

This Opinion is not a
Precedent of the TTAB

Mailed: July 16, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

*In re K & N Distributors*¹
—

Serial No. 86150854
—

Matthew H. Swyers of The Trademark Company, PLLC,
for K & N Distributors.

Anne C. Gustason, Trademark Examining Attorney, Law Office 117,
Hellen M. Bryan-Johnson, Managing Attorney.

Before Bucher, Zervas and Greenbaum,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

K & N Distributors (“Applicant”) seeks registration on the Principal Register of the mark NEOPLUS GEL in standard character form for “cosmetics” in International Class 3.² Applicant disclaimed the term “Gel.”

The Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), having determined that Applicant’s

¹ K & N Distributors is identified as a limited liability company in the original application.

² Application Serial No. 86150854 claims Trademark Act § 1(b), 15 U.S.C. § 1051(b), as a filing basis.

mark is likely to cause confusion or mistake or to deceive in view of Registration No. 2582466³ for the typeset⁴ word mark NEO PLUS for “all purpose preparations for cleaning, washing and scrubbing, namely, face cleansing products, namely cleansing gel, tonic lotion, scrub; products for face care, namely, day cream, night cream, eye cream/gel, nourishing cream, anti-age/anti-wrinkle cream, serum, anti-wrinkle eye cream, moisturizer, mask” in International Class 3.

When the refusal was made final, Applicant filed an appeal. Applicant and the Examining Attorney both filed briefs. We affirm the refusal to register.

Our determination under Trademark Act Section 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); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

³ Registered June 18, 2002. Renewed November 13, 2012.

⁴ Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R. § 2.52, was amended to replace the term “typed” drawing with “standard character” drawing.

We first consider the similarity or dissimilarity of the marks, comparing the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imports*, 73 USPQ2d at 1992. “[T]he 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 impression so that confusion as to the source of the goods offered under the respective marks is likely to result.” *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1727 (TTAB 2008).

The marks both begin with the term NEO followed directly by the term PLUS. GEL in Applicant’s mark is a highly descriptive or generic term when used on the identified “cosmetics,” and appropriately has been disclaimed. The addition of the term GEL in Applicant’s mark therefore does not serve to distinguish the marks. Thus, we find the marks similar in sound, meaning, appearance and commercial impression. Applicant has conceded “the phonetic equivalence of NEOPLUS versus NEO PLUS,” and “the highly similar nature of the ... cited trademark” because of the disclaimer of GEL.⁵

Applicant, however, submitted numerous third party registrations and argues that “the term NEO has consistently been treated as weak with respect to similar goods, [and] therefore consumers must rely on other factors, in this case the addition of the word GEL to the mark ... to be distinguished.”⁶ The argument is a red herring, because the term PLUS also appears in the marks (and directly after

⁵ Applicant's Brief at 8, 4 TTABVUE 9.

⁶ *Id.*

the term NEO in both marks); and consumers will not look to GEL, which is a highly descriptive or generic term for the goods identified in the application and registration, to distinguish the marks. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (it is a well-established principle that, “in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, 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 consideration of the marks in their entireties.”). In addition, as the Examining Attorney pointed out, evidence of weakness or dilution consisting solely of third-party registrations is generally entitled to little weight in determining the strength of a mark, because such registrations do not establish that the registered marks identified therein are in actual use in the marketplace or that consumers are accustomed to seeing them. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009); *Richardson-Vicks Inc. v. Franklin Mint Corp.*, 216 USPQ 989, 992 (TTAB 1982). Further, most of the third party registrations submitted by Applicant are not use-based registrations and hence have very limited probative value.⁷

⁷ Third-party registrations which individually cover a number of different items and *which are based on use in commerce* serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. *See In re Association of the United States Army*, 85 USPQ2d 1264, 1270 (TTAB 2007); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

In light of the foregoing, the *du Pont* factor regarding the similarity of the marks weighs in favor of a finding of a likelihood of confusion.

We turn next to the similarity or dissimilarity of the goods. In determining whether the goods are related, it is not necessary that the respective goods be competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could give rise to the mistaken belief that they originated from the same producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

It is settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in Applicant's application vis-à-vis the goods recited in the cited registration, and we cannot read limitations into those goods. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).

There is a clear relationship between "cosmetics" and goods such as registrant's "face cleansing products, namely cleansing gel, tonic lotion, scrub," which are used to prepare the face for cosmetics, or to cleanse the face from cosmetics. In addition,

the record contains website evidence from (i) lushusa.com⁸ (offering skin treatments and a link to “makeup”), and (ii) ulta.com (setting forth a “Line Smoother + Primer,” and various makeup).⁹ Applicant has not argued that the goods are dissimilar in its brief and is silent on the issue of the similarity or dissimilarity of the goods. The *du Pont* factor regarding the similarity of the goods therefore favors a finding of likelihood of confusion.

Turning to the similarity or dissimilarity of trade channels, Applicant argues that Applicant’s and registrant’s trade channels differ, with Applicant’s cosmetic gel offered in “make-up and cosmetics aisles of stores such as grocery stores and pharmacies, and ... our website” while registrant’s goods are offered in “specific locations, namely physician offices and medical spas” and not online.¹⁰ There are no trade channel restrictions in the identifications of goods, and, as noted earlier in this decision, our determination is made based on the goods recited in the application and the cited registration, and we do not read limitations into the identifications. *See Stone Lion Capital Partners*, 110 USPQ2d at 1161. Applicant maintains that its goods would be sold in the cosmetic aisles of stores such as grocery stores and pharmacies,¹¹ and we see no reason why registrant’s goods would not be sold in the same locations.

⁸ The webpage is titled “LUSH Fresh Handmade Cosmetics.”

⁹ The apivita.com webpage offering Apivita brand (i) face mask and anti-wrinkle cream, and (ii) “lip care.” The “lip care” products are depicted in different colors, but are identified by flavors such as “black currant” and “pomegranate” and are indicated as for “Dry/Chapped Lips.” The probative value of this evidence is hence questionable.

¹⁰ Applicant's Brief at 12; 4 TTABVUE 13.

¹¹ Applicant's Brief at 12-13; 4 TTABVUE 13-14.

In addition, Applicant argues that “The blocking mark’s cosmetics [sic] are designed to attract a very sophisticated [sic], namely, consumers visiting a medical spa or a physician’s office for skin care needs. The goods under the blocking mark are professional grade, as evidenced by Registrant’s website, and as such are assumed to be more expensive than that of the cosmetics sold under the NEOPLUS GEL mark” There is no evidence to support Applicant’s position and indeed the face masks on lushusa.com are offered at \$6.⁹⁵. Such goods appear to be ordinary consumer items subject to impulse purchases.

In balancing the relevant *du Pont* factors, all of which favor a finding of likelihood of confusion or are neutral, we find that there is a likelihood of confusion between Applicant’s mark NEO PLUS GEL for “cosmetics” and registrant’s mark NEOPLUS for “all purpose preparations for cleaning, washing and scrubbing, namely, face cleansing products, namely cleansing gel, tonic lotion, scrub; products for face care, namely, day cream, night cream, eye cream/gel, nourishing cream, anti-age/anti-wrinkle cream, serum, anti-wrinkle eye cream, moisturizer, mask.”

Decision: The refusal to register Applicant’s mark under Section 2(d) of the Trademark Act is affirmed.