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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Tropical Seas, Inc.

Serial No. 77830997

Bridget Heffernan Labutta of Allen, Dyer, Doppelt, Milbrath
& Gilchrist, P.A. for Tropical Seas, Inc.

Aretha Somerville, Trademark Examining Attorney, Law Office
107 (J. Leslie Bishop, Managing Attorney).

Before Bergsman, Wolfson and Lykos,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Tropical Seas, Inc. ("applicant") filed a use-based
application to register the mark REEF SAFE, in standard
character form, for "sun care lotions," in Class 3.

The Trademark Examining Attorney refused to register
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 is likely to cause confusion with the marks set forth
below, owned by the same entity:

1. REEF, in typed drawing form, for "sun block preparations and sun screen preparations," in Class 3;¹

2. REEF OIL and design, shown below, for "suntan lotion," in Class 3.² Registrant disclaimed the exclusive right to use the word "oil."



Our determination of likelihood of confusion 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. *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 services. 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

¹ Registration No. 2579774, issued June 11, 2002; Sections 8 and 15 declarations accepted and acknowledged.

² Registration No. 1166023, issued August 25, 1981; renewed.

cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

- A. The similarity or dissimilarity and nature of the goods described in the application and registration, the likely-to-continue channels of trade and classes of consumers.

Applicant is seeking to register its mark for "sun care lotions" and the cited registrations are for "sun block preparations and sun screen preparations" (REEF) and "suntan lotions" (REEF OIL).

"Sunblock" is defined as follows:

1. a substance that provides a high degree of protection against sunburn, often preventing most tanning as well as burning, as by obstructing the penetration of ultraviolet rays.
2. a lotion, cream, etc. containing such a substance.³

"Sunscreen" is defined as follows:

1. a substance formulated to prevent sunburn, skin cancers, and other conditions caused by excessive exposure to the sun, usually by absorbing and reflecting ultraviolet radiation. ...
2. a lotion, cream, etc. containing such a substance.⁴

³ The Random House Dictionary of the English Language (Unabridged), p. 1905 (2nd ed. 1987). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁴ *Id.* at 1906.

The term "sun care lotions" in applicant's description of goods is broad enough to encompass sun block preparations (which can be a lotion), sun screen preparations (which can be a lotion), and suntan lotions listed in the cited registrations. This is corroborated by the two use-based, third-party registrations submitted by the examining attorney that include the goods at issue. Third-party registrations which individually cover a number of different services that are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed services are of a type which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Moreover, applicant's label identifies its REEF SAFE product as a "Sunblock Lotion." Under these circumstances, we find that the goods at issue are legally identical.

Because the goods described in the application and the cited registrations are legally identical, we must presume that the channels of trade and classes of purchasers are the same. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade

channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *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").

- B. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression and the strength of the word "Reef" in connection with sun care lotions.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that where, as here, the goods are legally 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,

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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).

Moreover, in comparing the marks, 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 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, who retains a general rather than a 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). In this case, the average customer is an ordinary consumer who purchases sun care lotions.

The marks are similar in appearance, sound, meaning and commercial impression because they share the word

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"Reef." In fact, applicant's mark incorporates registrant's entire REEF mark, and under similar circumstances, likelihood of confusion has been found where the entirety of one mark is incorporated within another.

Coca-Cola Bottling Company of Memphis v. Joseph E. Seagram & Sons, Inc., 526 F.2d 556, 188 USPQ 105 (CCPA 1975)

(BENGAL LANCER in association with a representation of a soldier in garb of a Bengal lancer for nonalcoholic club soda, quinine water, and ginger ale is likely to cause confusion with BENGAL for gin); *In re Denisi*, 225 USPQ 624, 626 (TTAB 1985) (PERRY'S PIZZA for restaurant services is likely to cause confusion with PERRY'S for restaurant services); *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY DRUM for hairdressing and conditioner is likely to cause confusion with EBONY for cosmetics); *In re South Bend Toy Manufacturing Company, Inc.*, 218 USPQ 479, 480 (TTAB 1983) (LIL' LADY BUGGY for toy doll carriages is likely to cause confusion with LITTLE LADY for doll clothing).

