

**THIS DISPOSITION IS NOT
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Mailed:
December 18, 2003
Paper No. 17
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Creative Action, Inc.

Serial No. 76180488

Wayne D. Porter, Jr. of Rankin Hill Porter & Clark LLP for
Creative Action, Inc.

Idi Aisha Clark, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Hairston, Chapman and Bucher, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Creative Action, Inc. seeks registration on the
Principal Register for the mark shown below:



for "invalid walkers, namely, wheeled walkers and rollators
with waist-level handles to facilitate ambulation and an
integral lift mechanism to lift items," in International
Class 10.¹

¹ Application serial no. 76180488 was filed on December 13,
2000, based upon applicant's allegation of a *bona fide* intention
to use the mark in commerce.

This case is now before the Board on appeal from the final refusal to register based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining Attorney has held that applicant's mark, when used in connection with the identified goods, so resembles the mark shown below:



registered for "wheelchairs for disabled persons for transport by land, and replacement parts for the aforementioned goods," in International Class 12,² as to be likely to cause confusion, to cause mistake or to deceive.

Applicant filed an appeal brief as did the Trademark Examining Attorney. The Trademark Examining Attorney's appeal brief was mailed on August 18, 2003. Under the Trademark Rules, applicant had until Monday, September 8, 2003 to file a reply brief.³ Because applicant did not file

² Registration No. 2308356 issued on January 18, 2000.

³ "... The appellant may file a reply brief within twenty days from the date of mailing of the brief of the examiner." 37 C.F.R. §2.142(b)(1).

a reply brief until October 23, 2003, it was untimely filed and has not been considered. Additionally, the untimely reply brief contained a request for an oral hearing. An oral hearing was not scheduled as this request was also untimely. (In addition, the request for oral hearing was contained within the reply brief rather than being filed as a separate paper.)⁴

We affirm the refusal to register.

Applicant argues that the overall impressions of these two marks are different given that "EZ" and "Easy" are different; that the words WHEELER and WHEEL are different; that the design elements are different; and that "ee-zee" marks are weak given the large number of marks having such prefixes that have been registered for goods in International Classes 10 and 12.

The Trademark Examining Attorney responds that the involved marks are confusingly similar; that the goods herein are closely related and move through the same channels of trade to the same types of consumers; and that applicant has failed to prove that the cited mark is weak.

⁴ "If the appellant desires an oral hearing, a request thereof should be made by a separate notice filed not later than ten days after the due date for a reply brief ..." 37 C.F.R. §2.142(e)(1).

Our determination under Section 2(d) is based upon an analysis of all of the 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 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to the relatedness of the goods as listed in the cited registration and in the instant application. Registrant claims rights in its mark on "wheelchairs for disabled persons ...". Applicant intends to use its mark on "wheeled walkers and rollators" to "facilitate ambulation" for the "invalid."

On its webpage, applicant's "EzWheeler™ Cart" is described as a device that "Brings the Load ...  ... to you!" A picture of the product was made of record by applicant and by the Trademark Examining Attorney.



The Trademark Examining Attorney also included a screen print from a website dedicated to brain injury survivors and caregivers. This third-party site contains an

extensive discussion of the ways in which "rolling walkers" or "rollators" provide support, stability, balance and endurance for the person suffering from a loss of mobility:

Imagine a walker that glides. A walker you don't have to lift to move forward. A walker with wheels that turn and pivot. A walker with locking brakes, a basket for storage, and a seat for resting. Imagine a rollator. *Ahhhhh!*⁵

Consistent with the design of its rollator, applicant emphasizes the fact that its wire basket can be raised and lowered. Like all walkers with wheels, this device does not take the user anywhere, but requires the user to walk. Nonetheless, applicant's identification of goods begins by listing the target consumers as being "invalid[s]"⁶ capable of "ambulation." Hence, these goods are designed for people suffering a disability but who can still ambulate.

