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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bioenergy, Inc.

Serial No. 77503784

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Before Seeherman, Cataldo and Ritchie, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Bioenergy, Inc. has appealed from the final refusal of the trademark examining attorney to register REJUVALEN, in standard characters, for "skin cream" in Class 3.¹

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that

¹ Application Serial No. 77503784, filed June 20, 2008, based on Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b) (intent-to-use).

applicant's mark so resembles the mark REJUVALINE, registered for "non-medicated ingredients sold as an integral component of cosmetics and non-medicated skin care preparations,"² that, if used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

We note that the Board previously had occasion to consider the same refusal in connection with Application Serial No. 77503483, for the mark REJUVALEN and design. Our comments made in that decision, which issued on June 22, 2011, are largely applicable to the present case, and therefore much of this decision will repeat what we said in the earlier opinion.

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, 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

² Registration No. 3677319, issued September 1, 2009.

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F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning first to the marks, we are guided by the principle that, in evaluating similarities between 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 impression so that confusion as to the source of the goods offered under the respective marks is likely to result." *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1727 (TTAB 2008). When considered in this manner, the marks are extremely similar. Both marks are single terms which begin with the identical letters REJUVAL, followed by a vowel and the letter "N" and, in the case of the registrant's mark, a final "E." While there are some differences in the final letters, INE and EN, because these differences are at the end of each mark, and therefore make a lesser commercial impression, they are insufficient to distinguish the marks. See *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, 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).

Moreover, the marks can be pronounced virtually identically. Because there is no correct pronunciation of a trademark that is not a normal English word, the cited mark, REJUVALINE, can be pronounced with a short "i", while REJUVALEN can be pronounced with a short "e," such that most people would hear the marks as being identical. As for the connotation of the marks, to the extent that they would convey any connotation, they suggest the word "rejuvenate," and therefore the connotation is the same. In short, the marks convey the same commercial impression. This du Pont factor favors a finding of likelihood of confusion.

Applicant does not really dispute these points of similarity, but argues that, because the letter string REJUV is found in several registered marks,³ the inclusion of these letters in both marks is not a sufficient basis for finding confusion. However, in this case it is not

³ See, for example, REJUVACELL (Reg. No. 3051295 for, inter alia, skin moisturizers; REJUVADERMISE (Reg. No. 3360448) for, inter alia, skin creams; REJUVENE (Reg. No. 3686806) for, inter alia, facial creams, all submitted with applicant's response filed March 1, 2010.

merely the letters REJUV that are common to both marks, but the letters REJUVAL, followed by a vowel and "N," as discussed above. Thus, our conclusion that the marks are similar is not based only on the shared and suggestive element REJUV, but with the recognition that the suffixes in the marks are also very similar. When the marks are considered in their entirety, they are extremely similar, and the differences in the suffixes are insufficient to distinguish them.

Applicant also submitted, with a request for reconsideration filed September 28, 2010, four third-party registrations for "HYDRO" marks, i.e., e.g., HYDRO-SURGE, HYDROSHIELD, HYDROSPHERES and HYDROSTAT, to show that similar marks have been registered for skin cream and skin cream ingredients. We are not persuaded by this evidence or this argument. It need hardly be pointed out that "HYDRO" is not "REJUV", and that in the HYDRO marks the prefix is paired with words that are clearly different and have different meanings (SURGE, SHIELD, SPHERES and STAT), as opposed to the nearly identical non-word suffixes in the present case. Thus, merely because various HYDRO marks co-exist on the Register, the existence of these registrations provides no basis for finding that REJUVALEN and REJUVALINE can coexist without confusion. In fact, even in a

situation where prior registrations have some characteristics similar to an applicant's, which again is not the case with the HYDRO marks, the USPTO's allowance of such prior registrations does not bind the Board. In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

With respect to the goods, we repeat the oft-cited principle that it is not necessary that the goods or services of applicant and the registrant 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 that the respective goods or services 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, the complementary nature of the goods is apparent from the identifications themselves. Applicant's goods are skin cream; the registrant's goods are ingredients that are an integral component of skin care preparations. In other words, the registrant's goods are used in the same goods for which applicant intends to use

