Hearing:
July 14, 2011

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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 Continental Fragrances, Ltd.

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Serial No. 77677661

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Mary Margaret L. O'Donnell and Michelle L. Visser of Rader, Fishman & Grauer PLLC for Continental Fragrances, Ltd.

Sung In, Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

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Before Seeherman, Zervas and Lykos, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

On February 25, 2009, Continental Fragrances, Ltd. ("applicant") filed an application pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), for registration on the Principal Register of the mark INVISIBLE (in standard character form) for goods identified as "hair care preparations" in International Class 3.

The examining attorney finally refused registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of Registration No. 3378274 for the mark

INVISIBLE (in standard character form) for "cosmetics" in International Class 3.

Applicant appealed the final refusal of its application. Both applicant and the examining attorney filed briefs and the Board conducted an oral hearing. The refusal to register is affirmed.

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, however, two key, although 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, 29 (CCPA 1976). *See also, In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

We first consider the similarity or dissimilarity of the goods. To find that the goods are related, it is sufficient to show that because of the conditions surrounding their marketing, or because they are otherwise

related in some manner, the goods would be encountered by the same consumers under circumstances such that offering the goods and/or services under confusingly similar marks would lead to the mistaken belief that they come from, or are in some way associated with, the same source. *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010). *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

To establish that the goods are related, the examining attorney relies on (i) third-party registrations that list both cosmetics and hair care preparations; and (ii) printouts of third-party websites.

Third-party registrations that individually cover different items and that are based on use in commerce serve to suggest that the listed goods and services are of a type that may emanate from a single source. *See Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (although third-party registrations are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source."). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). The

examining attorney made the following six registrations of record which identify both cosmetics and various hair care preparations:[1]

> DREAM DROPS (Registration No. 3149740), owned by Unilever PLC.
>
> SERIOUSLY STRAIGHT (Registration No. 3169650), owned by Unilever PLC.
>
> YOU MUST HAVE A SENSE OF HUMOR TO USE OUR PRODUCTS (Registration No. 3621090), owned by Unilever PLC.
>
> PRINCIPAL SECRET AVOW (Registration No. 3607582), registered to Victoria Principal Productions, Inc.
>
> SKIN PRINCIPAL (Registration No. 3607583) registered to Victoria Principal Productions, Inc.
>
> OLATHERAPY (Registration No. 3604429), registered to Dean Christal.

One entity owns three of the registrations, and another entity owns two registrations. The registrations hence pertain to three entities. According to applicant, the registrations are insufficient to establish a relationship between the goods because they are simply too few in number.

The examining attorney also relies on one webpage each from www.aubrey-organics.com and www.lorealparisusa.com.[2]

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[1] A seventh third-party registration, Registration No. 3302034, was also made of record by the examining attorney. However, because it lists only services in International Class 35, it is irrelevant to the issues in this appeal.

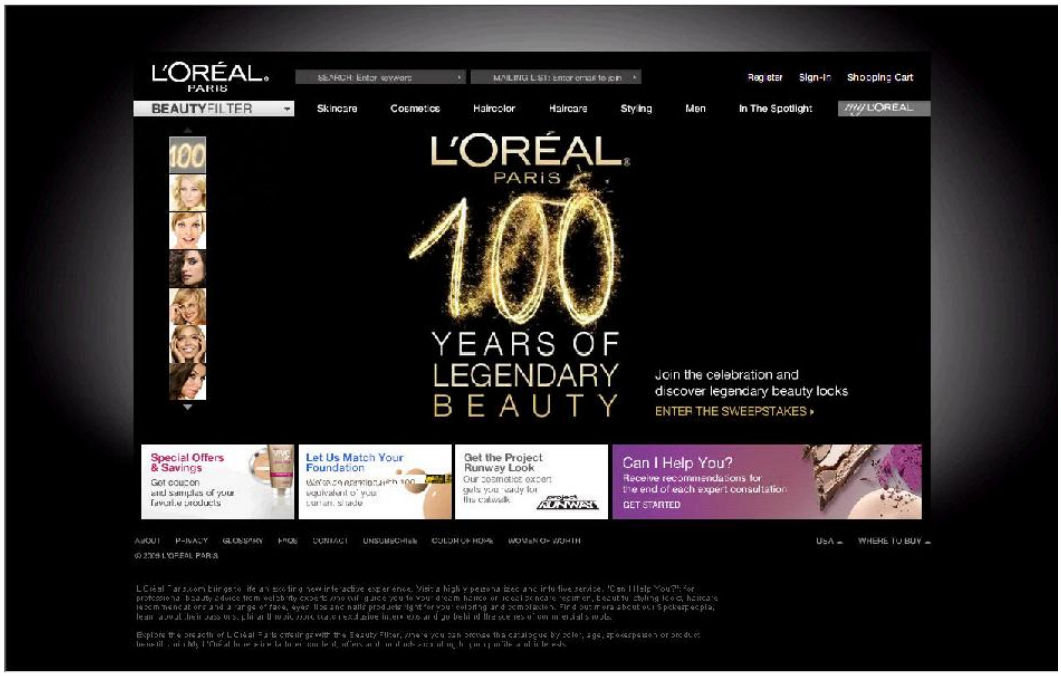
[2] A third webpage from giovannicosmetics.com has no probative value because, as far as we can determine, it does not identify any cosmetics.

