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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 Delta Light N.V.*

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Serial No. 79100309

Clifford D. Hyra for Delta Light N.V.

Marlene Bell, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell,  
Managing Attorney).

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Before Bucher, Holtzman and Greenbaum, Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Delta Light N.V. filed, on May 27, 2011, an application to register on the  
Principal Register the standard character mark LEDS GO... for goods ultimately  
identified as:

Interior lighting, namely, ceiling pendant lights, spotlights, wall mounted lamps and recessed floor, wall, and ceiling lamps, floor stand alone lamps, bases for lighting fixtures; lighting for illuminating objects, namely, LED landscape lights; ambience lighting for providing diffuse lighting, namely, light diffusers; positional lighting, namely, mobile light towers; directional lighting for illuminating a specified area, namely, light-mounting tracks having modular or continuous lights; outdoor

lighting, namely, recessed wall and floor lamps, surface mounted and pendant lamps

in International Class 11.<sup>1</sup>

Registration has been refused 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 standard character mark GO-LED for "LED night-lights" in International Class 11, as to be likely to cause confusion, mistake or deception. The examining attorney also refused registration pursuant to Section 6(a) of the Trademark Act, 15 U.S.C. § 6(a), based on applicant's failure to comply with the requirement to disclaim the word LEDS on the ground that it is merely descriptive of applicant's goods within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1051(e)(1).

When the refusals were made final, applicant appealed. We reverse both refusals.

We begin with the disclaimer requirement. An examining attorney may require an applicant to disclaim an unregistrable component of a mark otherwise registrable. Trademark Act Section 6(a). Merely descriptive terms are unregistrable, under Trademark Act Section 2(e)(1) and, therefore, are subject to disclaimer if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is grounds for refusal of registration. *See In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087 (Fed. Cir. 2005); *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46 (CCPA 1975); *In re Ginc UK Ltd.*, 90 USPQ2d 1472 (TTAB 2007);

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<sup>1</sup> Application Serial No. 79100309, filed May 27, 2011, under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), based on an International Registration.

*In re National Presto Industries, Inc.*, 197 USPQ 188 (TTAB 1977); and *In re Pendleton Tool Industries, Inc.*, 157 USPQ 114 (TTAB 1968).

There is no dispute that the term LEDS is at least descriptive of a type of light. Indeed, the identifications of goods in the application and registration include the term LED. However, applicant argues that no disclaimer is required because LEDS as used in the mark LEDS GO... forms a unitary double entendre, playing on the phrase “let’s go.” We agree.

A mark is unitary if it creates a single, distinct commercial impression. If the matter that comprises the mark or relevant portion of the mark is unitary, no disclaimer of an element, whether descriptive, generic, or otherwise, is required. TMEP § 1213.05. *See also Dena Corp. v. Belvedere Int’l, Inc.*, 950 F.2d 1555, 21 USPQ2d 1047 (Fed. Cir. 1991). The commercial impression is determined by various factors, including the meaning of the terms in the mark in relation to each other. *See Dena*, 21 USPQ2d 1047.

Unlike the case in *In re Taylor & Francis (Publishers), Inc.*, 55 USPQ2d 1213, 1216 (TTAB 2000), where the Board found that “the four words PSYCHOLOGY PRESS ALERE FLAMMUM make no sense as a single or unitary phrase,” the words LEDS GO do create a single unitary phrase; the word LEDS does not stand alone, creating its own separate commercial impression. Rather, consumers would perceive the phrase LEDS GO as a clever pun, playing on the expression “let’s go.” *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968). The

ellipsis reinforces this perception, asking consumers to “let’s go” somewhere, or do something.

In view of the above, and considering that the registration of LEDS GO... and the presumptions afforded registrations under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), pertain to the mark as a whole rather than to its components, per se, and that the registration thereof cannot serve to preclude others from making fair use of the term LEDS in describing their lighting products, the requirement for a disclaimer of LEDS is unnecessary. *In re Hampshire-Designers*, 199 USPQ 383, 384 (TTAB 1978).

We turn then to the refusal under Section 2(d) based on the prior-registered mark GO-LED for “LED night lights.” When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out 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 Drilling 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 or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We begin with the *du Pont* factor of the relatedness of the goods. We base our evaluation on the goods as they are identified in the registration and application. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard*

*Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). It is settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. *See In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). The goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods under similar marks, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

Contrary to applicant's assertions, the record supports a finding that the parties' goods are related and often emanate from the same source. The examining attorney submitted copies of third-party registrations that include night lights and various other indoor and outdoor lighting products, such as Registration Nos. 3739896, 3535595, 3956086 and 3621791. Third-party registrations which individually cover a number of different goods/services that are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods/service are of a type which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786; *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

The examining attorney also submitted webpages from third-party websites showing that the same companies sell night lights and various other lighting products under the same mark. In particular, Pegasus Lighting offers ceiling lights and LED night lights, with links to both on the kitchen lighting webpage <pegasuslighting.com/kitchen-lighting.html>; FunkyLights.com sells various child-themed lighting products, including a “Space Lamp With Night Light”, ceiling lights, and pendant lights <funkylights.com/kids\_lights/childrens\_lights.html>; and All Kids Lamps sells night lights, ceiling lights, wall lamps and floor lamps <allkidslamps.com/themes.html>.

This evidence also supports a finding that the goods are offered in the same channels of trade to the same potential customers.

We now consider the similarities and dissimilarities between applicant’s mark LEDES GO... and registrant’s mark GO-LED. In coming to our determination, we must compare the marks in their entirety as to appearance, sound, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) quoting *du Pont*, 177 USPQ at 567. The test, under this 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).

The marks LEDS GO... and GO-LED obviously share the word GO and the word LED in its singular or plural form. However, the order in which those terms appear, as well as applicant's use of LEDS in its plural form followed by an ellipsis, result in marks that differ in appearance and sound. Moreover, the marks convey distinctly different meanings and commercial impressions. We found above that consumers would view applicant's mark as a play on the common expression "let's go." Registrant's mark creates an entirely different commercial impression – directing a consumer to choose an LED light, rather than another type of light. When we consider the marks in their entireties, the differences far outweigh the points of similarity.

In view of the above, we find that even though the goods are closely related, and the purchasers and channels of trade overlap, the differences in the appearance, sound, meaning and commercial impression of the marks LEDS GO... and GO-LED are sufficient to make confusion unlikely. *See In re Best Products Co., Inc.*, 231 USPQ 988 (TTAB 1986); *See also In re Akzona Inc.*, 219 USPQ 94 (TTAB 1983); *In re Mavest, Inc.*, 130 USPQ 40 (TTAB 1961). Moreover, we find that the dissimilarity of the marks is dispositive. *See Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive").

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**Decision:** The refusal to register based on the requirement for a disclaimer of LEDS is reversed. In addition, the refusal to register based on a likelihood of confusion of registration under Section 2(d) of the Trademark Act is reversed.