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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Sirius Products, Inc.*

Serial No. 76/293,668

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 "WHAM!" 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. 76/293,668, filed on August 1, 2001, which is based on an allegation of 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 Here, inasmuch as the respective marks, contrary to the assertions in applicant's reply brief, are essentially identical in all respects and, on account of their arbitrary nature, plainly engender the same commercial impression, the focus of our inquiry is on whether applicant's goods are so related to registrant's goods that, if such products were to be offered under the marks at issue, confusion as to the source or sponsorship of the respective goods would be likely to occur. In this regard we note that, as a general proposition, where the marks at issue are identical or essentially the same,

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."

there need be only a viable relationship between the respective goods in order to support a holding of likelihood of confusion. See, e.g., In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1983) and In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983).

Turning, 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, 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. Registrant'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 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 arbitrary and essentially identical marks "WHAM!" and "WHAM" 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 their 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.

Finally, as emphasized by applicant in its reply brief, 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 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 essentially identical marks "WHAM!" 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 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 essentially identical mark "WHAM!" use 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.