The inclusion of the word "Oil" in the registered mark REEF OIL and design does not distinguish registrant's REEF OIL mark from applicant's mark REEF SAFE because the word "Oil" is descriptive of the composition of the suntan lotion and has been disclaimed. *In re National Data Corp.*,

753 F.2d 1056, 22\$ USPQ 749, 751 (Fed. Cir. 1985) ("That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark"). Thus, the word "Reef" is the dominant element in the registrant's mark REEF OIL and design and, therefore, it is similar to applicant's mark REEF SAFE.

The record before us provides no evidence that the word "Reef" has any meaning in connection with sun care lotions. However, the word "Reef" engenders a commercial impression relating to the ocean because a "reef" is a "chain of rocks or coral in the water."⁵ Thus, while the word "Reef" has no meaning in connection with sun care lotions, the marks engender similar commercial impressions by alluding to an ocean-related scene.

Applicant argues to the contrary and submitted copies of five third-party registrations for marks comprising, in part, the word "Reef" in connection with snorkeling and scuba diving equipment to show that "consumers have become well accustomed to differentiating between marks containing the term REEF for water- and ocean-related products, and

⁵ The Random House Dictionary of the English Language (Unabridged), p. 1619.

thus, are unlikely to be confused by marks containing" the word "Reef."⁶

However, applicant overstates the probative value of the third-party registrations. Third-party registrations do not prove that "Reef" is a weak term. Absent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office). See also *In re Hub Distributing, Inc.*, 218 USPQ 284, 285 (TTAB 1983).

[I]t would be sheer speculation to draw any inferences about which, if any of the marks subject of the third party (sic) registrations are still in use. Because of this doubt, third party (sic) registration evidence proves nothing about the impact of the third-party marks on purchasers in terms of dilution of the mark in question or conditioning of the purchasers as to their weakness in distinguishing source.

In re Hub Distributing, Inc., 218 USPQ at 286.

⁶ Applicant's Brief, p.4.

While third-party registrations may be used in the manner of a dictionary to show that a mark or a portion of a mark is descriptive or suggestive of goods and services, five third-party registrations comprising in part the word "Reef" for snorkeling and scuba diving equipment do not prove that the word "Reef" in connection with sun care preparations is so weak and diluted that applicant's application for the mark REEF SAFE is sufficient to distinguish the marks if they are used in connection with legally identical products. Furthermore, the third-party registrations submitted by applicant are of limited probative value because they do not cover sun care preparations. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (the third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are far removed from the goods at issue). *See also Key Chemicals, Inc. v. Kelite Chemicals Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972) ("Nor is our conclusion altered by the presence in the record of about 40 third-party registrations which embody the word "KEY". The great majority of those registered marks are for goods unrelated to those in issue, and there is no evidence that they are in continued use. We, therefore, can give them but little weight in the

circumstances present here"). Finally, the word "reef," meaning "a chain of rocks or coral in the water," has no inherent meaning in connection with sun care lotions.

In view of the foregoing, we find that applicant's mark REEF SAFE is similar to registrant's marks REEF and REEF OIL and design in terms of appearance, sound, meaning and commercial impression.

C. No reported instances of actual confusion.

Applicant argues that "Applicant is hardly a 'newcomer,' since it has been using the mark **REEF SAFE** since at least as early as 1996. In that time, there have been no known instances of actual confusion with the cited marks."⁷ The fact that an applicant in an *ex parte* case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis because the Board in such cases has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred. See, *In re Opus One, Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001); *In re Jeep Corporation*, 222 USPQ 333, 337 (TTAB 1984); *In re*

⁷ Applicant's Brief, p. 5.

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Barbizon International, Inc., 217 USPQ 735, 737 (TTAB
1983).

D. Balancing the factors.

In view of the facts that the marks are similar, the goods are legally identical, and the presumption that the goods move in the same channels of trade and are available to the same classes of consumers, we find that applicant's mark REEF SAFE for "sun care lotions" is likely to cause confusion with the mark REEF for "sun block preparations and sun screen preparations" and REEF OIL and design for "suntan lotion."

Decision: The refusal to register is affirmed.