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Mailed:
July 7, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Apollo Colors, Inc.

Serial No. 75942300

Joseph V. Norvell of Brinks Hofer Gilson & Lione for Apollo Colors, Inc.

Tina L. Snapp, Trademark Examining Attorney, Law Office 116 (M. L. Hershkowitz, Managing Attorney).

Before Seeherman, Zervas and Kuhlke, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Apollo Colors, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register APOLLO as a trademark for "color pigments for use in the graphic arts industry."¹ Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles

the mark APOLLO, previously registered for "dye stuffs and their intermediates, pigments and mordants for use in the manufacture of textile, leather and paper,"² that, as used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

The appeal has been fully briefed.³ Applicant did not request an oral hearing.

We reverse the refusal of registration.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *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

¹ Application Serial No. 75942300, filed March 13, 2000, and asserting first use and first use in commerce on July 1, 1970.

² Registration No. 1810363, issued December 14, 1993; Section 8 and 15 affidavits accepted and acknowledged; renewed.

³ With the denial of applicant's request for reconsideration the Examining Attorney submitted materials taken from certain third-party websites. In its brief applicant stated that the printouts submitted by the Examining Attorney of two of the websites were incomplete, and attached additional pages from these same websites. Because applicant had no opportunity to submit these pages prior to the filing of its appeal brief, we have treated these additional pages as of record. See *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986).

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).

The marks, of course, are identical, which is a factor that favors a finding of likelihood of confusion.

Applicant has argued that APOLLO is a weak mark, based on a search of USPTO records showing 498 registrations (of which 123 are "live") for marks which include the term APOLLO.

The submission from the USPTO TESS database lists the marks, registration numbers, and whether the registration is "live" or "dead." This mere listing of registrations numbers and marks is not sufficient to make the registrations of record. See *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974) (the submission of a list of registrations is insufficient to make them of record). Furthermore, even if the Examining Attorney had treated the list of record (and she did not), it is of no probative value, since it does not indicate the goods or services for which the marks are registered. Thus, we cannot ascertain whether APOLLO has a suggestive significance with respect to the goods listed in the cited registration of the subject application. We also take issue with applicant's statement that this list indicates that APOLLO has been diluted

through widespread use. Third-party registrations are not evidence that the marks shown therein are in use. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

The only third-party registration that is of record is for APOLLO-COAT for "coatings in the nature of interior and exterior paints, sealer coatings for use on boats, varnish, wood stain, enamels in the nature of house paints, and automobile finishing solutions."⁴ The Examining Attorney had cited this registration against applicant's application, and then withdrew this refusal. On the basis of this single third-party registration, we cannot conclude that the cited registration for APOLLO is weak and entitled to only a limited scope of protection.

Despite this, however, we believe that the differences in the channels of trade and the customers for the applicant's and the registrant's goods are sufficient to avoid any confusion.

The goods of applicant and registrant, as set forth in the respective identifications, are very specific as to their customers. Applicant's pigments are for use in the graphic arts industry; the registrant's goods are for use in the manufacture of textile, leather and paper. There is no evidence that textile, leather and paper manufacturers

are also engaged in the graphic arts industry. The Examining Attorney points to a definition of "graphic arts" submitted with her appeal brief, and of which we take judicial notice, as "the fine and applied arts of representation, decoration, and writing or printing on flat surfaces together with the techniques and crafts associated with them."⁵ Based on this definition, the Examining Attorney contends that the graphic arts industry "might include manufacture of printing media of all kinds including paper, leather, textiles or other flat surfaces." Brief, p. 4. However, we think the Examining Attorney goes too far in asserting, without any evidence, that the "flat surfaces" referred to in the definition of "graphic arts" would encompass anything that is flat, including leather or textiles. More importantly, the pigments that are identified in the cited registration are used in the manufacture of leather, textiles and paper; they are not for use on leather, textiles and paper. Thus, even if graphic arts were to encompass printing on all flat

⁴ Registration No. 2554483.

⁵ Merriam-Webster OnLine, www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=graphic+arts. The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

surfaces, the registrant's pigments would not be used by those in the graphic arts industry to do such printing.

Because of the different industries in which applicant's and the registrant's pigments are used, and the different customers, the channels of trade for the goods must also be considered to be different.

