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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 Carman, Amber R. dba Tangled Tantrum
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Serial No. 85758055
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Peter M. de Jonge and Eric E. Westerberg of Thorpe North & Western, LLP for Carman, Amber R.

Nicholas Altree, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

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Before Quinn, Mermelstein, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Carman, Amber R. (“Applicant”), identified as a limited liability company doing business as Tangled Tantrum, filed an application¹ to register on the Principal Register the trademark shown below for the following goods:

Hair oils; Hair shampoos and conditioners; Hair spray;
Hair sprays and hair gels; Hair styling fixative in the
nature of hair wax; Hair styling preparations; Hair
styling spray; Hair wax; Hair-washing powder; Styling

¹ Application Serial No. 85758055 was filed on October 18, 2012 under Trademark Act §1(a), 15 U.S.C. § 1051(a), stating October 17, 2012 as the date of first use and first use in commerce.

clay for hair; Styling foam for hair; Styling paste for hair,
in International Class 3.



The colors teal, black and white are claimed as features of the mark.

The Trademark Examining Attorney refused registration on the following four grounds: (a) likelihood of confusion with a registered mark, under § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d); (b) failure to submit an acceptable specimen of use of the mark, under §§ 1 and 45, 15 U.S.C. §§ 1051 and 1127; (c) failure to clarify an inconsistency between the name of Applicant and its type of entity; and (d) failure to provide a complete description of the mark, under 37 C.F.R. § 2.37. When the refusals were made final, Applicant appealed. Applicant and the Examining Attorney have filed briefs.

1. Refusal under Section 2(d).

The Examining Attorney refused registration under Section 2(d) on the ground that Applicant's mark, as used in connection with Applicant's goods, so resembles the registered mark TANTRUM as to be likely to cause confusion, or to

cause mistake, or to deceive. The cited mark is registered in standard characters for the following goods:

Beauty care cosmetics; haircare products and preparations, namely, shampoo, conditioners, shampoo and body wash, leave-in conditioner, detangle spray; haircare products in the form of hair sprays; hair care agents, namely, coloured hair spray; hair cleaning preparations; gels, mousses, and non-medicated balms for hairdressing and haircare; hair lacquers; preparations in aerosol form for hairdressing and haircare, namely, sprays for hair styling, glitter sprays for hair styling, detangle spray, leave-in conditioner; hair-colouring and hair-decolourising preparations; preparations for waving and setting hair; natural body care products for the hair, namely, natural shampoo, conditioner, hair lotion, hair gel, hair detangler, swimmers shampoo, leave-in conditioner; oils for use in haircare, namely, hair oils; perfumes, eaux de toilette; non-medicated toiletries; bath and shower gels; toilet soaps; deodorants for personal use; cosmetics; cosmetic preparations; beauty creams; creams, milks, lotions, and non-medicated balms and gels for the face, body and hands; skin cleansing preparations and products for non-medical use; non-medicated skin care preparations; sun-tanning and after-sun preparations, namely, milks, gels, oils, sprays, creams, lotions, balms, and after-sun lotion; make-up preparations; beauty face packs comprising cosmetics; beauty tonics for application to the face and body; essential oils, in International Class 3.²

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 issue of likelihood of confusion as set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). Two key considerations are the similarities between the marks and the similarities between the goods at issue. *See Federated*

² Reg. No. 4173352 issued on July 17, 2012. The registration also covers services in International Class 44, which the Examining Attorney did not cite as a factor in his refusal.

Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Addressing first the goods of Applicant and Registrant, we find that they are, in part, identical. The application and the registration both cover shampoos, conditioners, and gels for hair; hair oils; and hair spray. Moreover, Applicant's "hair styling preparations" are defined with sufficient breadth to encompass Registrant's more specifically identified "preparations for waving and setting hair" and "preparations in aerosol form for hairdressing and haircare, namely, sprays for hair styling, glitter sprays for hair styling, detangle spray, leave-in conditioner." We need not address the degree of similarity of all of the identified goods of Applicant and Registrant. In the context of an analysis under Section 2(d), it is sufficient if likelihood of confusion is found with respect to use of the mark on any item that comes within the description of goods in a single-class application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007). Accordingly, the *du Pont* factor of the similarity or dissimilarity of the goods favors a finding of likelihood of confusion.

As Applicant's goods are legally identical to those of Registrant, we must presume that the goods of Applicant and Registrant move in the same channels of trade and are offered to the same classes of consumers. *See In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was

entitled to rely on this legal presumption in determining likelihood of confusion); *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). Accordingly, the *du Pont* factor relating to the similarity or dissimilarity of trade channels favors a finding of likelihood of confusion.

