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BAC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Coyote Botanicals, Inc.

Serial No. 75/695,933

I. C. Waddey, Jr. of Waddey & Patterson, PC for Coyote Botanicals, Inc.

Jan Mooneyham, Trademark Examining Attorney, Law Office 115 (Tomas Vlcek, Managing Attorney).

Before Chapman, Wendel and Bottorff, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On May 3, 1999, Coyote Botanicals, Inc. filed an application to register on the Principal Register the mark COYOTE BOTANICALS for "topical gel for medical and therapeutic use, namely, treatment of skin conditions such as Actinic keratosis, Lentigines, and Seborrheic keratosis." Applicant disclaimed the word "botanicals." Applicant claimed a date of first use and first use in commerce of October 1997.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the

ground that applicant's mark, when used on applicant's identified goods, so resembles the registered mark COYOTE MOON for "skin care products, namely, lotions, moisturizers, soaps, cleansers and creams; hair care products, namely shampoos and conditioners; essential oils for personal use; and colognes,"<sup>1</sup> as to be likely to cause confusion, mistake, or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested.

The Examining Attorney essentially takes the position that the dominant portion of applicant's mark is the word COYOTE, with the second word being descriptive; that both marks share the identical first word, and are highly similar in sound, appearance, and commercial impression; that the respective goods are closely related in that they are both skin care products; and that the record shows that a single entity may offer for sale both medicated topical skin care products (e.g., for treatment of acne) and non-medicated skin care products (e.g., skin lotions and moisturizers).

Applicant contends that the marks must be considered in their entirety, and when so viewed, COYOTE BOTANICALS

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<sup>1</sup> Registration No. 2,183,048, issued August 18, 1998. The claimed date of first use is December 1, 1996.

and COYOTE MOON are dissimilar in sound, meaning and commercial impression; that the respective goods are dissimilar as applicant's "goods are pharmaceutical in nature and registrant's goods are, in contrast, cosmetic in nature" (brief, p. 3); that therefore the goods "would be sold through different channels of trade and, even if they goods were sold at the same retail store, they would be placed in different aisles." (Brief, p. 3).

Turning to a consideration of the respective goods, the Examining Attorney has made of record copies of several third-party registrations, most of which issued on the basis of use in commerce, to show that various businesses have registered a single mark in connection with both medicated and non-medicated skin care products.

Third-party registrations are not evidence of commercial use of the marks shown therein, or that the public is familiar with them. Nevertheless, third-party registrations which individually cover a number of different items and which are based on use in commerce have some probative value to the extent that they suggest that the listed goods may emanate from a single source. See *Olde Tyme Foods Inc., v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); and *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

Moreover, it is well settled that goods need not be identical or even competitive to support a finding of likelihood of confusion; it is sufficient that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See *Monsanto Co. v. Enviro-Chem Corp.*, 199 USPQ 590, 596 (TTAB 1978); and *In re Peebles Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992).

Both applicant's and registrant's goods are skin preparations applied for therapeutic or cosmetic purposes. The following statement appears on applicant's specimen labels: "A centuries old herb, rich in minerals, formulated for today's skin. Regular use can help to keep your skin conditioned and beautiful." Thus, applicant itself touts the cosmetic property of its product.

Based on the record before us, we conclude that applicant's goods, topical gel for medical and therapeutic use, namely treatment of skin conditions, and the portion of registrant's goods which are skin care products, namely, lotions, moisturizers, soaps, cleansers and creams are related. That is, these goods bear a sufficient relationship that the use of the same or similar marks on

such goods would likely cause confusion. See *Jean Patou, Inc. v. Theon, Inc.* 9 F.3d 971, 29 USPQ2d 1771 (Fed. Cir. 1993); and *Neutrogena Corporation v. Bristol-Myers Company*, 410 F.2d 1391, 161 USPQ 687 (CCPA 1969).

Regarding the respective trade channels and purchasers, the Board must determine the issue of likelihood of confusion on the basis of the goods as identified in the application and the registration. See *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). As noted above, the topical gel for treatment of skin conditions sold by applicant and the skin lotions moisturizers, cleansers and creams sold by registrant, while obviously separate products, are commercially related items. Moreover, the identifications of goods include no restrictions as to trade channels or classes of purchasers. Both applicant's and registrant's goods, as identified, could be offered and sold to the same classes of purchasers through the same or overlapping channels of trade. That is, purchasers may seek the therapeutic properties of applicant's product or a regular skin moisturizer to condition their skin. See *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994); and *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Turning next to a consideration of the respective marks, it is well settled that marks must be considered in their entireties. However, our primary reviewing court has held that in articulating reasons for reaching a conclusion on the question 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 or portion of a mark. That is, one feature of a mark may have more significance than another. See *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); and *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

In this case, both applicant's mark, and registrant's mark begin with the identical, arbitrary word COYOTE, which is the dominant feature of applicant's mark, and, as the first word in the registrant's mark, is the one most likely to be remembered. Of course, there is an obvious difference in the two involved marks, specifically that the term MOON is the second word in registrant's mark, while the term BOTANICALS is the second word in applicant's mark. However, the second word has been disclaimed by applicant as it is descriptive. In fact, purchasers are unlikely to remember the specific difference between the marks due to the recollection of the average purchaser, who normally

retains a general, rather than a specific, impression of the many trademarks encountered. That is, the purchaser's fallibility of memory over a period of time must also be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd*, Appeal No. 92-1086 (Fed. Cir. June 5, 1992).

In any event, purchasers familiar with registrant's goods sold under the registered mark COYOTE MOON may, upon seeing applicant's mark COYOTE BOTANICALS on closely related goods, assume that applicant's goods come from the same source as registrant's goods, simply referring to a new medicated type of skin lotion or cream.

We find that the marks, COYOTE BOTANICALS and COYOTE MOON, are similar in sound, appearance, connotation and commercial impression.

Any doubt on the question of likelihood of confusion must be resolved against the newcomer as the newcomer has the opportunity of avoiding confusion, and is obligated to do so. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, at 1440 (TTAB 1993).

Based on the similarity of the marks, the relatedness of the goods, and the similar or overlapping trade channels and purchasers, we find that there is a likelihood that the purchasing public would be confused when applicant uses the mark COYOTE BOTANICALS for "topical gel for medical and therapeutic use, namely, treatment of skin conditions such as Actinic keratosis, Lentigines, and Seborrheic keratosis." See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

**Decision:** The refusal to register under Section 2(d) is affirmed.