

THIS DECISION IS NOT A
PRECEDENT OF THE TTAB

Mailed: December 22, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Gotham Licensing Group, LLC

Serial No. 78796823

Donna Mirman Broome of Gottlieb, Rackman & Reisman for
Gotham Licensing Group, LLC.

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**Before Drost, Zervas, and Mermelstein, Administrative
Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

Applicant seeks registration of the mark DOLLHOUSE for
"cosmetics and perfumes" in International Class 3.¹

Registration has been finally refused pursuant to
Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground
that applicant's mark so resembles the mark DAHLHOUSE
registered for "massage gel and oil, skin conditioners and
moisturizers, skin softeners, antiwrinkle gels, skin
antiaging gels, nonmedicated gels and oils to protect the

¹ Filed January 23, 2006, based on the allegation of a *bona fide*
intent to use the mark in commerce.

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skin from wind and environmental pollution,"² as to be likely, if used on the identified goods, to cause confusion, to cause mistake, or to deceive. Trademark Act § 2(d); 15 U.S.C. § 1052(d).

We affirm.

I. Applicable Law

Our determination under Trademark Act § 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. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192

² Registration No. 2561976, issued April 16, 2002. Affidavits under Trademark Act §§ 8 and 15 filed and acknowledged.

USPQ 24, 29 (CCPA 1976); *In re Azteca Rest. Enters., Inc.*,
50 USPQ2d 1209 (TTAB 1999).

II. Discussion

A. The Similarity Or Dissimilarity And Nature Of The Goods

Applicant argues that its goods and those of the cited registrant "significantly differ," contending that "[a]nti-aging skin gels are marketed very different [sic] than cosmetic and perfume products." App. Br. at 6. The examining attorney disagrees, arguing that applicant's goods are, at least in part, legally identical to those identified in the subject application. Ex. Att. Br. at 7-8.

The examining attorney submitted twenty-seven third party registrations,³ many of which include "cosmetics" on the one hand, and one or more of the goods in the cited registration on the other. Third-party registrations which individually cover a number of different items and which are based on use in commerce may serve to suggest that the listed goods are of a type that may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d

³ Eight of these registrations have been disregarded because they were registered under Trademark Act §§ 44 or 66. Because such registrations are not based on use in commerce, they "have very little persuasive value" when offered to infer that the goods identified therein would be perceived by U.S. consumers as

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1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd* No. 88-1444 (Fed. Cir. Nov. 14, 1988).

But more importantly, the examining attorney's third-party registrations convince us that the term "cosmetics" refers to a broad category of goods which includes some or all of the cited registrant's goods (with the exception of perfumes). For example, the goods in some of the registrations are identified as follows:

Cosmetics, namely, anti-aging cream, anti-wrinkle cream, ... facial cream, skin moisturizer....

Registration No. 3217438.

Cosmetics, namely, ... face moisturizer....

Registration No. 3125990.

Cosmetics and skin care products, namely, ... lip moisturizer....

Registration No. 3234875.

Cosmetics and beauty products, namely preparations for anti-aging and pollution barriers....

Registration No. 3107016.

[A] full line of cosmetics and hair-care products, namely, ... skin moisturizer, ... body cream, body oil....

Registration No. 3194417.

sharing a common origin. *Albert Trostel & Sons*, 29 USPQ2d at 1785-86; *Mucky Duck*, 6 USPQ2d at 1470.

In addition to these and other third-party registrations, the examining attorney submitted with his brief⁴ the following definition:

Cosmetic

...

Noun: 1. A preparation, such as a powder or a skin cream, designed to beautify the body by direct application.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (online at Bartleby.com, Oct. 3, 2008).

Although applicant does not indicate what particular kind of cosmetics it intends to sell, the evidence makes clear that the term encompasses many of the items identified in the cited registration, such as "skin conditioners and moisturizers, skin softeners ... [and] anti-aging gels." While applicant may not intend to apply its mark to the full range of goods that may be described as "cosmetics," its use of the broad term in its identification of goods requires us to conclude that applicant's identification of goods overlaps in significant part with that of the cited registrant. We accordingly conclude that applicant's goods are identical in part, and

⁴ The examining attorney's request for judicial notice is granted. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

otherwise closely related, to the goods set out in the cited registration.⁵

This factor supports the examining attorney's refusal to register.

