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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re TBH Marks, Inc.

Serial No. 76222858

Manny D. Pokotilow of Caesar, Rivise, Bernstein, Cohen & Pokotilow, Ltd. for TBH Marks, Inc.

Gina M. Fink, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Hairston, Bucher and Bottorff, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark LIP REDEEMER for "lipstick, non-medicated lip care preparations and lip foundation."¹

¹ Serial No. 76222858, filed March 9, 2001, which alleges December 2000 as the date of first use and date of first use in commerce. The word LIP has been disclaimed apart from the mark as shown.

The Trademark Examining Attorney has issued a refusal to register applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the previously registered mark PERM REDEEMER for "hair conditioner for conditioning chemically treated hair susceptible to bitterness, said conditioner being absorbable by the hair shafts of said chemically treated hair."²

When the refusal was made final, applicant filed this appeal. Applicant and the Examining Attorney have filed briefs, but no oral hearing was requested. We affirm the refusal to register.

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). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

² Registration No. 1,369,716 issued November 12, 1985; Sections 8 & 15 affidavits accepted and acknowledged, respectively. The word PERM is disclaimed apart from the mark as shown.

The Examining Attorney maintains that applicant's and registrant's goods are related because both are in the nature of personal care products which are sold in the same channels of trade to the same class of purchasers. With respect to the relatedness of the goods, the Examining Attorney submitted copies of eighteen use-based third-party registrations for marks which cover lip products and hair conditioners. Further, the Examining Attorney argues that the respective marks are similar because each mark is dominated by the word REDEEMER.

Applicant, in urging reversal of the refusal to register, argues that the respective goods are not related because they have different uses. Also, applicant argues that the goods are sold to discriminating purchasers. Further, applicant maintains that marks containing the word REDEEMER are weak marks, and thus registrant's mark is entitled to only a limited scope of protection. Applicant submitted copies of six third-party registrations of marks which contain REDEEMER and an excerpt from Merriam-Webster's Collegiate Dictionary (2001) wherein the word "redeem" is defined as, inter alia, "repair, restore."

Turning first to a consideration of the goods, we agree with the Examining Attorney that applicant's lip products and registrant's hair conditioner are related

goods in that they are personal care products. Further, in the absence of any limitations in the respective application and registration with respect to trade channels or purchasers, we deem applicant's and registrant's goods to travel in all the usual trade channels to all the normal purchasers. Thus, in our likelihood of confusion analysis, we must assume that applicant's lip products and registrant's hair conditioner are sold in such retail stores as drug stores, mass merchandisers, discount stores, and department stores to ordinary consumers.

Further, although the third-party registrations submitted by the Examining Attorney are not evidence that the marks shown therein are in use, or that the public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods involved in this appeal are of a type which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988).

Turning next to the marks, in determining whether they are dissimilar or similar, 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 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). Further, although the marks 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). For instance, "that a particular feature is descriptive . . . with respect to the involved goods . . . is one commonly accepted rationale for giving less weight to a portion of a mark . . ." 224 USPQ at 751.

Applying these principles to the present case, we find that applicant's mark LIP REDEEMER and registrant's mark PERM REDEEMER, when compared in their entireties in terms of appearance, sound and connotation, are similar in their overall commercial impressions. Each mark is comprised of a term which describes the "product use", i.e., LIP and PERM(ED HAIR), followed by the word REDEEMER. We find that REDEEMER dominates the commercial impression created by

each mark and is entitled to greater weight in our comparison of the marks.

Although the marks obviously differ as to the term which describes the product use, consumers are likely to ascribe this difference to the different goods with which the marks are used, rather than to differences in the sources for those goods. Also, the goods involved in this case can be relatively inexpensive and bought off the shelf in drug stores, mass merchandisers, etc., under conditions in which consumers will not take great care in making their purchases.

With respect to the third-party registrations submitted by applicant, as noted earlier, third-party registrations are not evidence that the marks depicted therein are in use or that the public is familiar with them. Moreover, we note that none of the registrations covers the types of goods involved in this appeal.³ Nevertheless, even if marks which consist of or contain the word REDEEMER are considered to be weak due to an asserted

³ The marks and the goods covered are: THE CAN REDEEMER and design for "used beverage container collection services;" GLASS REDEEMER for "used beverage container collection services;" SCREEN REDEEMER for "computer software used to display images on screen;" REDEEMER for "toy action figures and accessories therefor;" BEAVER REDEEMER for "machines for automatically accepting tickets and/or currency and dispensing tokens and/or coins;" and ROOF REDEEMERS for "cleaning services, namely, cleaning the exterior of residential buildings and roofs."

degree of suggestiveness conveyed by such term, even weak marks are entitled to protection where confusion is likely. Here, the registered mark PERM REDEEMER is still highly similar in sound, appearance, connotation and commercial impression to applicant's mark LIP REDEEMER.

Accordingly, we conclude that consumers familiar with the registered mark PERM REDEEMER for hair conditioner, would be likely to believe, upon encountering the mark LIP REDEEMER for lip products, that the goods emanate from or are associated with the same source.

Decision: The refusal to register under Section 2(d) is affirmed.