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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Sirius Products, Inc.*

Serial No. 76/213,557

Mark B. Harrison and Jacqueline Levasseur Patt of Venable,
Baetjer, Howard & Civiletti, LLP for *Sirius Products, Inc.*

Anthony J. Tambourino, Trademark Examining Attorney, Law Office
107 (Thomas Lamone, Managing Attorney).

Before *Simms, Hohein and Hairston*, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Sirius Products, Inc. has filed an application to register the mark "WAM!" for a "stain remover for porcelain, fiberglass, tile, grout, metal surfaces, synthetic surfaces, vinyl, wood, marble, linoleum, plastic surfaces, glass, painted surfaces, brick, stone and concrete."¹

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 applied to its goods, so resembles the

¹ Ser. No. 76/231,557, filed on March 27, 2001, which is based on a bona fide intent to use such mark in commerce.

mark "WHAM," which is registered for a "drain pipe cleaner,"² as to be likely to cause confusion, or mistake or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods and the similarity of the marks.³

Turning first, therefore, to consideration of the respective goods, both applicant and the Examining Attorney correctly acknowledge in their main briefs that it is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited registration, and not--we further observe--in light of what such goods are shown or asserted to actually be. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783,

² Reg. No. 805,748, issued on March 15, 1966, which sets forth July 15, 1939 as a date of both first use anywhere and first use in commerce; renewed.

³ The court, in particular, pointed out that: "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."

1787 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where applicant's and registrant's goods are broadly described as to their nature and type, it is presumed in each instance that in scope the application and registration encompass not only all goods of the nature and type described therein, but that the identified goods move in all channels of trade which would be normal for those goods and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Moreover, applicant and the Examining Attorney properly agree that it is well established 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 and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Applicant argues that, in this case, there are "substantial differences" between stain removers and drain pipe cleaners "such that confusion is clearly not likely." Referring to printouts of several pages which it made of record from registrant's website, applicant maintains in particular that:

Drain pipe cleaners and stain removal products are two distinctly different goods. [R]egistrant's good is a "concentrated chemical emulsifier which liquefies and disperses grease, soap, detergents and other organic waste responsible to [sic, should be "for"] system failures." Registrant's good are [sic, should be "is"] poured into drain lines, septic tanks, cesspools, and malfunctioning waste disposal systems and is available for purchase in 50 gallon vats. In contrast, Applicant's goods remove stains from common surfaces found in the home including porcelain, tile, and linoleum. Therefore, the nature and purpose of Applicant's goods and registrant's goods are different.

Registrant's primary customers are professional plumbers. Neither professional plumbers nor ordinary customers would encounter Applicant's goods in the same home centers or hardware stores and Applicant's customers would not encounter registrant's goods in the same stores.

Furthermore, customers would not believe that the same company produced drain cleaners and stain removers. The Examining Attorney has provided no evidence to support any conclusion that customers would believe the same companies produced drain cleaners and stain removers under the same mark. Therefore, Applicant's goods and registrant's goods are used for different purposes, are directed to different customers and travel in different channels of trade.

We concur with the Examining Attorney, however, that as identified in the application and cited registration, there is clearly a viable relationship between the goods at issue such

that their marketing under the same or substantially similar marks would be likely to cause confusion as to the origin or affiliation thereof. Among other things, we observe that with respect to the availability of registrant's "HERCULES" plumbing chemicals, including its "WHAM" drain pipe cleaner, the evidence furnished by applicant states under the heading "Homeowner & Industrial Info" that:

While you may find a selection of our products in a home center or hardware store near you, please consider the added value of using a licensed plumber. Specialty products often require special care for safe and effective use. That's why Hercules products are sold to plumbers through plumbing wholesalers across America.

