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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Church & Dwight Co., Inc.¹

Serial No. 78434777

Salvador K. Karottki of Goldberg, Kohn, Bell, Black,
Rosenbloom & Moritz, Ltd. for Church & Dwight Co., Inc.

John Dwyer, Trademark Examining Attorney, Law Office 116
(Michael W. Baird, Managing Attorney).

Before Hohein, Grendel and Cataldo,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

An application was originally filed by Orange Glo International, Inc., and subsequently assigned to Church & Dwight Co., Inc. (as noted below), to register on the Principal Register the mark MORNING MIST in standard character form for the following goods, as amended:

¹ An assignment of the application involved herein from the original applicant, Orange Glo International, Inc., to Church & Dwight Co., Inc. was recorded with the Assignment Branch of the United States Patent and Trademark Office on August 16, 2006 at Reel 3371/Frame 0093.

"laundry and household bleach for household use, laundry detergent for household use" in International Class 3.²

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as intended to be used on or in connection with its goods, so resembles the mark MORNING MIST, previously registered on the Principal Register in typed form for "all purpose disinfectant for institutional and industrial use" in International Class 5,³ as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs on the issue under appeal, and applicant filed a reply brief.

Applicant asserts that registrant's identification of goods clearly indicates that its goods are for institutional and industrial use; and that, by contrast, the goods identified under applicant's mark are intended for household use. Applicant further asserts that registrant markets its goods to institutions and industries solely through distributors; and that applicant, on the

² Application Serial No. 78434777 was filed June 14, 2004, based on applicant's assertion of its bona fide intent to use the mark in commerce.

³ Registration No. 2392849 issued October 10, 2000; Section 8 affidavit accepted, Section 15 affidavit acknowledged.

other hand, markets its goods to household consumers through retail points of sale. Applicant argues that, as a result of the trade channel limitations specified in the identification of goods in both the involved application and cited registration, applicant and registrant should be afforded limited rights in their marks; that the respective goods of applicant and registrant are marketed in mutually exclusive channels of trade to different consumers; and that there is very little likelihood that purchasers would encounter both marks. Applicant nonetheless concedes that a small number of janitorial professionals are likely to purchase both applicant's and registrant's products in their separate channels of trade; that, however, such consumers represent a very small percentage of household or retail consumers; and that such consumers are not likely to be confused as to the source of those goods given the degree of care and sophistication of that class of purchasers with regard thereto. In support of its arguments in favor of registration, applicant submits a portion of the file history of application Serial No. 75643025, which matured into the cited registration.⁴

⁴ We note that applicant submitted a copy of this material with its main brief on the case. As provided in Trademark Rule 2.142(d), evidence submitted for the first time as an attachment to a brief is untimely. In this case, however, applicant previously made this material of record as an exhibit to its

The examining attorney argues that registrant's mark MORNING MIST is a coined term; that MORNING MIST thus is a strong mark and should be afforded a broad scope of protection; that applicant's proposed mark is identical to the registered mark, MORNING MIST; and that because both marks appear in standard character form, they may be displayed in a manner that is identical with regard to font, lettering, style and color. The examining attorney further argues that applicant's goods may emanate from the same source as those of registrant; that registrant's disinfectants may be used in conjunction with applicant's laundry detergent and bleach; that household bleach is considered an all-purpose disinfectant; and that, as a result, applicant's goods are related to those of registrant. The examining attorney argues in addition that household consumers of applicant's goods who seek to use commercial strength products may also purchase registrant's goods; that the goods as identified in the involved application and cited registration are not limited as to channels of trade or method of sale; and that applicant's goods thus may move in the same trade channels as those of

February 13, 2006 request for reconsideration of the examining attorney's August 12, 2005 final Office action. Accordingly, the material submitted with applicant's brief merely serves as a courtesy copy of evidence timely made of record, and we have considered this material in our determination herein.

registrant. Finally, the examining attorney argues that applicant has introduced no evidence to support its argument regarding the sophistication of relevant consumers of the identified goods; and that even sophisticated consumers are not immune from source confusion. In support of his arguments in favor of refusal, the examining attorney has made of record third-party registrations and materials obtained from the Google Internet search engine.

Applicant argues in reply that both applicant and registrant expressly amended their identifications of goods to specify mutually exclusive target markets; that applicant's target market is household users while that of registrant is institutional and industrial users; and that the record does not support a finding that applicant's goods will move in the same trade channels as those of registrant.

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, 567 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (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 and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 27 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

We first consider the similarity of the marks. We begin by noting that applicant does not argue that its mark is dissimilar from that of registrant. In fact, we note that applicant's mark is identical to the cited mark, MORNING MIST, in appearance, spelling and sound. Further, applicant has applied for its mark in standard character form. Registrant's mark is presented in typed form, which is the term formerly used by the United States Patent and Trademark Office to identify marks appearing in standard character form. See TMEP §807.03. Marks appearing in typed or standard character form may be displayed in any reasonable stylization, font, color and size. See *Phillips Petroleum Co. v. C. J. Webb, Inc.*, 442 F.2d 1376, 170 USPQ 35 (CCPA 1971) [a mark in typed or standard character form is not limited to the depiction thereof in any special form]; *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585 (TTAB 1992) ["[a]s the *Phillips Petroleum* case makes clear, when [an] applicant seeks [or a registrant has] a typed or block letter registration of its word mark, then the Board

must consider all reasonable manners in which ... [the word mark] could be depicted"]; and TMEP §807.03 Thus, applicant's mark may be displayed in a stylized manner that is identical to a stylization adopted by registrant. In sum, the marks are identical in all respects. Use of identical marks is a fact which "weighs heavily against applicant." See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 165, 223 USPQ 1289 (Fed. Cir. 1984); and *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993). We further note that applicant fails to present either arguments or evidence to rebut the examining attorney's position that the mark MORNING MIST is a strong mark as applied to the recited goods. On the facts before us, and in the absence of any evidence to the contrary, we agree with the examining attorney that MORNING MIST is a strong mark, and as such is entitled to a broad scope of protection.

