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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Crave, Inc.

Serial No. 78865900

Daniel S. Polley of Daniel S. Polley, P.A. for Crave, Inc.

Nakia D. Henry, Trademark Examining Attorney, Law Office
111 (Craig D. Taylor, Managing Attorney).

Before Rogers, Bergsman and Wellington, Administrative
Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Crave, Inc., applicant herein, seeks registration on
the Principal Register of the mark CRAVE (in standard
character form) for services ultimately identified in the
application as "design of product packaging and product
labels for others" in International Class 42.¹

¹ Serial No. 78865900, filed on April 20, 2006. The application
is based on use in commerce under Trademark Act Section 1(a), 15
U.S.C. §1051(a), and contains an allegation that the mark was
first used anywhere and in commerce on March 31, 2006.

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 registered mark CRĀV for "promoting the sale of goods and services of others through promotional contests via print media and electronic media, namely, internet, television, radio and telephone" in International Class 35.²

Both applicant and the examining attorney filed briefs.

As a preliminary matter, we note that in applicant's request for reconsideration, filed November 19, 2007, applicant amended the services recited in Class 42 to read as they currently read and to delete services recited in Class 35. Nevertheless, the examining attorney, in her brief, requests that "applicant's previously claimed services be deemed abandoned." Brief, (unnumbered) p. 9. Specifically, she states that applicant limited its appeal to the services identified above, but "has not deleted the remaining services from the application that also pose a likelihood of confusion." *Id.* Applicant did not file a

² Registration No. 3142459, issued on September 12, 2006. A description of the mark states "[t]he mark is presented without any claim as to special form."

reply brief or otherwise respond to the examining attorney's request. To the extent the examining attorney's request for a finding of abandonment is focused on the Class 35 services, the request is moot, as they have been deleted by applicant. Similarly, to the extent the request seeks a finding of abandonment as to the services deleted from Class 42, the request also is moot.

We now turn to the likelihood of confusion refusal.

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 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 look to determine the similarity or dissimilarity of the marks when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. *Palm Bay Imports, Inc.*, 73 USPQ2d at 1692. The test, under the first *du Pont*

factor, 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 that confusion as to the source of the services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks and service marks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). In this case, the average purchasers would be people running companies that require packaging or label design and promotional contests to sell their products or services.

The marks at issue are essentially identical. Applicant's mark is CRAVE and the cited registered mark is CRĀV. In terms of appearance, the only differences between the two marks are applicant's addition of the letter "E" at the end and omission of the horizontal line directly above the letter "A". As to the latter difference, the examining attorney contends that the horizontal line is a macron, a pronunciation symbol, and denotes that that the letter "A" is to be pronounced as a long vowel. As such, the examining attorney asserts that the two marks are "phonetic equivalents and are

similar sounding." Brief, (unnumbered) p. 5.

Applicant, on the other hand, argues, without any supporting evidence, that the horizontal line "has the effect of leading one to believe that word [registrant's mark] is a foreign word" and "[g]iven that such pronunciation is typically associated with a foreign language, consumers viewing Registrant's mark most likely will be unfamiliar with such pronunciation, causing consumers to hesitate and think about Registrant's mark to determine how to correctly pronounce it." Brief, p. 3.

We agree with the examining attorney that the registered mark will most likely be viewed and understood by consumers as containing a long vowel symbol. We disagree with applicant's contention that the pronunciation symbol will not be recognized by consumers; indeed, anyone who has looked up words in a dictionary will have encountered this symbol above a vowel and understands that it indicates that the vowel is pronounced as a long vowel. Even if one does not know that the symbol is called a "macron", the significance of such a ubiquitous symbol will not be lost on the consumer. In this regard, we take judicial

notice of the dictionary definition entry of applicant's mark³:

Main Entry:

CRAVE

Pronunciation:

\'krāv\

Function:

verb

Inflected Form(s):

craved; crav·ing

Etymology:

Middle English, from Old English *crafian*; akin to Old Norse *krefja* to crave, demand

Date:

before 12th century

*transitive verb*1: to ask for earnestly : BEG , DEMAND
<crave a pardon for neglect>2 a: to want greatly : NEED
<craves drugs> b: to yearn for <crave a vanished youth>
intransitive verb: to have a strong or inward desire <craves after affection>

[*Merriam-Webster's Collegiate® Dictionary, Eleventh Edition.*]

This dictionary definition demonstrates the use of the macron over the letter "A" for pronunciation purposes, indicating that the word is to be pronounced with a "long A" vowel sound. With this in mind, we find it perfectly reasonable that the two marks would likewise

³ The Board may take judicial notice of dictionary definitions. See *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

be pronounced in the same manner. Indeed, the registered mark almost appears to be a pronunciation entry for applicant's mark, CRAVE.

