

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: December 19, 2012

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**  
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In re Henkel Corp.  
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Serial No. 77408579  
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A. Kate Huffman for Henkel Corp.

Jaclyn Kidwell Walker, Trademark Examining Attorney, Law Office 112 (Angela Bishop Wilson, Managing Attorney).

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Before Cataldo, Taylor and Lykos,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Henkel Corp., filed an application to register the mark GOT2B GUARDIAN ANGEL in standard characters on the Principal Register for "hair care preparations; hair styling preparations" in International Class 3.<sup>1</sup>

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that

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<sup>1</sup> Application Serial No. 77408579 was filed on February 28, 2008, based upon applicant's allegation of its bona fide intent to use the mark in commerce in connection with the goods.

applicant's mark so resembles the mark GUARDIAN ANGEL, previously registered in standard characters on the Principal Register for "cosmetics, namely, skin moisturizers" in International Class 3 as to be likely to cause confusion, mistake or deception.<sup>2</sup>

When the refusal was made final, applicant appealed. Applicant and the examining attorney submitted main briefs on the issue under appeal, and applicant submitted a reply brief.

#### **Likelihood of Confusion**

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, 567 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis two key, though not exclusive, 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, 27 (CCPA 1976). See also *In re Dixie*

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<sup>2</sup> Registration No. 3815873 issued on July 6, 2010.

*Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

The Marks

In comparing applicant's mark and registrant's mark, we first note that applicant has incorporated the registered mark, GUARDIAN ANGEL, in its entirety. In cases such as this, a likelihood of confusion frequently has been found. "When one incorporates the entire arbitrary mark of another into a composite mark, the inclusion of a significant, nonsuggestive element will not necessarily preclude a likelihood of confusion. [Internal citations omitted]. An inclusion of a merely suggestive or descriptive element, of course, is of much less significance in avoiding a likelihood of confusion." *The Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design is similar the mark CONCEPT). *See also Coca-Cola Bottling Co. v. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL LANCER and Bengal Lancer soldier design is similar to the mark BENGAL); and *In re Bissett-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (E-CELL is similar to the mark E). Thus, the importance of applicant's incorporation of registrant's GUARDIAN ANGEL mark depends greatly on the degree of

suggestiveness of that mark as well as elements of the marks that are not shared.

*Strength of the Registered Mark*

There is no evidence to indicate that GUARDIAN ANGEL possesses any recognized meaning in connection with the recited goods. While it stands to reason that the term "guardian angel" may be slightly suggestive in connection with skin and hair care products having protective qualities, it is only modestly suggestive and we find no specific meaning of the term in connection with the identified goods in either the subject application or cited registration. Even allowing for any suggestive nature of the term GUARDIAN ANGEL, the fact that applicant has incorporated the registered mark greatly increases the level of similarity between the marks. *See In re Denisi*, 225 USPQ 624, 626 (TTAB 1985) (PERRY'S PIZZA for restaurant services specializing in pizza and PERRY'S for restaurant and bar services); *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); and *In re South Bend Toy Manufacturing Company, Inc.*, 218 USPQ 479, 480 (TTAB 1983) (LIL' LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing).

Applicant has made of record Internet evidence of third parties displaying products under the names "Guardian Angel Body Balm;"<sup>3</sup> "Guardian Angel Fragrance Oil;"<sup>4</sup> "Guardian Angel 7 Day Candle;"<sup>5</sup> "Your Guardian Angel" (in relation to health and skin care products);<sup>6</sup> Estee Lauder Guardian Angel Lucidity Powder Compact;<sup>7</sup> and Estee Lauder Cherub/Guardian Angel Perfume Compact.<sup>8</sup> We note, however, that with the exception of "Guardian Angel Body Balm" and the "Your Guardian Angel" products, none of the third parties appear to use the term in connection with the goods in the cited registration or involved application, but rather in connection with less closely related goods such as makeup and perfume or unrelated goods such as fragrance oil and candles. In addition, there is no indication as to the extent to which consumers have been exposed to these third-party uses such that we may conclude that the mark in the cited registration is weak and entitled to a narrow scope of protection. As such, we find based on this record

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<sup>3</sup> [makeupalley.com](http://makeupalley.com)

<sup>4</sup> [naturesgardencandles.com](http://naturesgardencandles.com)

<sup>5</sup> [mexgrocer.com](http://mexgrocer.com)

<sup>6</sup> [Angel-Face-Makeup.html](http://Angel-Face-Makeup.html)

<sup>7</sup> [keeganskorner.com](http://keeganskorner.com)

<sup>8</sup> [Ebay.com](http://Ebay.com)

that GUARDIAN ANGEL is, at worst, mildly suggestive of a characteristic of the involved goods.<sup>9</sup>

*Fame of Applicant's GOT2B Designation*

Evidence made of record by the examining attorney suggests that GOT2B is a mark used by applicant in connection with a variety of beauty, hair and skin care products. There is no evidence that GOT2B is descriptive or even suggestive as applied to such goods.

