

THIS OPINION IS NOT  
A PRECEDENT OF THE  
TTAB

Mailed:  
July 7, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re K & N Distributors*<sup>1</sup>

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Serial No. 86150955

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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 DERMOPLUS GEL in standard character form for “cosmetics” in International Class 3.<sup>2</sup> 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

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

<sup>2</sup> Application Serial No. 86150955 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. 2324254<sup>3</sup> for the typeset<sup>4</sup> word mark DERMA PLUS for “skin care products, namely, medicated skin care lotions sold in aerosol containers” in International Class 5. Registrant disclaimed the term “Derma.”

When the refusal was made final, Applicant filed an appeal. Applicant and the Examining Attorney both filed briefs. We reverse 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 Fondée 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.”).

We first consider the similarity or dissimilarity of the marks, comparing the marks in their entireties as to appearance, sound, connotation and commercial

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<sup>3</sup> Registered March 12, 2002. Renewed March 8, 2010.

<sup>4</sup> 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.

impression. *Palm Bay Imports*, 73 USPQ2d at 1960. “[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 are similar because they both include the similar term DERMO or DERMA, followed by the term PLUS. The term GEL in Applicant’s mark, as a descriptive or generic term, does not serve to distinguish the marks. Thus, we find the marks similar in sound, appearance and commercial impression. The meaning of the marks is similar too, in that they both communicate “better skin.”<sup>5</sup> Indeed, Applicant “concede[s] the phonetic equivalence of DERMOPLUS versus DERMA PLUS” and “the highly similar nature of the ... cited mark” and Applicant’s mark.<sup>6</sup>

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

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<sup>5</sup> We take judicial notice of the noun “derma” as meaning “dermis,” and of the noun “dermis,” as meaning “the sensitive vascular inner mesodermic layer of the skin made up chiefly of white fibrous connection tissue with some smooth muscle and elastic tissue and numerous nerves and sensory receptors.” *Webster’s Third New International Dictionary of the English Language Unabridged* (Merriam-Webster Inc. 1986). The Board may take judicial notice of dictionary definitions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>6</sup> Applicant's Brief at 8, 4 TTABVUE 9.

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).

The Examining Attorney argues that “[b]oth the applicant’s and the registrant’s goods are related skin care items”; and that they “have the same purpose and function, namely, to provide the user with better quality and more beautiful skin.”<sup>7</sup> We are not persuaded; registrant’s goods are intended to treat a medical condition, not to simply provide better quality and more beautiful skin.

In addition, the Examining Attorney has made of record printouts of several web-pages to demonstrate that a single entity offers the same goods under the same mark, as those set forth in the application and registration. We have carefully reviewed the Examining Attorney’s website evidence and find that none of it concerns the goods set forth in the cited registration. The cited registration recites “skin care products, namely, medicated skin care lotions sold in aerosol containers”

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<sup>7</sup> Examining Attorney’s brief at unnumbered pp. 6-7; 6 TTABVUE 8-9.

while the Examining Attorney's evidence concerns skin care lotions which do not indicate that they are medicated, and do not show that they are in aerosol containers. Medicated skin care lotions sold in aerosol containers include products such as anti-itch sprays for the relief of skin irritations. They do not include products such as anti-wrinkle cream enhanced with vitamin A. *See* printout from neotericcosmetics.com, submitted with the Final Office Action. *See also*, Jean Robert Cesar declaration, ¶ 6, submitted with Applicant's September 29, 2014 response, stating "it can be assumed that the medicated lotions sold under the DERMA PLUS mark are/were sold in the same aisles as first-aid kits or antiseptics, and would not be confused with goods sold in the make-up aisle."

Inasmuch as the evidence set forth by the Examining Attorney does not establish a relationship between the goods, even though the marks are similar, the record does not support a finding of a likelihood of confusion between Applicant's marks for "cosmetics" and registrant's mark for "skin care products, namely, medicated skin care lotions sold in aerosol containers." *See Kellogg Co. v. Pack'em Enterprises Inc.*, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *du[[Pont* factor may not be dispositive.").

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