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its mark. In addition, the examining attorney has made of record third-party registrations showing that a single mark has been adopted for use for both ingredients in the manufacture of cosmetics and for cosmetic preparations themselves. See, for example, Registration No 2713958 for, inter alia, skin and body creams, and essential oils for use as ingredients in the manufacture of cosmetic preparations; Registration No. 2860612 for, inter alia, cosmetic ingredient used as a component in the manufacture of body lotions, and skin creams; Registration No. 2976823 for, inter alia, cosmetic ingredient containing an essential vitamin complex for use in body creams and lotions, skin creams and skin lotions, and for skin treatments in the nature of creams and lotions for the prevention and treatment of sunburn and sun damage; and Registration NO. 1790028 for, inter alia, essential oils for use as ingredients in the manufacture of cosmetic preparations, and skin creams. 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. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

The real question is whether applicant's and registrant's goods will be encountered by the same classes of customers, such that there will be an opportunity for confusion to occur. The registrant's goods are identified as ingredients sold as an integral component of cosmetics and skin care preparations, thereby indicating that these are goods sold to manufacturers of cosmetics and skin care preparations, and not to the public at large, while applicant's goods, skin creams, are general consumer products. However, the examining attorney has made of record numerous advertisements showing that skin care product manufacturers feature the ingredients in their products, including trademarked ingredients. For example, Neutrogena features the moisturizers "Neutrogena® Healthy Defense® Daily Moisturizer SPF 30 & SPF 50 with Purescreen™ for Sensitive Skin" and "Neutrogena® Healthy Defense® Daily Moisturizer SPF 50 with Helioplex®," stating that the latter "contains Helioplex®, the sunscreen complex that helps block the harmful UVB-burning rays and UVA-aging rays which can cause premature lines and wrinkles." www.neutrogena.com. Vaseline advertises its moisturizer as containing STRATYS 3™, "an effective patented moisturizing complex, combining three powerful ingredients that infuse and suspend moisture across all layers of skin...."

<http://vaselinesheerinfusion.com>. There are similar advertisements for "HELENA RUBINSTEIN COLLAGENIST with PRO-Xfill," "Youthtopia Firming eye cream with Rhodiola," and the moisturizer "La Roche Posay Substiane with Pro Xylane." Moreover, applicant has submitted an advertisement in which the registrant's mark, REJUVALINE, is prominently advertised as being contained in a skincare product sold under the trademark DERMITAGE:

Dermitage is the only skincare line with Rejuvaline, a proprietary ingredient complex that effectively targets the visible signs of aging for more youthful-looking skin. Rejuvaline boosts the effectiveness of beneficial ingredients by delivering them deeper into the skin and continually releasing them to where they are needed most.

In view of this practice in the industry, including registrant's own use of REJUVALINE for an ingredient complex in an advertisement for a skincare product, members of the general public are likely to be exposed to the registrant's trademark in connection with skin creams. That is, the goods are marketed in such a way that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods come from a common source. The du Pont factors of the similarity of the goods, channels of trade

and classes of consumers favor a finding of likelihood of confusion.

Applicant points out that the examining attorney's evidence does not show that the same mark is used for both skin cream and ingredients for skin cream, and therefore asserts that "there would never be a situation where a product was marketed as Rejuvalen with Rejuvaline." Brief, unnumbered p. 6. However, it is not necessary to find a likelihood of confusion that applicant would have to market its REJUVALEN skin cream by advertising that it contains the registrant's REJUVALINE ingredients. On the contrary, because of the industry practice of using different trademarks for the ingredients of the cosmetic products and the products themselves, consumers would not necessarily expect applicant's REJUVALEN skin cream to feature REJUVALINE as an ingredient. Instead, consumers who are familiar with skin creams containing REJUVALINE as a component ingredient are likely to believe, upon seeing REJUVALEN skin cream, that it emanates from the same source as the ingredient does. There is also the likelihood of reverse confusion, i.e., if a consumer is familiar with REJUVALEN skin cream and sees a cosmetic product featuring REJUVALINE as a component ingredient, s/he is likely to

believe that there is a sponsorship or connection between the two.

Neither applicant nor the examining attorney has argued or submitted evidence on the remaining du Pont factors. To the extent that they are relevant, we have treated them as neutral.

Because of the similarity of the marks and the closely complementary nature of the goods, as discussed above, the consumers who are the general public are likely to believe that there is a connection or sponsorship between applicant's REJUVALEN skin cream and the registrant's REJUVALINE component ingredients in skin care preparations. We therefore find that the Office has met its burden in proving that applicant's mark, if used for its identified goods, is likely to cause confusion with the registered mark. To the extent that there is any doubt on this issue, we resolve that doubt, as we must, in favor of the registrant and prior user. In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal of registration is affirmed.