

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

In re: Mighty Leaf Tea
Serial No.: 76/678,969
Filed: July 2, 2007
Mark: ML

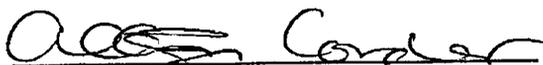
**NOTICE OF APPEAL
FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

Mighty Leaf Tea hereby appeals to the United States Court of Appeals for the Federal Circuit for review of the Trademark Serial No. 76/678,969 Opinion dated May 8, 2009 of the United States Patent and Trademark Office Trademark Trial and Appeal Board affirming the Examining Attorney's refusal of registration. A copy of that Opinion is attached hereto.

July 2, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the Notice of Appeal including the Opinion dated May 8, 2009, was filed with the Director, U.S. Patent and Trademark Office Trademark Trial and Appeal Board by "Express Mail Post Office to Addressee" Label No. EH 467 644 269 US addressed to:

General Counsel
United States Patent and Trademark Office
P.O. Box 15667
Arlington, Virginia 22115

The undersigned also certifies that three copies of the Notice of Appeal including the Opinion dated May 8, 2009, check for \$450, Charles C. Valauskas Entry of Appearance, Allison M. Corder Entry of Appearance, and Certificate of Interest was filed with the Clerk of the Court, United States Court of Appeals for the Federal Circuit by "Express Mail Post Office to Addressee" Label No. EH 467 644 272 US addressed to:

Clerk of the Court
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington D.C. 20439

on this 2 day of July, 2009.


Allison M. Corder

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Hearing:
April 21, 2009

Mailed:
May 8, 2009

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mighty Leaf Tea

Serial No. 76678969

Charles C. Valauskas of Valauskas & Pine LLC for Mighty Leaf Tea.

Priscilla W. Milton, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Seeherman, Grendel and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Mighty Leaf Tea ("applicant") filed a use-based application on the Principal Register for the mark ML, in standard character form, for "personal care products and skin care preparations, namely, skin soap, body wash, foam bath, body lotion, body scrub, bath salts and massage oil; potpourri; incense," in Class 3.

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

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ML MARK LEES, shown below, for "skin care products, namely, skin cleanser, skin toner, skin cream, skin lotion, skin mask gel, make-up foundation, powder and blush," in Class 3.¹



MARK LEES

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 goods and/or 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

¹ Registration No. 2132830, issued January 27, 1998; Sections 8 and 15 affidavits accepted and acknowledged; renewed.

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characteristics of the goods and differences in the marks").

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

The goods identified in the application and registration are in part identical and, insofar as bath salts and massage oil are concerned, otherwise closely related.²

Applicant's Goods	Personal care products and skin care preparations, namely, skin soap, body wash, foam bath, body lotion, body scrub, bath salts and massage oil; potpourri; incense
Registrant's Goods	Skin care products, namely, skin cleanser, skin toner, skin cream, skin lotion, skin mask gel, make-up foundation, powder and blush"

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

Because the goods identified in the application and the cited registration are in part identical and otherwise closely related, we must presume that the channels of trade and classes of purchasers are the same. See *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-

² The fact that applicant's description of goods also includes potpourri and incense in Class 3 does not obviate the relatedness of the other listed products. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

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part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

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

With regard to the conditions of sale, because there are no restrictions in the description of goods, the skin care products listed in the description of goods may include inexpensive lotions and creams that would not be purchased with a great deal of care and do not require purchaser sophistication. See *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) ("When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care") (citations omitted). Thus, this factor favors finding a likelihood of confusion.

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

We now turn 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.*, 177 USPQ at 567. 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, we are mindful that where, as here, the goods are in part identical and otherwise closely related, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

Moreover, 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

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impression so that confusion as to the source of the goods and services 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).

We find that the marks are identical in terms of appearance and sound to the extent that they share the letters "ML." The fact that these letters in the registered mark appear in stylized form does not distinguish them because applicant is attempting to register its mark in standard character form, and a registration therefor would entitle applicant to use the mark in the same stylization. *In re Hester Industries, Inc.*, 231 USPQ 881, 883 n.6 (TTAB 1986) ("Inasmuch as the drawing of applicant's mark is in typed form, applicant is not limited to any particular form of display, and might use its mark in the same form as registrant"). See also

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TMEP §1207.01(c)(iii) (5th ed. 2007) ("If a mark (in either an application or a registration) is presented in standard characters, the owner of the mark is not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording (or other literal element, e.g., letters, numerals, punctuation) and not in any particular display"). There is no doubt that if the marks at issue were placed side-by-side, certain differences between them, including those specifically enumerated by applicant, would be readily discernible. However, as indicated above, in the normal environment of the marketplace where purchases are actually made, purchasers and prospective purchasers do not usually have the opportunity for a careful examination of marks in minute detail. An individual relies on the recollection of the various marks that he or she has previously seen in the marketplace and, more frequently than not, in the case of letter marks, such as in this case, the consumer's recollection is not obscured with minute details or specific characteristics of the marks, but is determined by an overall or general impression of the many and various marks that he or she has encountered in his or her daily living experiences. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980) (applicant's

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block letter "W" within a circular design is similar to opposer's block "W" with a line extending from the top portion of the right leg of the "W").

