THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Mailed:
December 5, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ayurvedic Concepts, Ltd.

Serial No. 78800436

John S. Egbert of Egbert Law Offices, PLLC for Ayurvedic Concepts, Ltd.

Marilyn D. Izzi, Trademark Examining Attorney, Law Office 112 (Angela Bishop Wilson, Managing Attorney).

Before Taylor, Bergsman and Ritchie, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Ayurvedic Concepts, Ltd., dba Himalaya USA ("applicant"), filed an intent-to-use application to register the mark EVECARE, in standard character form, for "nutritional supplements," in Class 5.

The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark is likely to cause confusion with the mark EVECARE and design, shown below, for "body and beauty care cosmetics,"

in Class 3.[1] The registrant described its mark as the stylized word "evecare."

Our determination of likelihood of confusion 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 issue of likelihood of confusion. *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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

[1] Registration No. 3171445, issued November 14, 2006.

A. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co., supra.* In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.,* 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.,* 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, the test 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 impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.,* 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.,* 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished,* No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than a specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.,* 207 USPQ 335, 344 (TTAB

1980); *Sealed Air Corp. v. Scott Paper Co.,* 190 USPQ 106, 108 (TTAB 1975). In this case, the relevant public is consumers of nutritional supplements and cosmetics.

While the marks must be compared in their entireties, in analyzing the similarity or dissimilarity of two marks, there is nothing improper in stating that for rational reasons, more or less weight has been given to a particular feature of a mark. *In re National Data Corporation,* 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In the case of marks consisting of words and a design, the words are normally given greater weight because they would be used by consumers to request the products. *In re Dakin's Miniatures, Inc.,* 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.,* 2 USPQ2d 1553, 1554 (TTAB 1987).

In this case, the word "Evecare" is the dominant element of the mark in the cited registration. The design element is a leaf that serves as the background for the "Eve" portion of "Evecare." Indeed, the registrant identifies its mark as the stylized version of the word "Evecare." Inasmuch as applicant's mark is EVECARE, the applicant's mark is identical to the dominant part of the registered mark.

Applicant, however, contends that the marks engender different commercial impressions.

> The falling leaf appearing under the "EVE" portion of the registrant's mark obviously invokes an image of Eve, the Garden of Eden, and the story of Eve eating from the Tree of Knowledge. The youth, beauty and innocence of Eve fits in with the cosmetic and skin care products sold by the cited registrant. On the other hand, Applicant's "EVECARE" word mark as used on vitamin supplements would not give a consumer the same commercial impression. Instead, the consumer would likely interpret Applicant's mark as a combination of the words "evening" and "care."[2]

Because the word portions of the marks are identical and because a side-by-side comparison is the not the test, the marks are substantially similar in appearance, sound, meaning and commercial impression. The differences, if any, in the commercial impressions engendered by the marks would likely come into play only in connection with a side-by-side comparison of the marks. However, even if the marks are compared side-by-side, the marks engender the the same commercial impression because the word "Evecare" is the dominant portion of the registered mark. In any event, applicant has not submitted any evidence demonstrating that the marks engender different commercial impressions.

Thus, in considering the marks in their entireties, we find that the marks are very similar.

[2] Applicant's Brief, p. 9.

B. The similarity or dissimilarity and nature of the goods described in the application and registration.

Having found that applicant's mark is very similar to registrant's mark, we turn to the similarity or dissimilarity and nature of applicant's nutritional supplements and the registrant's cosmetics. It is not necessary that these goods be identical or even competitive to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods. *See In re Opus One, Inc.,* 60 UPSQ2d 1812, 1815 (TTAB 2001); *In re Melville Corp.,* 18 USPQ2d 1386, 1387 (TTAB 1991).

Moreover, the greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods and registrant's goods that is required to support a finding of likelihood of confusion. *In re Opus One, Inc.,* 60 UPSQ2d at 1815; *In re Concordia International Forwarding Corp.,* 222 USPQ 355, 356 (TTAB 1983). Where, as in this

case, the applicant's mark is substantially similar to the registrant's mark, there need only be a viable relationship between the goods to find that there is a likelihood of confusion. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("even when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source"); *In re Concordia International Forwarding Corp.*, 222 USPQ2d at 356.

