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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Held

Serial No. 76513338

Paul M. Denk for Robert F. Held.

Dezmona Mizelle-Howard, Trademark Examining Attorney, Law
Office 110 (Chris A. F. Pedersen, Managing Attorney).

Before Hohein, Zervas and Kuhlke, Administrative Trademark
Judges.

Opinion by Zervas, Administrative Trademark Judge:

Robert F. Held has appealed from the final refusal of
the trademark examining attorney to register CITRUS SPARKLE
(in standard character form) as a trademark for "an air
freshener that applies directly onto an air vent register"
in International Class 5.¹ Applicant has entered a
disclaimer of "CITRUS" apart from the mark as shown.

¹ Application Serial No. 76513338, filed April 28, 2003,
asserting a bona fide intention to use the mark in commerce under
Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The examining attorney has refused registration 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 previously registered mark SPARKLING CITRUS² (in standard character form) for "[c]andles" in International Class 4, and "[a]ir fresheners and deodorizers; fragrances sold as an integral component of air fresheners and deodorizers" in International Class 5, as to be likely, when used on applicant's goods, to cause confusion or mistake or to deceive. The cited registration also

On October 1, 2004, applicant - in response to the final Office action - filed a request for reconsideration including an amendment to the identification of goods from "[a]n air freshener that applies directly onto an air vent register" to "[a]ir freshener that applies directly to the intake vent of an air vent register." In her Office action mailed on November 8, 2004, the examining attorney stated that "applicant's request for reconsideration is denied," but did not specifically comment on the amendment. The Office's electronic database shows that applicant's amendment has been entered into the electronic record. In his brief, applicant identifies his goods using the original identification of goods. Similarly, the examining attorney, in her brief, identifies applicant's goods as "an air freshener that applies directly to the air vent," which is the original identification of goods without the word "register."

Because applicant has amended his identification of goods, the examining attorney has not specifically objected to the amendment and the Office's electronic database identifies the involved goods as those of the amendment, we consider the identification of goods in applicant's application as the amended identification of goods, i.e., "[a]ir freshener that applies directly to the intake vent of an air vent register." (Our decision in this case, however, would not be any different if we considered applicant's goods as the goods identified in the original identification of goods.)

² Registration No. 2754402, issued August 19, 2003.

contains a disclaimer of the exclusive right to use CITRUS apart from the mark as shown.

After the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs.³ Applicant did not request an oral hearing.

Upon careful consideration of the arguments advanced by applicant and the examining attorney, we conclude that confusion is likely.

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 Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods

³ The examining attorney has referred to certain "attachments" to her brief (at p. 7) consisting of third-party registrations showing that "applicant's goods are related to registrant's candles as well." The examining attorney did not earlier introduce such "attachments" into the record. The record in the application should be complete prior to the filing of an appeal, and the Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. See Trademark Rule 2.142(d) and TBMP § 1207.01 (2d ed. rev. 2004). Thus, because the "attachments" were not filed prior to applicant's appeal, we have not further considered the "attachments."

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.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We initially turn to the second and third *du Pont* factors, i.e., the similarities between registrant's and applicant's goods and the similarities between registrant's and applicant's trade channels and classes of purchasers of those goods. We must make our determinations under these factors based on the goods as they are recited in the application and registration, respectively. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Both party's goods are "air fresheners."⁴ Although applicant's identification of goods adds that the air fresheners are "applie[d] directly to the intake vent of an air vent register," registrant's identification of goods is not restricted in terms of the manner of use, and hence, for purposes of the likelihood of confusion analysis, encompasses air fresheners that are applied directly to the

⁴ Applicant states that "the mark of the cited registration is apparently a fragrance for an air freshener and deodorizer, such as the fragrances sold as an integral component of the air fresheners and deodorizers." (Brief at p. 4.) Applicant's characterization of registrant's identification of goods is not correct. Registrant's identification of goods includes "[a]ir fresheners and deodorizers" in addition to "fragrances sold as an integral component of air fresheners and deodorizers."

intake vent of an air vent register. Thus, the manner of use of its goods is irrelevant to our analysis. We therefore find that applicant's and registrant's goods are in part legally identical.⁵

