

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

Mailed:
Aug. 19, 2005

Grendel

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Flowery Beauty Products, Inc.

Serial No. 76438209

Jack L. Most of Goetz Fitzpatrick, for Flowery Beauty
Products, Inc.

Julie A. Watson, Trademark Examining Attorney, Law Office
113 (Odette Bonnet, Managing Attorney).

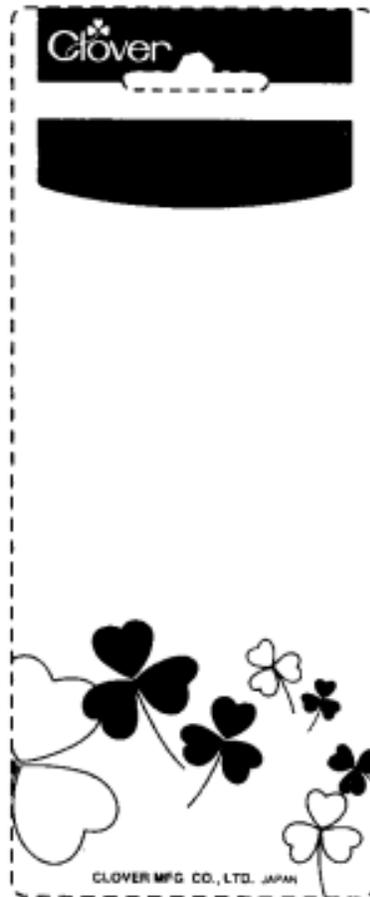
Before Quinn, Walters and Grendel, Administrative Trademark
Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark SWEDISH CLOVER (in standard character form) for
goods identified in the application as "pedicure implement,

namely foot file for removing calluses," in International Class 8.¹

The Trademark Examining Attorney has issued a final refusal to register applicant's mark, on the ground that the mark, as applied to the goods identified in the application, so resembles the mark depicted below



¹ Serial No. 76438209, filed August 1, 2002 on the basis of use in commerce under 15 U.S.C. §1051(a). November 5, 1985 is alleged in the application as the date of first use of the mark anywhere and as the date of first use of the mark in commerce.

previously registered for a variety of goods in Classes 8, 16 and 26, as to be likely to cause confusion, to cause mistake, or to deceive.² Trademark Act Section 2(d), 15 U.S.C. §1052(d). Although many goods in all three classes are identified in the registration, the Trademark Examining Attorney's Section 2(d) refusal is based on the Class 8 goods identified in the registration as "pedicure sets."

Applicant has appealed the final refusal. Applicant and the Trademark Examining Attorney filed main appeal briefs, and applicant filed a reply brief. No oral hearing was requested. We affirm the refusal to register.

Initially, an evidentiary matter requires our attention. Applicant attached to its main appeal brief evidence which had not been made of record prior to the filing of the appeal. That evidence consists of a photocopy of a product catalog which served as the specimen

² Registration No. 2763303, which issued on September 16, 2003 from an application filed on June 11, 2001. The registration includes the following "description of the mark" statement:

The mark consists of two dark green strips, the top strip containing the word 'CLOVER' and the design of a clover. The two strips are placed above a design of several clovers in various shades of green and in different sizes over the wording 'CLOVER MFG. CO. LTD. JAPAN.' The outline of the packaging is shown in broken lines and is not part of the mark sought to be registered. The broken lining shown on the drawing is for showing the position of the mark in relation to the packaging; no claim is made to the right to the shape of the packaging itself.

in the file of Registration No. 2763303, the registration cited by the Trademark Examining Attorney as a Section 2(d) bar to registration of applicant's mark. In her appeal brief, the Trademark Examining Attorney objected to this evidence on the ground that it is untimely because it was not made of record prior to the filing of the appeal.

We agree that this evidence, submitted for the first time with applicant's appeal brief, is untimely under Trademark Rule 2.142(d), 37 C.F.R. §2.142(d), and we therefore shall not consider it.

We hasten to add, however, that even if applicant had made this evidence of record in a proper and timely manner, its presence in the record would have had no effect on our analysis or decision herein. According to applicant, the catalog evidence shows that the owner of the cited registration in fact does not use the registered mark on "pedicure sets," the goods identified in the cited registration which are the basis of the Trademark Examining Attorney's Section 2(d) refusal. Rather, the catalog displays only goods used in connection with sewing, knitting, quilting and similar pursuits. Applicant argues that because the specimen of use (the catalog) did not show use of the mark on the "pedicure sets" included in the application's identification of goods, the examination of

the application which matured into the cited registration was flawed, and the registration should not have issued with respect to "pedicure sets."

In essence, and despite applicant's protestations to the contrary, applicant is arguing that the cited registration is invalid to the extent that its identification of goods includes "pedicure sets." Applicant repeatedly argues that, in making our likelihood of confusion determination, we essentially should ignore the presence of "pedicure sets" in the registration's identification of goods, and instead compare applicant's goods only to the types of sewing, knitting and quilting products which are displayed in the registrant's specimen catalog.

We find that this argument of applicant's constitutes an impermissible collateral attack on the validity of the cited registration which cannot be heard in this ex parte proceeding. Section 7(b) of the Trademark Act, 15 U.S.C. §1057(b), provides that a certificate of registration on the Principal Register shall be *prima facie* evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in commerce in connection with the all of the goods or services specified in the certificate. During ex

parte prosecution, an applicant will not be heard on matters that constitute a collateral attack on the cited registration (e.g., a registrant's nonuse of the mark). See *In re Dixie Restaurants*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *Cosmetically Yours, Inc. v. Clairol Inc.*, 424 F.2d 1385, 1387, 165 USPQ 515, 517 (C.C.P.A. 1970); *In re Peebles Inc.* 23 USPQ2d 1795, 1797 n. 5 (TTAB 1992); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2014-15 (TTAB 1988).

