN 2 MOUNTAIN OUTDOOR PRODUCTS when the marks are used on identical and closely related products. Prospective purchasers are likely to remember the similarity between the words, "mountain" and "ocean" and the differences would not be sufficient to lead to the conclusion that the goods sold under these marks are not associated with the same source.

Applicant also submitted evidence of third-party registrations and applications for the terms "mountain," "ocean," and "sea." Opposer's objects to these registrations on the grounds of hearsay and relevance. Applicant argues that it "does not offer the registrations and applications as evidence of use in the marketplace or for the truth of allegations of use found in the filings but instead as evidence of the descriptive or suggestive nature of the terms." Applicant's Brief at 4. Opposer's objections are overruled. Third-party registrations may be used to demonstrate that a portion of a mark is suggestive or descriptive. In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987). However, these registrations and applications do not support a conclusion that the elements of opposer's mark are descriptive or so highly suggestive and that applicant's mark would not be likely to cause confusion.

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Applicant's final argument is that the marks have co-existed since 1994 without any actual confusion.⁶ The absence of actual confusion does not mean there is no likelihood of confusion. Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983); J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991). See also Majestic Distilling, 65 USPQ2d at 1205 ("The lack of evidence of actual confusion carries little weight"). In this case, there is no evidence of the extent of sales and advertising or market penetration. Without evidence that any actual customers could have encountered both marks, allegations of a lack of actual confusion are not significant.

Therefore, when we consider the marks and the goods of opposer and applicant and the other relevant factors, we conclude that there is a likelihood of confusion.

Decision: The opposition to the registration of the goods in International Class 3 of application No. 76076074 is sustained.

⁶ Applicant apparently is relying on its allegation in its application's date of first use anywhere for this date. Even if this date was supported by evidence, we note that the application alleges a date of first use in commerce almost five years later (October 14, 1999).