In the absence of any limitations in the identifications, it is presumed that the goods move in the same channels of trade and are purchased by the same classes of purchasers. *Id.*

We next consider the first *du Pont* factor, i.e., the similarities of the marks. We consider whether they are similar in appearance, sound, connotation and commercial impression when compared in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691- 92 (Fed. Cir. 2005). 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

⁵ While the examining attorney also finally refused registration based on "candles" in the cited registration, we need not decide this issue in view of our finding below that confusion is likely with respect to registrant's "air fresheners."

a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Additionally, where, as in the present case, the marks would appear on virtually identical goods, the degree of similarity between the marks which is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

As applied to the goods at issue, we find that applicant's mark CITRUS SPARKLE is similar in meaning and commercial impression to the cited registered mark SPARKLING CITRUS. Both marks are four-syllable, two-word marks which contain the word CITRUS. Further, SPARKLING in registrant's mark is a variation of SPARKLE in applicant's mark, and similar in meaning. See definition of record of "sparkle" and "sparkling."⁶ Also, applicant has not

⁶ The definition in the record of "sparkle," which appears to have been taken by the examining attorney from the online version of *The American Heritage Dictionary of the English Language*, is as follows:

Sparkle, v.

sparkled, sparkling, sparkles. v. intr.

1. To give off sparks.
2. To give off or reflect flashes of light; glitter.
3. To be brilliant in performance.
4.
 - a. To shine with animation: *He has eyes that sparkle.*
 - b. To flash with wit: *Her conversation sparkled all evening.*
5. To release gas bubbles; effervesce: *Champagne sparkles.*

identified any change in meaning which results from the transposition of CITRUS and SPARKLE or SPARKLING. Viewing the marks in their entireties, and keeping in mind the imperfect recollection of purchasers, we find that the basic similarity between the marks which results from the presence in both marks of the identical word CITRUS and the words SPARKLE and SPARKLING, which are similar in meaning and appearance, outweighs the slight dissimilarity between the marks which results from the transposition of CITRUS and SPARKLE or SPARKLING and the difference in form of SPARKLE and SPARKLING. See *In re Wine Society of America Inc.*, 12 USPQ2d 1139 (TTAB 1989); and *In re Nationwide Industries Inc.*, 6 USPQ2d 1882 (TTAB 1988) (RUST BUSTER, with "RUST" disclaimed, for rust-penetrating spray lubricant held likely to be confused with BUST RUST for penetrating oil).⁷

v. tr. To cause to flash and glitter: *Sunlight was sparkling the waves.*

n.

1. A small spark or gleaming particle.
2. A glittering quality.
3. Brilliant animation; vivacity.
4. Emission of gas bubbles; effervescence.

⁷ Although, in certain cases, the transposition of the terms in a mark can change the overall commercial impression of the mark sufficiently to avoid a finding of confusing similarity, we cannot conclude that this is such a case.

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Applicant has noted the disclaimers of CITRUS in both applicant's application and registrant's registration.

Applicant states:

[B]oth required the disclaimer of the term CITRUS. This leaves the only significant portion of the two marks, the words SPARKLE, and SPARKLING. It is believed, when these marks are reviewed, and with their disclaimed aspects, that these are relatively weak trademarks.

We do not agree with applicant that "the only significant portion of the two marks" are SPARKLE and SPARKLING. In determining likelihood of confusion, we must consider the marks as a whole, and not just the non-disclaimed portions of a mark. Also, even if the marks are "relatively weak trademarks," this does not automatically mean that confusion is not likely. Even weak marks are entitled to protection against the registration of a similar mark for essentially identical goods. See *Plus Products v.*

Pharmavite Pharmaceutical Corp., 221 USPQ 256 (TTAB 1984). See also *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974) (likelihood of confusion is to be avoided as much between weak marks as between strong marks).

In view of the foregoing, we conclude that applicant's mark CITRUS SPARKLE for "an air freshener that applies directly onto an air vent register" is likely to cause

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source confusion among purchasers with the registered mark SPARKLING CITRUS for "[a]ir fresheners and deodorizers; fragrances sold as an integral component of air fresheners and deodorizers."

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.⁸

⁸ If this case is appealed and our decision herein is reversed, the application will be returned to the examining attorney for consideration of the amendment to the identification of goods.