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PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Tami Mack and Aurel A. Astilean

Serial No. 78515955

Myron Amer, of Myron Amer, P.C. for Tami Mack and Aurel A. Astilean.

Chrisie Brightmire King, Trademark Examining Attorney, Law Office 109 (Dan Vavonese, Managing Attorney).

Before Hohein, Grendel and Taylor, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Tami Mack and Aurel A. Astilean, as joint applicants, seek registration on the Principal Register of the mark SPEEDFIT (in standard character form) for goods identified in the application as "printed matter, namely, books and

periodicals in the field of health, fitness, exercise and sport performance," in Class 16.¹

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicants' mark on the ground that the mark, as applied to the goods identified in the application, so resembles the mark SPEEDFIT, previously registered (in standard character form) for "health, fitness and exercise instruction" in Class 41,² as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

We affirm the refusal to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the

¹ Serial No. 78515955, filed on November 12, 2004. The application is based on applicant's asserted bona fide intention to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b).

² Registration No. 29511973, issued May 17, 2005. The registration is owned by Aurel A. Astilean, an individual, who is one of the joint applicants in the application involved in this appeal. Earlier in the prosecution of the application, applicants herein asserted there is a unity of control as between Mr. Astilean and the present joint applicants which would obviate the Section 2(d) refusal. The Trademark Examining Attorney rejected that contention. Applicants apparently have abandoned their position on appeal, inasmuch as they have failed to argue the issue on appeal or even mention it in their appeal brief. We find in any event that the requisite unity of control is not established by the record in this case. See generally TMEP §1201.07.

likelihood of confusion issue (the *du Pont* factors). See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Under the first *du Pont* factor, we find that applicants' mark SPEEDFIT and the cited registered mark SPEEDFIT are identical in terms of appearance, sound, connotation and overall commercial impression. Applicants do not contend otherwise. This factor weighs heavily in favor of a finding of likelihood of confusion.

We turn next to the second *du Pont* factor, i.e., the similarity or dissimilarity between applicants' goods as identified in the application and the services recited in the cited registration. It is settled that it is not necessary that the respective goods and services be identical or even competitive in order to support a finding of likelihood of confusion. That is, the issue is not whether consumers would confuse the goods and services themselves, but rather whether they would be confused as to the source of the goods and services. It is sufficient

that the goods and services be related in some manner, or that the circumstances surrounding their use be such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods and services. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

We find that the goods identified in applicants' application, i.e., "printed matter, namely, books and periodicals in the field of health, fitness, exercise and sport performance," and the services recited in the cited registration, i.e., "health, fitness and exercise instruction" are highly similar and related such that when they are sold under the identical marks involved herein, source confusion is likely. The Trademark Examining Attorney has made of record at least five use-based third-party registrations which cover both applicants' type of goods and the type of services recited in the cited registration. Although such registrations are not evidence

that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent that they serve to suggest that the goods and services listed therein are of a kind which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

Contrary to applicants' contention, the fact that applicants intend to use their SPEEDFIT mark on goods, while the cited registration covers services, does not preclude a finding of likelihood of confusion. See TMEP §1207.01(a)(ii) and cases cited therein. This is especially so in the present case, where the subject matter of applicants' goods and the cited registrant's services is the same or overlapping, i.e., health, fitness and exercise. Applicants' argument that, in making our determination under the second *du Pont* factor, we must look only to the difference in the physical formats of the respective goods and services, and disregard the fact that the goods and services involve the same subject matter, is unsupported by law and is wholly unpersuasive. As noted above, the issue is not whether consumers would be able to distinguish between the respective goods and services

themselves, but rather whether they are likely to be confused as to the source of the respective goods and services. We find that such confusion is likely here.

We further find that the purchasers for these respective goods and services are likely to be the same, i.e., persons desiring resources and information, both in printed form and via live instruction, pertaining to health, fitness and exercise. We also find that these purchasers would be ordinary consumers who exercise only a normal level of care in purchasing the goods and services. Such purchasers who are familiar with registrant's SPEEDFIT instruction services are likely to assume, upon encountering printed materials bearing the same mark, that registrant is the source or sponsor of the printed materials, or that some other affiliation exists.

In short, we find that applicants' mark is identical to the cited registered mark, that applicants' goods are similar and related to registrant's services, and that the respective goods and services are or would be marketed to the same purchasers, who would be ordinary consumers. These findings with respect to the relevant *du Pont* factors lead us to conclude that a likelihood of confusion exists.

Decision: The refusal to register is affirmed.