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**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Sylmark Holdings Limited

Serial No. 78850450

Christopher C. Larkin, Seyfarth Shaw LLP for Sylmark Holdings Limited.

Khanh M. Le, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Holtzman, Zervas and Ritchie de Larena, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Sylmark Holdings Limited filed, on March 30, 2006, an application to register on the Principal Register the mark



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for goods ultimately identified as "electric grills" in International Class 11.<sup>1</sup> Applicant has entered a statement describing the mark as "consist[ing] of [a] swirl design with letters WC."

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the previously registered mark WONDERROASTER (in typed form) for "electrically operated rotisseries" in International Class 21.<sup>2</sup>

When the refusal was made final, applicant filed this appeal and requested reconsideration. The examining attorney denied the request for reconsideration and the appeal was resumed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

Our determination of the examining attorney's refusal to register the mark under Section 2(d) of the Trademark Act is based on an analysis of all of the 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 &*

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<sup>1</sup> Application Serial No. 78850450, claiming a bona fide intent to use the mark in commerce pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>2</sup> Registration No. 0873368, renewed July 22, 1989.

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 services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn initially to the first *du Pont* factor and consider whether applicant's mark and the cited registered mark are similar or dissimilar when compared in their entirety in terms of appearance, sound, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The analysis is not whether the marks can be distinguished when compared side-by-side. Rather, we must determine whether the marks are sufficiently similar that there is a likelihood of confusion as to source and, in making this determination, we must consider the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In considering applicant's mark, we find that the term WONDERCOOKER is the dominant term in the mark; WONDERCOOKER is located at the top of applicant's mark and appears in larger letters than the other wording in the mark, which forms a unitary phrase. According to the Federal Circuit, while the mark must be considered as a whole, "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. Indeed, this type of analysis appears to be unavoidable."<sup>3</sup> *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). As for the design,<sup>4</sup> we agree with applicant which contends that "the literal portion of Applicant's mark should be accorded greater weight than the design element in the likelihood of confusion analysis ...." Brief p. 7. Generally, in marks comprising both a word and a design, the word portion is normally accorded greater

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<sup>3</sup> For this reason, applicant's complaint that the mark is being impermissibly dissected when the examining attorney focuses on WONDERCOOKER, and then the two elements WONDER and COOKER, is not persuasive. Brief at pp. 4 - 5.

<sup>4</sup> Both applicant and the examining attorney in their briefs refer to applicant's mark as containing the letter W and a swirl design, rather than in the manner of the description of the mark in the record, i.e., WC and a swirl design. Accordingly, and because the letter "C" in the swirl design is so stylized that it appears to be part of the swirl design and not a letter C, we

weight because it would be used by prospective consumers to order the services or be spoken through word of mouth. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987); *Ceccato v. Manifattura Lane Gaetano Muzotto [sic] & Figli, Spa.*, 32 USPQ2d 1192 (TTAB 1994). Also, the design - identified by applicant as a swirl - is not particularly distinctive and is not one that consumers would likely recall. THERE'S A MILLION MEALS INSIDE!, which also is in the mark, is a unitary informational slogan regarding the WONDERCOOKER in lettering considerably smaller than WONDERCOOKER. The phrase hence is less prominent than WONDERCOOKER in forming the commercial impression of the mark. While the phrase may "suggest a versatile cooking appliance", as applicant contends (brief at p. 8), it does not change the meaning of WONDERCOOKER or the overall commercial impression of the mark.

When we compare the terms WONDERROASTER and WONDERCOOKER, we find them to be more similar than different.<sup>5</sup> Of course, both begin with the word WONDER and end with the name of an apparatus for cooking food, with

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consider too that the design includes the letter W and a swirl design.

<sup>5</sup> We do not, as applicant accuses the examining attorney of doing, "view the prefix 'wonder' alone as the dominant portion of Applicant's actual 11-syllable, word-and-design mark." Brief at p. 5.

