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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Art House Greetings, Inc.

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Serial No. 77093040

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Christopher P. Carroll for Art House Greetings, Inc.

Aisha Clarke, Trademark Examining Attorney, Law Office 101  
(Ronald R. Sussman, Managing Attorney).

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Before Quinn, Hairston and Zervas, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

Art House Greetings, Inc. filed, on January 28, 2007,  
an intent-to-use application to register the mark ART HOUSE  
GREETINGS ("GREETINGS" disclaimed) in standard character  
form for "greeting cards."

The trademark examining attorney refused registration  
under Section 2(d) of the Trademark Act, 15 U.S.C.  
§1052(d), on the ground that applicant's mark, when applied  
to applicant's goods, so resembles the previously  
registered mark ARTEHOUSE in standard character form for

"fine art prints, posters, calendars and greeting cards"<sup>1</sup> as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Applicant argues that the marks are "clearly distinguishable," stating that the combination of the Italian word "arte" and the English word "house" comprising registrant's mark ARTEHOUSE creates a different commercial impression than that created by the combination "ART HOUSE" in applicant's mark. Applicant also points to differences between the marks in appearance and sound; with respect to the latter, applicant contends that consumers will pronounce the letter "E" in "ARTE" in registrant's mark. Applicant does not contest that the goods are similar or, in part, identical; however, applicant does assert that its customers are more sophisticated than the average purchaser of greeting cards. Lastly, applicant relies on the absence of any known instances of actual confusion and, in this connection, introduced a declaration of one of its officers. Applicant also submitted an excerpt from registrant's website to show that registrant's goods are based on Italian art, and an excerpt from a guide to the Italian language.

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<sup>1</sup> Registration No. 3308861, issued October 9, 2007.

The examining attorney maintains that the goods are, in part, identical and/or otherwise related. The marks, according to the examining attorney, are similar, it being likely that the additional letter "e" in the "ARTE" portion of registrant's mark will be neither noticed nor pronounced by consumers.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, 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 turn to consider the goods. It is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods identified in the cited registration. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993); and *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490,

1 USPQ2d 1783 (Fed. Cir. 1992). Where the goods in the application at issue and/or in the cited registration are broadly identified as to their nature and type, such that there is an absence of any restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of trade which would be normal therefore, and that they would be purchased by all potential buyers thereof. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Further, it is not necessary that the respective goods be identical or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of 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 originated from the same producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

When we compare the goods, we again note applicant has not disputed at any time during prosecution or the appeal the examining attorney's finding that the applicant's and registrant's "greeting cards" are legally identical. So as to be clear, applicant's communications during prosecution and appeal brief are completely silent on the *du Pont* factor relating to the similarity between the goods. Likelihood of confusion may be found based on any item that comes within the identification of goods in the involved application or registration. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

In view of the identity between applicant's and registrant's "greeting cards," we presume that they travel in the same trade channels (e.g., greeting card stores, specialty stores, drug and grocery stores, and the like) and are bought by the same classes of purchasers, including ordinary ones. Further, greeting cards generally are relatively inexpensive. Given the absence of any limitation in the respective identifications of goods relating to cost, we must assume that applicant's and registrant's greeting cards include those that are inexpensive. As such, they would be subject to impulse purchases made with nothing more than ordinary care.

The identity, at least in part, between the goods, and the overlap in purchasers and trade channels weigh heavily in favor of a finding of likelihood of confusion.

Likewise, the fact that greeting cards may be subject to an impulse purchase favors a finding of likelihood of confusion.

We next turn to consider the *du Pont* factor of the similarity between the marks. We must compare the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). 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 goods and/or 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. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Finally, where, as in the present case, the marks are used, in part, on identical goods, the degree of similarity between the marks that is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

It is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("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.").

In the case of applicant's mark, the "ART HOUSE" portion of the mark clearly dominates the "GREETINGS" portion. The generic/descriptive word "GREETINGS" is disclaimed, and, although we have compared the marks in their entireties, this word plays a subordinate role in the mark. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997). There is no

question that "ART HOUSE" is the portion of the mark that is most likely to be remembered and used by consumers in calling for and referring to applicant's greeting cards. This dominant portion of applicant's mark, "ART HOUSE," is similar to the entirety of registrant's mark ARTEHOUSE.

In terms of appearance, the marks, in their entireties, are very similar. Given that the letter "E" appears in the middle of registrant's mark, we share the examining attorney's doubts that American consumers will even notice it. Even if the letter "E" is noticed, consumers are unlikely to give it much significance in forming their perception of the mark.