As the Examining Attorney, in light thereof, accurately points out in his brief:

The applicant argues that the registrant markets its products to the professional plumber while the applicant instead markets its products to the general consumer. In support of this argument, the applicant directs the TTAB ... to evidence consisting of Internet advertising from registrant's website. The applicant then concludes [that] "neither professional plumbers nor ordinary customers would encounter Applicant's goods in the same home centers or hardware stores and Applicant's customers would not encounter registrant's goods in the same store." As it did during examination, the applicant has neglected to refer to relevant portions of its own evidence that belie this conclusion. The registrant's advertisement clearly indicates that the registrant's products are available at home centers and hardware stores where the general consumer shops. While the registrant sells the product in large 55-gallon drums, it also sells the goods in smaller consumer-sized gallon and quart bottles. The fact that the registrant recommends that the general consumer hire a professional plumber to administer its products is irrelevant.

The general consumer can still purchase and use the goods on his or her own. Therefore, the applicant's own evidence demonstrates that the same type of consumer has access to and uses both products.

In addition, we note that the evidence made of record by applicant shows that registrant, besides its various "DRAIN & WASTE SYSTEM CLEANERS," also markets under its "HERCULES" house mark "MAINTENANCE & CLEANING COMPOUNDS," a category which could encompass goods such as a stain remover.

More importantly, as the Examining Attorney also persuasively argues in his brief, neither applicant's nor registrant's goods, as respectively identified, are restricted to a particular channel of trade or class of purchaser:

Neither party has limited [its] ... own channels of trade solely to the retail, wholesale or professional market. The applicant's identification [of goods] specifically indicates that any consumer may use the [stain remover] product on "tile" and "grout." The registrant's identification of goods is "drain pipe cleaner" without limitation of the channels of trade. Any consumer, whether a professional plumber or a homeowner, may see these products in a hardware store [or home center] and mistakenly believe that the same source offers products for cleaning bathroom, kitchen and washroom drains and also products for cleaning bathroom, kitchen and washroom tile and grout. Therefore, the identifications not only indicate that neither party has limited the trade channels, but, in the applicant's case, the identification also shows a relationship between the areas of the household in which the consumer uses and stores these products.

Applicant's attempts to restrict registrant's "drain pipe cleaner" to a concentrated chemical emulsifier, which liquefies and disperses grease, soap, detergents and other organic waste

responsible for waste treatment system and which is sold exclusively in commercial-sized quantities through plumbing wholesalers primarily to professional plumbers, while limiting its stain remover to a household cleaning preparation sold only in hardware and home center stores to ordinary consumers, are consequently without merit given the broad manner in which both applicant's and registrant's goods are respectively identified. Such goods, instead, must be viewed as suitable for sale to both ordinary consumers and professional plumbers, and must be regarded as available for purchase in all usual channels of trade for goods of their kinds, including hardware stores and home center outlets.

Turning, next, to consideration of the respective marks, applicant urges that confusion is not likely because "the marks are not identical." Applicant, in particular, insists that when considered in their entirety, applicant's mark "WAM!" and registrant's mark "WHAM" "are dissimilar in sound and appearance and create different commercial impressions inasmuch as:

Applicant's mark is the coined word WAM followed by an exclamation point. The coined word followed by the exclamation point make Applicant's mark distinctive. In contrast, Registrant's mark is a word that appears in the dictionary. See dictionary definition attached to Applicant's response dated January 7, 2002, and attached hereto.

Applicant concludes, therefore, that "the overall appearance of these marks and the distinctive elements of Applicant's mark give rise to different commercial impressions," such that "customers would not confuse the cited mark with Applicant's mark."