-er as the last syllable. Both have a similar cadence, with every second syllable ending in -er. In view of this similar construction and sound, applicant's mark would easily be perceived as the name of registrant's product line consisting of cookers, with the slogan highlighting the long life of the cooker. Thus, we find that in view of similarities between WONDERROASTER and WONDERCOOKER, the marks are similar in sound, meaning and commercial impression. These similarities outweigh any difference in appearance of the marks.

Applicant has argued in footnote 2 of its brief that WONDER "would have limited ability to ... [dominate the mark] because 'wonder' is a somewhat laudatory term"; and that the Board has found confusion unlikely where the common elements in two marks are suggestive or descriptive terms. The definition of "wonder" as an adjective, taken from *The American Heritage Dictionary of the English Language* (4<sup>th</sup> ed. 2000) located at bartleby.com and submitted with the examining attorney's brief,<sup>6</sup> is "1.a. Arousing awe or

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<sup>6</sup> Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides that the record in an application should be complete prior to the filing of an appeal. See also TBMP § 1207.01 (2d ed. rev. 2004). However, the Board may take judicial notice of dictionary definitions, including online dictionary entries which exist in printed format, and we take judicial notice of the definition of "wonder" provided by the examining attorney. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789 (TTAB 2002). See also *University of Notre Dame du Lac v. J. C. Gourmet Food Imports*

admiration. **b.** Wonderful. **2.** Far superior to anything formerly recognized or foreseen." Even if WONDER were to be considered a laudatory term in itself, the combination of WONDER with either ROASTER or COOKER creates a term which, as a whole, has more than a laudatory connotation - the mark has a cadence or rhythm to it. Thus, it is not only that both marks include the term WONDER, but it is also the cadence and the similarity in the terms ROASTER and COOKER that makes the combined terms WONDERROASTER and WONDERCOOKER similar. The shared term WONDER is just one element that makes the marks, when considered in their entirety, similar.

Applicant has also argued that the design portion, "the different fonts used for the phrase WONDERCOOKER and THERE'S A MILLION MEALS INSIDE! and the positioning and different typestyle for those elements, all combine to create a composite mark that is very different visually from WONDERROASTER in a typed drawing." Brief at p. 7. Applicant's argument is not persuasive. Because registrant's mark is a typed mark, we must assume that it can be used in the same stylized form as applicant's mark (without the design element). *Squirtco v. Tomy Corp.*, 697

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*Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (“[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a difference cannot legally be asserted by that party.”). See also *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000) (“Registrations with typed drawings are not limited to any particular rendition of the mark and, in particular, are not limited to the mark as it is used in commerce”). Moreover, applicant's mark is not any less similar to registrant's mark because applicant's mark includes and prominently features WONDERCOOKER.

The *du Pont* factor regarding the similarity of the marks is therefore resolved against applicant.

We next turn to the *du Pont* factor regarding the similarity or dissimilarity of the goods. To support a finding of likelihood of confusion, it is sufficient to show that the respective goods are related in some manner or that the circumstances surrounding their marketing are 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

producer or that there is an association between the producers of the goods. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

In this regard, the examining attorney has made of record various third-party registrations including both electric grills and electric rotisseries in the identifications of goods. Third-party registrations which individually cover a number of different items and which are based on use in commerce may have some probative value to the extent that they 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 (TTAB 1993). These third-party registrations suggest that consumers could, because of the similar nature of the marks, mistakenly believe that applicant's and registrant's goods originate from the same source.

In addition, the examining attorney has made of record various webpages from retailers of electric kitchen appliances that show (i) electric rotisseries sold under the same mark as electric grills, and (ii) cooking appliances having both an electric grill and an electric rotisserie. This evidence demonstrates a clear relationship between the goods.

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Further, applicant has not challenged the examining attorney's contention that the goods are related.

Thus, we find that the goods are related and resolve the *du Pont* factor regarding the similarity of the goods against applicant.

Because of the similarity of the marks and the relationship between the goods, we find that applicant's mark "electric grills" is likely to cause source confusion among purchasers with the registered mark WONDERROASTER for "electrically operated rotisseries."

Decision: The refusal to register under Section 2(d) is affirmed.