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OF THE TTAB

Paper No. 26

RFC

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Swenco Products, Inc.

Serial No. 75/799,467

Jim Zegeer for Swenco Products, Inc.

James T. Griffin, Trademark Examining Attorney, Law Office
103 (Daniel Vavonese, Managing Attorney).

Before Cissel, Hanak and Walters, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On September 14, 1999, applicant, a corporation
organized and existing under the laws of the state of
Missouri, filed the above-identified application to
register the mark shown below



on the Principal Register for what were subsequently identified as "electrical connectors for splicing 8-gauge and smaller stranded electrical wires, excluding straight- and right-angle radio frequency coaxial electrical connectors and excluding electrical panel units for sequentially connecting and disconnecting electrical connectors." The basis for filing the application was applicant's assertion that it had first used the mark in interstate commerce in connection with these products on June 1, 1999.

In addition to raising several informalities, including a requirement to disclaim the representation of the electrical connector shown in the drawing, the Examining Attorney refused registration under Section 2(d) of the Lanham Act on the ground that applicant's "POSI-LOCK" and design mark, when used in connection with the electrical connectors set forth in the application, so resembles the mark "POSI-LOCK," which is registered¹ for "straight and right angle radio-frequency coaxial electrical connectors," that confusion is likely.²

¹ Reg. No. 1,224,889, issued on the Principal Register on Jan. 25, 1983 to Sealectro Corporation; affidavits under section 8 and 15 accepted and acknowledged.

² Registration was also refused under Section 2(d) of the Act based on another cited registration, but the Examining Attorney subsequently withdrew that registration as a basis for refusing registration.

Applicant responded to the first Office Action by amending the identification-of-goods clause to read as indicated above and to include a statement that the lining shown in the drawing merely indicates shading. Applicant also presented arguments with respect to the Examining Attorney's requirement for a disclaimer of the representation of the electrical connector in the mark and the refusal to register based on likelihood of confusion.

The Examining Attorney, however, maintained both the requirement for disclaimer and the refusal to register.

Applicant timely filed a Notice of Appeal, and, following a number of extensions of time, an appeal brief. The request of the Examining Attorney to supplement the record after applicant had filed its appeal brief was denied. The Examining Attorney then filed his appeal brief,³ but applicant neither filed a reply brief nor requested an oral hearing before the Board.

Accordingly, we have resolved this appeal based on consideration of the evidence properly of record, the arguments presented in the briefs and the relevant legal precedents. We conclude that both the requirement to

³ Attached to the Examining Attorney's brief were copies of pages from two technical dictionaries. Ordinarily, submission of evidence not already of record with an appeal brief is untimely under Trademark Rule 2.142(d), but the Board may take judicial

disclaim the representation of the connector and the refusal to register based on Section 2(d) of the Act are well taken.

We turn first to the disclaimer requirement. As the Examining Attorney points out, an accurate picture or representation of descriptive matter such as the configuration of the product is the equivalent of the written name of it. As such, it is merely descriptive of the product under Section 2(e)(1) of the Act and therefore must be disclaimed under Section 6(a), just as descriptive terminology must be disclaimed. *Thistle Class Association v. Douglass & McLeod, Inc.*, 198 USPQ 504 (TTAB 1978). See also TMEP Section 1213.02(c).

In its response of August 30, 2000, applicant argued that "[t]he depiction of the electrical connector is unique to applicant and is applicant's style of connector...". Applicant seems to be arguing that because the mark depicts applicant's own product, as opposed to a generic connector or one resembling the connectors made by a competitor, the depiction is not merely descriptive of applicant's connector and therefore does not need to be disclaimed. This argument is not well taken. Applicant concedes that

notice of dictionary definitions, so we have considered this evidence.

the design in its mark depicts its product. That is the end of our inquiry. Because the representation of applicant's electrical connector is merely descriptive of applicant's goods within the meaning of Section 2(e)(1) of the Lanham Act, it must be disclaimed under section 6(a) of the Act. The requirement for such a disclaimer is affirmed.

We turn next to the refusal based on likelihood of confusion under Section 2(d) of the Lanham Act. The factors to be considered in determining whether confusion is likely were set forth by the predecessor to our primary reviewing court in the case of *In re E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Chief among these factors are the similarity of the marks as to appearance, pronunciation, meaning and connotation and the relationship between the goods or services with which the marks are used.

In the instant case, confusion is likely because the marks create similar commercial impressions and the goods specified in the application are closely related to the goods set forth in the cited registration.

The marks create similar commercial impressions because the dominant portion of applicant's mark is identical to the cited registered mark. It is well settled

that when a mark consists of a word portion along with a design, the word portion is often more likely to be impressed upon a purchaser's memory and to be used in calling for or recommending the goods. In *Re Appitito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Further, the design portion of this mark is a merely descriptive depiction of the goods. For these reasons, it is appropriate to give greater weight to the literal portion of applicant's mark in determining whether confusion with the cited registered mark is likely. When considered in its entirety, applicant's mark is quite similar to the registered mark in appearance, pronunciation and connotation. In both marks, the word "POSI-LOCK" is suggestive of the same characteristic. It is likely to suggest to the relevant consumers that the connector bearing it provides a positive lock which ensures a good electrical connection.

Turning to the goods, then, we note that in order for confusion to be likely, the goods do not need to be identical or even directly competitive. It is sufficient if they are related in some manner, or if the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come

Ser No. 75/799,467

from a common source. In re Corning Glass Works, 229 USPQ 65 (TTAB 1985); In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978).

Applicant's products are electrical connectors for splicing 8-gauge and smaller stranded electrical wires. The goods specified in the cited registration are electrical connectors for coaxial cable. Although not identical, these products are closely related. Both are connectors for electrical wires, and they are complementary in the sense that the same person could purchase both for use in wiring different electrical components in his or her home. A consumer familiar with the use of the registered "POSI-LOCK" mark in connection with coaxial electrical connectors, upon being presented with applicant's "POSI-LOCK" and design mark on connectors for stranded electrical wires, is likely to assume, mistakenly as it would turn out to be, that a single source is responsible for both products.

DECISION: The refusal to register under Section 2(d) of the Act is affirmed. The requirement for a disclaimer under Section 6(a) of the design of the electrical connector is also affirmed.