Registrant's identification of goods also confirms the obvious - that wheelchairs are generally designed for, and marketed to, disabled persons. While perhaps most wheelchairs are used by those who cannot walk at all, clearly some wheelchairs are used by persons suffering from

⁵ See <http://www.bindependent.com/hompg/bi/bindep/store/aisles/s-needs/mobility/mobility.htm>

⁶ **invalid** 1. suffering from disease or disability; SICKLY, DISABLED; ..., Webster's Third New International Dictionary, Unabridged (1993). We take judicial notice of this definition. See University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594 (TTAB 1982), *aff'd* 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

temporary immobility or limited mobility who are still at times able to ambulate - the very same population that would use applicant's rollator. Moreover, with the progression of age, disease or other disabling conditions, a rollator user could well have to rely upon a wheelchair at some point in the future.

Even if one should presume that these goods are used by distinctly separate subgroups among the disabled population, as noted by the Trademark Examining Attorney, it is well settled that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods are related in some manner; or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in an environment that would give rise, because of the similarity of the marks employed thereon, to the mistaken belief that applicant's goods originate from or are in some way associated with the registrant. See Turner Entertainment Co. v. Nelson, 38 USPQ2d 1942 (TTAB 1996); In re Phillips-Van Heusen Corp., 228 USPQ 949 (TTAB 1986); General Mills Fun Group, Inc. v. Tuxedo Monopoly, Inc., 204 USPQ 396 (TTAB 1979), affirmed 648 F.2d 1335, 209 USPQ 986 (CCPA

1981); and Autac Inc. v. Viking Industries, Inc., 199 USPQ 367 (TTAB 1978).

The Trademark Examining Attorney has placed into the record a webpage showing that scooters, wheelchairs, lifts, walkers and rollators are marketed through the same channels of trade and sometimes under the same trademarks (e.g., Invacare).⁷ This confirms that these goods would be considered commercially related by an appreciable number of purchasers.

Applicant has repeatedly argued that another factor weighing in its favor is the fact that registrant's wheelchairs are classified in International Class 12 (e.g., as a vehicle) while applicant's rollators are classified in International Class 10 (e.g., as a medical device). However, arguments as to different classifications for the respective goods have no persuasive value in this context. The classification system is simply for the convenience of the Office and has no bearing on the relationship of the goods. See In re Leon Shaffer Golnick Advertising, Inc., 185 USPQ 242 (TTAB 1974).

Hence, we agree with the Trademark Examining Attorney that these goods are closely related, and that they move

⁷ See <http://www.discountscoters.com/>

through the same channels of trade to similar types of consumers.

We turn then to the du Pont factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound and connotation.

In summarizing her comparison of the involved marks, the Trademark Examining Attorney argues that these marks " ... convey the same commercial impression and are therefore confusingly similar." (Trademark Examining Attorney's appeal brief, p. 3)

In turn, applicant argues that because: (i) "EZ" and "Easy" do not look the same; (ii) the word WHEELER in its mark has a different sound, meaning and appearance than registrant's mark with the word WHEEL; and (iii) the design elements do not look the same, we should find that these marks create different overall commercial impressions.

As noted by the Trademark Examining Attorney, the issue is not whether a side-by-side comparison of the marks would make distinctions apparent, but rather whether the marks create a similar overall commercial impression in connection with the goods with which they are, or are intended to be, used. Visual Information Institute, Inc. v. Vicon industries Inc., 209 USPQ 179 (TTAB 1980).

In determining what the overall commercial impressions of the marks are, we must focus on the perception and recollection of the average purchaser of the goods in question, recognizing that people normally retain general, rather than specific, impressions of trademarks. 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 (Fed. Cir., June 5, 1992).

Applying this standard, we find that these marks are similar in appearance and pronunciation. We also find that as to appearance, the somewhat different types of wheels depicted in these two composite marks (each suggestive of the type of wheels found on these respective products) is not significant enough to cause a difference in overall commercial impressions of the marks, as applicant has urged us to conclude. As to the meaning of these marks, we find that both marks have the same suggestive connotation, namely, that with "minimal effort" on the part of the disabled person, these "wheeled" items provide mobility for the user.

