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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re GTS DO BRASIL LTDA

Serial No. 78971518

Jeffrey M. Furr of Furr Law Firm for GTS DO BRASIL LTDA.

David Yontef, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Bucher, Kuhlke, and Wellington, Administrative
Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

GTS DO BRASIL LTDA ("applicant") filed, on September 10, 2006, an application to register on the Principal Register the mark GTS DO BRASIL (in standard character format) for "agricultural machinery, namely, harvesting headers and road-maker planes" in International Class 7. The application is based on an allegation of a bona fide intent to use the mark in commerce. DO BRASIL is

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translated into English as "of Brazil," and applicant has disclaimed the term "Brasil."

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 GTS (in standard character form) for "lawn mowers; and internal combustion engines for lawn mowers and parts therefor" in International Class 7.¹

Registration has also been finally refused pursuant to Trademark Rule 2.61(b) on the basis that applicant failed to comply with a requirement for information regarding "the meaning and/or significance of the letters 'GTS' in the agricultural trade or industry."

Applicant appealed the final refusals of its application and filed a request for reconsideration. The examining attorney denied applicant's request for reconsideration and, subsequently, both applicant and the examining attorney filed briefs. As discussed below, both of the refusals to register are affirmed.

We consider first the Office's requirement for information. It is proper for an examining attorney to request additional information from an applicant in order to examine the application properly. *In re Air Products*

¹ Registration No. 1414750, issued on October 28, 1986; renewed.

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and Chemicals, Inc., 192 USPQ 157 (TTAB 1976); 37 C.F.R. § 2.61(b). In his second Office Action, the examining attorney imposed the following requirement:

...applicant must specify whether the letters "GTS" have any significance in the agricultural trade or industry or as applied to the goods described in the application. 37 C.F.R. §2.61(b).

Applicant, in its responses, has repeatedly refused to specifically address the request. Instead, applicant has stated that "GTS stands for the initials of the original owners of [applicant]." Brief, p. 5. In this regard, applicant submitted a copy of a letter purportedly signed by the original owners and indicating that their surnames begin with the letters "G," "T" and "S."

Notwithstanding applicant's response and explanation, we find that it has not complied with the examining attorney's proper request for information. The fact that the letters GTS have significance to applicant, e.g., representing the first letters of three of its original owners' surnames, does not remove the possibility that the initialism, GTS, may also have significance in the agricultural machinery field or trade. And, applicant has not, even in its brief, directly responded to the specific request in this regard. Applicant's initial failure to comply could have been the result of a misunderstanding;

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however, by the time the refusal was made final or at least by the time applicant filed its brief, there is no real excuse for not understanding and complying with the requirement.

In view thereof, applicant's noncompliance with the Trademark Examining Attorney's lawful requirement under Trademark Rule 2.61(b) warrants refusal of the application.

We turn next to our determination of the examining attorney's refusal to register the mark under Section 2(d) of the Trademark Act which 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 & 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 goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We first consider the similarity and dissimilarity between the marks, GTS and GTS DO BRASIL. Our focus is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc.*

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v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). Here, the marks are nearly identical inasmuch as applicant's mark incorporates the entirety of the registered mark, GTS. Visually and phonetically, the only difference is the addition of the geographically descriptive phrase, DO BRASIL, in applicant's mark, which translates into English as "of Brazil."

The registered mark, GTS, will clearly be perceived as the dominant element of applicant's mark and as an arbitrary initialism. Although the examining attorney suggested several possible meanings for the initialism in connection to agricultural machinery, there was no conclusive explanation given. And, as noted, applicant has not stated whether or not the initialism has any significance in the agricultural machinery industry. Instead, applicant stated only that the initialism is the result of the first letters of applicant's original owners' surnames; applicant did not, however, present any evidence that the average consumer would be aware of this abbreviation. Accordingly, we must assume that the initialism GTS would be perceived by consumers of applicant's and the cited registrant's goods in the same

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manner, namely, as an arbitrary combination of three letters.

The dominance of "GTS," as an element of applicant's mark, is further reinforced by its location at the beginning. *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). See also *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 at 1692 (Fed. Cir. 2005) ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

As to the commercial impression and connotations of the marks, it is well settled that the addition of descriptive terminology to an otherwise identical mark is normally insufficient to alter the overall commercial impression of the mark to the point where the likelihood of confusion is eliminated. Here, applicant is simply adding the geographically descriptive phrase, DO BRASIL, to the registered mark. While this term is not ignored in our

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comparison of the marks, the fact remains that it is far less important than GTS in creating an impression, and it is of little, if any, source-distinguishing effect. See *In re National Data Corp.*, *supra* ("That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark"). Even if, *arguendo*, some emphasis or attention is placed on the phrase "DO BRASIL," this may actually enhance or increase the likelihood of confusion because purchasers who are familiar with both applicant and the owner of the registered mark, may assume (falsely) that applicant is a Brazilian affiliate of the registrant.

Ultimately, the only difference between the two marks, namely, applicant's addition of the phrase DO BRASIL, does very little to distinguish the marks. The marks are extremely similar visually and aurally, and in terms of connotation. Accordingly, this *du Pont* factor weighs heavily in favor of finding a likelihood of confusion.

We turn next to the similarity and dissimilarity of applicant's goods, i.e., agricultural machinery, namely, harvesting headers and road-maker planes, vis-à-vis registrant's goods, i.e., lawn mowers; and internal combustion engines for lawn mowers and parts therefor.

