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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Follica, Inc.

Serial No. 77665184

Karen L. Elbing of Clark & Elbing for Follica, Inc.

Esther A. Borsuk, Trademark Examining Attorney, Law Office
112 (Angela Wilson, Managing Attorney).

Before Hairston, Walters, and Zervas, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Follica, Inc. has filed an application to register the
mark FOLLICA on the Principal Register for, inter alia,
"pharmaceutical preparations for hair growth treatments," in
International Class 5.¹

With respect only to these goods in International Class
5, the examining attorney has issued a final refusal to

¹ Serial No. 77665184, filed February 6, 2009, based on an allegation of
a bona fide intent to use the mark in commerce. The application
includes goods and services in International Classes 10 and 44 that are
not part of the refusal and appeal.

register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark PROFOLLICA, previously registered for "shampoos; hair care kits comprising non-medicated hair care preparations, namely, a shampoo and activator gel; hair gel," in International Class 3,"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

Our determination 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 likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by

² Registration No. 3453331, issued June 24, 2008, to Leading Edge Marketing, Inc.

Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

The Marks

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. 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 impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715 (TTAB 2008). 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).

Furthermore, although the marks at issue must be considered in their entireties, 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. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant contends that the "Pro" portion of the registered mark, PROFOLLICA, is sufficient to distinguish it from applicant's mark, FOLLICA. Whereas, the examining attorney argues that "Pro" is defined in the *Merriam-Webster Online Dictionary* (11th ed. 2010) as "noun or adj, Professional"³; that "Pro is a commonly used term, which renders "Follica" the dominant portion of applicant's mark; and, that, therefore, the marks create the same overall commercial impression. We take judicial notice of the additional definitions in the *Merriam-Webster Online Dictionary* (2010) of "Pro" as "prefix, 1. a. earlier than; prior to; before; b. rudimentary c. precursory; 2. a. located in front of or at the front of; anterior to" and "adverb, on the affirmative side; in affirmation."

Regardless of which of the above definitions is attributed to the "Pro" portion of the registered mark, we agree with the examining attorney that prospective purchasers are likely to see "Pro" as a prefix to the term "Follica," which we find is, thus, the dominant portion of the registered mark. Applicant's mark is identical to this

³ We grant the examining attorney's request that we take judicial notice of this dictionary definition.

portion of the registered mark. Therefore, although the marks have the noted differences, when we compare them in their entireties we find that on the whole they are similar in appearance, sound, connotation and commercial impression, and that the lack of the prefix "Pro" in applicant's mark does not distinguish it from the registered mark. Consumers familiar with registrant's mark may simply conclude that applicant's mark is an alternate version of the registrant's mark, perhaps adopted in conjunction with an alternate line of products for the hair, i.e., products to stimulate hair growth.

This *du Pont* factor favors a finding of likelihood of confusion.

The Goods

Turning to consider the goods involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

Further, it is a general rule that goods need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein; and *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

Applicant contends that its goods are pharmaceutical preparations which are quite distinct from non-medicated hair products; that applicant's pharmaceutical products are likely to be purchased upon the recommendation or prescription of a doctor or pharmacist and, therefore, the channels of trade differ; and that the relevant purchaser of its goods is both careful and sophisticated, i.e., knowledgeable. On the other hand, the examining attorney contends that applicant's and registrant's goods are for the identical purpose of promoting hair growth; that the fact that one is a pharmaceutical preparation while the other is non-medicated is immaterial; and that the end consumer of

applicant's goods is the general consumer, who is not sophisticated.

In support of her position that the goods are similar, the examining attorney submitted copies of nine third-party use-based registrations which include, among many other items, hair care products, non-medicated hair growth products, and medicated hair growth products. Applicant contends that this evidence is not persuasive and points to an excerpt from registrant's website, which applicant submitted in response to the refusal to register. Applicant points to the following statements therein:

- ProFollica "lets you break free of surgery and prescription drugs for your hair loss needs";
- ProFollica is the natural choice for those who want an alternative to the pharmaceutical approach for hair re-growth"; and
- "This product is not intended to diagnose, cure, or prevent any disease."

Registrant's goods are broadly identified as "shampoos; hair care kits comprising non-medicated hair care preparations, namely, a shampoo and activator gel; hair gel," which encompass products to stimulate hair growth. Information from registrant's website confirms this fact. Therefore, registrant's identified goods encompass non-medicated hair shampoos and gels used to stimulate hair growth, which is identical in purpose to applicant's goods. We take judicial notice of the definition in the *Merriam-*

Webster Online Dictionary (2010) of "pharmaceutical" as "a medicinal drug." "Preparations" is a broad term that, in the context of applicant's goods, could encompass shampoos and hair gels. Thus, the only difference between applicant's goods and a subset of registrant's goods is that applicant's goods are medicinal, or medicated products, whereas, registrant's products are not medicated.

While the third-party registrations in evidence are not evidence of use of the marks in connection with the respectively identified products, or that the public is familiar with them, such registrations nevertheless have some probative value to the extent that they may serve to suggest that such goods are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). In this case, in view of the obvious similarities between the goods and their purpose, we find that these third-party use-based registrations are sufficient to support the conclusion that the goods are related.

This *du Pont* factor weighs in favor of a likelihood of confusion.

Channels of Trade and Purchasers

There is no evidence regarding trade channels for the respective goods and, thus, this *du Pont* factor is neutral.

Similarly, there is no evidence in the record that pharmaceutical preparations may be purchased only upon prescription, which would require consultation with a doctor. Therefore, we find that both applicant's and registrant's identified goods may be purchased by members of the general public. These purchasers encompass all levels of sophistication and there is no evidence that purchasers of hair growth stimulating products exercise more than ordinary care in purchasing these products.

This *du Pont* factor weighs in favor of a likelihood of confusion.

Conclusion

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, FOLLICA, and registrant's mark, PROFOLLICA, their contemporaneous use on the related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is affirmed as to the goods in International Class 5 in this multiclass application. The application will publish in due course in only for the two remaining classes.