

**THIS OPINION  
IS NOT A PRECEDENT  
OF THE TTAB**

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Cybex International, Inc.

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Serial No. 77051068

Mark J. Sever, Jr. and John F. Letchford of Archer &  
Greiner for Cybex International, Inc.

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

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Before Grendel, Taylor and Mermelstein, Administrative  
Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Cybex International, Inc.<sup>1</sup> has filed an application to  
register on the Principal Register the mark LEGACY (in  
standard character format) for goods ultimately identified  
as "treadmills" in Class 28.<sup>2</sup>

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<sup>1</sup> Cybex International, Inc. (Cybex) referred to itself  
throughout the brief as "Appellant." For consistency of  
discussion, we will refer to Cybex as "applicant" unless we are  
directly quoting material from the brief.

<sup>2</sup> Serial No. 77051068 filed on November 27, 2006, and based on  
an allegation of a bona fide intention to use the mark in  
commerce on the identified goods.

The examining attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark is likely to be confused with the registered mark LEGACY REFORMER (in standard character format) for "physical therapy equipment, namely, floor supported platforms having [a] movable portion intended for exercise and treatment [of] all muscles of the body" in Class 10 and "manually operated exercise equipment, namely, floor supported platforms having [a] movable portion intended for exercise and treatment [of] all muscles of the body" in Class 28.<sup>3</sup>

After the refusal was made final, applicant appealed. Both applicant and the examining attorney filed briefs. We affirm the refusal to register.

As a preliminary matter, we note that both applicant and the examining attorney have attached to their respective appeal briefs evidentiary materials that were not made of record during the prosecution of the application.<sup>4</sup> These submissions are untimely. 37 C.F.R. § 2.142(d) provides, in part, that "[t]he record in the application should be complete prior to the filing of an

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<sup>3</sup> Registration No. 2928009, registered February 22, 2005.

<sup>4</sup> In addition, applicant's submission included materials that had been previously made of record during prosecution of the application, and need not have been resubmitted.

appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed." Accordingly, these materials have not been considered in reaching our decision herein.<sup>5</sup>

Our determination of the issue of likelihood of confusion is based on an analysis of all 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 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).

We consider first the similarity of the marks. In determining the similarity or dissimilarity of marks, we must consider the marks in their entireties in terms of sound, appearance, meaning and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test under

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<sup>5</sup> We hasten to add that even if we had considered them, the decision would be the same.

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. 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).

Applicant maintains that the marks are dissimilar when viewed in their entireties. Applicant particularly argues that:

Appellant's application is for the single-word mark "LEGACY." As such, it has no "dominant" portion. In contrast, in the two-word registration "LEGACY REFORMER" cited against Appellant's mark, there clearly is a dominant portion and that portion is the term "REFORMER." This is so because ... the term "reformer" has essentially become synonymous with a multi-station exercise machine for performing Pilates exercises. That is, when a consumer of such goods is confronted with the term "reformer," he or she would naturally think of Pilates multi-station exercise machines. As a practical matter, therefore, the term "LEGACY" [sic] (or any other modifier term, for that matter) would assume a secondary significance to the term "reformer."

(Brief, p. 8). As support for its position that the term "reformer" is synonymous with a multi-station exercise machine, applicant has made of record copies of web pages from the website [www.pilates.com](http://www.pilates.com) (allegedly owned by registrant) showing that, in addition to the LEGACY REFORMER, other "reformers," for example, the Pilates Studio Reformer, the Allegro Pilates Reformer, the Clinical Reformer, the IQ Reformer, the Allegro Sport Reformer and the Fletcher Reformer are available. One such page reads, in part: "Select the Pilates Reformers that are right for you." Applicant also made of record results from a search of the Google<sup>®</sup> search engine for the phrase "pilates reformer." The results show for example, at the web site [www.peakpilates.com/store/](http://www.peakpilates.com/store/), one can obtain the Classic Reformer with Leather. It is described as follows:

A great reformer for the purist. Super-strong with a timeless look and flawless function. Critical dimensions combine with exacting design specifications result in superior performance and a more effective workout.

The examining attorney argues, by contrast, that the marks are, on the whole, similar in appearance, sound, meaning and commercial impression. She particularly argues that applicant's mark and the registered mark are identical, in part, except for the absence of REFORMER from

applicant's mark; and that "if 'reformer' is approaching the status of a generic term, as applicant states, then REFORMER would be even less significant when seen in connection with LEGACY." (Brief, p. 4).

It is a well-established principle that in articulating reasons for reaching a conclusion on the issue of likelihood 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 entireties. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

We find in this case, that the dominant and distinguishing portion of the registered mark LEGACY REFORMER is the term "LEGACY," and not REFORMER as applicant contends. It is dominant because it has no apparent meaning for exercise equipment, such as registrant's exercise platforms, and is the first term in registrant's mark. See Presto Products Inc. v. Nice-Pak Products, Inc., 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005)

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("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label). Moreover, as the record demonstrates, the term "reformer" appears to be rather suggestive of registrant's floor supported exercise platforms and, as such, is entitled to less weight in our determination of the source-indicating significance of the mark.

Applicant's applied-for mark LEGACY is identical to the dominant portion of registrant's mark. Thus, while not present in applicant's mark, the somewhat suggestive term REFORMER does not significantly distinguish applicant's and registrant's marks. See *In re Dixie Restaurants*, 105 F.3d at 1407, 41 USPQ2d at 1533-34.

