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This Opinion is Not
Citable as Precedent
of the TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Refresh Skincare, Inc.

Serial No. 78231303

Cynthia B. Stevens of Wildman, Harrold, Allen & Dixon for
Refresh Skincare, Inc.

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Before Hairston, Bucher and Rogers,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Refresh Skincare, Inc. (applicant) has applied to register the mark set forth below, on the Principal Register, for goods and services identified after amendment as "skin care products, namely skin and face moisturizers, conditioning, firming, smoothing and toning creams and lotions, skin resurfacing creams, lotions and crystals,

¹ Jennifer H. Dixon issued the initial and final office actions.

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skin exfoliating creams, lotions and crystals, all sold at skin care salons" in Class 3, and for "skin care salon services" in Class 44.²



Under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), the examining attorney has refused registration of applicant's mark, in view of the prior registration of the mark shown below, on the Principal Register, for "personal soap" in Class 3.



The cited registration, no. 1537128, issued May 2, 1989 and includes a description stating, "The mark consists of the word 'refresh' overlapping an hibiscus flower blossom. The lining and/or stippling shown in the mark on

² The USPTO's database includes an apparently superfluous use of the word "skin" in the Class 3 identification, which has not been repeated above.

the drawing is a feature of the mark and does not indicate color."³

The original drawing of applicant's mark showed the three elements, i.e., the leaf, the word "refresh" and the word "skincare" in a vertical format, with no overlap and with the word "refresh" much larger than the word "skincare." The drawing, however, was found by the examining attorney to be unacceptable and a substitute was required. When the two words in the mark were displayed in the original drawing with space between them, the examining attorney required a disclaimer of "skincare." That requirement was withdrawn when the first amended drawing, albeit of unacceptable quality, showed the words with no space between them. A second substitute drawing was filed with applicant's request for reconsideration of the final refusal, and the examining attorney has indicated in the appeal brief that such drawing, showing the mark as displayed in this decision, is acceptable.

Identification and classification issues were also resolved during prosecution.⁴ The refusal under Section 2(d), however, was made final.

³ Section 8 & 15 affidavits, respectively, have been accepted and acknowledged.

⁴ The amendment of the Class 3 identification involved, among other things, deletion of the term "soap."

Applicant has appealed the refusal. Both applicant and the examining attorney have filed briefs. Applicant did not request an oral argument.

Our determination under Section 2(d) of the question of likelihood of confusion is based on an analysis of all relevant analytical factors for which there is probative evidence of record. See In re E. I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In the analysis of likelihood of confusion presented by this case, key considerations are the similarities of the marks and the related nature of the goods of applicant and registrant, see Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976), as well as the likely marketing of the goods to the same class of prospective consumers.

In comparing the marks, we assess their similarities and differences in appearance, in sound as they would be spoken, in their meaning, and in the overall commercial impression they create. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In doing so, we remain mindful of the well-settled principal that "there is nothing improper in stating that, for rational reasons,

more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable." In re National Data Corp., 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Overall, we find the marks very similar for likelihood of confusion purposes. While applicant's mark includes a leaf and registrant's mark includes a flower blossom, both marks utilize the dominant word "refresh" and display that word overlapping with, respectively, the leaf and blossom designs. Words tend to dominate over designs because words would be used to request products or services by name. In re Appetito Provisions Co., 3 USPQ2d 1553, 1554 (TTAB 1987); and Kabushiki Kaisha Hattori Tokeiten v. Scuotto, 228 USPQ 461, 462 (TTAB 1985). Consumers familiar with registrant's mark for soap, when confronted with applicant's mark for other skin care products and services may not note the difference between the word "refresh" overlapping a blossom and that word overlapping a leaf. Spoons Restaurants, Inc. v. Morrison, Inc., 23 USPQ2d 1735 (TTAB 1991)(When comparing marks, emphasis is on the likely recollection of the average customer, who normally retains a general rather than a specific impression of trademarks