The Examining Attorney has made of record third-party registrations in an attempt to show that goods of the type identified in the application and the cited registration may be sold under a single mark by a single source. Third-party registrations which individually cover a number of different items and which are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, supra at 1785-86 (TTAB 1993). The following registrations have been highlighted by the Examining Attorney in her brief, and are therefore the ones she presumably believes are most persuasive:⁶

⁶ The Examining Attorney also highlighted a registration, No. 2121979, for the BAYER logo. We have not listed the goods in that registration because it is clear that the logo is in the nature of a house mark, registered for goods in Classes 1, 2, 3, 4, 5, 6, 17, 22 and 23, ranging from wire ropes to pesticides to industrial oils to tanning agents for use in the manufacture of leather to general purpose adhesives for mending broken articles. Obviously this registration, for a wide variety of goods, is of

FLEXOBRITE for "colourants for use in paint, textiles, ink, plastics, and rubber; mordants for use in paint, textiles, inks, plastics, and rubber; color pigments and color pigment compositions; printing inks; aqueous and non-aqueous pigment dispersions for leather finishing, textile printing, the printing and mass coloration of materials, and for use in paint manufacture";⁷

PIGMENTS FOR THE IMAGINATION for "color pigments, colorants for use in the manufacture of printers ink, textiles, plastics, synthetic fibers, paints and papers; printers ink; pigment dispersions in aqueous or non-aqueous forms for use in the manufacture of printers ink, textiles, paints and papers; color concentrate compounds for use in the manufacture of printers ink, plastics, synthetic fibers, textiles and paints";⁸

HILTON DAVIS for "paints, coloring matter, colorants, pigment concentrates, technical dyes and dyestuffs, color dispersion products and certified drug and cosmetic

no probative value to show that the goods listed therein are related.

Our focus on the registrations highlighted by the Examining Attorney does not mean we have not considered the other third-party registrations that were submitted. However, they are not persuasive of a different result herein. Most of the registrations are based on Section 44 of the Act, rather than use in commerce. Some are for pigments used in goods that are specifically different from those identified in the application and cited registration. See, for example, Registration No. 2721075 for "colorants and color pigments for use in the manufacture of food, beverages, cosmetics and pharmaceuticals." Other registrations identify pigments that are used in the textile industry, but make no mention of graphic arts, or are for use in printing but make no mention of textiles, paper or leather.

⁷ Registration No. 2266097.

⁸ Registration No. 2418769.

colorants for use in the manufacture of consumer and industrial products in the textiles, paints, food products, cosmetics, pharmaceuticals, printing and plastics industries";⁹

CLARIANT for "dyestuffs for use in the manufacture and finishing of textiles, leather, metal, and paper; color pigments; mordants for use in the textile, leather, metal, and paper industries; lacquers in the nature of a coating";¹⁰ and

HISPERSE for "color pigments, pigment dispersions and dyestuffs for printing and dyeing of fibers and textile materials."¹¹

The registration for HISPERSE is for pigments used for printing and dyeing fibers and textiles, and makes no mention of use in the graphic arts industry. Thus, this registration is of no value in demonstrating relatedness of the involved goods. The registration for HILTON DAVIS is for pigment concentrates for use in the manufacture of products in the textile and printing industries. Applicant's goods, as identified, are for use in the graphic arts industry, and applicant has further explained that its products are sold to graphic arts companies, who use them in lithographic printing applications. An identification listing pigments for use in the manufacture

⁹ Registration No. 1975942.

¹⁰ Registration No. 2349316.

¹¹ Registration No. 2115379.

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of a product that is then used in the printing industry is not the same as an identification listing a pigment actually used in the graphic arts industry.

The registrations for FLEXOBRITE and PIGMENTS FOR THE IMAGINATION include colorants for use in textiles and, in the case of FLEXOBRITE, colourants for use in inks and, in the case of PIGMENTS FOR THE IMAGINATION, colorants and pigment dispersions for use in the manufacture of printers ink. While ink or printers ink could be considered a product used in the graphic arts industry, the colorants used to manufacture ink would not be such a product. As for the printing inks and printers ink itself, which are also identified in these registrations, these goods are different from the color pigments for use in the graphic arts industry which are identified in applicant's application.