To show that nutritional supplements and cosmetics are related products, the Examining Attorney submitted 25 third-party registrations, based on use in commerce, encompassing both products. Although these registrations are not evidence that the marks in the third-party registrations are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they may serve to suggest that the goods listed in the registrations (*i.e.*, nutritional supplements and cosmetics) may emanate from a single source.[3] *In re Infinity Broadcasting Corp. of Dallas,* 60 USPQ2d 1214, 1217-1218

[3] The Examining Attorney submitted copies of two-third party applications listing both products in the description of goods. Pending applications have no probative value in this appeal. The applications are evidence only that they have been filed. *Interpayment Services ltd. v. Docters & Thiede,* 66 USPQ2d 1463, 1467 n.6 (TTAB 2003).

(TTAB 2001); *In re Albert Tostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Muck Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 (TTAB 1988).

Applicant contends that the third-party registrations "should not hold as much probative value as is being sought by the Examiner" and that "any conclusions derived from reliance on third-party registrations in order to determine that the goods are closely related should not go too far."[4]

By submitting the third-party registrations, the Examining Attorney is essentially asking us to draw the inference that when different products are listed in the same registration, those products may emanate from a single source. Applicant may rebut this inference with evidence (*e.g.*, a declaration from counsel or a paralegal that he/she investigated the use of the marks in the third-party registrations and could not find any evidence that the registrants used the marks on both of the products at issue and/or an equal or greater number of third-party registrations owned by different entities for the same or similar marks where each entity has registered its mark for one of the goods at issue). In this case, applicant did not submit any evidence and simply asserted that *contra* to

[4] Applicant's Brief, pp. 4-5.

our well settled practice, we should not consider the third-party registrations. Suffice it to say that we give the third-party registrations the probative value to which they are entitled and as noted above, applicant presented no evidence to rebut the inference.

The Examining Attorney also submitted excerpts from websites selling both nutritional supplements and cosmetics.[5] The excerpt from the Medicalpoint website (medicalpoint.com) has a headline or title "Natural Supplements/Cosmetics."[6] The excerpt has information explaining that Lifetime Health, Australia's leading brand of vitamins and minerals, sells a wide variety of cosmetics and vitamin supplements under the "Natural Life" trademark.

The excerpt from the Murad website (murad.com) shows that Murad sells supplements, moisturizers, and cleansers under the MURAD mark.

---

[5] The excerpt from the Bliss website (blissword.com) has no probative value because it only displays nutritional supplements. There is nothing presented in that excerpt from which we can glean that the website owner also sells cosmetics. The Examining Attorney should have submitted a second page displaying cosmetics, assuming such a page existed.

[6] Although this is a website of a company from Australia, the excerpt provides information regarding the exchange rate between the Australian dollar and the U.S. dollar from which we can infer that this company is also attempting to do business in commerce with the United States.

The Examining Attorney submitted three relevant news articles retrieved from the LexisNexis database showing a relationship between cosmetics and nutritional supplements.[7]

1. "Cosmetic treatments include supplements"

   Times-Picayune, March 23, 2008

   Cosmetic treatments are no longer just about creams and emollients . . . The latest thing is "ingestibles," supplements such as omega-3 oils, alpha lipoic acid, grape seed, pomegranate extract and many other nutritional-sounding words you never used to hear at the cosmetic counter.

   * * *

   Here's a closer look at beauty ingestibles, which hope to capture a significant share of the $45-billion-a-year cosmetic and skin care market.

2. "A SNACK for the SKIN"

   The News Journal, March 18, 2008

   This is a story regarding a Minneapolis company, Intelligent Nutrients, which manufactures both cosmetics and supplements.

3. "Direct Selling Stocks"

   A blog by Stockerblog, March 15, 2008.

   The excerpt from this blog identified a number of companies that manufacture both nutritional supplements and cosmetics or personal care products

[7] The Examining Attorney submitted 8 total articles of which only 3 were relevant.

> (*e.g.,* Herbalife, Ltd, Nu Skin Enterprises Inc., USANA Health Sciences Inc., Manatech Inc., and Nature's Sunshine Products Inc.).

The Examining Attorney also submitted an excerpt from the SEC 10-K405 filing by Beauticontrol Inc. that identified itself as a manufacturer and direct seller of, *inter alia,* skin care products, cosmetics, and nutritional supplements.

Finally, the Examining Attorney submitted an excerpt from the NPI Center website (npicenter.com) reviewing the September 2008 Health & Beauty America conference, a cosmetic trade show.