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In making our determination regarding the relatedness thereof, we must look to the goods as identified in the involved application and cited registration. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

We note, at the outset of considering this *du Pont* factor, that the greater the degree of similarity between applicant's mark and the cited registered mark, the lesser the degree of similarity between applicant's goods and registrant's goods that is required to support a finding of likelihood of confusion. See *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). If the marks are the same, as they nearly are in this case, it is only necessary that there be a viable relationship between the goods in order to support a finding of likelihood of confusion. See *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). Furthermore, it is not necessary that the goods at issue be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient instead that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of

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the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

The examining attorney argues that the respective goods are related because, "like the lawn mowers associated with the registered mark, applicant's goods are intended for landscaping...and [t]herefore, the goods of the parties have at least one shared common purpose." Brief, p. 4. In support of his position, the examining attorney made of record copies of numerous use-based third-party registrations to her final Office action which show that various trademark owners have adopted a single mark for goods of the kind that are identified in both applicant's application and the cited registration.² Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. *In re Infinity Broad Corp.*, 60 USPQ2d 1214 (TTAB 2001); *In re*

² Attached to Office actions dated February 5, 2007 and August 24, 2007.

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Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). In particular, the evidence shows that several companies that manufacture larger agricultural machines, such as applicant's, may also manufacture "lawn mowers" (or "mowers," which presumably would include lawn mowers). Also, in this regard, the examining attorney attached copies of printouts from the cited registrant's website.³ On its website, registrant touts its wide-range of goods as enabling the purchaser to "manage your agricultural, horticultural, lawn and garden needs," and that it is a "proven performer on farm and construction machinery..." We reiterate that our likelihood of confusion analysis is based solely on the goods identified in the involved application and cited registration; nonetheless, the aforementioned evidence indicates that a company that sells lawn mowers may also sell agricultural machinery or goods that have agricultural applications.

Based on the record herein, we find that the respective goods are sufficiently related that, when identified by nearly identical marks, prospective purchasers are likely to believe that they come from the same source. Accordingly, the *du Pont* factor involving the

³ Attached to Office action dated June 19, 2008.

similarity and nature of the goods weighs in favor of finding that there is a likelihood of confusion.

As to the *du Pont* factors involving the similarity or dissimilarity of likely-to-continue trade channels and classes of consumers, we initially note that applicant's goods are prefaced as "agricultural machinery." We may therefore assume that these goods are limited to use in the agricultural industry and are sold to consumers engaged in said trade. On the other hand, the registration's identification of goods contains no limitation as to channels of trade or classes of purchasers. Thus, it is presumed that the registration encompasses all types of lawn mowers and they move in all channels of trade normal for lawn mowers, and they are available to all classes of purchasers for the lawn mowers. See *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 211 USPQ 639, 640 (TTAB 1981). The registration's identification thus includes larger, commercial-grade lawn mowers that could possibly complement applicant's road-maker planes and harvesting headers. It is foreseeable that the same consumer involved in agriculture would have a need for a commercial-grade lawn mower as well as applicant's agricultural machinery. In which case, the respective goods would be marketed to the same purchasers

and presumably in the same trade channels. Accordingly, we find that the channels of trade and classes of consumers are factors that weigh in favor of finding a likelihood of confusion.

Applicant contends, without any evidentiary support, that purchasers of agricultural machinery are "sophisticated consumers," and that they are not inclined to make impulse purchases. Here, we may assume that applicant's goods are not inexpensive machines and, likewise, registrant's goods, to the extent they are commercial-grade lawn mowers, would involve a significant purchase. Thus, we may presume that there is level of purchaser sophistication that is higher than the ordinary consumer. Nonetheless, we have held that even with respect to those purchasers who are sophisticated, they are not necessarily immune from source confusion. See *Wincharger Corporation v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289 (CCPA 1962); *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). This is particularly true in this case because of the degree of similarity of the marks. Thus even those sophisticated purchasers involved in purchasing the respective goods may likely believe that applicant's and registrant's goods emanate from a single source. In view thereof, the factor regarding the sophistication of

purchasers only slightly favors applicant.

Finally, applicant argues that it has been "using the mark in the United States with no actual confusion regarding the source of the goods." Brief, p. 5. Although it is a factor to be considered, the absence or presence of actual confusion is of little probative value where, as here, we have no evidence pertaining to the nature and extent of the use by applicant and registrant. In any event, the test under Section 2(d) is not actual confusion but likelihood of confusion. See *Majestic Distilling*, 65 USPQ2d at 1205 ["uncorroborated statements of no known instances of actual confusion are of little evidentiary value"].

In conclusion, because of the near identity of the marks and the relatedness of the goods, trade channels and classes of purchasers, we find that purchasers familiar with registrant's goods offered under the mark GTS are likely to believe, upon encountering applicant's mark GTS DO BRASIL for the goods identified in its application, that they originate with or are somehow associated with the same entity. Although we have stated that the *du Pont* factor regarding the purchaser sophistication weighs slightly in applicant's favor, it is not sufficient to outweigh our findings on the other *du Pont* factors, specifically the

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nearly identical marks and relatedness of the goods. Also, any doubts which we may have had have been resolved in favor of registrant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes*, 179 USPQ 729 (CCPA 1973).

Decision: The refusals to register under Section 2(d) of the Trademark Act and pursuant to Trademark Rule 2.61(b) are affirmed.