Applicant has pointed out that, of the third-party registrations submitted by the Examining Attorney, only one registration, No. 2721889 for DAY GLO, specifically refers to graphic arts in its identification, namely, "phosphorescent color pigments and dispersions for use in paints, plastics, coatings and graphic arts." This registration also includes "plastics, textiles, coatings and tracer applications," a listing that frankly puzzles us

as it appears to be missing some words, since "plastics" and "textiles" do not belong in Class 2. Because of the question regarding this listing, we cannot view this registration as showing the relatedness of applicant's and the cited registrant's goods.

There are some registrations, including the registration for CLARIANT and FLEXOBRITE, which list "color pigments" per se. The Examining Attorney points to these registrations, which do not limit the uses for the color pigments, and argues that the presumptions of Section 7(b) of the Act require us to treat this identification as encompassing all uses for color pigments. We do not agree. Clearly, a determination of the issue of likelihood of confusion between the applied-for and registered marks must be made on the basis of the goods as they are identified in the involved application and registration. In such circumstances, if there are no limitations in the identification, we must presume that the "registration encompasses all goods of the nature and type described, [and] that the identified goods move in all channels of trade that would be normal for such goods." In re Elbaum, 211 USPQ 639, 640 (TTAB 1981). However, when third-party registrations are being submitted for the purpose of showing that goods are related, the same Section 7(b)

presumptions do not apply. As noted previously, third-party registrations are not evidence that the marks shown therein are in use, or that consumers are familiar with them. They simply "serve to suggest that the listed goods and/or services are of a type which may emanate from a single source." In re In re Albert Trostel & Sons Co., supra at 1786 (emphasis added). Therefore, we think the Examining Attorney gives too broad a reading to a listing of "color pigments" in a registration by asserting that such a listing shows that the registrant is using these pigments in both the graphic arts industry and in the manufacture of textile, leather and paper. On the other hand, we also recognize that broad identifications of goods may be permissible in certain instances, see TMEP § 1402.03, and we do not mean to suggest that, unless the identification in a third-party registration mimics exactly the identification in the application and the cited registration, it is of no probative value.

What we are left with, then, is that none of the third-party registrations specifically covers the identical goods identified in applicant's application and the cited registration. Although there are a few registrations which arguably could be viewed to include the same goods, we find that these registrations are not sufficient to demonstrate

that companies generally sell both the goods identified in the application and the goods identified in the cited registration under a single mark.

The Examining Attorney has also submitted evidence of third-party websites. Again, we concentrate on the excerpts from these websites that the Examining Attorney quoted in her brief, and which she characterizes as "the relevant parts":

Sun Chemical Corporation's Colors Group is one of the worlds [sic] leading producers of organic pigments and dispersions for use as colorants in printing inks, plastics, paints, cosmetics, textiles and specialities.
www.sunpigments.com/aboutus.htm

...you can save on your total pigment cost without sacrificing opacity, consistency or color. Coatings applications for HITOX encompass alkyds, acrylic urethanes, high solids systems, water reducibles, water bases, and powder coatings. Plastics uses include PCV pipe and conduit, color concentrates, and vinyl siding. HITOX also finds uses in inks, adhesives, paper, foundry products, and building materials.
www.tormineral.com

Please note that we offer pigments suitable for a wide range of end use application(s) ie. Offset inks, aqueous flexographic inks, solvent flexo, malic, polyamide, vinyl and NC/PA based inks, PVS, LDPE, JDPE, PP, ABS, cable grade (plastics), air drying enamel paints, industrial (OEM) water based

paints, textiles, leather, rubber and paper.

www.amantech.com/index1.html

Anar Chemical Industries is among one of the fastest growing companies in the field of Dyes, Pigments & Intermediates... Industries we serve ... Paint Industry ... Textile Industry ...Leather Industry ... Paper Industry ... Inks Industry.
www.anarchem.com

Reviewing these excerpts and the underlying materials in order, we note that the information about Sun Chemical Corporation and its Colors Group describes the history of the group, which originally was two separate companies. There is no indication about the trademark or trademarks under which this entity's pigments are sold, or whether the pigments for various purposes are all sold under a single trademark. Nor do the materials indicate that the pigments are directed to the graphic arts industry.

The second excerpt, for HITOX TiO₂, appears to use HITOX as a trademark for a pigment that can be used in inks and paper. However, "inks" is mentioned only tangentially; and it is not clear to what industry the inks are marketed, or whether the pigments would be sold to those in the graphic arts industry.