We agree, however, with the Examining Attorney that, "while the marks are not in fact identical, there are not enough differences to overcome a likelihood of confusion." As alluded to by the Examining Attorney, the proper test for determining confusing similarity is not whether the respective marks are distinguishable on the basis of a side-by-side comparison. The reason therefor is that such a comparison is not ordinarily the way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is accordingly on the recollection of the average purchaser, who normally retains a general rather than a specific impression of marks. See, e.g., Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); Envirotech Corp. v. Solaron Corp., 211 USPQ 724, 733 (TTAB 1981); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

Here, as the Examining Attorney accurately observes, "the marks are pronounced the same and look almost the same." Specifically, the dictionary definition made of record by applicant shows that the word "wham," which is defined by Merriam-Webster's Collegiate Dictionary (© 2001) as meaning "1 : a solid blow 2 the loud sound of a hard impact," may be pronounced as "'hwam , 'wam," with the latter obviously being identical to applicant's "WAM!" mark in sound. The slight

differences in appearance between the marks at issue, consisting solely "of an additional 'H' in the registrant's mark and an exclamation point (!) in the applicant's mark," are "hardly significant," as the Examining Attorney contends. Furthermore, while applicant's "WAM!" mark may indeed have originated, as applicant asserts, as the "coined word WAM followed by an exclamation point," we agree with the Examining Attorney that "it is hardly a step for a consumer to think that WAM! means 'a solid blow' or 'the sound of a hard impact' just as WHAM does," given the association of an exclamation point with the phonetically equivalent and visually similar term "WAM" to form applicant's mark. Customers for applicant's goods could, therefore, readily regard applicant's "WAM!" mark as simply a misspelling of registrant's "WHAM" mark, particularly when the marks are used in connection with such closely related goods as, respectively, a stain remover and a drain pipe cleaner. Overall, the marks at issue are so substantially similar in commercial impression that confusion as to the origin or affiliation of applicant's and registrant's goods is likely to occur. See, e.g., In re Lamson Oil Co., 6 USPQ2d 1041, 1042 (TTAB 1987) [mark "TRUCOOL" for "synthetic coolant for use in the metal working industry for machining operations" held so similar to mark "TURCOOL" for "cutting oil" that confusion is likely].

Nonetheless, as a final consideration, applicant emphasizes in its reply brief that the Examining Attorney has conceded in his brief that "it is true that the consumer uses drain cleaners and stain removers for different purpose[s] in the

house." While the Examining Attorney insists with respect to the goods at issue that "it is also true that they are still both household 'cleaners,' found in the same aisle of the hardware [or home center] store, used in the same areas of the consumer's home and stored next to one another in the consumer's storage closet," applicant contends that, even if such specifically different products were to be sold in the same retail outlets:

[I]t does not follow that the products are related or that customers would think the products come from the same source. In the age of the superstore where one-stop shopping is the norm, a consumer could encounter many products in the same store. A large retail store like Home Depot® carries numerous products from step ladders to light bulbs, and so on. It does not follow that two different goods are related simply because they are sold in the same large retail store. If this were the case, any two different products found in one large retail store could be related.

Even if Applicant's goods and Registrant's goods are sold in the same store as the Examining Attorney contends, it is not likely that these goods would be stocked on the same shelf. It is more likely that applicant's goods would be stocked with other cleaning products and registrant's goods would be stocked with the plumbing supplies, thus, decreasing any likelihood that these goods are related.

To the extent, however, that the differences argued by applicant may serve to raise doubt as to our conclusion that there exists a viable relationship between applicant's stain remover and registrant's drain pipe cleaner such that their contemporaneous sale under the arbitrary and substantially similar marks "WAM!" and "WHAM" would be likely to cause confusion, we resolve such doubt, as we must, in favor of the registrant. See, e.g., In re

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Hyper Shoppes (Ohio) Inc., 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) and In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Columbes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

We accordingly conclude that, whether they are ordinary consumers or professional plumbers, customers who are familiar or acquainted with registrant's mark "WHAM" for a "drain pipe cleaner" would be likely to believe, upon encountering the substantially similar mark "WAM!" used by applicant for a "stain remover for porcelain, fiberglass, tile, grout, metal surfaces, synthetic surfaces, vinyl, wood, marble, linoleum, plastic surfaces, glass, painted surfaces, brick, stone and concrete," that such closely related goods emanate from, or are sponsored by or associated with, the same source.

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