We next consider the similarity or dissimilarity of the marks at issue in their entireties as to appearance, sound, connotation and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). In comparing the marks, we are mindful that where, as here, the goods are identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007). We consider each mark in its entirety. However, 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 that our ultimate conclusion rests upon a comparison of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The cited mark is TANTRUM in standard characters. Applicant's mark is a design of concentric circles, with an outer serrated edge, that includes the wording TANGLED TANTRUM in large stylized letters and, in much smaller lettering, the wording LIFE IS A MIX-UP. The mark also includes silhouette representations of a can of hairspray and a comb inside a separate, non-concentric circle; and a curved banner across the center of the mark. The various components of the mark are teal, black, and white in color.

We note Applicant's warning that "it is incorrect to compare marks b[y] eliminating portions thereof and then simply comparing the residue."³ Nonetheless, giving due regard to all elements of Applicant's mark, it is clear that the mark is dominated by the wording TANGLED TANTRUM. In the case of marks consisting of words and a design, the words normally have greater weight because they would be used by consumers to request the products. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 2 USPQ2d 1553, 1554 (TTAB 1987). *See also Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). Accordingly, although the mark includes a number of graphic elements, they are less significant as source identifiers than the wording TANGLED TANTRUM.⁴

³ Applicant's brief at 4.

⁴ We also agree with the Examining Attorney's observation that the silhouette designs of the spray can and the comb are suggestive of Applicant's hair care products and thus have reduced distinctiveness as source indicators. (Examining Attorney's brief at 8.) Moreover, the circular "seal" design is not particularly distinctive.

We also find that the wording TANGLED TANTRUM is far more likely than the slogan LIFE IS A MIX-UP to be used by customers in calling for the goods. The mark, by its very format, induces customers to focus on the words TANGLED TANTRUM, which occupies the center of the mark, is highlighted by the black banner, and is by far the largest wording in the mark.

In appearance, the marks at issue are similar in part, inasmuch as the registered mark TANTRUM is incorporated, in its entirety, into the dominant element (TANGLED TANTRUM) of Applicant's mark. Moreover, because the cited mark is registered in standard character form, we must consider that it may be displayed in any style of lettering, including a stylization similar to that of Applicant. See *In re Vitterra*, 101 USPQ2d at 1910; *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011). Other aspects of Applicant's mark differ from the registered mark in appearance.

The marks are also partly similar in sound, to the extent that TANTRUM would be pronounced the same in both marks. We give due consideration to the other wording in Applicant's mark that would give rise to differences in sound, including the alliterative T in the phrase TANGLED TANTRUM.

With respect to the meaning of the marks, Applicant defines TANTRUM to mean "a violent demonstration of rage or frustration"; Applicant defines TANGLED to mean "complicated, mixed-up, intricate, or confused."⁵ Applicant argues:

⁵ Applicant's brief at 6, citing Dictionary.com; we note that Applicant has not actually made any dictionary definitions of record.

“tangled tantrum” creates a commercial impression of confusion, mix-up, or something that is complicated or intricate. This meaning is further supported because “tangled” appears before “tantrum” and is the dominant term. Additionally, both “tangled tantrum” and “life is a mix-up” are included in Applicant’s mark, further contributing to the impression of something that is complicated or confused.

Assuming, for the sake of our analysis, that Applicant’s definitions are correct, we note that the word TANTRUM would have the same meaning in both marks. We acknowledge that Applicant’s mark, viewed as a whole, includes the suggestion of “confusion, mix up,” primarily because of the correspondence between the words MIX-UP and TANGLED. However, in the context of Applicant’s goods, which are hair care and hair styling products, the word TANGLED is suggestive of tangled hair that needs styling or disentangling, tasks that, a customer might believe, may be accomplished by the use of Applicant’s products. In other words, a customer may view the word TANGLED as a reference to the purpose of Applicant’s goods. The suggestiveness of the word TANGLED reduces its capacity to distinguish the dominant portion of Applicant’s mark, TANGLED TANTRUM, from the cited mark TANTRUM.

In considering the overall commercial impression of the marks in their entireties, we bear in mind that “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). In view of

the dominance of the wording TANGLED TANTRUM in Applicant's mark and the suggestive quality of the word TANGLED, a customer who is familiar with the cited mark TANTRUM may, upon seeing Applicant's mark, mistakenly believe that Applicant's product is a TANTRUM product that is especially suited to treatment of tangled hair. Accordingly, we find that the overall commercial impressions created by the two marks are similar, and that the *du Pont* factor of the similarity or dissimilarity of the marks weighs in favor of a finding of likelihood of confusion.

Neither Applicant nor the Examining Attorney has submitted evidence or arguments as to any other *du Pont* factors. We treat those factors as neutral.

Having considered all of the relevant *du Pont* factors and all evidence and arguments of record, including those not specifically discussed herein, we find that Applicant's mark, as applied to Applicant's goods, so closely resembles the cited registered mark as to be likely to cause confusion, mistake or deception as to the source of Applicant's goods. Accordingly, we affirm the refusal under Section 2(d).