Applicant argues that the commercial impression engendered by the marks is different because the registered mark includes the name MARK LEES and presumably consumers will view the letters ML as the initials for MARK LEES, as opposed to simply an arbitrary combination of letters. However, the inclusion of the name MARK LEES in registrant's mark does not preclude likelihood of confusion with applicant's "ML" mark. Likelihood of confusion has frequently been found where contested marks used on related products involve one mark which consists of a single word and another which is comprised of that same word followed by a second term. *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY DRUM for hairdressing and conditioner is likely to cause confusion with EBONY for cosmetics). See also *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967) (THE LILLY for dresses is likely to cause confusion with LILLI ANN for dresses); *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994) (ULTRA for gasoline likely to cause confusion with ULTRA LUBE for lubricating oils and greases); *Corporate Fitness Programs Inc. v. Weider Health*

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and *Fitness Inc.*, 2 USPQ2d 1682 (TTAB 1987) (SHAPE for fitness magazines is likely to cause confusion with SHAPE WRITEUP for physical fitness newsletters); *In re Dennison Manufacturing Co.*, 229 USPQ 141 (TTAB 1986) (GLU STIC for adhesives is likely to cause confusion with UHU GLU STIC for adhesives); *In re United States Shoe Corporation*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE for women's clothing stores and women's clothing is likely to cause confusion with CREST CAREER IMAGES for clothing). For example, consumers familiar with the registered mark for skin care products are likely to assume, when they encounter applicant's ML mark on the same or closely related products, that this is a variation of the registrant's ML MARK LEES trademark, a monogram used for esthetic or marketing reasons.

Applicant contends that because the letters ML have been registered numerous times in connection with skin care products, the fact that applicant's mark contains the same letters ML as in the registrant's mark is not a sufficient basis on which to base a finding of likelihood of confusion. In support, applicant submitted copies of the following third-party registrations for skin care products:³

³ Applicant also included copies of applications for the marks TMLA, MLAB, FEMLOGIC and design, and SIMLINE. The Board has long

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Registration Number	Mark
3320567	MLE
3190546	MLUXE
2763224	M'LIS
2335027	JML and design
31935532	AMLAVI

There are a number of problems with applicant's argument. The five third-party registrations that applicant made of record fail to demonstrate that the various ML marks for skin care products are actually being used, much less that the extent of such third-party use is so great that consumers have become accustomed to seeing various ML marks and, therefore, have learned to distinguish between them.⁴ See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office); *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ

held that third-party applications are evidence only of the fact that they were filed; they have no other probative value. *Interpayment Services Ltd. v. Doctors & Thiede*, 66 USPQ2d 1463, 1467 n.6 (TTAB 2003). Nevertheless, even if we considered these applications, they would not change our decision because they suffer the same probative defects as the registered marks.

⁴ And, of course, applicant is seeking to register ML *per se*, without any additional distinguishing element.

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268, 269 (CCPA 1973); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). In this respect, applicant's reliance in its brief on Federal Circuit and Board cases for the proposition that the third-party registrations are evidence of the wide-spread use of the letters "ML" in connection with skin care products is misplaced because third-party registrations are not evidence of use.

While third-party registrations may be used in the manner of a dictionary to show that a mark or a portion of a mark is descriptive or suggestive of goods and services, the third-party marks submitted by applicant are not for the element ML *qua* ML. Applicant has merely submitted a group of registrations that have the letters "ML" as part of a longer letter string (*i.e.*, MLUXE, M'LIS, JML and AMLAVI). The indiscriminate citation of third-party registrations without regard to the similarity of the marks involved is not indicative that the letters ML have a suggestive or descriptive connotation. See *In re George Weston Ltd.*, 228 USPQ 57, 58 (TTAB 1985) (third-party registrations covering different marks for different products does not prove that SPEEDI-BAKE is merely descriptive of frozen dough); *Cook's Pest Control, Inc. v. Sanitas Pest Control Corporation*, 197 USPQ 265, 271 (TTAB

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1977) (third-party registrations that contain different design elements and do not include the word marks at issue are of little probative value); *Aileen, Inc. v. Eileen Togs, Corp.*, 188 USPQ 698, 700 (TTAB 1975) (third-party registrations for personal names different from those at issue are of no significance). The only mark that is arguably close to applicant's mark and registrant's mark is MLE, but that registration in addition to the marks at issue are not sufficient to demonstrate that the letters "ML" have significance in connection with skin care products.

In view of the foregoing, we find that the marks are similar in terms of appearance, sound, connotation and commercial impression, and that any dissimilarities are outweighed by the similarities.

F. Balancing the factors.

In view of the similarities of the marks, the in part identical and otherwise closely related goods and the presumption that the goods move in the same channels of trade and are sold to the same classes of consumers, we find that applicant's mark ML for "personal care products and skin care preparations, namely, skin soap, body wash, foam bath, body lotion, body scrub, bath salts and massage oil; potpourri; incense" is likely to cause confusion with

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the registered mark ML MARK LEES and design for "skin care products, namely, skin cleanser, skin toner, skin cream, skin lotion, skin mask gel, make-up foundation, powder and blush."

Decision: The refusal to register is affirmed.