

**This Opinion is Not a  
Precedent of the TTAB**

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November 4, 2013

**United States Patent and Trademark Office**  
Trademark Trial and Appeal Board

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*In re Anderal OÜ*

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Serial No. 79105302

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Lawrence G. Fridman, of Silber & Fridman, representing Anderal OÜ.  
Colleen Dombrow, Trademark Examining Attorney, Law Office 101 (Ronald R.  
Sussman, Managing Attorney).

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Before Seeherman, Wolfson, and Gorowitz, Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Anderal OÜ (“applicant”) seeks registration on the Principal Register of the  
mark depicted below:



for “soaps; perfumery; essential oils; cosmetics; non-medicated skin care  
preparations; cosmetic sunscreen preparations; non-medicated toiletries; nail care

preparations; hair lotions; hair-care preparations; shampoos; hair gels; hair sprays; non-medicated hair shine serums; hair conditioners; hair foams; hair oils; hair bleaching preparations; hair waving preparations; hair colorants; hair dyes; hair-coloring preparations; adhesives for affixing false hair,” in International Class 3.<sup>1</sup>

The Trademark Examining Attorney has refused registration of applicant’s mark with respect to the goods in Class 3 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), contending that applicant’s use of its mark for its identified goods is likely to cause confusion with the mark depicted below:



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<sup>1</sup> Application Serial No. 79105302, filed on October 17, 2011 under Section 66(a), based on International Registration No. 1097423, which was registered on October 17, 2011. The description of the mark contained in the application states: The mark consists of the stylized wording “RICH” surrounded by an ornamental border made up of leaves, circles, curved lines and swirls, so the ornamental border appears as a base of a crown. On top of the ornamental base, a stylized crown is positioned. Color is not claimed as a feature of the mark.

The application includes goods in Class 11 for which registration has not been refused, namely, “electric hair dryers; hair dryers; hair drying apparatus.” Additionally, the application initially included services in International Class 44, but in its request for reconsideration, applicant amended the application to delete those services.

registered for “beauty masks; body masks; cloths or tissues impregnated with a skin cleanser; face and body creams; face and body lotions; facial masks; skin cleansers” in International Class 3.<sup>2</sup>

When the refusal was made final, applicant appealed and filed a request for reconsideration. After the examining attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

#### Applicable Law

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Rests. 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 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); see also *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

#### A. Comparison of the Goods; Trade Channels and Classes of Purchasers

We base our evaluation of the goods as they have been identified in the registration and application. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41

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<sup>2</sup> Reg. No. 4037830; registered October 11, 2011.

USPQ2d 1531, 1534 (Fed. Cir. 1997); *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

The cited mark has been registered for “beauty masks; body masks; cloths or tissues impregnated with a skin cleanser; face and body creams; face and body lotions; facial masks; skin cleansers.” The goods for which applicant seeks registration include, *inter alia*, soaps, skin care preparations, cosmetics and toiletries, goods which are legally identical to registrant’s skin care products.<sup>3</sup> In addition, the examining attorney has submitted Internet evidence and third-party registrations showing the relatedness of the remaining items listed in applicant’s application, but in view of the fact that the goods are in part identical, there is no need for us to discuss this additional evidence. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application). Therefore, we have confined our comments regarding the goods to these legally identical items.<sup>4</sup> Regarding channels of distribution and likely purchasers, because the goods are, in part, legally identical, and there are no

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<sup>3</sup> “Cosmetics” are defined as “a powder, lotion, lipstick, rouge, or other preparation for beautifying the face, skin, hair, nails, etc.” “Toiletries” are defined as “any article or preparation used in cleaning or grooming oneself, as soap or deodorant.” Random House Dictionary, © 2013, found in Dictionary.com Unabridged, www.dictionary.com. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

<sup>4</sup> We note the examining attorney has also submitted substantial evidence that the remaining goods in applicant’s identification are closely related to registrant’s skin care preparations.

restrictions in either the application or the cited registration, we must presume that the channels of trade and classes of purchasers for these goods are the same. *See American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers.”).

Accordingly, these *du Pont* factors weigh in favor of a finding of likelihood of confusion.

B. Comparison of the Marks

Our first observation is that where, as here, the goods are legally identical, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992)). In comparing the marks, we must consider the marks in their entirety as to appearance, sound, connotation and commercial impression, to determine their similarity or dissimilarity. *Viterra*, 101 USPQ2d at 1908 (quoting *du Pont*); *Palm Bay*, 73 USPQ2d at 1692. Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). While the decision must not be based on a dissection of the marks into their various components, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a

consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). 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).

In the case at hand, both marks are comprised of the word “RICH” centered within an ornamental border design.