In terms of connotation, the marks are also identical. Again, keeping in mind the defined meaning of applicant's mark, we find that applicant's mark, as applied to applicant's services, may serve to suggest that a product package designed by applicant will entice consumers "to want badly" or "crave" whatever goods are contained in the package. Likewise, registrant's mark, CRĀV, may have the same suggestive connotation because it will be perceived as the phonetic equivalent of the word "crave" thus suggesting too that registrant's promotional services will lead consumers to "crave" the goods being promoted.

Viewing the marks in their entireties, we find that they are virtually identical and likely to cause confusion when used in connection with respective related services (discussed below). Applicant's addition of the letter "e" and omission of the macron above the letter "a" have little effect when trying to distinguish between the two marks; these slight differences are outweighed by the marks' overall

similarity. The first *du Pont* factor weighs in favor of a finding of likelihood of confusion.

Under the second *du Pont* factor, we look to the similarity or dissimilarity between applicant's services, i.e., "design of product packaging and product labels for others," and opposer's services, i.e., "promoting the sale of goods and services of others through promotional contests via print media and electronic media, namely, internet, television, radio and telephone." It is helpful to look at applicant's prosecution of the application, in particular with regard to its recited services. In its use-based application, applicant stated that it "is using in commerce" its mark "on or in connection with" the following services (emphasis added):

Business marketing and business advertising consulting services, namely, corporate branding identity and development, corporate message identity and development, brand positioning, product branding, corporate branding, print advertising, radio advertising; online advertising; audiovisual advertising; **design of business marketing and advertising materials**, design of product packaging and product labels; creating multimedia presentations for others to assist in marketing products and services; **creating print, radio, online and audiovisual advertising for others to assist in marketing products and services**; creating brochures, catalogs, printed business communications, annual reports for others to assist in marketing or describing products and services; **development of business promotions and giveaways**; logo design, website design in International Class 035.

Applicant responded to the first Office Action's requirement for a more definite recitation of services by amending its recitation to the following (emphasis added):

Business marketing and business advertising consulting services, namely, corporate branding identity and development, corporate message identity and development, brand positioning, product branding, corporate branding, **print advertising, radio advertising; online advertising; audiovisual advertising; design of business marketing and advertising materials**, design of product packaging and product labels; **creating multimedia presentations for others to assist in marketing products and services; creating print, radio, online and audiovisual advertising for others to assist in marketing products and services**; creating brochures, catalogs, printed business communications, annual reports for others to assist in marketing or describing products and services; **development of business promotions and giveaways**; logo design, website design in International Class 035; and

Design of product packaging and product labels for others; creating multimedia presentations for others to assist in marketing products and services; website design for others in International Class 42.⁴

We hasten to make clear that our analysis under the second *du Pont* factor, involving the similarity or dissimilarity of the respective services, is limited to applicant's services as currently identified in the application. In other words, our analysis does not involve a likelihood of confusion between any of the deleted services and the services in the cited registration.

⁴ As noted above, in its request for reconsideration, applicant amended the recitation of services currently before us.

Nonetheless, we note that on two occasions applicant stated under oath that it was rendering services in commerce that are closely related, if not encompassing, the services recited in the cited registration, and using the applied-for mark for such services. These statements indicate that a company, such as applicant, would render or contemplate rendering, under a single mark, both product packaging and label design services for others as well as services applicant described as: design of business marketing and advertising materials; development of business promotions and giveaways; print advertising, radio advertising; and online advertising. Applicant also stated in response to the first Office Action that it "works with companies in the design and development of their corporate brands and identity, advertising material and product packaging and with brand integration."

Applicant's statements in adopting its ultimate recitation of services are somewhat contradictory to its arguments made later in the request for reconsideration and brief. Specifically, applicant later argues that its product label and packaging design services "have nothing to do with advertising or promoting broadly, and are even further remote to [registrant's services], namely, promotional contests." Brief, p. 3. Because the

respective services are "completely unrelated and different," applicant contends that "companies specializing in product packaging and product label design are not known for providing promotional contest services." *Id.*, p. 4.

