

10/3/01

**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 15  
Bottorff

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re **Destron Fearing Corporation**

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Serial No. 75/373,740

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**Carl L. Johnson** of **Jacobson & Johnson** for **Destron Fearing Corporation**.

**Howard Smiga**, Trademark Examining Attorney, Law Office 102 (**Thomas V. Shaw**, Managing Attorney).

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Before **Wendel, Bottorff and Drost**, Administrative Trademark Judges.

Opinion by **Bottorff**, Administrative Trademark Judge:

Applicant has filed an intent-to-use application seeking registration of the mark LASERMARK (in typed form) for goods identified, as amended, as “ear tags for domesticated animals, namely, cows and hogs,” in International Class 20.<sup>1[1]</sup>

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<sup>1[1]</sup> Serial No. 75/373,740, filed October 14, 1997. In the application as originally filed, applicant identified its goods as “animal identification ear tags and process for placing identification information on the tags.” In the first Office action, the Trademark Examining Attorney, *inter alia*, required applicant to submit a more definite identification of goods,

The Trademark Examining Attorney has refused registration on two grounds. First, he contends that applicant's mark is merely descriptive of applicant's goods and that it thus is barred from registration under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1). Second, he contends that registration is barred under Trademark Act Section 2(d), 15 U.S.C. §1052(d), because applicant's mark, as applied to applicant's goods, is likely to cause confusion vis-à-vis the mark depicted below

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including a specification of whether the tags were composed of metal or plastic. In response, applicant amended the identification of goods to "plastic ear tags for livestock." Later, in response to the Trademark Examining Attorney's final Office action, applicant requested further amendment of the identification of goods to the above-referenced "ear tags for domesticated animals, namely, cows and hogs." This amendment was accepted by the Trademark Examining Attorney, despite the fact that it expanded the identification of goods by removing the limitation of the goods to "plastic" ear tags. See Trademark Rule 2.71(a). It appears from applicant's arguments on appeal that its ear tags in fact are intended to be made of plastic; we note also that the goods remain classified in Class 20, which is appropriate only if the goods are composed of plastic. Thus, for purposes of this opinion, we shall presume that applicant's goods are intended to be made of plastic. In view of our disposition of this appeal and the resulting eventual abandonment of the application, however, the issue of the correctness of the identification of goods is moot, and we accordingly shall not remand the application for entry of an amendment to the identification of goods.

which is previously registered (with a disclaimer of the exclusive right to use LASER MARK apart from the mark as shown) for “metal tags used to identify fish and wildlife, and fish and wildlife metal tags for which a laser is used to apply or recover identifying marks,” in International Class 6.<sup>2[2]</sup>

When the refusals were made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney have filed briefs, but applicant did not file a reply brief. Applicant requested an oral hearing, but subsequently withdrew that request, and no oral hearing was held.

We turn first to the Section 2(d) refusal to register applicant’s mark. Our likelihood of confusion 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 §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).

We must compare the respective marks in terms of their appearance, sound and connotation, and must determine whether the marks, when viewed in their entireties, present similar or dissimilar overall commercial impressions.

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<sup>2[2]</sup> Registration No. 2,037,661, issued February 11, 1997.

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 impression that confusion as to the source of the goods 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. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, 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).

Viewing applicant's mark and the cited registered mark in their entireties, we find them to be highly similar. The two marks are phonetic equivalents, and they have the same connotation. Applicant's mark also is visually similar to the registered mark, in that both marks are dominated by the wording LASERMARK or LASR MARK. The slight differences in spelling and appearance, i.e., applicant's compression of the two words into one and registrant's omission of the letter "E," do not suffice to distinguish the marks in their entireties.

Likewise, the marks are not distinguished by the presence of the design element in the registered mark. That design element does not significantly change the overall commercial impression of the registered mark; it merely reinforces the

meaning of the wording in the mark. Viewing the marks in their entireties, we find that they create the same overall commercial impression.

We next consider the similarity or dissimilarity between applicant's and registrant's goods. It is not necessary that these respective goods be identical or even competitive in order to support a finding of likelihood of confusion.

Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978). Moreover, the greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

We find that applicant's goods are similar, indeed essentially identical, to registrant's goods. The fact that applicant's animal identification tags apparently

will be made of plastic<sup>3[3]</sup> while registrant's animal identification tags are made of metal does not appear, on this record, to be of any commercial or legal significance in our likelihood of confusion analysis. Likewise, the essential identity of the respective goods is not affected or eliminated by the fact that applicant's animal identification tags are intended to be used for domestic livestock while registrant's animal identification tags are intended for use on fish and wildlife. Registrant's and applicant's goods are animal identification tags, whatever their material composition or intended use. There is no basis in the record for concluding that these minimal differences between applicant's and registrant's goods are the types of differences which purchasers would rely upon to identify and distinguish the source of these products.

