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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Critter Control, Inc.

Serial No. 76638760

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Critter Control, Inc.

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Office 116 (Michael W. Baird, Managing Attorney).

Before Hairston, Walsh and Bergsman, Administrative
Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

Critter Control, Inc. (applicant) has applied to
register the mark CRITTER CARDS in standard characters on
the Supplemental Register for services identified as
"providing greeting cards to be sent to others via a global
electronic network" in International Class 45.¹ Applicant
has disclaimed "CARDS." The Examining Attorney has finally

¹ Application Serial No. 76638760, filed May 17, 2005, claiming
first use of the mark anywhere and first use of the mark in
commerce on November 30, 2004, in an amendment to allege use.

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refused registration under Trademark Act Section 2(d), 15 U.S.C. 1052(d), based on a likelihood of confusion with Registration No. 2612850 for the mark shown below on the Principal Register for goods identified as "greeting cards" in International Class 16.



The registration issued on August 27, 2002, and is active. The registration claims both first use of the mark anywhere and first use of the mark in commerce in January 1999. Applicant has appealed. Applicant and the Examining Attorney have filed briefs. We affirm.

Section 2(d) of the Trademark Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion ..." 15 U.S.C. § 1052(d). In *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977), the Court set forth the factors to consider in determining likelihood of confusion. Here, as is often the case, the crucial factors are the

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similarity of the marks and the similarity of the goods and services of applicant and the registrant. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and services] and differences in the marks."). Below we will consider each of the factors as to which applicant or the Examining Attorney have presented arguments or evidence.

The goods and services of applicant and the registrant need not be identical to find a likelihood of confusion under Trademark Act Section 2(d). They need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods and services originate from the same source. *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). See also *On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000).

Furthermore, in comparing the goods and services we must consider the goods and services as identified in the application and cited registration. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is

legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods [and services] set forth in the application [and registration] regardless of what the record may reveal as to the particular nature of an applicant's goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed."). See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.").

Applicant identifies its services as "providing greeting cards to be sent to others via a global electronic network"; the goods identified in the cited registration are "greeting cards." In its brief applicant argues that its services are "an electronic transmission of a message which contains pictures of animals." Applicant's Brief at unnumbered page 4. Applicant notes that the cited registration covers paper greeting cards and asserts that the goods and services thus differ. Applicant also asserts that it "... has a very unique trade channel." *Id.* Applicant explains that it offers its services only online through its website. On the other hand, the Examining

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Attorney states, "The fact that the applicant provides electronic greeting cards whereas the registrant provides printed greeting cards is insignificant."

We concur with the Examining Attorney without hesitation. The goods and services in this case are closely related. A greeting card is a greeting card whether it is in printed or electronic form. Applicant's characterization of its service as merely a "message" is inconsistent not only with its identification in the application, but also with its specimen where the "message" is explicitly identified as a "greeting card." Applicant's service serves the same purpose and is directed to the same class of purchasers as applicant's goods. The Examining Attorney has provided evidence showing that the goods and services are related.

First, the Examining Attorney has provided copies of several use-based, third-party registrations for marks covering both printed and electronic greeting cards, for example, Registration Nos. 2454901, 2489619, 2587936 and 3159387. See Attachments to Final Refusal. These registrations serve to suggest that the services in the application and the goods in the cited registration are the types of goods and services which may emanate from the same source. *In re TSI Brands Inc.*, 67 USPQ2d 1657, 1659 (TTAB

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2002); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). The Examining Attorney has also provided evidence from the Internet showing that the same party offers both printed and electronic greeting cards. See, for example, a copy of pages from americangreetings.com and hallmark.com. *Id.* This evidence flatly contradicts applicant's assertions that the goods and services differ substantially and that the trade channels are distinct.

Accordingly, we conclude that applicant's services and the goods identified in the cited registration are closely related and that the channels of trade for those goods and services are also closely related. Moreover, because the goods and services are so closely related, and because there are no restrictions as to the classes of purchasers in the descriptions of goods and services, we find that the classes of purchasers are the same.

We now turn to the marks. In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). While we must consider the marks in their entireties, it is entirely appropriate to accord greater importance to the

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more distinctive elements in the marks. As the Court of Appeals for the Federal Circuit observed, "... in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety. Indeed, this type of analysis appears to be unavoidable." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Also, "... it is well established that the test to be applied in determining likelihood of confusion is not whether marks are distinguishable on the basis of a side-by-side comparison but rather whether they so resemble one another as to be likely to cause confusion, and this necessarily requires us to consider the fallibility of memory over a period of time. That is to say, the emphasis must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks." *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975) (internal citations omitted). *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975) (internal citations omitted).

With regard to the marks, applicant states, "The Applicant respectfully submits that the use of 'Critter Cards' is only a minor and relatively insignificant portion of the cited registration. The mark is dominated by the picture of the raccoon's head." Applicant's Brief at unnumbered page 3. Applicant also argues that the additional wording in the registered mark distinguishes the marks. Applicant thus argues that the marks are not similar. The Examining Attorney argues that the marks are similar in spite of the presence of the design and additional wording in the cited mark because CRITTER CARDS still projects a distinct commercial impression within the registered mark.

We concur with the Examining Attorney and conclude that the marks, when viewed in their entirety, are similar.

First, with regard to the design element in the cited mark, the Board generally holds that when marks have both literal and design elements, the literal elements are more significant because purchasers use the literal elements in identifying and requesting the goods or services. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983). In this case,

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however, the design element is clearly a significant part of the mark as evidenced by the size of the raccoon design in comparison to the words. Nevertheless, we believe that consumers will still use the term "CritterCards" to refer to the registrant's greeting cards.

Next, with regard to the respective literal elements, while there are specific differences between the literal elements in the marks, in particular, the inclusion of the additional phrase PIXELS 'N' PAGES in the cited mark, the differences are not sufficient to distinguish the marks. Each of the two phrases in the cited mark conveys a distinct connotation and creates a separate commercial impression. PIXELS 'N' PAGES appears on a separate line from CRITTER CARDS. In addition, each of the phrases projects a distinct meaning. The phrases are not connected in a way which would in any way alter the meaning, connotation or commercial impression of CRITTER CARDS. Neither dominates the other; each can serve independently as a source indicator.

In the case of applicant's mark, there is no other element which would distinguish applicant's mark from CRITTER CARDS as used in the cited registered mark. Thus, a potential purchaser encountering applicant's mark is likely to associate applicant's mark, CRITTER CARDS, with

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the cited mark, which also includes CRITTER CARDS as a distinct element. This is particularly likely when, as here, the marks are used on closely related goods and services.

Therefore, we conclude that the marks, when viewed in their entireties, are similar in connotation and commercial impression. Furthermore, the differences in appearance and sound are less significant than these similarities. Consequently, we conclude that the marks are similar overall.

Finally, based on all evidence of record in this case related to the *du Pont* factors, we conclude that there is a likelihood of confusion between applicant's CRITTER CARDS mark when used in connection with "providing greeting cards to be sent to others via a global electronic network" and the cited PIXELS 'N' PAGES CRITTER CARDS and Design mark when used in connection with "greeting cards."

Decision: We affirm the refusal to register under Trademark Act Section 2(d).