Applicant argues that "GOT2B is a famous, highly recognized brand, regarded as a standard in the hair care industry."<sup>10</sup> We note, however, that applicant has submitted very little evidence of the purported fame of that portion of its mark. In addition, even assuming *arguendo* that the notoriety of GOT2B creates a situation of reverse confusion, we still must resolve doubt for the senior user of the mark, which in an *ex parte* proceeding is presumed to be the one who registered first (particularly as, we note, applicant has filed an intent-to-use application). *In re*

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<sup>9</sup> Applicant also has made of record copies of several third-party registrations taken from the USPTO Trademark Electronic Search System (TESS) for GUARDIAN and ANGEL formative marks for hair, skin and body products in addition to a variety of unrelated products, although none of the examples show use of both terms in the same mark. These registrations are not persuasive, primarily because none display both of the terms comprising registrant's mark, namely, GUARDIAN and ANGEL, let alone the unitary term GUARDIAN ANGEL.

<sup>10</sup> Applicant's brief, p. 10.

*Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). As a result, applicant's argument is not persuasive in an *ex parte* context for our likelihood of confusion determination.

We note in addition that there is little, if any, evidence regarding the fame of registrant's mark, and we find that factor to be neutral. *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006) (fame is not normally a factor in *ex parte* proceedings).

Based upon the foregoing, we find the cited mark, GUARDIAN ANGEL, to be entitled to a normal scope of protection. Further, and as discussed above, applicant has appropriated the entirety of registrant's mark which, at worst, is mildly suggestive of the recited goods. See *Wella Corp* 194 USPQ at 422. We further observe that consumers are often known to use shortened forms of names, and it is highly likely that applicant's goods will be referred to as "GUARDIAN ANGEL." Cf. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) [Rich, J., concurring: "the users of language have a universal habit of shortening full names - from haste or laziness or just economy of words"].

We must, of course, consider the marks in their entirety and we have already noted that applicant relies heavily on the GOT2B portion of its mark in arguing that the two marks are dissimilar. However, because applicant incorporates the entire registered mark which has not been shown to be descriptive or weak, purchasers are likely to assume that applicant's mark may simply be a variation of registrant's mark, rather than identifying a different source.

In sum, we conclude that applicant's mark and the registered mark are substantially similar in terms of sound, appearance, connotation and overall commercial impression. Accordingly, this *du Pont* factor weighs in favor of finding a likelihood of confusion.

The Goods

We turn now to our consideration of the identified goods, noting that 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 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).

In this case, we find that applicant's hair care preparations and hair styling preparations are related to registrant's skin moisturizers inasmuch as both are beauty products intended to enhance the respective appearance of the hair and skin. Thus, the goods appear to be related on the face of their respective identifications thereof.

In support of the refusal to register, the examining attorney made of record copies of approximately 16 use-based, third-party registrations reciting goods of a type similar to the goods identified in the involved application and cited registration, including 9 that recite "hair care preparations" or "hair styling preparations" and "skin moisturizers."<sup>11</sup> In addition, the examining attorney made of record four of applicant's own registrations that recite both hair and skin care products similar to the ones identified in its involved application and the cited registration.<sup>12</sup> These registrations suggest, in general,

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<sup>11</sup> For example, Registration Nos. 3887930; 3108590; 2986294; 2923034; and 2936388 are illustrative.

<sup>12</sup> These include Registration Nos. 0613665; 1787304; 2617174; and 2854835.

that applicant's hair care and styling products may originate from the same source as registrant's skin moisturizers. See *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001). Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source. See, e.g., *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988).

The examining attorney further made of record evidence from commercial Internet websites showing that hair care and styling products and skin care products are offered under the same marks. These websites include [aveda.com](http://aveda.com); [trefis.com](http://trefis.com); and [loccitane.com](http://loccitane.com). Such evidence serves to demonstrate that third parties are using a single mark to identify applicant's types of goods as well as those of registrant.

We note applicant's arguments that the above evidence is not persuasive to show a relationship between its goods and those of registrant. However, our case law consistently holds that such evidence is persuasive to

support a finding that the goods in an involved application are related to the goods identified in a cited registration for purposes of a likelihood of confusion determination. As discussed above, the third-party website evidence is competent to show that such parties use a single mark to identify both applicant's and registrant's types of goods, and the third-party registrations suggest that the identified goods are of a kind that emanate from a common source. Based upon this evidence and the nature of the goods themselves, we find that registrant's goods are related to those provided by applicant for purposes of our determination herein.

As a result, this *du Pont* factor also favors a finding of likelihood of confusion.

Channels of Trade

It is settled that in making our determination regarding the relatedness of the parties' goods, 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) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may

reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."). See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.").

Because there are no restrictions in either applicant's or registrant's identification of goods as to the channels of trade in which the goods may be encountered, or type or class of customer to which the goods are marketed, both applicant's and registrant's goods must be presumed to move in all normal channels of trade and be available to all classes of potential consumers, including those of each other's goods. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). In consequence thereof, this *du Pont* factor further favors a finding of likelihood of confusion.

Summary

In summary, weighing all of the evidence of record as it pertains to the relevant *du Pont* factors, we find that a likelihood of confusion exists. Moreover, to the extent that any of the points raised by applicant raise a doubt

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about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. See *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 165, 223 USPQ 1289 (Fed. Cir. 1984).

**Decision:** The refusal of registration is affirmed.