Similarly, applicant has presented no evidence to support its argument that applicant's livestock identification tags and registrant's fish and wildlife identification tags move in different trade channels or are purchased by different classes of purchasers. There is no evidentiary basis for concluding that "farmers and ranchers," asserted by applicant to be the purchasers and users of its livestock identification tags, would not also have use for or need of identification tags for the fish and/or wildlife on their property. Likewise, nothing in the record supports a finding that the government officials and researchers identified by applicant as the purchasers and users of registrant's fish and wildlife

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<sup>3[3]</sup> See discussion *supra* at footnote 1.

identification tags would not also have use for or need of identification tags for livestock which they might be charged with regulating or researching.

Finally, there is no basis in the record for concluding that the purchasers of these products are so sophisticated or careful in their purchasing decisions that they would be immune to source confusion which otherwise would arise from use of these essentially identical marks on these essentially identical goods.

Considering all of the evidence of record with respect to the relevant *du Pont* evidentiary factors, we conclude that a likelihood of confusion exists in this case. Although the registered mark is admittedly weak, as evidenced by registrant's disclaimer of LASER MARK apart from its mark as shown in the registration, we find that the scope of protection to be afforded to the registered mark is sufficiently broad to preclude registration of applicant's essentially identical mark for essentially identical goods. Any doubts as to our conclusion must be resolved against applicant. *See In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

We also affirm the Trademark Examining Attorneys' Section 2(e)(1) mere descriptiveness refusal. A term is deemed to be merely descriptive of goods, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215,

217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods for which registration is sought, the context in which it is being used on or in connection with those goods, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

Applicant's goods are identified as "ear tags for domesticated animals, namely, cows and hogs." As noted above at footnote 1, the application, as originally filed, included the wording "and process for placing identification information on the tags." This wording eventually was deleted, but we nonetheless may consider it to the extent that it aids us in determining the nature of applicant's goods and the significance of applicant's mark as applied to those goods.

We further note that in the registration cited as the Section 2(d) bar to registration of applicant's mark, in which registrant disclaimed the exclusive right to use LASER MARK, registrant's goods are identified in relevant part as "tags for which a laser is used to apply or recover identifying marks." Applicant, in comparing its goods to registrant's goods for purposes of the likelihood of

confusion issue, distinguished the respective goods only with respect to their material composition and the animals on which the tags are intended to be used. Applicant did not attempt to distinguish its goods from registrant's goods by arguing that applicant and registrant use different methods of placing identification information on their respective tags.

We reasonably conclude (and applicant does not contend otherwise) that the "process for placing identification information on" applicant's tags, to which applicant referred in its original identification of goods, is the same as or similar to the process used by registrant, i.e., a process by which "a laser is used to apply or recover identifying marks" to or from the tags. In view thereof, we find that LASERMARK is merely descriptive of applicant's goods. The tags contain or employ marks which serve to identify the animals wearing the tags, and those identifying marks are applied to or recovered from the tags by means of laser technology.

Applicant's arguments to the contrary are not persuasive. It is not dispositive that "laser" and "mark" might have other meanings in other contexts, because we must look to the meanings which are likely to be ascribed to the words as they are encountered on or in connection with applicant's goods, not in the abstract. In this regard, the Trademark Examining Attorney has submitted dictionary definitions of "laser" and "mark"<sup>4[4]</sup> which directly describe important

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<sup>4[4]</sup> Specifically, The Computer Glossary (7<sup>th</sup> Ed.) by Alan Freedman, defines "laser" as follows:

features or attributes of applicant's animal identification tags, i.e., that they contain marks which are applied or recovered by laser technology. Furthermore, the mere descriptiveness of the two words is not eliminated by combining them into LASERMARK. Combining the words does not create a commercial impression which is new or different, unique or incongruous; the resulting composite is as merely descriptive as the two words are when used separately.

Decision: The refusals to register under Trademark Act Sections 2(d) and 2(e)(1) are affirmed.

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(Light Amplification from the Stimulated Emission of Radiation) A device that creates a very uniform light that can be precisely focused. It generates a single wavelength or narrow band of wavelengths and is used in applications such as communications, printing and disk storage. Unlike the transmission of electricity, transmission of light pulses over optical fibers is not affected by nearby electrical interferences.

Webster's II New Riverside University Dictionary defines "mark" as follows, in pertinent part:

-n. **1.** A visible trace or impression, as a spot, dent, or line ... **5.a.** An inscription, name, stamp, label, or seal placed on an article to signify ownership, quality, manufacture, or origin. **b.** A notch in an animal's ear or hide indicating ownership. ... **7.b.** A visible sign or symbol, as a badge or brand adopted by or imposed on a person. ... -vt. **1.** To make a visible impression on, as with a spot, line, or dent. **2.** To form, make or depict by making a visible impression, as with a spot, line, or dent. **3.a.** To indicate or distinguish by making a visible impression ... -vi. **1.** To make a visible impression **2.** To receive a visible impression...