2. Refusals relating to specimen of use; Applicant's name and entity; and the description of the mark.

In addition to the refusal to register the mark under Section 2(d), the Examining Attorney required that Applicant submit a substitute specimen of use; that it provide an explanation regarding Applicant's name and form of entity; and that it provide a more complete description of the mark. Applicant never responded to any of these three requirements and the Examining Attorney ultimately made

his requirements final.⁶ Applicant makes no mention of any of these requirements in its brief.

Applicant's failure to address the three outstanding requirements in its brief is, itself, a basis upon which the Board may affirm the Examining Attorney's refusal. "All requirements made by the examiner and not the subject of appeal shall be complied with prior to the filing of an appeal." 37 C.F.R. § 2.142(c). "If an applicant that files an appeal to the Board fails to comply with such a requirement, the refusal to register may be affirmed by the Board for failure to comply with that requirement, regardless of the disposition made by the Board of the issue or issues that are the subject of appeal." TBMP § 1201.04 (2014). Accordingly, the three requirements stand and we affirm the Examining Attorney's refusal of registration for failure to comply with them. Moreover, as we discuss below, we find that all three requirements were well-founded.

(a) Refusal for failure to submit an acceptable specimen of use.

In connection with an application under Trademark Act § 1(a), an applicant must file "such number of specimens or facsimiles of the mark as used as may be required by the Director." 15 U.S.C. § 1051(a). The Trademark Rules require that an applicant submit "One specimen per class showing how the applicant actually uses the mark in commerce." 37 C.F.R. § 2.34(a)(1)(iv). A specimen must "show[] the mark as used on or in connection with the goods or services." 37 C.F.R. 2.56(a).

⁶ Applicant's response to the first Office Action addressed only the § 2(d) refusal, adding that Applicant "will address the other issues raised by the Examiner separately." Response to Office Action of June 6, 2013. No such response was ever filed.

“A trademark specimen is a label, tag, or container for the goods, or a display associated with the goods.” 37 C.F.R. § 2.56(b)(1). These Trademark Rules give effect to the definition of “use in commerce” as set forth in Trademark Act § 45, 15 U.S.C. § 1127.

The specimen of use submitted with Applicant’s application is merely an image of the mark; it appears to be identical to the drawing of the mark submitted with the application. It is not a representation of a label, tag or container for the goods, nor of a display that is used in such a way as to associate the mark with the goods. It does not demonstrate the manner in which the mark is used on or in connection with the goods. Applicant did not submit any substitute specimen in response to the Examining Attorney’s requirement that it do so.

In sum, Applicant has failed to meet the requirement of Section 1(a) of the Act that Applicant submit a specimen of use. Accordingly, we affirm the Examining Attorney’s refusal under Sections 1 and 45 of the Trademark Act.

(b) Requirements regarding Applicant’s name and entity; and the description of the mark.

The application identifies Applicant as “Carman, Amber R.” and indicates that Applicant is a limited liability company organized under the laws of Nevada. The Examining Attorney required Applicant to “clarify this inconsistency,” citing Section 1(a)(2) of the Trademark Act, 15 U.S.C. § 1051(a)(2); and 37 C.F.R. §§ 2.32(a)(2) and 2.32(a)(3)(i) and (ii). The Examining Attorney’s perception of an inconsistency was well-founded. We note that the application was signed by

“Amber Carman” as “Owner,” suggesting that “Carman, Amber R.” is the name of an individual, rather than a limited liability company.

The examining attorney also found the description of the mark in the application to be deficient. He required Applicant to “provide a more complete description of the applied-for mark,” citing 37 C.F.R. § 2.37, and offered a proposed description. We note that Applicant’s description of the mark did not assign the various colors of the mark to particular wording and design elements and made no mention of certain design elements, such as the black banner and the serrated outer circle.

In connection with both these requirements, we note that Section 1(a)(4) of the Act provides that “The applicant shall comply with such rules or regulations as may be prescribed by the Director.” 15 U.S.C. § 1051(a)(4). We find that both requirements were validly based on the statute and applicable rules. Moreover, as Applicant makes no mention of either requirement in its appeal brief, it has waived its opportunity to argue that the requirements are inappropriate. *See* TBMP § 1203.02(g). We accordingly affirm the refusal to register the mark on the basis of Applicant’s failure to address the Examining Attorney’s requirements.

Decision: The refusal to register is affirmed on grounds of likelihood of confusion, under Section 2(d); on grounds of failure to submit an acceptable specimen of use, under Sections 1 and 45; and on the ground of Applicant’s failure to comply with the Examining Attorney’s requirements relating to the proper

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identification of Applicant and the submission of a complete description of the mark,
under Section 1(a)(4) and 37 C.F.R. §§ 2.32 and 2.37.