Finally, in applicant's supplemental brief of December 6, 2002,⁸ applicant argues that frequently occurring variations on the words "Easy" and "Wheel," including combinations of these two words, make this a crowded field where consumers are conditioned to look to other parts of composite marks for distinguishing features. Applicant cites to Board precedent in support of its position:

Evidence of widespread third-party use, in a particular field, of marks containing a certain shared term is competent to suggest that purchasers have been conditioned to look to the other elements of the marks as a means of distinguishing the source of goods or services in the field.

In re Broadway Chicken Inc., 38 USPQ2d 1559 (TTAB 1996).

However, applicant did not submit its showing of these third-party registrations until the time of its supplemental brief. At that juncture, applicant clearly

⁸ Following the Office's final refusal to register of January 18, 2002, applicant filed a timely Notice of Appeal on July 18, 2002. In its appeal brief, applicant amended the identification of goods. The Board expressly offered applicant the option to file a supplemental brief if it desired after hearing again from the Trademark Examining Attorney. The Trademark Examining Attorney then assigned to the case found the amended identification of goods to be acceptable, withdrew on a second registration earlier cited under Section 2(d) of the Act, but denied reconsideration on the refusal to register based on the remaining cited registration. This Office action was mailed on October 23, 2002. Then applicant did submit a supplemental brief to the Board on December 4, 2002 which contained copies of a large number of third-party registrations that applicant retrieved from the United States Patent and Trademark Office's automated search records during November 2002.

could have requested a remand to have the Trademark Examining Attorney consider this evidence. Then, had a remand been granted, the Trademark Examining Attorney would have had the opportunity to submit evidence to rebut the evidence submitted by applicant. Because applicant did not request a remand, and thus the case was not remanded to the Trademark Examining Attorney for further examination, the Trademark Examining Attorney has consistently refused to consider these registrations. In her brief, she properly objects to this proffered evidence on the ground of untimeliness, and asks us to refuse to consider this additional evidence under Trademark Rule 2.142(d).⁹ We sustain the objection, and we have not considered the exhibits to applicant's supplemental brief.

Even if we had considered this evidence, we hasten to add that it would not have persuaded us to reach a different conclusion in this appeal. Third-party registrations, by themselves, are not entitled to much

⁹ "(d) The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. After an appeal is filed, if the appellant or the examiner desires to introduce additional evidence, the appellant or the examiner may request the Board to suspend the appeal and to remand the application for further examination." 37 C.F.R. §2.142(d).

weight in determining whether confusion is likely. See In re Hub Distributing, Inc., 218 USPQ 284 (TTAB 1983). Such registrations are not evidence of what happens in the marketplace or that the public is so familiar with the use of such marks that the other elements are emphasized in order to allow purchasers to distinguish among such marks. National Aeronautics and Space Administration v. Record Chemical Co., 185 USPQ 563 (TTAB 1975). In any event, marks that convey different commercial impressions than applicant's mark (e.g., EZ BIG WHEEL, WHEEL-EZY, etc.), or similar marks registered for quite different goods (e.g., cleaning preparations, motorcycle stands, specialized computer applications for automobile financing, etc.), can hardly be the basis for concluding that the cited mark is a weak trademark.

Moreover, if applicant had timely submitted evidence showing that registrant's arguably suggestive mark should be treated as a relatively weak mark, we note that even weak marks registered on the Principal Register are entitled to the statutory presumptions of Section 7(b) of the Act, and hence should be protected against the registration by a subsequent user of a highly similar mark

for closely related goods. See Hollister Incorporated v. Ident A Pet, Inc., 193 USPQ 439 (TTAB 1976).

In conclusion, we find that these marks have the same commercial impression, and that they are used, or are intended to be used, on related products that often move through the same channels of trade to the same classes of ordinary purchasers. Based on the evidence in this record, we cannot conclude that registrant's mark is weak and therefore entitled to a narrowed scope of protection.

Decision: The refusal to register under Section 2(d) of the Trademark Act is hereby affirmed.