

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

Mailed: May 31, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Global Animal Management, Inc.

Serial No. 77551179

James E. Rosini, of Kenyon & Kenyon, for Global Animal Management, Inc.

Charles L. Jenkins Jr., Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Grendel, Holtzman, and Ritchie, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Global Animal Management, Inc. ("applicant") filed an application to register the mark shown below for goods identified as "radio frequency identification tags for animals," in International Class 9:¹

GAM▲TAG

¹ Serial No. 77551179, filed August 20, 2008, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a *bona fide* intent to use in commerce, and disclaiming an exclusive right to use the term "TAG" apart from the mark as shown. The description of the mark reads: "The mark consists of the words "GAM" and "TAG" appearing in black separated by a red triangle symbol.

The Trademark Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the registered mark GAMMATAG,² in standard character form, for "radio frequency identification (RFID) equipment and systems, namely, RFID tags," that when used on or in connection with applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs, and applicant filed a reply brief. For the reasons discussed herein, the Board affirms the refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (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

² Registration No. 3542469, issued December 9, 2008, based on first use and first use in commerce on November 30, 2006.

Serial No. 77551179

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").

The Goods and Channels of Trade

The items in the application are identical-in-part to those in the cited registration. Specifically, the "radio frequency identification tags for animals," identified in the application are a subset of the "radio frequency identification (RFID) equipment and systems, namely, RFID tags," identified in the cited registration. Although applicant argues that the goods are different, and are sold to different purchasers based on the respective websites of applicant and registrant, we are bound to consider only the identifications of goods themselves, which are clear in showing that both applicant and registrant identify radio frequency identification, or RFID, tags, with applicant more specifically identifying RFID tags for animals. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("[t]he authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed." [citations omitted]).

Accordingly, we find the goods to be overlapping and legally identical.

The fact that some of applicant's goods are identical to registrant's goods is sufficient to support a finding of likelihood of confusion. See *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). Furthermore, there is nothing that prevents the registrant from selling its "radio frequency identification (RFID) tags" specifically "for animals" as so designated in the application. Accordingly, these may appear in the same stores or venues as applicant's products, and may be sold to the same customers. This is particularly true where, as here, the goods are in-part identical. Accordingly, we find that these *du Pont* factors weigh heavily in favor of finding a likelihood of confusion.

The Marks

Preliminarily, we note that the more similar the goods at issue, the less similar the marks need to be for the Board to find a likelihood of confusion. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. See *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*

Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

In comparing the marks, we are mindful that the 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 and/or services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer for the goods at issue, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The mark in the cited registration consists of the term GAMMATAG in standard character form. Applicant submitted definitions of the term "GAMMA" as "a unit of magnetic field strength"/"involving or relating to photons of energy"³ and "a very high form of radiation."⁴ Applicant argues that this term is descriptive of the goods in the cited registration. We

³ American Heritage Dictionary (4th ed. 2000).

⁴ Kernermen English Multilingual Dictionary (2010).

disagree, and find the term to be at most suggestive of the goods in the cited registration.

The examining attorney describes applicant's mark as being pronounced "GAMATAG" as well. It is well-settled that there is no correct pronunciation of a trademark. *In re Teradata Corp.*, 223 USPQ 361, 362 (TTAB 1984). However, we agree with applicant that it is not obvious that the red triangle in the middle of applicant's mark would be perceived by consumers as the letter "A." Rather, we think it more apt that consumers would likely perceive applicant's mark as "GAM TAG" with a red triangle in the middle. That said, the letters do clearly dominate the mark, and the triangle does little, if anything, to change the commercial connotation as it is the words and not the design that will be used by consumers to call for or refer to the goods. *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 2001); *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).⁵ Overall, applicant's "GAM TAG" sounds strikingly similar to registrant's "GAMMATAG" and looks quite similar too, especially with a red triangle in the middle that is shaped like the letter "A."

In sum, we find the similarities of the marks to outweigh their dissimilarities, and this *du Pont* factor to also favor

⁵ Applicant's reference in its reply brief to examples like WAL*MART actually prove this point. Consumers pronounce and refer to the letters, not the intervening symbol.

Serial No. 77551179

finding a likelihood of confusion.

Consumer Sophistication

Applicant urges us to consider consumer sophistication. In this regard, as with the other *du Pont* factors, we are bound by the parties' respective identifications of goods. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, *supra*, 16 USPQ2d 1783, 1787.

There is nothing in the record that would give us further insight as to whether "RFID tags" and "radio frequency tags for animals" may be sold to particularly savvy customers. Presumably, the overlapping customers would be breeders or possibly veterinarians, although it is also possible that pet owners could purchase RFID tags for various purposes, including to track their pets. To the extent we accept that the goods are marketed to more careful purchasers, with some advanced knowledge of tracking devices, we note that with identical goods and similar marks, even a careful, sophisticated consumer of these goods is not likely to note the differences in the marks. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948-949 (Fed. Cir. 2000). Accordingly, we deem this *du Pont* factor to be neutral.

Conclusion

In summary, we have carefully considered all of the evidence and arguments of record relevant to the pertinent *du Pont* likelihood of confusion factors. We conclude that with in-part identical goods, legally identical channels of trade, and similar marks with similar connotations, even with potentially sophisticated purchasers, there is a likelihood of confusion between applicant's mark for the goods for which it seeks registration and the registered mark GAMMATAG for the items identified therein.

Decision: The refusal to register is affirmed.