

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Walter Brachmann Gmbh & Co. KG
v.
Pro-Life Importacao E Exportacao LTDA

Opposition No. 91177890
against Serial No. 76618831

Gary D. Krugman of Sughrue Mion, PLLC for Walter Brachmann
Gmbh & Co. KG

Michael J. Striker for Pro-Life Importacao E Exportacao LTDA.

Before Hairston, Bucher and Grendel, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Pro-Life Importacao E Exportacao LTDA, a corporation of
Brazil, seeks registration on the Principal Register of the
following mark:

biomarine

for goods identified in the application as follows:

"non-medicated skin care preparations,
namely, creams and gels for facial treatment,
cleansers, moisturizers for the body, suntan

lotions, skin rejuvenating tonics and creams"
in International Class 3¹

Walter Brachmann GmbH & Co. KG, a German firm, has opposed this application on the ground of priority of use and likelihood of confusion, alleging that applicant's mark, when used in connection with the identified goods, so resembles its **BIOMARIS** mark (*in standard character format*), registered in connection with the following goods:

"perfumes, hair tonic, body and bathing oil, skin cleansing creams and lotions, body lotion, skin cream, face lotion, mouthwash, toothpaste, toilet soaps, hair shampoo, seaweed and sea-salt solutions for bathing, after shave cream and after shave lotion" in International Class 3, and

"sea-salt and herbal sea-salt for food purposes" in International Class 30;²

as to be likely to cause confusion, to cause mistake or to deceive, under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

Applicant, in its answer, denied all the essential allegations of these claims.

¹ Application Serial No. 7661883 was filed on November 1, 2004 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce.

² Registration No. 1248763 issued on August 23, 1983; renewed.

I. THE RECORD

By operation of Trademark Rule 2.122, 37 CFR § 2.122, the record includes the pleadings and the file of the involved application.

The record also includes opposer's Notice of Reliance filed on March 21, 2008, making of record a certified copy of opposer's registered **BIOMARIS** mark. On March 21, 2008, opposer also filed a separate Notice of Reliance pursuant to Trademark 2.122(e), on an official record, specifically, a decision in connection with an opposition filed in the European Community involving opposer and applicant.

Applicant took no testimony and presented no evidence in support of its position.

II. PRELIMINARY MATTER

Applicant argues that the European Community Decision of the Office for Harmonization in the Internal Market relied upon by Opposer should be given no consideration herein, and has moved to strike this Notice of Reliance filed by Opposer.

Applicant argues that under the Trademark Rules, a Notice of Reliance may only be filed with respect to publications available to the general public in libraries or in general circulation among the public or the relevant segment of the public. However, opposer responds that this Notice of

Reliance was *not* filed based upon the portion of the rule relating to printed publications. Rather, opposer notes that the relevant material submitted pursuant to the Notice of Reliance is an official record and is properly introduced pursuant to the Trademark Rules of Practice.

We find that a certified copy of the EU decision dated November 30, 2006 was properly introduced as an official record pursuant to the Trademark Rules of Practice. On the other hand, this decision has no preclusive effect upon the instant case, and has little or no probative value in reaching our likelihood of confusion determination herein.

III. ANALYSIS

A. Standing

Opposer's standing is a threshold inquiry made by the Board in every *inter partes* case. In *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999), the Federal Circuit enunciated a liberal threshold for determining standing, i.e., whether one's belief that one will be (is) damaged by the registration is reasonable and reflects a real interest in the case. See also *Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987); and *Lipton Industries, Inc. v.*

Ralston Purina Company, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Opposer has submitted evidence of its ownership of its **BIOMARIS** registration. We consider this sufficient to establish opposer's interest and, therefore, standing, in this proceeding.

B. Priority

Because opposer has established that it owns a valid and subsisting registration of its pleaded mark, priority is not an issue. See *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974); and *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125 (TTAB 1995).

C. Likelihood of Confusion

We turn, then, to the issue of likelihood of confusion under Section 2(d) of the Trademark Act. Our determination must be based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). 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." See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Relatedness of the goods, Channels of Trade and Conditions under which sales are made, and to whom

In looking at the respective identifications of goods, we agree with opposer that these goods are identical and otherwise closely related. We must presume that these inexpensive items will be available to the same groups of ordinary purchasers through all the same channels of trade. All of these related *du Pont* factors favor opposer in this proceeding.

The Number and Nature of Similar Marks in Use on Similar Goods

Opposer points out that there is no evidence in the record that any third party uses any similar mark on any goods whatsoever, including the skin care products of opposer and applicant. We agree that based on the record herein, this factor favors opposer.

The Marks

We turn next to examine the similarity of the parties' marks in their entirety 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, 1692 (Fed. Cir. 2005).

Opposer argues that while applicant's mark ends in the letters "-ine" and opposer's mark ends in the letters "-is," the respective marks share the first seven letters in the same order. As a result, opposer argues that the two marks are substantially identical visually and in the commercial impressions they engender and that they are most similar aurally.

By contrast, applicant argues that the marks are not aurally similar, and are not visually similar because applicant's mark contains a distinctive wave design missing from opposer's mark.

We find that these respective marks are not confusingly similar. Applicant's mark is highly distinctive visually, having a wave design within the letter "O." Although opposer is correct in noting that the marks are identical as to the first seven letters, the two marks sound different in their entireties. As to connotations, applicant's term "biomarine" has a readily recognizable meaning, i.e., a combination of "bio-" (biological) and "marine" (sea). The record demonstrates no readily apparent connotation associated with opposer's "Biomaris" mark. Accordingly, we

find that these marks are dissimilar as to their commercial impressions. In spite of the fact that the goods are in part identical, we find that these respective marks are sufficiently dissimilar that there is no likelihood of confusion herein. See *Kellogg Co. v. Pack'em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

Conclusion

In conclusion, we find that opposer has priority in view of its registrations of record; that applicant's goods are identical in part and otherwise closely-related to opposer's goods; that the respective trade channels and classes of customers are presumably identical; but that the dissimilarity of the respective marks alone is dispositive of the likelihood of confusion issue herein.

Decision: The opposition is hereby dismissed and a Notice of Allowance should issue to applicant in due course.