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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Lifespan Enterprises, Inc.

Serial No. 76627870

Mark Levy of Mark Levy & Associates for Lifespan
Enterprises, Inc.

Tina Brown, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Hairston, Bergsman, and Ritchie de Larena,
Administrative Trademark Judges.

Opinion by Ritchie de Larena, Administrative Trademark
Judge:

Lifespan Enterprises, Inc. filed an application to
register the mark LIFESPAN, in standard character format,
for "printed matter, namely, magazines featuring lifestyle
information and resources for people age 50 and over," in
International Class 16.¹

¹ Application Serial No. 76627870, filed January 10, 2005,
pursuant to Section 1(a) of the Trademark Act, 15 USC §1051(a),
claiming October 2004 as its dates of first use anywhere and
first use in commerce.

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark LIFESPAN, when used in connection with the identified goods, so resembles the registered mark LIFESPAN, in typed drawing format, when used in connection with "paper goods and printed matter, namely, pamphlets, booklets, magazines and informational literature directed to applicant's consumers concerning applicant's activities in the fields of medicine and health," as to be likely to cause confusion.²

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs. For the reasons discussed herein, the Board affirms the final refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In a

² Registration No. 2296218, issued November 30, 1999. Registrant claimed 1983 as its date of first use anywhere and first use in commerce. Sections 8 and 15 declarations accepted and acknowledged.

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likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The 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”). We consider each of the factors as to which applicant or the examining attorney presented arguments or evidence.

The similarity or dissimilarity of the marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In this case, the marks are identical. Therefore, the appearance, sound, connotation and commercial impression are the same.

Applicant presented the following dictionary definition of “Lifespan”: 1. A lifetime; 2. The average or maximum length of time an organism, material, or object can be expected to survive or last.”³ Applicant argues that by

³ American Heritage Dictionary, 4th Ed. (2000).

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this definition, registrant's LIFESPAN mark is "highly suggestive" and entitled to only a narrow scope of protection. In support of its argument, Applicant submitted copies of the following three registrations that also contain the term "Lifespan":

<u>MARK</u>	<u>REGISTRATION NO.</u>	<u>GOODS/SERVICES</u>
LIFESPAN TEA	2,999,514	Red tea
LIFESPAN BIOSCIENCES	2,616,138	Scientific research . . . in protein and gene discovery . . .
REGIONS LIFESPAN ACCOUNTS	2,005,285	Banking services . . .

However, none of these third-party registrations are for goods related to those provided by either applicant or registrant. Furthermore, even if the evidence showed registrant's LIFESPAN mark to be weak, registrant is still entitled to the benefits of Section 7(b) of the Trademark Act, 15 U.S.C. §1057(b) (a registration is *prima facie* evidence of the validity of the registered mark and of the registrant's exclusive right to use the mark in commerce).

Accordingly, registrant is entitled to protection from likelihood of confusion induced by third party registration or use. See *Giant Food Inc. v. Roos and Mastacco, Inc.*,

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218 USPQ 521 (TTAB 1982) (even owner of weak mark is entitled to protection from likelihood of confusion). In view of the foregoing, the Board finds that the first *du Pont* factor weighs heavily in favor of finding that there is a likelihood of consumer confusion.

Similarity of the Goods

Applicant is seeking registration of its mark for magazines directed to people age 50 and over. The cited registration covers various printed matter, including magazines in the field of medicine and health. Applicant argues that the focus of its magazines is "quite different" from what is or may be covered by the magazines identified by registrant's mark. In particular, applicant notes that the magazines identified by registrant's mark are in "the fields of medicine and health." Applicant's mark, on the other hand, is specific to magazines "featuring lifestyle information and resources for people age 50 and over."

However, the examining attorney offered evidence that the magazines sold by applicant are likely to overlap with those of registrant. In particular, the examining attorney introduced evidence of third party magazines and other printed publications that feature sections and subheadings for "lifestyle" -- a key subject matter in applicant's magazines -- alongside those for "health" -- a key subject

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matter in registrant's magazines. This indicates that information on "lifestyle" and on "health" may be the subject of the same magazines.

We find the evidence offered by the examining attorney to be probative of the high degree of similarity between the goods offered by applicant and registrant. The use of identical marks, as in this case, on goods that are highly similar or identical, will likely lead consumers to the assumption that there is a common source. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). Furthermore, we find that applicant's description overlaps with registrant's, and presents merely a subcategory of registrant's goods. Certainly, registrant is not limited in any way by its registration from targeting its content or its distribution to the health of consumers over age 50, or ways in which that may impact the consumers' "lifestyle." In view of the foregoing, the second *du Pont* factor weighs in favor of finding a likelihood of consumer confusion.

Channels of Trade and Classes of Consumers

With respect to channels of trade and classes of purchasers, applicant argues that the respective goods travel through different channels of trade. In particular, applicant argues that registrant's goods "will likely be

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sold to health professionals," whereas applicant's goods "are sold to the general public." (Brief at 5).

Additionally, applicant contends that registrant's goods are not directed to people age 50 and over. However, in the absence of specific limitations in the application and the cited registration, we must presume that applicant's and registrant's goods will travel in all normal and usual channels of trade and methods of distribution and be sold to all classes of consumers. *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983).

In other words, we cannot draw the distinctions urged by applicant, and we must presume that applicant's magazines will be sold to the general public age 50 and over. Additionally, we must presume that registrant's printed publications will be sold to the general public age 50 and over. Thus, for purposes of our likelihood of confusion analysis, the trade channels and classes of purchasers are deemed to be, at the very least, overlapping.

Further, applicant argues that customers of both applicant's and registrant's goods are sophisticated. However, there is no evidence that purchasers of the types of magazines and printed publications involved herein are sophisticated. Moreover, even a sophisticated consumer

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is not immune from source confusion. Since the marks are identical, even a careful, sophisticated consumer is not likely to note minor differences, if any, in the content or target audience. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948-949 (Fed. Cir. 2000).

In view of the foregoing, the third and fourth *du Pont* factors weigh in favor of finding that there is a likelihood of consumer confusion.

Balancing the Factors

Considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that a likelihood of confusion exists because the marks are exactly identical, they are used on highly similar and even overlapping goods, they are likely to be sold through the same channels, and they are likely to target the same consumers.

Decision: The refusal to register is affirmed.