We next turn to a consideration of the goods. We note, at the outset of considering this *du Pont* factor, that the greater the degree of similarity between applicant's mark and the cited registered mark, the lesser the degree of similarity between applicant's goods and registrant's goods that is required to support a finding of likelihood of confusion. See *In re Opus One Inc.*, 60

USPQ2d 1812, 1815 (TTAB 2001). If the marks are the same, as in this case, it is only necessary that there be a viable relationship between the goods in order to support a finding of likelihood of confusion. See *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

Furthermore, it is not necessary that the goods at issue be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient instead that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In this case, the examining attorney has made of record a number of use-based third-party registrations which show that various entities have adopted a single mark for goods that are identified in both applicant's application and the cited registration. See, for example:

Registration No. 2192673 for soap and detergents, namely, all-purpose cleaners, janitorial cleaners, metal cleaners, laundry detergents, commercial detergents, kitchen cleaners and industrial cleaners in International Class 3; and all-purpose disinfectant cleaning preparations in International Class 5;

Registration No. 2206412 for, *inter alia*, laundry detergent in International Class 3; and all-purpose disinfectants in International Class 5;

Registration No. 2627064 for, *inter alia*, laundry bleach; laundry detergent in International Class 3; and all-purpose disinfectants in International Class 5;

Registration No. 2882374 for, *inter alia*, household and laundry bleach in International Class 3; and all-purpose disinfectants in International Class 5;

Registration No. 2631898 for, *inter alia*, laundry detergent in International Class 3; and all-purpose disinfectants in International Class 5;

Registration No. 1128786 for, *inter alia*, laundry bleach; laundry detergent...detergents having deodorizing properties for farm, home and industrial use in International Class 3; and disinfectants; deodorants for home, farm and industrial use in International Class 5;

Registration No. 1379919 for, *inter alia*, laundry detergents in International Class 3; and household and institutional disinfectant preparations in International Class 5; and

Registration No. 1575911 for, *inter alia*, laundry detergents; bleaches...all for household, office, industrial, commercial, and institutional use in International Class 3; and disinfectant cleaners...for household, office, industrial, commercial and institutional use in International Class 5.

Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

In addition, the examining attorney submitted evidence from the Google Internet search engine suggesting that certain of applicant's goods, namely, household bleach, perform the same function as those of registrant. Excerpts from these articles and web pages follow (emphasis in originals):

Household bleach is good for an **all-purpose disinfectant**.

(www.arches.uga.edu);

Household bleach = 5% soln of hypochlorite - good for **all-purpose disinfectant**.

(www.biologie.uni-hamburg);

...an **all-purpose disinfectant**, chlorine bleach destroys most household germs including...

(c3.org/chlorine_knowledge_center/life); and

An **all-purpose disinfectant**, such as normal **household bleach** (diluted 1:10) or an iodophor.

(www.ehs.iastate.edu/bs.spillkit.com).

The foregoing evidence demonstrates the existence of at least a viable relationship between the goods at issue, and this *du Pont* factor also favors a finding of likelihood of confusion.

We note applicant's argument that the goods identified in the subject application and cited registration recite specific trade channel limitations. However, there is no evidence of record that these trade channels are mutually exclusive. Furthermore, and as noted above, it is not necessary for the goods to be directly competitive or move in the same trade channels to support a finding of likelihood of confusion. See *In re International Telephone & Telegraph Corp.*, *supra*. Where, as here, the marks are identical, we need only a viable relationship between the goods to find likelihood of confusion. See *In re Concordia International Forwarding Corp.*, *supra*. In this case, applicant and registrant use the same mark to identify cleaning products. The third-party registrations made of record by the examining attorney show that a viable relationship exists between these cleaning products. Certain of the registrations cover goods which expressly are for household as well as institutional and industrial uses. Moreover, the evidence of record points to potential overlap in consumers. Specifically, industrial or institutional purchasers may also purchase household and laundry bleach or detergent, especially given that household bleach is an effective all-purpose disinfectant.

We further note applicant's argument that the owner of the cited registration limited the trade channels in its identification of goods in order to overcome a refusal to register. However, even with applicant's submission of a portion of the file history of the application that resulted in the cited registration, we are not privy to all of the facts and circumstances in that case. Second, it is well settled that each case must be decided on its own merits. Previous decisions by examining attorneys in approving other marks are without evidentiary value and are not binding on the Office or the Board. See *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994); and *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984).

The final *du Pont* factor discussed by applicant and the examining attorney is that of the conditions of sale. Applicant asserts that its goods would be purchased by careful and sophisticated users. However, sophisticated purchasers are not necessarily knowledgeable in the field of trademarks or immune from source confusion. See *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988). Further, there is no evidence that either applicant's or registrant's goods would be purchased only by highly sophisticated persons. Moreover, in view of the third-party registrations which evidence that both household

bleach and laundry detergent as well as all-purpose disinfectants may emanate from a single source, prospective purchasers may mistakenly believe that these goods could emanate from a single source. In addition, even if some degree of care were exhibited in making the purchasing decision, the involved marks MORNING MIST are identical so that even careful purchasers are likely to assume that the marks identify goods emanating from a single source.

Weighing all of the evidence of record as it pertains to the relevant *du Pont* factors, we find that a likelihood of confusion exists. To the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. See *In re Shell Oil Co.*, *supra*; *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, *supra*.

Decision: The refusal to register is affirmed.