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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nuvita Market, L.L.P.

Serial No. 76382474

Charles H. Knull of Ullman, Shapiro & Ullman, LLP for
Nuvita Market, L.L.P.

Steven Foster, Trademark Examining Attorney, Law Office 106
(Mary Sparrow, Managing Attorney).

Before Seeherman, Chapman and Drost, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On March 14, 2002, Nuvita Market, L.L.P. (an Arizona limited liability partnership) filed an application to register on the Principal Register the mark DESIGNER SKIN DRAMA QUEEN for "sunblock, non-medicated after[-]sun skin balm, bronzers, suntanning preparations, sun screen, suntan oil and lotion, after-sun skin lotion, self-tanning lotion, and tanning accelerators" in International Class 3. The application is based on applicant's assertion of a bona

fide intention to use the mark in commerce. Applicant disclaimed the word "skin."

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its identified goods, so resembles the registered mark DRAMA QUEEN for "lotions, creams and moisturizers for face and body, cologne, perfume, face and body scrub and cleanser, body sponge scrubber with container for liquid soap, soap" in International Class 3,¹ as to be likely to cause confusion, mistake or deception.²

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion

¹ Registration No. 2274988, issued August 31, 1998 to Cosmar Corporation, Section 8 affidavit accepted, Section 15 affidavit acknowledged.

² The Examining Attorney originally cited two registrations under Section 2(d) of the Trademark Act, and referenced five pending applications. The second cited registration (Reg. No. 2415111) as well as the five referenced pending applications all consist of or include the words DESIGNER SKIN, and all are owned by Designer Skin LLC. Applicant successfully argued to the Examining Attorney that there is unity of control and a single source of the goods offered by applicant and Designer Skin LLC; and the Examining Attorney withdrew his refusal to register based on the second cited registration and he withdrew the references to the five pending applications. See TMEP §1201.07(b)(iii) (3d ed. 2002).

issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning first to a consideration of the goods involved in this case, we start with the well-settled principle that the question of likelihood of confusion in Board proceedings must be determined based on an analysis of the goods or services identified in applicant's application vis-a-vis the goods or services recited in the cited registration. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Further, it is also well settled that goods or services need not be identical or even competitive to support a finding of likelihood of confusion. Rather, it is enough that the goods or services are related in some manner or that the

circumstances surrounding their marketing are such that they would likely be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they emanate from or are in some way associated with the same producer or that there is an association between the producers of each party's goods or services. See *In re Peebles Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992); and *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

It is not necessary that a likelihood of confusion be found as to each item in the application vis-a-vis the goods or services in the cited registration. See *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983); *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981); and *Alabama Board of Trustees v. BAMA-Werke Curt Baumann*, 231 USPQ 408, n. 7 (TTAB 1986).

In this case, applicant's identification of goods includes the item "after-sun skin lotion" and registrant's identification of goods includes the items "lotions, creams and moisturizers for face and body." The goods must be considered legally identical in that applicant's "after-sun skin lotion" is encompassed within the broader language "lotions" in the cited registration. Moreover, the

Examining Attorney correctly argues that applicant's identified sun tan preparations and registrant's identified skin care preparations are closely related. See *Royal Hawaiian Perfumes v. Diamond Head Products of Hawaii*, 204 USPQ 144, 147 (TTAB 1979). See also, *Hewlett-Packard Company v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) ("even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services").

The Examining Attorney submitted into the record printouts of several third-party registrations, all based on use in commerce, to show that both types of products are offered under a single mark. (See e.g., Registration No. 2760429 for, inter alia, "lotion for the face" and "suntan lotion for the face"; Registration No. 2805692 for, inter alia, "face and skin moisturizers and conditioners" and "sunscreens, suntanning lotions"; Registration No. 2660913 for, inter alia, "skin care preparations, namely, face creams, gels and lotions; ... skin moisturizing creams, gels and lotions" and "sun screen, sunblock"; Registration No. 2768083 for, inter alia, "body lotions" and "cosmetics, namely, sun tanning preparations; ... suntan lotions; and after-sun lotions"; and Registration No. 2730746 for, inter

alia, "facial creams, ... body creams and lotions" and "sun block, sunscreen, sun creams, suntan lotion, ... after-sun lotions.")