We find that the word RICH is the dominant feature in both marks, a finding with which applicant partially agrees, noting that the “frame of ‘faded colors’ [in registrant’s mark] exists only as background” and is “purposefully presented as a non-dominant feature of [registrant’s] mark,” *Brief* at 6. The fact that registrant’s design is presented in grayscale in the cited registration supports this view.<sup>5</sup> In contrast, applicant argues that its mark is dominated by the design surrounding the word RICH, in particular because the depiction of the crown, located at the top of the artwork, is alleged to be a significant feature. We acknowledge that the crown element is recognizable; however, we disagree with applicant’s characterization of the “crown” as a “significant” feature of the mark. As discussed *infra*, the crown is merely part of the background design surrounding the literal portion of the mark,

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<sup>5</sup> The reference to faded “colors” apparently refers to the grayscale tones used in the cited mark. We point out that color is not claimed in the cited registration.

which is the word RICH. As we have often noted, for a composite mark containing both words and a design, it is generally the word portion that is the dominant portion because it is more likely to be impressed upon a purchaser's memory. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). *See also, Viterro* 101 USPQ2d at 1908 (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir 1983)). That is, consumers will remember the word RICH rather than the crown design (or the overall design that includes the crown) because they will refer to the mark by the word RICH, rather than as the "soap" (for example) with the crown design. The overall design, although intricate, is merely a background or "carrier" element that frames the word RICH, and as such is not the dominant element of the mark.

Thus, applicant's mark, like the cited mark, is dominated by the identical word RICH, creating similarity in the marks in terms of their sight, sound, and meaning. They are also similar in overall commercial impression. Each situates the word RICH in the center of an oval-shaped, decorative border that serves to frame the literal element. The fact that there is a recognizable "crown" in applicant's mark, but not in the cited mark, does not sufficiently distinguish the marks so as to avoid confusion. The minor stylization differences in the script used for the word "RICH" in each mark are also unlikely to be recollected, or even noticed, by consumers. *See In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991) ("While applicant's mark is in script form and registrant's is in block letters, that is the only difference between them and that is not a significant difference in

view of the fact that purchasers are unlikely to remember this simple distinction. Rather, it is the word itself which will more likely be recalled.”).

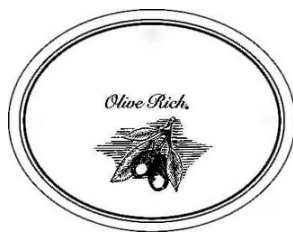
Applicant argues that the term RICH is weak as applied to the goods for which registration is sought and that consumers would thus be likely to distinguish the marks based on the differences in their design elements. In support of this assertion, applicant has submitted five registrations for marks containing the word RICH for the same or closely related goods. Three of these are presently valid:<sup>6</sup>

Reg. No. 3500716 for the mark RICH SMOOTH N SHINE and design:



for “hand and body lotion, toilet soap, skin moisturizers, hair care products, ..., cosmetics, ..., nail care preparations, cologne and perfume”;<sup>7</sup>

Reg. No. 3146493 for the mark OLIVE RICH and design:



for, *inter alia*, a variety of hair and skin care products, including soaps, creams and lotions;<sup>8</sup> and

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<sup>6</sup> The two registrations that have been cancelled or expired have not been considered. A cancelled registration is not evidence of anything except that it issued. *See* TBMP §704.03(b)(1)(A) (June 2013) and cases cited therein.

<sup>7</sup> Registered September 16, 2008.

<sup>8</sup> Registered September 19, 2006; Sections 8 and 15 combined declaration accepted and acknowledged.

Reg. No. 3187455 for the standard character mark RICH REWARDS for “hair care preparations.”<sup>9</sup>

These registrations are insufficient to show that RICH is weak. While we recognize that there is a suggestive quality to the word “rich” in association with products such as face lotions and creams, the existence of a mere three registrations does not show that the word RICH is common in the skin care field. Further, because the marks of the registrations include other distinguishing words and designs, they have little probative value in determining whether protection for the cited mark should not be extended beyond the specific configuration in which the word RICH appears in the cited mark. Moreover, it is well-settled that even suggestive or weak marks are entitled to protection from the use of a very similar mark for legally identical goods. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010); *American Lebanese Syrian Associated Charities*, 101 USPQ2d at 1029; and *In re Chica*, 84 USPQ2d 1845, 1850 (TTAB 2007) (“even weak marks are entitled to protection against registration of similar marks, especially identical ones, for related goods and services”) (*citing In re Colonial Stores*, 216 USPQ 793, 795 (TTAB 1982)).

Regardless of the differences which might be apparent in a side-by-side comparison, the test under the first *du Pont* factor expressly rejects this type of comparison. Rather, the focus is on whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Edom Labs., Inc. v.*

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<sup>9</sup> Registered December 19, 2006; Sections 8 and 15 combined declaration accepted and acknowledged.

*Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). Here, both marks depict the word RICH centered inside an ornately drawn oval-shaped frame made up of similar decorative elements. Comparing the marks in their entirety, we find them to be similar in appearance, pronunciation, meaning and commercial impression.

Accordingly, the first *du Pont* factor favors a finding of likelihood of confusion.

C. Conclusion

For the aforesaid reasons, we find that registration of the mark



for the goods set forth in applicant’s application is likely to cause



confusion with the mark

for the goods listed in the cited registration.

**Decision:** The refusal to register applicant’s mark under Section 2(d) in International Class 3 is affirmed. As the refusal was limited to International Class 3, the application will proceed to publication for the goods in International Class 11 in due course.