The www.aubrey-organics.com webpage contains links at the top of the webpage for, inter alia, "Hair Care," "Skin Care," "Makeup," "Fragrance" and Body Lotions."

http://www.aubrey-organics.com/ 08/27/2009 05:51:39 PM

The www.lorealparisusa.com webpage contains links at the top of the webpage for, inter alia, "Cosmetics" "Haircare," and "Styling."

http://www.lorealparisusa.com/_us/_en/default.aspx 08/27/2009 10:14:20 PM



Applicant argues that the webpages are not persuasive because they are only two in number and are from retailers which offer a wide variety of goods "showing a shopping experience similar to that of mass market retailers such as Target and Costco that sell an enormous variety of goods." Brief at 16. Additionally, applicant states that the webpages show categories of goods without making it clear that the merchants offer both types of products. (The examining attorney evidently relies on the links to "makeup" and "hair care" at the top of the aubrey-organics.com webpage, and links to "cosmetics" and "hair care preparations" at the top of the lorealparis.com webpage, which applicant claims is insufficient.)

We find that the examining attorney's evidence, when considered together, suffices to establish that the goods are related. The third-party registrations, although small in number, clearly list both applicant's and registrant's goods, and serve to suggest that such goods are of a type which may emanate from a single source. The websites contain links which identify the relevant goods with sufficient particularity under or next to the merchant's marks. *Cf., In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009) ("Air compressors, water pumps, and/or electric motors all are offered for sale on the websites … [t]he website of Cascade Machinery and Electric, Inc. … lists among its products 'pumps,' 'compressors,' and 'electric motors.'"). Applicant's suggestion that Aubrey Organics and L'Oreal are large retailers such as Target and Costco (where purchasers can buy goods ranging from, e.g., bread to automotive parts) is not well taken; both websites list product categories in limited fields. Further, we are not troubled by the fact that the examining attorney is relying on links to the goods rather than webpages showing the marks on the goods; while it would have been preferable for the examining attorney to have actually demonstrated that the marks appear on the goods, we have no doubt that consumers viewing the websites would understand that Aubrey

Cosmetics and L'Oreal manufacture and offer both hair care preparations and cosmetics, and it is because of this consumer understanding that consumers would believe that hair care preparations and cosmetics sold under identical marks emanate from a single source.

We next 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; and *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Applicant's and registrant's marks are clearly identical in terms of appearance and sound. With regard to their connotations and commercial impressions, when used with such hair care preparations as hair spray or gel, "invisible" suggests that the preparation is not visible after it is applied. "Invisible" in the context of "cosmetics" such as facial concealer or foundation also suggests that the cosmetics are not visible when worn. This suggestive meaning of the marks and their commercial impression are therefore the same.[3]

[3] We note that applicant's mark can also suggest that it can be used to hold a hair style in place "invisibly," and that, for

We now consider the strength of registrant's mark and the number and nature of similar marks in use for similar goods. Applicant argues that registrant's mark is weak "for many different types of cosmetics and skin products," brief at 6, and entitled to only a narrow scope of protection, which would not block the registration of applicant's mark. In this regard, applicant submitted (i) several third-party registrations into the record for INVISIBLE formative marks, and (ii) printouts of webpages from Internet retailers (such as amazon.com) showing use of INVISIBLE marks on such websites, along with an accompanying declaration from the individual who accessed the websites.

Turning first to the third-party registrations, applicant submitted eight registrations for the following marks which recite cosmetics or various types of cosmetics, such as foundation or concealer:[4]

INVISIBLE LIGHT INVISIBLE TOUCH

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cosmetics, may call to mind a blemish- or wrinkle-free appearance, or the wearer having a naturally flawless complexion. However, we do not think that these additional meanings are sufficient to distinguish the marks; consumers are not likely to engage in a detailed analysis of otherwise identical marks to find subtle differences in meaning.