or service marks), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992). Even if consumers noted the differences in the designs, because the marks share the identical dominant term there would still be a likelihood of confusion. See Giant Food, Inc. v. Nation's Food Service, Inc., 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983)(Comparing applicant's mark GIANT HAMBURGERS and design with opposer's GIANT and GIANT and design marks, the court noted that nothing in applicant's mark indicated source or origin and purchasers were left to speculation; and court reasoned that a person familiar with opposer's products "would likely conclude that the word 'GIANT' in applicant's mark refers to opposer as the sponsor, source and origin of applicant's products"). Thus, we disagree with applicant's suggestion that the respective designs are dominant and that the differences in the designs suggest that there is no likelihood of confusion.

Applicant also argues that the marks differ because its "mark contains 3 words and 4 syllables; registrant's mark contains 1 word, 2 syllables." Brief, p. 9. Applicant's addition of "skincare" to the word "refresh," however, is unlikely to serve as a means for consumers to distinguish the marks, as it is a descriptive or generic term for applicant's goods or services. National Data, 224

USPQ at 751 ("That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark..."). In addition, the first part of marks is most likely to be impressed on the minds of consumers and remembered. Presto Prods., Inc. v. Nice-Pak Prods., Inc., 9 USPQ2d 1895 (TTAB 1988)

Applicant also argues that the mark in the cited registration should be accorded a limited scope of protection, because "there are numerous sellers in the same market using similar marks" and "the term 'refresh' is extremely weak and certainly entitled to only a very narrow and limited scope of protection." Brief, p. 4. Applicant bases this argument in part on evidence that six other entities reportedly are using marks which include the term "refresh," or variations thereof, for products or services the same as or similar to those involved herein. Brief, pp. 4-5; Olsen declaration submitted with February 27, 2004 response to initial refusal of registration. Additional evidence offered to support the argument includes reprints from USPTO records regarding six registrations and six applications. Stephens declaration submitted with February 27, 2004 response to initial refusal of registration and Request for Reconsideration of final refusal of

registration.⁵ Finally, the Stephens declaration also introduced into the record the results of a search of the USPTO's TESS (Trademark Electronic Search System) database for the term REFRESH, yielding 157 applications or registrations, but without any indication of goods or services.⁶

The results of the TESS search are of little, if any, probative value, as the list does not even reveal the goods or services of the listed applications and registrations. As for the evidence of alleged use of certain marks and the evidence of particular registrations and applications provided in detail, we have reviewed and cross-referenced these items and list them below.

Registrations and separate evidence of use:

Refresh & Restore is registered and Jean Olsen, applicant's declarant states that she "called Bath & Body Works and was told the mark 'Refresh & restore' was used on 'Bath & Body Skin Care' products." The registration is apparently owned by Bath & Body Works and lists numerous class 3 products, including soap.

re:fresh a day spa is registered in stylized form and the Olsen declaration introduces an Internet web page showing that the spa services provider listed as owning the registration is also listed in the web page domain name. The web site also shows use of the terms "re:new,"

⁵ Three applications were referenced in the Stephens declaration. Another three were referenced in the request for reconsideration.

⁶ Most of the marks in the TESS (Trademark Electronic Search System) search results list include the term "refresh," a phonetic equivalent, or a longer term that includes that letter string in it. Some results show foreign terms.

"re:juvenate," "re:plenish," "re:capture," and "re:balance."

Evidence of use alone:

An Internet web page shows use of **RepHresh** for "vaginal gel."

The Olsen declaration asserts that a web page shows use of the mark **Refresh**, by Neways International for a bath and body gel. The web page attached to the declaration, however, does not support the declaration, as only the letters "esh" are visible.

The Olsen declaration also asserts that a web page shows that "Heather Kleinman's Cosmetic Connection ... sells skin care products under the name 'Refreshing'." In fact, the web page does not show this. The attached web page is a review of products of another and it is unclear whether the discussed products are sold under a mark using the term "**refreshing**" or whether the source of the reviewed products uses that term in a descriptive sense.