B. The Similarity Or Dissimilarity of the Marks in Their Entireties as to Appearance, Sound, Connotation and Commercial Impression.

In a likelihood of confusion analysis, we compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. We begin our comparison with the observation that "[w]hen marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

Applicant's mark is DOLLHOUSE, while the mark in the cited registration is DAHLHOUSE. The marks both start with the letter "D," and conclude with "-LHOUSE," differing only

⁵ Applicant argues that it would be uncommon for a clothing manufacturer such as itself to "enter the highly specialized area of skin gels and anti-aging creams." Nonetheless, applicant chose to identify the goods in its intent-to-use application as "cosmetics," a broad term which encompasses those items, and others in the cited registration. In a case such as this, we must limit our consideration to the goods as set out in the application, without importing limitations, such as the one suggested by applicant.

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in the middle two letters of the first word (DOLL vs. DAHL). Both the cited registration and applicant's mark are "word marks," i.e., are registered or seek registration for the words themselves, apart from any particular font, color, or capitalization. The marks could thus be used in the same stylization, and would appear highly similar visually. *Phillips Petroleum Co. v. C. J. Webb, Inc.* 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971) (a mark registered in standard character or typed form is not limited to being depicted in any particular manner of display).

Applicant argues that the marks are distinguishable because they would be pronounced differently. We disagree. It has long been recognized that marks which sound alike (or nearly so) may be deemed similar for trademark purposes, even if spelled differently. *E.g. Crown Radio Corp. v. Soundsciber Corp.*, 506 F.2d 1392, 184 USPQ 221 (CCPA 1974) (CROWNSCRIBER similar to SOUNDSCRIBER); *Cluett, Peabody & Co. v. Wright*, 46 F.2d 711, 8 USPQ 344 (CCPA 1931) (ARROW similar to AIR-O); *Beck & Co. v. Package Dist. of America, Inc.*, 198 USPQ 573 (TTAB 1978) (BECK'S BEER similar to EX BIER).

The dictionary definitions proffered by the examining attorney indicate that "doll" and "dahl" may be pronounced identically. Even when the other noted pronunciation of

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"doll" is used, the marks would sound very similar. Any difference in pronunciation between DAHLHOUSE and DOLLHOUSE is therefore unlikely to be noticed in normal speech. We conclude that the marks would be pronounced identically, or very nearly so. It has long been acknowledged that trademark owners have little control over the pronunciation of their marks. See *In Re The Belgrade Shoe Company*, 411 F2d 1352, 162 USPQ 227 (CCPA 1969) ("The appellant acknowledges that 'there is no correct pronunciation of a trademark.'").

Lastly, we note that applicant's mark has an arbitrary meaning, namely that of a miniature house for play with dolls. Although DAHLHOUSE appears to have no meaning spelled as such, the fact that it is a homophone for the common word "dollhouse" makes it likely that it would be associated in the mind of many consumers with the same meaning as applicant's mark.

We conclude that the marks at issue are highly similar in their appearance, sound, meaning, and commercial impression, a factor which supports the examining attorney's refusal.

C. Sophistication of Purchasers

Applicant further argues that confusion is not likely because its customers "are very fashion conscious. Such

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customers are likely to be relatively sophisticated shoppers. Similarly, customers of registrant's goods and in particular of cosmetics, are likely to examine with care the products they apply to their skin and bodies." App. Br. at 5-6.

Applicant presents no evidence in support of its argument. Neither applicant's goods nor those identified in the cited registration are limited to any particular channel of trade or class of customer. Moreover, neither applicant's goods nor those of the registrant exclude inexpensive cosmetic items which may be purchased with less care and attention. But in any event, even consumers who exercise a high degree of care are not necessarily knowledgeable regarding the trademarks at issue, and therefore immune from source confusion. *In re Wilson*, 57 USPQ2d 1863, 1865-66 (TTAB 2001) (where marks are very similar and goods related, confusion may be likely even among sophisticated purchasers); *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988) ("Being knowledgeable and/or sophisticated in a particular field does not necessarily endow one with knowledge and sophistication in connection with the use of trademarks.").

III. Conclusion

After careful consideration of the record evidence and

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argument, we conclude that in light of the identical and closely related goods, and the highly similar marks at issue, use of applicant's mark on or in connection with the identified goods would pose a likelihood of confusion with the mark in the cited prior registration.

Decision: The refusal to register under Trademark Act § 2(d) is accordingly affirmed.