When considering the third-party registrations submitted by the Examining Attorney, we are aware that such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them. Such third-party registrations nevertheless have some probative value to the extent they may serve to suggest that such goods are of a type which emanate from the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, footnote 6 (TTAB 1988).

We also do not find any differences in the channels of trade or classes of purchasers for the respective goods. We must presume, given the identifications (neither of which is limited), that the goods travel in the same channels of trade (e.g., drug stores), and that they are purchased by the same classes of purchasers, which in this case is the public at large. See *Canadian Imperial Bank v. Wells Fargo Bank*, supra.

Turning then to a consideration of the marks, we view them in terms of their sound, appearance, connotation and commercial impression. See *Palm Bay Imports Inc. v. Veuve*

Clicquot Ponsardin, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

Applicant argues that the leading and dominant portion of its mark is DESIGNER SKIN, with DRAMA QUEEN being a "subordinate part" of its mark; that DESIGNER SKIN is applicant's (and its sister company's) "house mark," and therefore it negates the likelihood of confusion; and that the commercial impressions of the marks DESIGNER SKIN DRAMA QUEEN and DRAMA QUEEN are different.

The Examining Attorney argues that the mere addition of a term to an already registered mark does not overcome or obviate the likelihood of confusion; that the shared element in the marks -- DRAMA QUEEN -- is arbitrary with respect to the involved goods as there is no evidence that the phrase is commonly used in the cosmetic or toiletry industries; and that the addition of the "house" mark is likely to add to consumers' confusion.

We must consider the marks in their entireties. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). And the addition of a trade name or house mark to a registered mark does not generally avoid confusion. See *Menendez v. Holt*, 128 U.S. 514 (1888). There are exceptions to that general rule, including (i) when there are recognizable differences between the shared

elements such that the addition of a trade name or house mark may be sufficient to render the marks as a whole distinguishable and avoid confusion and (ii) when the shared elements are descriptive or highly suggestive or play upon commonly used or registered words. See *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); *Rockwood Chocolate Co. v. Hoffman Candy Co.*, 372 F.2d 552, 152 USPQ 599 (CCPA 1967); *In re Apparel Ventures, Inc.*, 229 USPQ 225 (TTAB 1986); *In re Dennison Manufacturing Co.*, 229 USPQ 141 (TTAB 1986); *In re Riddle*, 225 USPQ 630 (TTAB 1985); *In re S.D. Fabrics, Inc.*, 223 USPQ 54 (TTAB 1984); and *In re C.F. Hathaway Company*, 190 USPQ 343 (TTAB 1976).

The exceptions are not applicable here. As argued by the Examining Attorney, there is no evidence that the registered mark DRAMA QUEEN is anything other than arbitrary for the involved goods. Moreover, the common element (the words DRAMA QUEEN) in applicant's mark and the registered mark are identical. When the house mark DESIGNER SKIN is added to the registered mark for identical and closely related goods, there is a likelihood of confusion. See *Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419 (CCPA 1977); and *Coca-Cola Bottling Co. v. Seagram & Sons, Inc.*, 526 F.2d 556, 188

USPQ 105 (CCPA 1975). Consumers familiar with registrant's mark DRAMA QUEEN, upon seeing DESIGNER SKIN DRAMA QUEEN, are likely to believe that the registrant has simply added a house mark to its product mark. That is, "where the marks are otherwise virtually the same, the addition of a house mark ... is more likely to add to the likelihood of confusion than to aid to distinguish the marks." Key West Fragrance & Cosmetic Factory, Inc. v. Mennen Co., 216 USPQ 168, 170 (TTAB 1982).

We find the marks, considered in their entireties, to be similar in sound, appearance, connotation and overall commercial impression.

In view of the similarities of the marks, the goods being in part identical and in part closely related, and the goods being sold through the same channels of trade to ordinary consumers, we find that applicant's mark is likely to cause confusion with the mark in the cited registration.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.