The Olsen declaration asserts "I contacted Polardreams International and was told the mark **REFRESH & REVIVE** was currently being used in connection with skin care products sold at Sam's Club." The declaration does not reference any corroborating evidence.

Registrations alone:

RE:FRESH is registered for class 3 "cosmetic skin care products," but not including soap. This registration does not appear to be owned by the owner of the **re:refresh a day spa** mark referenced above.

Refreshing Nourishing is registered for various items, including soaps, makeup, skin care, and perfume. The word "nourishing" is disclaimed.

Refresh & Rejuvenate The Body Of Your Soul is registered for various hair care products and skin care products.

There is a reprint of only some information on the registration for the mark **Refresh Zing Care Package** for a "personal rejuvenation kit" including various items. The

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middle page of the TARR printout is missing, so the identification is incomplete.

Applications alone:

Renew & Refresh, for items including soap, wash, lotion, and creams.

COLOR REFRESHER, for various hair care products; "color" is disclaimed.

Refresh & Extend, for skin lotion; "extend" is disclaimed.

PURE REFRESH, for a "non-medicated herbal mouthwash and rinse."

REFRESH YOUR SHAVE!, for "shave foam, shave gel, shave cream and shave conditioner."

REFRES H AIR, for various hair care products.

We discount the items listed as evidence solely of use of four marks. We do not find the "RepHresh" mark to present the same commercial impression as the marks involved herein, and the evidence regarding the other three marks is lacking, for reasons stated above in the listings. Accordingly, applicant has provided evidence of registration and use of two marks, registration of four other marks, and the filing of applications for six marks.

We find many of these marks to present different overall commercial impressions than the two involved marks, and some are associated with different products, such as those listed in registrations or applications for hair care products or shaving products. In short, we do not find

this evidence sufficient to warrant according the mark in the cited registration the narrow scope of protection urged by applicant. Of all the marks, applicant's is the closest to the mark in the cited registration. Therefore, even if the registered mark were entitled to only a narrow scope of protection, it would be protected against registration of applicant's mark for the identified goods. On the other hand, we acknowledge that the registered mark is highly suggestive and is not entitled to a very broad scope of protection.

The examining attorney has made of record numerous third party registrations showing registration of the same mark for soaps and various skin care products such as those listed in the applicant's identification. These registrations also list beauty salon services or skin care salon services. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type that may emanate from a single source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). We find these registrations to suggest that it is not unusual for a spa or salon to also offer to customers a wide range of

products that they may use at home. Indeed, applicant's own identification of goods and services supports this conclusion, as applicant claims use of its mark for skin care salon services and various skin care products sold at skin care salons. Nonetheless, the registrations submitted by the examining attorney do not serve to suggest that the owner of the cited registration, having registered its mark only for "personal soap," would find the operation of beauty salons or skin care salons within its natural zone of expansion.

We must assume that registrant's personal soap, not being limited to any particular class of consumers or channels of trade, will be available to all usual consumers of soap through all usual channels of trade for such products. See In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Thus, we must assume that registrant's soap will be available in salons, as are applicant's various skin care products. A consumer finding applicant's products and registrant's soap in a salon would be likely to conclude they emanate from a common source, or have the same sponsorship. Indeed, even a consumer familiar with registrant's soap outside the salon channel of trade, who may have purchased the product in a retail store, when confronted with applicant's mark on skin care

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products in a salon, would likely reach the same conclusion. Accordingly, we find there is a likelihood of confusion or mistake among consumers when the respective marks are used on or in connection with the identified products. We do not, on the other hand, find a likelihood of confusion when registrant's mark is used for soap and applicant's mark is used for skin care salon services.

Decision: The refusal of registration under Section 2(d) is reversed as to applicant's Class 44 services. The refusal of registration is affirmed as to applicant's Class 3 goods.