[4] Office records reflect that the application for INVISIBLE TATTOO, cited by applicant, has been abandoned, and therefore has no probative value in this appeal. Moreover, even live applications are only probative to show that an application has

INVISIBLE STOCKINGS	INVISIBLE COVERAGE
INVISIBLE EXPRESSION	CLEARLY INVISIBLE
THE INVISIBLE MAN	CG INVISIBLE CONCEALER

Third-party registrations are not evidence of use of the marks in the marketplace, and they do not show that the public is familiar with them. *See Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); and *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). Third-party registrations, however, may be used in the manner of dictionary definitions, to show that a term has significance in a particular industry. *See Tektronix, Inc. v. Daktronics, Inc.*, 187 USPQ 588, 592 (TTAB 1975), *aff'd*, 534 F.2d 915, 189 USQP 693 (CCPA 1976). INVISIBLE MAN and INVISIBLE TOUCH have a different commercial impression from INVISIBLE per se, and therefore do not affect the strength of the cited registration. The other registrations, however, suffice to show that INVISIBLE has significance in the field of cosmetics, namely, that cosmetics such as a facial concealer or foundation are not noticeable when worn, i.e., blemishes and the like become "invisible" with the assistance of cosmetics.

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been filed. *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1467 n.6 (TTAB 2003).

As for the webpages from Internet retailers (such as amazon.com) which offer various products for sale, this evidence reflects two uses of the mark INVISIBLE without any additional terms for cosmetics and five uses of INVISIBLE formative marks for goods such as lotion, face powders and sealers.[5] In total, we count seven third-party uses of the term "invisible" for goods related to registrant's goods.

After carefully considering all of the evidence bearing on the strength of registrant's mark, we find that the record reflects (i) that "invisible" has a suggestive meaning in connection with certain cosmetics such as a facial concealer or foundation which renders the term inherently weak as a source indicator in the cosmetics field, and (ii) that the public has been exposed to uses by third parties of INVISIBLE alone or in connection with other terms as a trademark for cosmetics, which renders the cited mark weak. In view thereof, applicant has established that registrant's mark is not entitled to a broad scope of protection, and in fact is a weak mark.

[5] Because of the differences in the goods, we discount those websites offering goods such as blemish treatment products, hand lotion and cream, deodorant, tinted lotion for legs and shaving gel. We also discount marks which have a different commercial impression from INVISIBLE, namely, INVISIBLE FOUNDATION OF YOUTH and ABSOLUTELY INVISIBLE CANDLELIGHT.

Turning next to the trade channels for the goods, applicant argues that the trade channels are dissimilar, stating that "while both hair care preparations and cosmetics may be sold in the same stores, they would not be sold in the same areas or sections of these stores"; and:

> Cosmetics are often found around the entryway of a store and then follow around the perimeter of the store in order to entice one into an impulse buy and drawing one further into the store than may have been initially intended. Alternatively, hair care preparations are found within the myriad of aisles in a store and frequently require attention to detail as to what exactly the purpose and the qualities of the product is to ensure that all of the results are what the consumer is seeking.

Brief at 16-17. Applicant's arguments do not persuade us that the trade channels for registrant's and applicant's goods differ; on the contrary, applicant acknowledges that both hair care preparations and cosmetics may be sold in the same stores. As for applicant's claim that they would not be sold in the same areas or sections of these stores, applicant has not submitted any evidence in support of its contention. Moreover, cosmetics and hair care preparations are both personal care products used by the same consumer on a daily basis. Consumers are likely to buy both types of products, and therefore be exposed to the trademarks of each. And, since both are beauty products, they may be purchased at the same time, or the purchase of one may

trigger the intention to buy the other. Further, the Aubrey Organics and L'Oreal webpages reflect that hair care preparations and cosmetics may be purchased on the same websites and are featured side by side. Thus, we find that the trade channels overlap, and the goods are sold to the same purchasers.

When we balance the *du Pont* factors, we consider that applicant's and registrant's marks are identical, and they are associated with related goods, namely, common consumer goods which are both used for personal care and grooming, sold in overlapping trade channels and sold to the same consumers. These factors outweigh the weakness of the cited registration, particularly because applicant is seeking to register the identical mark, and therefore there is no additional element that might serve to distinguish them. In view thereof, we conclude that applicant's mark INVISIBLE, for hair care preparations, is likely to cause confusion with registrant's mark INVISIBLE, for cosmetics.

DECISION: The refusal to register under Section 2(d) of the Trademark Act is affirmed.