> Perhaps the most interesting development in the cosmetics industry this year was illustrated in the form of three sessions focusing on nutritional supplements (or "nutriceuticals"), which were carefully programmed to address beauty from the inside out.
>
> * * *
>
> Nutritional supplement companies are clamoring to exploit the growth opportunities in the faster-growing personal care market in an attempt to mitigate the effects of their mature market, while personal care companies are looking for ways to work with supplement companies to penetrate a marketplace seemingly ripe with opportunity.

The evidence submitted by the Examining Attorney convinces us that nutritional supplements and cosmetics are related products manufactured by the same companies and that they are complementary products used together in a personal care regimen.

C. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

In addition to the evidence already discussed, the Examining Attorney also submitted excerpts from the Edible Nature website (ediblenature.com) and the Smarter website (smarter.com) showing these two online retailers advertising the sale of cosmetics and nutritional supplements. Accordingly, there is evidence of four online retailers selling cosmetics and nutritional supplements.

Moreover, the "Cosmetic treatments include supplements" article in the *Times-Picayune,* and the review of the September 2008 Health & Beauty America conference discuss the merging of the cosmetic (or personal care products) and nutritional supplements markets. In the *Times Picayune* article, the author reports that "Perricone's line of supplements is sold at stores such as Sephora," a cosmetics retailer, as is the Dr. Murad line of supplements, and the review of the September 2008 Health & Beauty America conference reports that there is a growing

cross-over market between nutritional supplements and cosmetics.

Beautycontrol Inc. provided the following information in its SEC filing:

> The cosmetic and nutritional supplement industries are highly fragmented and competitive markets which are sensitive to changing consumer preferences and demands. There are many large and well known companies that manufacture and sell broad lines of skin care, cosmetic products and nutritional supplements through retail establishments. The company competes with a number of direct sales companies who market skin care and cosmetic products and nutritional supplements.

Because there are no limitations as to channels of trade or classes of purchasers in the description of goods for either the application or the cited registration, it is presumed that the identified products move in all channels of trade normal for nutritional supplements and cosmetics, and that those products are available to all classes of purchasers for the listed goods. *See In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Applicant's argument that the sales of supplements are limited to health food stores, general nutrition stores and the over-the-counter drug section of general drug stores while the sale of cosmetics is limited to retail beauty supply stores is not supported by any evidence, contradicted by the evidence

submitted by the Examining Attorney, and may not be considered because of the legal presumption noted above.

In view of the foregoing, we find that nutritional supplements and cosmetics move in the same channels of trade and are sold to the same classes of consumers.

D. The conditions under which and buyers to whom sales are made (*i.e.*, "impulse" vs. careful, sophisticated purchasing).

Applicant contends that its nutritional supplements are purchased by sophisticated purchasers who exercise extra care because the products are ingested to supplement daily food intake to develop a more healthy mind and body. In other words, "consumers are vividly aware of what they put into their body (sic)."[8] Assuming this to be true, these circumstances may aggravate rather than mitigate the likelihood of confusion. If a purchaser of nutritional supplements is aware of the reputation of applicant, upon encountering a substantially similar mark for related and complementary cosmetics, that consumer may believe that he/she is dealing with applicant. On the other hand, cosmetics are bought by everyone, and a consumer who had a good experience with EVECARE and design cosmetics upon

[8] Applicant's Brief, pp. 10-11.

encountering EVECARE supplements may mistakenly believe that the products emanate from a single source.

In any event, the fact applicant's consumers may be sophisticated about nutritional supplements, does not mean that they are sophisticated and knowledgeable about trademarks, or have such good memories for the minimal differences between the marks at issue, that they could differentiate between respective marks or appreciate that similarity does not imply some kind of business relationship or affiliation. *See Hydrotechnic Corp. v. Hydrotech International, Inc.*, 196 USPQ 387, 392-393 (TTAB 1977); *Refreshment Machinery Inc. v. Reed Industries, Inc.*, 196 USPQ 840, 843 (TTAB 1977) (selling to a sophisticated purchaser does not automatically eliminate the likelihood of confusion because "[i]t must also be shown how the purchasers react to trademarks, how observant and discriminating they are in practice, or that the decision to purchase involves such careful consideration over a long period of time that even subtle differences are likely to result in recognition that different marks are involved").

E. Balancing the factors.

In view of the facts that the marks are very similar, the goods are related, and the goods move in the same channels of trade and are sold to the same classes of

consumers, we find that applicant's registration of the mark EVECARE for nutritional supplements is likely to cause confusion with the registered mark EVECARE and design for body and beauty care cosmetics.

Decision: The refusal to register is affirmed.