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Mailed:
July 25, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Patrick Helbling

Serial No. 76583582

Patrick Helbling, pro se.

Matthew C. Kline, Trademark Examining Attorney, Law Office
114 (K. Margaret Le, Managing Attorney).

Before Seeherman, Grendel and Holtzman, Administrative
Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark depicted below



for services recited in the application, as amended, as "marine historical services in the nature of museums and aquarium and oceanarium services, namely, providing the public with opportunities to view various forms of aquatic life in an environment that closely simulates their native habitat," in Class 41.¹

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the ground that the mark, as used in connection with the services recited in the application, so resembles the mark MARINELAND, previously registered (in standard character form) for services recited in the registration as "providing the public with opportunities to view various forms of aquatic life in an environment that closely simulates their native habitat, and to view trained performances by aquatic creatures,"² as to be likely to

¹ Serial No. 76583582, filed March 29, 2004. The application was filed on the basis of intent-to-use under Trademark Act Section 1(b), 15 U.S.C. §1051(b). Applicant subsequently filed an Amendment to Allege Use, in which he alleged July 1, 2003 as the date of first use of the mark anywhere and the date of first use of the mark in commerce.

² Registration No. 0860738, issued November 19, 1968, renewed; affidavits under Sections 8 and 15 accepted and acknowledged.

cause confusion, to cause mistake, or to deceive.

Trademark Act Section 2(d), 15 U.S.C. §1052(d).³

Applicant and the Trademark Examining Attorney filed main appeal briefs. No reply brief was filed, and no oral hearing was requested. We affirm the refusal to register.

Our likelihood of confusion 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 issue (the *du Pont* factors). See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

³ We reject applicant's contention that the Trademark Examining Attorney has cited the "wrong" registration in his Section 2(d) refusal, i.e., that he should have cited now-cancelled Registration No. 0381339. Registration No. 0860738 is in full force and effect, and it serves as a bar to registration of applicant's mark in the event that likelihood of confusion is found. Likewise, we reject applicant's "alternative" argument that his mark is entitled to registration pursuant to Trademark Act Section 2(f). A Section 2(f) claim of acquired distinctiveness does not overcome a refusal based on Section 2(d).

Under the first *du Pont* factor (similarity or dissimilarity of the marks), we find that applicant's mark and the cited registered mark, when viewed in their entirety in terms of appearance, sound, connotation and overall commercial impression, are similar. Applicant's mark is dominated by the word MARINELAND, which is the entirety of the cited registered mark. The words "OF THE PACIFIC" in applicant's mark are subordinate to MARINELAND in both size and source-indicating significance, and the design element in applicant's mark does not suffice to distinguish the marks. Moreover, in cases such as this one where the applicant's services are legally identical to the services recited in the cited registration (see *infra*), the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be in a case where the services are more dissimilar. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). We find that applicant's mark is similar to the cited registered mark, and that the first *du Pont* factor accordingly weighs in favor of a finding of likelihood of confusion.

Under the second *du Pont* factor (similarity or dissimilarity of the services), we find that applicant's

services, as recited in the application, are identical in part to certain of the services recited in the cited registration, i.e., "providing the public with opportunities to view various forms of aquatic life in an environment that closely simulates their native habitat, and to view trained performances by aquatic creatures."⁴ This factor weighs in favor of a finding of likelihood of confusion.

Given the essentially identical nature of the respective services, we find, under the third *du Pont* factor (similarity or dissimilarity of trade channels), that applicant's services and the services of the cited registration are or would be offered in legally identical trade channels and to legally identical classes of purchasers. Neither applicant's recitation of services nor the services recited in the cited registration are limited

⁴ Applicant's proposal (made in his brief) to amend his recitation of services to either "marine historical services in the nature of museums and aquarium and oceanarium services, namely, providing electronic library services which feature newspapers, magazines, photographs, film and illustrations via an on-line computer network," or to "marine historical services in the nature of museums and aquarium and oceanarium services," is untimely. It is unavailing in any event because both of the proposed amendments would constitute an impermissible change to and/or broadening of the recitation of services, in violation of Trademark Rule 2.71(a), 37 C.F.R. §2.71(a). Moreover, even if the amendments were allowed, we would still find that applicant's services are similar and related to the services recited in the cited registration, under the second *du Pont* factor.

in terms of trade channels and classes of purchasers, and we therefore must presume that they encompass all normal trade channels for such services and all normal classes of purchasers for such services. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Applicant's contentions that his services are "historical society" services provided only via the Internet, and that registrant's location in Florida is 3,000 miles from applicant's location in California, are legally irrelevant and unavailing. The third *du Pont* factor weighs in favor of a finding of likelihood of confusion.

Under the sixth *du Pont* factor (number and nature of similar marks in use for similar services), we find that there is no evidence in the record which would support a finding that the cited registered mark is weakened by third-party use. Even assuming that applicant's asserted examples of third-party use are properly of record, none of those third-party uses is relevant to this case. Uses of the term MARINELAND outside the United States, or in connection with goods and services far afield from the services at issue here, are not probative evidence under the sixth *du Pont* factor in this case.

Applicant relies heavily on arguments which appear to pertain to the tenth *du Pont* factor, i.e., "the market interface between applicant and the owner of a prior mark." Applicant asserts (at unnumbered page 2 of his brief):

Marineland of the Pacific operated as an independent oceanarium in the state of California from 1954 until its closing and demolition in 1987. From 1954 to 1987, Marineland of the Pacific promoted and marketed itself with a consistent mark using the name and logo in a commercial application. The applicant, as representative of the Marineland of the Pacific Historical Society, is now seeking to protect the original Marineland of the Pacific name and logo through federal registration. During the 33 years of operation, the registrant had full knowledge of the commercial and promotional use of the name and mark of Marineland of the Pacific.

In 1950, a group of investors formed Oceanarium, Inc. (a California corporation) for the purposes of establishing "one or more aquariums, oceanariums, and similar projects for the public exhibition of aquatic and marine life..." An agreement was reached with the registrant - at that time operating under the name of Marine Studios in Marineland, Florida - to adopt the names Marineland of Florida and Marineland of the Pacific. Both companies were independently owned. In 1954, Marine Studios changed its name to Marineland of Florida and continued operations under this name, and Marineland of the Pacific opened to the public as the world's largest oceanarium. Marineland of the Pacific was demolished in 1987, and ceased to operate as a business. The applicant seeks to protect the name and logo of the former company under the operation of an historical society.

Even assuming that all of these assertions regarding the alleged dealings in the past between registrant and a third party, Oceanarium, Inc. (a party with whom applicant has not shown he is in privity), were supported by actual evidence in the record (and they are not), they would not change the result herein. That is, even assuming that the owner of the cited registration had consented to Oceanarium, Inc.'s use of the mark in question from 1954 to 1987, there simply is no evidence to support a finding that the owner of the cited registration now consents, nineteen years later, to registration of the mark in question, whether by applicant or by anyone else. Applicant's assertion in its brief that he "is not opposed to the prospect of contacting the registrant to seek a proper consent agreement" is manifestly insufficient under the tenth *du Pont* factor. Likewise, the evidence of record does not support applicant's implicit assertion that registrant is guilty of laches, or that registrant has otherwise demonstrated by its conduct that it believes today that there is no likelihood of confusion.

In short, we find no evidence in the record which is pertinent to the tenth *du Pont* factor, and that factor accordingly is neutral in our likelihood of confusion analysis.

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Considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that a likelihood of confusion exists. We have considered applicant's arguments to the contrary, but are wholly unpersuaded.

Decision: The refusal to register is affirmed.