Thus, the registrant's registration in this case is presumed to be valid as to all of the goods identified in the registration's identification of goods, including "pedicure sets." It is well-settled that our likelihood of confusion determination in an *ex parte* Section 2(d) case like this one must be based on a consideration of the goods as identified in the cited registration, regardless of what the registrant's actual goods might be shown to be (or not be). See *In re Dixie Restaurants Inc.*, *supra*.

Having resolved this evidentiary issue, we turn now to the merits of the case. Our determination under Section 2(d) is based on an analysis of all of the 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 & 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 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.*, *supra*.

We find that applicant's goods, "pedicure implement, namely foot file for removing calluses," are closely related to the "pedicure sets" identified in the cited registration. First, we note that applicant has expressly conceded that "pedicure sets may include foot file type implements." (Applicant's main brief at 7). Applicant likewise posits as "an undeniable fact" that "pedicure sets often include files such as the Applicant's." (Applicant's reply brief at 4.) These admissions are corroborated by the evidence properly made of record by the Trademark Examining Attorney (as attachments to her October 30, 2004 final refusal). This evidence includes printouts from the websites of at least four companies (Ki Wha Ind. Inc., FootSmart.com, PerfumeBay.com and Crabtree&Evelyn.com) which are marketing pedicure sets which include foot files. The Trademark Examining Attorney also has made of record two third-party registrations which demonstrate the

relationship between the respective goods. Registration No. 1515089 is for goods identified in the registration as "pedicure kits consisting of toe separators, nail clippers, foot file and nail brush." Registration No. 2805826 is for goods identified in the registration as "manicure and pedicure implements, namely, nail files, nail scissors, nail clippers, foot files, nail pushers, nail buffers, nail buffer blocks, cuticle trimmers, cuticle sticks, cuticle pumice sticks, and pedicure wands."³

This evidence establishes that applicant's goods, as identified in the application, are closely related to the "pedicure sets" identified in the cited registration. Indeed, as discussed above, applicant does not deny the inherent relationship between these goods; applicant merely argues (without avail, as discussed above) that registrant is not actually marketing pedicure sets. We find that the second *du Pont* factor weighs in favor of a finding of likelihood of confusion.

We also find that applicant's and registrant's respective goods, as identified in the application and the

³ Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

cited registration, would be marketed in the same trade channels and to the same classes of purchasers. We also find that these goods are ordinary, inexpensive consumer items which would be purchased by ordinary consumers without a great deal of care. Thus, the third and fourth *du Pont* factors also weigh in favor of a finding of likelihood of confusion.

We turn finally to the first *du Pont* factor, i.e., whether applicant's mark and the cited registered mark are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. We make this determination in accordance with the following principles.

The test, under the first *du Pont* factor, 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).

We find that the dominant feature in the commercial impression created by the cited registered mark is the word CLOVER, which is an arbitrary, strong term as applied to the goods at issue. The two dark strips at the top of the mark are merely background carrier devices. The depictions of clover designs merely refer back to the word CLOVER, and reinforce the dominance of that word in the mark. The word CLOVER appears again at the bottom of the mark, along with the generic entity designation MFG. CO. LTD. JAPAN. That entity designation has little or no source-indicating significance of its own. It merely refers back to and reinforces the significance of the word CLOVER as the dominant source-indicating feature of the mark. For these reasons, we find that CLOVER is the dominant feature of the cited registered mark, and that it is entitled to the most significance in our comparison of applicant's and registrant's marks. *See In re National Data Corp.*, *supra*.

Comparing the marks in terms of appearance, sound and connotation, we find that the marks are highly similar to the extent that they both feature the arbitrary word CLOVER. The additional elements in the cited registered mark, i.e., the clover designs and additional generic entity designation wording contribute little or nothing to the mark's commercial impression, and they do not significantly distinguish the cited registered mark from applicant's mark.

The main point of dissimilarity between the two marks is applicant's addition of the word SWEDISH, which would be perceived as modifying the word CLOVER. SWEDISH CLOVER has a somewhat different connotation, sound and appearance than has CLOVER per se. On balance, however, we find that the basic similarity between the marks which results from the presence of the arbitrary word CLOVER in both marks outweighs the dissimilarity which results from applicant's addition of the word SWEDISH. As used on the closely related goods involved in this case, SWEDISH CLOVER and CLOVER are sufficiently similar that confusion is likely to result. *See, e.g., Coca-Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (BENGAL and BENGAL LANCER (and design) found to be confusingly similar; applicant's addition of LANCER (and

design) to opposer's mark BENGAL does not eliminate likelihood of confusion). The first *du Pont* factor therefore weighs in favor of a finding of likelihood of confusion.

In summary, we find that because pedicure foot files and pedicure sets are such similar items and so closely related in the marketplace, and because CLOVER is such an arbitrary term as applied to these goods, applicant's addition of the term SWEDISH to its mark does not eliminate the likelihood of confusion. Purchasers familiar with registrant's CLOVER pedicure products are likely to assume, upon encountering applicant's SWEDISH CLOVER pedicure products in the marketplace, that they are an extension of the registrant's CLOVER line of pedicure products.

Confusion is likely, and registration of applicant's mark therefore is barred under Trademark Act Section 2(d). To the extent that any doubts might exist as to the correctness of this conclusion, we resolve such doubts against applicant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.