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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Woodridge Labs, Inc.

Serial No. 76636010

Deborah A. Wilcox and Melinda M. Kline of Baker & Hostetler
for Woodridge Labs, Inc.

Paul C. Crowley, Trademark Examining Attorney, Law Office
110 (Chris A.F. Pedersen, Managing Attorney).

Before Seeherman, Walters and Kuhlke, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Woodridge Labs, Inc. has filed an application to
register on the Principal Register the mark OPTIMOIST for
"hair care preparations, namely, shampoos," in International
Class 3.¹

The examining attorney has issued a final refusal to
register under Section 2(d) of the Trademark Act, 15 U.S.C.

¹ Serial No. 76636010, filed April 14, 2005, based on use in commerce,
alleging first use and use in commerce as of October 6, 2004.

§1052(d), on the ground that applicant's mark is likely to cause confusion with the mark OPTI MOISTURE, registered for "skin cleansing, moisturizing and firming creams, lotions and liquids, face masques, topically applied nonmediated (*sic*) lotions, creams and masques to reduce fine lines and wrinkles on the face and skin," in International Class 3.² The registration includes a disclaimer of MOISTURE.

Applicant has appealed and filed a brief, but did not request an oral hearing. The examining attorney has also filed a brief.

The examining attorney contends that the appearance and sound of the two marks are similar because both marks begin with the term OPTI followed by MOISTURE in the registered mark, and MOIST, a form of the word MOISTURE, in the applied-for mark. The examining attorney submitted definitions from www.msn.encyarta.com of MOISTURE as "wetness, especially as droplets of condensed or absorbed liquid, or in a vapor" and of MOIST as "damp: slightly wet," and argues that these terms have essentially the same meaning and, thus, the connotations and commercial impressions of the two marks are substantially the same. In support of her position that applicant's and registrant's goods are closely related, the examining attorney submitted

² Registration No. 2447097, issued on April 24, 2001 to Thibiant International, Inc.

copies of fourteen third-party registrations that include, among the identified goods for a single mark, both shampoos and hair care products and face and skin care products such as lotions, masques and creams. She argues that the items are all personal care products that would be marketed through the same trade channels to the same class of purchasers, namely, general consumers.

Applicant's principal contentions are that the marks are different because the registered mark consists of two words,³ whereas applicant's mark has merged two words and is, thus, an arbitrary, coined phrase; that the goods are different and would appear in "physically distinct and distant locations on a store shelf" (brief, p. 2); that the trade channels of the products are different because applicant's product is marketed on television and used by various celebrities; that the buyers of applicant's product are "sophisticated, business users familiar with the various hair care products in general" (brief, p. 3); that registrant's product and mark are not generally known to the public, whereas, applicant's product is marketed by Ellin Lavar, a famous professional hair designer; and that there has been no actual confusion.

³ Applicant also contends, in error, that the marks are different because the registered mark is stylized; however, the registration for the cited mark contains a standard character claim and, thus, is not registered in a stylized form.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v.*

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Scott Paper Co., 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In our case, both marks begin with the term OPTI followed by MOIST or MOISTURE. The examining attorney has provided sufficient evidence via dictionary definitions to establish that MOIST is essentially another form of the word MOISTURE and that it has essentially the same meaning. The words MOIST and MOISTURE, and, thus, the marks as a whole, differ only by three letters, the "URE" at the end of the registered mark. The marks are not distinguished by the mere fact that the registered mark consists of two words and applicant's mark is a single word. Therefore, we conclude that the sound, appearance, connotation and overall commercial impressions of the marks OPTIMOIST and OPTIMOISTURE are substantially similar.

Turning to consider the goods or services involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-

vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

The products identified herein all relate to personal hygiene, and, therefore, are likely to be purchased and used by the same classes of purchasers. See, *Ferdinand Mulhens v. Sir Edward Ltd.*, 214 USPQ 298 (TTAB 1981); and *Guerlain, Inc. v. Richardson-Merrell Inc.*, 189 USPQ 116 (TTAB 1975).

And, while there is no per se rule governing likelihood of confusion in cases involving such items, the record includes specific evidence of a significant number of third-party marks registered for goods including both shampoo and face and body lotions, masques and creams.⁴ Although third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, such registrations nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). It is very likely that purchasers would use face creams, lotions and masques and shampoos as part of the same "beauty" regimen. We find the third-party registrations adequate to establish that the goods involved in this case may come from a single source.

Notwithstanding the specific differences between shampoo and skin and face care products, we find them to be sufficiently related for the reasons stated above, that, when sold under similar marks, purchasers are likely to be

⁴ All of the third-party registrations in the record include allegations of use in commerce.

confused. Moreover, despite applicant's arguments about its particular trade channels or its particular customers, there are no limitations on the trade channels or the classes of purchasers of the respective products. Thus, we must assume that these goods would be sold through all ordinary channels of trade for such goods. Since both applicant's and registrant's identified products are personal care products used to enhance one's personal appearance, both types of products can be sold through the same channels of trade, e.g., drugstores, and to the same class of purchasers. These purchasers would include ordinary consumers who are not likely to exercise more than a normal degree of care in making their purchases and who, indeed, may purchase these items on impulse.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, OPTIMOIST, and registrant's mark, OPTI MOISTURE, their contemporaneous use on the identified goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods. We do not find applicant's arguments to the contrary to be persuasive.

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