The evidence submitted by the examining attorney also shows a relationship between applicant's product and label design services for others with the cited registrant's promotional services for others' goods and services. Specifically, she attached Internet evidence that includes printouts from online articles and websites of third parties. For example, we note in the article "Are Promotional Contests Affecting Children and Youth," the proliferation of promotional contests targeting children is attributed to "their spending power, purchasing influence and malleability with respect to branding."⁵ The article also shows that "branding campaigns" may be "kicked off" with a promotional contest. Connecting promotional contests to "branding" services is relevant because applicant describes itself, in its specimen of record, as a

⁵ "Are Promotional Contests Affecting Children and Youth" (Tim Pelton, Katharina Paxman and Leslee F. Pelton, June 4, 2005). Printouts retrieved from www.youth.society.uv.ca/resources/documents/promo-contest-yh-cys-june6.pdf, and attached to Office action dated May 19, 2007.

"brand identify and packaging design firm for food and beverage companies."

In addition, the printouts from the "American Sweepstakes & Promotion Co" (ASPC) website also demonstrate a relationship between promoting the goods and/or services of others through contests and "creative design" services for others.⁶ As the examining attorney noted, the website indicates that ASPC renders promotional services for other's goods and/or services and also provides "a la carte" business services that include "creative design" services. We agree with the examining attorney that, in the context of, and in conjunction with, promotional contests, this could include product packaging or label design services.

The examining attorney also submitted several third-party registrations to show that the respective services may emanate from a common source.⁷ Although such

⁶ Printouts retrieved from www.american-sweeps.com, attached to Office action dated January 11, 2008.

⁷ Applicant objected to the examining attorney's reliance on two of the third party registrations (Reg. Nos. 3081102 and 3114397) because they do not have use in commerce dates. The objection is sustained and the registrations have not been considered. As we have held many times before, registrations without use in commerce dates are not indicative of a common source in the United States of the goods or services identified therein and have no probative value. See, e.g., *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470, n. 6 (TTAB 1988) (third-party registrations which are based upon foreign registrations "are not even necessarily evidence of a serious intent to use the marks

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 may serve to suggest that the 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). Registration No. 2810421 (for the mark SERCHLITE) indicates that the same source provides both promotional services for others via contests as well as "creating brand identity for others." Registration No. 2800018 (for the mark EL VOCEADOR) also identifies services that include promoting the goods and services of others through a variety of methods, including contests, as well as providing "branding campaigns for others." Again, although applicant has limited its services to product packaging and label design services for others, the specimen of record indicates that applicant's services are compatible with, and include, creating "brand identity" for others.

Upon consideration of all of the evidence, we find that there is, at the very least, a viable relationship

shown therein in the United States on all of the listed goods and services, and they have very little, if any, persuasive value on the point for which they were offered.").

between registrant's promotional services and applicant's product label and packaging design services. It is also certainly foreseeable that the same services may be integrated into one project for the same consumer. For example, someone designing a promotional contest for a client who produces goods (of any type) might easily settle on a promotion that urges prospective consumers of those goods to "look for specially marked labels or packages," designating goods involved in the promotion; this would therefore entail incorporating specifically designed labels or packages for the promotion.

Accordingly, we find that the second *du Pont* factor weighs in favor of a finding of likelihood of confusion.

Because there are no limitations as to channels of trade or classes of purchasers in either the application or the registration, it is presumed that the registration and the application encompass all of the services of the type described in the description of services, that the services so identified move in all channels of trade normal for those services, and that the services are available to all classes of purchasers for the listed services. See *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). In this case, the same consumers may need applicant's packaging design services, as well as the registrant's promotional

services. Accordingly, we find that the channels or trade and classes of consumers may be the same.

Finally, applicant argues that it "has never heard or run across Registrant in the marketplace or at industry shows or events and has never experience (sic) a single instance of consumer confusion between the respective marks, despite both being in commerce and located in Florida for approximately two years." Brief, p. 6. In an *ex parte* case, as we have here, the absence of actual confusion is hardly unusual and seldom is a significant factor in finding that there is no likelihood of confusion. In particular, we have no evidence here as to extent of either applicant's or the registrant's use of the respective marks, and therefore we cannot determine whether there has been any significant opportunity for actual confusion to have occurred. See *Majestic Distilling*, 65 USPQ2d at 1205 ("The lack of evidence of actual confusion carries little weight"). Thus, we consider this factor to be neutral.

For the reasons discussed above, and considering all of the evidence of record pertaining to the *du Pont* factors, we conclude that a likelihood of confusion exists. Applicant's mark is essentially identical to the cited registered mark, and applicant's services are related to

Ser. No. 78865900

the services recited in the cited registration and the services move in the same channels of trade, to same classes of consumers.

Decision: The refusal to register is affirmed.