As to sound, we begin with the legal premise, as pointed to by the examining attorney, that there is no "correct" pronunciation of a trademark because it is impossible to predict how the American public will pronounce a particular mark. We find this to be especially true when the debate over pronunciation, as in this case, centers on a foreign term. Therefore, "correct" pronunciation cannot be relied upon to avoid a likelihood of confusion. *See Centra Industries Inc. v. Spartan Chemical Co. Inc.*, 77 USPQ2d 1698 (TTAB 2006); and *In re Great Lakes Canning, Inc.*, 227 USPQ 483 (TTAB 1985). Applicant contends (as supported by applicant's Ex. A

captioned "How To Pronounce Italian Vowels") that consumers will articulate the "E" in registrant's mark in a sharp, clear fashion. We find it just as likely, however, that American consumers, especially those not familiar with the Italian language, will not even bother to pronounce the "E." In any event, even if the "E" in registrant's mark is pronounced, the difference in sound between the marks is minimal relative to the other similarities between the marks.

We also find that the marks convey essentially the same meaning. We take judicial notice that the translation of the Italian word "arte" in English is "art." The Pocket Oxford Italian Dictionary (2006). See *In re Styleclick.com*, 58 USPQ2d 1523, 1525 (TTAB 2001) (the Board may take judicial notice of dictionary definitions). Thus, both marks, as applied to greeting cards, connote that the goods emanate from an art house. The fact that registrant's mark may also suggest an art house specializing in Italian art does not create a significant difference in meaning.

With respect to commercial impression, applicant argues that "the combination of the Italian word 'ARTE' with the English word 'HOUSE' is a 'somewhat incongruous expression which competitors,' such as the Appellant, have

'no need to use to describe their goods. In other words, the use of the Italian word 'ARTE' is somewhat out of place or incompatible with the English word 'HOUSE' which makes the combination commercially distinguishable from the completely English combination ART HOUSE." (Brief, pp. 4-5). Applicant relies on prior Board decisions wherein the Board found that the juxtaposition of a foreign word with an English word created an incongruous mark that may serve to distinguish it from an otherwise similar mark. See, e.g., *In re Sweet Victory, Inc.*, 228 USPQ 959 (TTAB 1986). We find, however, that the cases are distinguishable for the reasons articulated by the examining attorney. In any event, "ARTE" and "ART" as they appear in ARTEHOUSE and ART HOUSE GREETINGS, respectively, are very similar in appearance, and identical in meaning; any difference in sound is minimal. And, again, because American consumers may not notice or pronounce the "E" in the "ARTE" portion of registrant's mark ARTEHOUSE, or otherwise be familiar with the Italian language, the purported incongruity would not even be perceived by consumers.

In sum, any differences between the marks are easily outweighed by the similarities. The marks, ARTEHOUSE and ART HOUSE GREETINGS, both for greeting cards, engender substantially similar overall commercial impressions.

Thus, the *du Pont* factor regarding the similarity between the marks weighs in favor of a finding of likelihood of confusion.

In connection with its assertion of the absence of any actual confusion between the involved marks, applicant introduced the declaration of Justin E. Neal, applicant's vice-president for finance. Mr. Neal states that applicant began using its mark in March 2007, and that applicant has marketed and sold its greeting cards in approximately 30 states.

Applicant's assertion of no actual confusion between the marks is entitled to little weight. *In re Majestic Distilling Co.*, 65 USPQ2d at 1205 ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value"). See *In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of applicant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, *J.C. Hall Co. v.*

*Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965), especially in an *ex parte* context. In any event, the record is devoid of probative evidence relating to the extent of use of registrant's mark and, thus, whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

As indicated earlier, there is no limitation on the "greeting cards" listed in either applicant's or registrant's identification of goods. Thus, we must assume that the greeting cards include those that are relatively inexpensive and bought on impulse. Applicant contends, however, that its cards are "directed toward a more sophisticated greeting card buyer." (Brief, p. 9). We will assume, strictly for purposes of dispensing with this legally untenable argument, that applicant's customers are more sophisticated than the average purchaser of greeting cards. Nevertheless, even careful purchasers are likely to

be confused when encountering identical products offered under similar marks. As stated by our primary reviewing court, "[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. 'Human memories even of discriminating purchasers ... are not infallible.'" *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) quoting *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). The similarity between the marks and the identity between the goods outweigh any sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

We conclude that consumers familiar with registrant's greeting cards sold under the mark ARTEHOUSE would be likely to mistakenly believe, upon encountering applicant's mark ART HOUSE GREETINGS for greeting cards, that these identical goods originated with or are somehow associated with or sponsored by the same entity.

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Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

**Decision:** The refusal to register is affirmed.