The web materials from which the third excerpt is taken lists AMANTACH PIGMENTS at the top of the page, and

also lists pigments by color and "C.I. number" (e.g., Pigment Orange 5), as well as by what appears to be other generic names (e.g., cadmium, synthetic iron oxide). The uses for these specific pigments is not indicated, but it does appear that only AMANTECH PIGMENTS is used to identify the source of the pigments.

The website from which the fourth excerpt is taken uses separate pages to list the categories of uses of its dyes. For example, there is a page headed "Textiles" which states that it is "one of the leading manufacturers of textile dyes and offers comprehensive ranges for all segments of the modern textile finishing industry." Another page is headed "Leather" and discusses its specialty dyes for leather, and lists the dyes by CI name. Yet another page is headed "Inks" and states that "Anar has introduced good quality of dyes and pigments for Ink markets." The additional pages from the website, submitted by applicant, show that this company is located in India. Based on this, applicant argues that there is no evidence that this company's goods are sold in the United States.

The website materials provide some tenuous evidence that a single company may sell pigments used in textiles and pigments for markets that could include the graphic arts industry. However, this evidence is quite limited,

and is insufficient for us to find that applicant's and the registrant's goods are related.

Even if we were to conclude from the third-party registrations and Internet evidence that pigments used in both the graphic arts industry and pigments, dye stuffs and mordants for use in the manufacture of textile, leather and paper emanate from a single source, that does not necessarily demonstrate that the goods are related, such that confusion is likely to result from the use of the same or a confusingly similar mark on both.

As the Examining Attorney has pointed out, in quoting *In re International Telephone and Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978), it "is sufficient for purposes herein that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could because of the similarity of the marks used therewith, give rise to the mistaken belief that they originate from or are in some way associated with the same producer." (emphasis added). Here, we find that there is insufficient evidence to show that the goods would be encountered by the same persons. There is no evidence that people who are engaged in the graphic arts industry

are also engaged in the manufacture of textile, leather and paper, such that the same purchasers would buy both products. As a result, it is highly unlikely that there would be an opportunity for confusion to occur, even from the use of identical marks, on these goods that are sold to consumers in different industries. The goods at issue are not ordinary consumer goods that might be displayed and sold together in the same retail stores; rather, they are highly specialized goods sold to sophisticated purchasers who are engaged in very different businesses.

We recognize that pigments can be sold through the Internet, and that, in view of some of the website evidence submitted by the Examining Attorney, we think it possible that a company who wishes to purchase pigments for use in the graphic arts industry could access a website that also sells pigments for the manufacture of textiles, leather or paper. However, there is no evidence that the products of multiple companies are offered on a single website, where consumers might encounter both applicant's APOLLO pigments for the graphic arts industry and the registrant's APOLLO pigments for the manufacture of textiles, leather and paper. This possibility for confusion strikes us as being merely theoretical or de minimis. See *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713,

21 USPQ2d 1388, 1391 (Fed. Cir. 1992), "We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations."

The Examining Attorney also argues that she must consider any goods in the registrant's normal fields of expansion, and that the registrant is entitled to protection against the registration of a similar mark on a product that might reasonably be expected to be produced by it in the normal expansion of its business. In support of this position, she points to the third-party registrations and the third-party web pages. Although it might be possible to argue that it is a normal expansion if a company that has used its mark on pigments used in a wide variety of industries began to use its mark on pigments for the graphic arts industry, that is not the situation here. Rather, the cited registration is for a very limited identification--dye stuffs and their intermediates, pigments and mordants for use in the manufacture of textile, leather and paper. There is no evidence that the registrant uses its mark on pigments used in other industries; on the contrary, here the cited registration issued in 1993, and there is no suggestion that the registrant has expanded the use of its mark since that date. Nor is there evidence that companies that sell

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pigments only for use in the manufacture of textile, leather and paper expand to use their marks on pigments in the graphic arts industry.

In conclusion, we find that, in view of the differences in the consumers and channels of trade for the goods, there is no likelihood of confusion between applicant's use of the mark APOLLO for color pigments for use in the graphic arts industry, and registrant's mark APOLLO for dye stuffs and their intermediates, pigments and mordants for use in the manufacture of textile, leather and paper.

Decision: The refusal of registration is reversed.