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THE TTAB

Hearing: August 14, 2008

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cargo Cosmetics Corp.

Serial No. 77002927

Donald L. Dennison of Dennison, Schultz, & Macdonald for Cargo Cosmetics Corp.

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Before Holtzman, Zervas and Walsh, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Cargo Cosmetics Corp. (applicant) to register the mark PURSEGLOSS, in standard character form, for goods ultimately identified as "lipstick, lip gloss, and lip balm" in Class 3.¹

¹ Application Serial No. 77002927 was filed on September 20, 2006, based on an allegation of a bona fide intention to use the mark in commerce.

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the registered mark PURSE POWDER ("Powder" disclaimed) in standard characters for "cosmetic face powder" in Class 3, as to be likely to cause confusion.²

When the refusal was made final, applicant appealed. Briefs have been filed. An oral hearing was held.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to a comparison of applicant's goods, lipstick, lip gloss and lip balm, with registrant's goods, cosmetic face powder. Applicant states, in its brief (p. 4), that it "does not contest the fact that the goods of the parties are similar and would move in the same trade channels."

² Registration No. 2926383, issued February 15, 2005.

Indeed, we find that the goods, by their nature, are closely related cosmetic products that would be sold in the same channels of trade to the same classes of purchasers, including ordinary consumers. In addition, the examining attorney has submitted a number of third-party registrations showing, in each instance, that the same mark has been registered for both applicant's and registrant's products. These third-party registrations, while not evidence of use of the marks therein, tend to show that purchasers would expect the types of products offered by applicant and registrant, if sold under similar marks, to emanate from the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988).

We turn then to a comparison of applicant's mark PURSEGLOSS and registrant's mark PURSE POWDER in their entireties in terms of sound, appearance, meaning and commercial impression. See *du Pont*, supra. See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

In comparing the marks we must consider that the test under this 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 impressions that confusion as to the source of the goods offered under the respective marks is likely to result.

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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).

In addition, while marks must be compared in their entireties, "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 entireties. 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).

Applying the above principles in this case, when we compare applicant's mark PURSEGLOSS and registrant's mark PURSE POWDER in their entireties, giving appropriate weight to the features thereof, we find that the marks are similar in sound, appearance, meaning and overall commercial impression, and that the similarities between the marks far outweigh their differences.

The shared word PURSE, a term which although perhaps suggestive of the goods, is nonetheless aurally and visually the most significant part of both marks. It is the first word in each mark and, moreover, it is the only nondescriptive portion of the marks. See *In re National Data Corp.*, supra at 751 ("That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for

giving less weight to a portion of a mark"). See also *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (noting the importance of the first part of a mark as "most likely to be impressed upon the mind of a purchaser and remembered."). The identical and significant first word PURSE is followed in both marks by the generic name of a cosmetic product. As a result, the two marks as a whole have a visually similar structure and a similar overall sound.

The word PURSE is also significant in conveying the meaning of the marks and their overall commercial impression. The words GLOSS and POWDER have different, but related meanings, and when PURSEGLOSS and PURSE POWDER are viewed as a whole and in the context of the goods, the two marks suggest the very same thing - cosmetics to carry in a purse. Purchasers are likely to assume that PURSEGLOSS identifies another cosmetic product from registrant rather identifying a different source for the product.

Contrary to applicant's contention, it is not significant that applicant's mark, unlike registrant's mark, is presented as a single term. The presence or absence of a space between the two words does nothing to distinguish one mark from the other. Applicant's mark may be considered "unitary" for disclaimer purposes, but the compression of the words does not change the meaning of the words or the commercial impression the mark as a whole conveys. The word GLOSS still retains its generic meaning

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in relation to the goods. See, e.g., *In re Cox Enterprises Inc.*, 82 USPQ2d 1040, 1043 (TTAB 2007) ("Without the space, THEATL is equivalent in sound, meaning and impression to THE ATL and is equally descriptive of applicant's goods.") Keeping in mind that the comparison of the marks is not made on a side-by-side basis and that recall of purchasers is often hazy and imperfect, this is an insignificant detail that is not likely to be noticed or remembered by consumers when seeing these marks at separate times on closely related goods. See, e.g., *Seaguard Corp. v. Seaward International, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are "essentially identical").

Applicant argues that the word PURSE is highly suggestive of women's cosmetics products "which are usually carried by the consumer in her purse."³ To support this contention, applicant has submitted printouts of Registration No. 2833364 for the mark PURSE YOUR LIPS for lip gloss; and Serial No. 78912940 for the mark CURSE OF THE PURSE for lip gloss.⁴ Applicant also argues, based on this evidence, that neither the cited registration nor the third-party registration was cited against the third-party

³ We construe applicant's additional contention that the registered mark is "descriptive" as an argument that the mark is weak, and not as an impermissible collateral on the registration.

⁴ This evidence is untimely having been submitted for the first time with applicant's brief. Trademark Rule 2.142(d). However, because the examining attorney has not objected to the evidence and, moreover, has considered it on the merits, the evidence is considered as properly of record.

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application; and that the PURSE YOUR LIPS registration was never cited against PURSE POWDER. According to applicant, this is evidence that the examining attorneys did not consider that the marks would be likely to cause confusion, despite the common presence of the word PURSE.

Applicant's arguments are not well taken. The fact that none of those marks were cited against each other is irrelevant, but in any event not surprising, as each mark creates a different commercial impression from the other. Furthermore, neither of the third-party marks is as similar to the cited mark as applicant's mark.

We recognize that PURSE has a suggestive meaning in relation to cosmetics. However, as we have stated, that suggestive meaning is the same in both marks. Furthermore, contrary to applicant's contention, the evidence fails to establish that registrant's mark is highly suggestive or weak in relation to these goods.

To begin with, pending applications are of no probative value other than as evidence that they were filed on a certain date. Moreover, the existence of one third-party registration containing the word PURSE is not sufficient to show that the term has been commonly registered for its suggestive meaning in relation to cosmetics, or that the public is so familiar with marks containing the word PURSE for cosmetics that they will rely

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on other portions of the marks to distinguish them. In any event, we certainly cannot find, based on this evidence, that the scope of protection accorded registrant's mark should not extend to applicant's highly similar mark for closely related goods.

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