Accordingly, and while differences admittedly exist between the respective marks when viewed on the basis of a side-by side comparison, we find that in their entireties, the marks are not only substantially similar in appearance due to the shared term LEGACY but, in light thereof, they are substantially similar in connotation and convey a substantially similar commercial impression. The factor of the similarity of the marks thus favors a finding of likelihood of confusion.

We now turn to a consideration of the goods identified in the application and the cited registration. Applicant, citing *Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384 (2d Cir. 1995); *Fisons Horticulture, Inc. v. Vigoro Indus.*, 30 F.3d 466, 472 (3d Cir. 1994); and *du Pont*, 476 F.2d at 1362, contends that "[t]he requirement that goods or services be in competition is especially well entrenched in trademark law." (Brief, p. 8). While this may be true in certain situations, the cases cited by applicant in support of this position can be distinguished. *Arrow Faster* and *Fisons Horticulture* were infringement actions. In *du Pont*, unlike this case, the applicant and registrant agreed to restrict themselves to different markets, i.e., the general purpose cleaning market (registrant) and the automobile market (du Pont). Because each party could be sued for breach of the agreement, the Court found the fact that the goods of one party "could be used" in the field of the other too conjectural given that they had agreed to avoid such cross-use.

It is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490,

1 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ 2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that the goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which would give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. In re *Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and the cases cited therein.

The examining attorney argues that the goods are related. To support her position, the examining attorney made of record with her final office action copies of third-party registrations to show that various trademark owners provide both treadmills and exercise platforms.<sup>6</sup> The

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<sup>6</sup> The examining attorney also submitted a copy of an application and an additional registration. The third-party application has no probative value because applications are evidence only that an application has been filed. See *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463 (TTAB 2003). The registration likewise is of no probative value because it does not cover both treadmills and exercise platforms.

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third-party registrations may serve to suggest that the types of goods involved herein are related. See *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source"). See also *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

These registrations include:

Registration No. 2640887 for, *inter alia*, "treadmills" and power stands, namely, exercise platforms, abdominal benches and dumbbell racks;

Registration No. 2803335 for "treadmills" and "exercise platforms";

Registration No. 3030425 for *inter alia* "exercise treadmills" and "exercise platforms"; and

Registration No. 3124926 for, *inter alia*, "exercise platforms" and "treadmills."

Based on the evidence of record, we find the third-party registrations are sufficient to demonstrate that applicant's treadmills and registrant's floor supported platforms having a movable portion intended for exercise

and treatment of all muscles of the body are related fitness equipment.

Applicant argues that the goods are dissimilar because "it is using its mark LEGACY solely in connection with treadmills ... [which] exercise only a user's legs, not 'all muscles of the body' as specified by the descriptions of goods set forth in the 'LEGACY REFORMER' registrations...." (emphasis in original) (Brief, p. 9). Further, applicant, by its arguments, seems to suggest that registrant's goods are limited to Pilates use.

We find these arguments unavailing. Simply because registrant's exercise platforms are more versatile than applicant's treadmills, in that they exercise additional parts of the body, does not alter the fact that both applicant's and registrant's goods perform the same function, i.e., they exercise the body. Moreover, it is common knowledge that walking and running, exercises routinely performed on a treadmill, have significant cardiovascular benefits.

In addition, an applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence. In re Bercut-Vandervoort & Co., 229 USPQ 763, 764 (TTAB 1986). Because the goods in the cited registration are not limited as to intended use, we may not

presume that they are sold only for use with Pilates exercises. Similarly, because the identifications of goods in the application and the cited registration are not restricted as to channels of trade or classes of purchasers, we must presume that both applicant's treadmills and registrant's exercise platforms will be offered in the same channels of trade, such as general merchandise stores, fitness equipment centers and via the Internet, and will be offered to the same consumers, namely ordinary purchasers, seeking exercise equipment. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

In view thereof, the *du Pont* factors of the similarity of the goods, channels of trade and classes of purchasers strongly favor a finding of likelihood of confusion as to the cited registration.

Finally, with respect to the conditions of sale, applicant argues that:

The treadmills offered by Appellant under the "LEGACY" mark and the multi-station "REFORMER" exercise machines (including the "LEGACY REFORMER" and other "reformers") sold by BBI [registrant] and others cost many hundreds to several thousands of dollars. ... Consequently, purchases of these products are surely not "impulse buys." It is respectfully submitted that consumers of such products are sophisticated and would not lightly undertake a purchase of such magnitude. That is to say, consumers contemplating the purchase of such costly

equipment would be fully aware of not only the type of equipment that they are buying but also the source of the equipment before a purchase is made.

We find this argument unpersuasive. The record is devoid of any information regarding the pricing of either applicant's treadmills or registrant's floor supported platforms for exercise and treatment of the muscles. In the absence of such limitations to the identification of goods, we must presume that applicant's treadmills and applicant's exercise platforms are available in a range of prices, including lesser expensive models that would be attractive to ordinary consumers looking to purchase a piece of exercise equipment for home use. However, even assuming that purchasers of applicant's treadmills and registrant's exercise platforms may need to exercise a degree of care or thought in choosing such goods, even careful purchasers of goods can be confused as to source under circumstances where substantially similar marks are used on substantially related goods. See *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers ... are not infallible.").

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In view of the foregoing, we conclude that prospective purchasers familiar with the registered mark LEGACY REFORMER for floor supported platforms having movable portion intended for exercise and treatment [of] all muscles of the body would be likely to believe, upon encountering applicant's substantially similar mark LEGACY for treadmills, that such goods emanate from, or are sponsored by or affiliated with the same source.

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