

**THIS OPINION
IS NOT A PRECEDENT OF
THE TTAB**

Hearing:
January 16, 2007

Mailed: June 7, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Wieland Dental + Technik GmbH & Co.

Serial No. 76514103

Gary M. Nath and H. David Starr of Nath & Associates for
Wieland Dental + Technik GmbH & Co.

Andrea D. Saunders, Trademark Examining Attorney, Law Office
108 (Andrew Lawrence, Managing Attorney).

Before Hohein, Walters and Walsh, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Wieland Dental + Technik GmbH & Co. has filed an
application to register the mark REFLEX, in standard
character form, on the Principal Register for, as amended,
"ceramic masses for dental use, namely veneering material
for dental use," in International Class 5.¹

¹ Serial No. 76514103, filed May 14, 2003, based on an allegation of a
bona fide intention to use the mark in commerce under Section 1B; and
based on a claim of priority under Section 44(d) and a German
registration under Section 44(e). Applicant subsequently filed an

The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark REFLEX, previously registered on the Principal Register for "orthodontic appliances for use in the mouth formed from nickel titanium wire,"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

acceptable amendment to allege use alleging first use and use in commerce as of 2003.

² Registration No. 1476733 issued February 16, 1988, in International Class 10, to TP Orthodontics, Inc. Sections 8 and 15 affidavits accepted and acknowledged, respectively.

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Turning, first, to the marks, there is no question that the marks are identical. Applicant defines "reflex" as "an innate or automatic reaction" (request for reconsideration of November 11, 2004) and argues that the term is suggestive of the registered goods and, thus, entitled to only a narrow scope of protection. However, we see no basis for this characterization of the mark on this record and find that the term is arbitrary in connection with both applicant's and registrant's identified goods.

Applicant also contends that the mark is a weak mark due to large numbers of third-party registrations. However, the evidence submitted in support of this contention consists, in part, of a long list of registration numbers for the mark REFLEX with no indication as to the nature of the goods or other potentially relevant factors such as disclaimers and, as such, is of little to no probative value. Additionally, applicant submitted copies of six

registrations for the mark REFLEX in International Class 10. However, all six registrations pertain to medical instruments unrelated to the field of dentistry, prosthodontics, or orthodontics and, as such, are of limited probative value. Thus, while it appears that REFLEX may be a common mark across the wide field of medical instruments, there is no indication that any third parties have registered or used the mark REFLEX in connection with dentistry, prosthodontics, or orthodontics.

Turning to consider the goods involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods recited in the registration, rather than what the evidence shows the goods actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under

circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein; and *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

The examining attorney submitted, in support of her position that the goods are likely to emanate from the same source, copies of third-party registrations and excerpts from Internet websites offering dental supplies for sale. Of the six third-party registrations submitted,³ only two registrations are for goods that include both orthodontic products and dental supplies such as applicant's ceramic veneers.

Of the seven website excerpts submitted with the final refusal, six sites pertain to dental offices which offer dental and orthodontic services, and four of those same sites also offer cosmetic dentistry services. The seventh site, NAOL Orthodontic Laboratory and Supply, is described

³ Three registrations are not based on use in commerce and, thus, are of no probative value. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). One registration is for dental floss for various uses and is not probative in relation to the specific goods herein. We note that the examining attorney also submitted with the denial of the request for reconsideration excerpts from three unidentified sources. These submissions are of no probative value.

by the examining attorney in her brief as supplying both orthodontic and dental products. The web page submitted includes the following two separate statements:

NAOL ... is a full service orthodontic laboratory and supply company supplying the orthodontic community with the highest quality products available.

[and]

Orthodontic Laboratory and Supply will supply all dental supply needs. Orthodontics and dental orthopedics equipment and supplies are available to dentists, orthodontists, dental technicians, and doctors from this high quality dental supply and orthodontic laboratory.

Additionally, the examining attorney submitted four website excerpts with the continuation of the final refusal, following acceptance of the amendment to allege use, all of which offer for sale both ceramic onlays or ceramic veneers and orthodontic wires, among other products.

Applicant contends that there are significant differences between the respective goods, their functions, and the materials from which they are made. It is clear that the respective goods themselves, and, thus, their function, are different; and that the goods are made of different materials. However, the question is not whether prospective purchasers can distinguish between the goods, but whether they will believe that the goods, identified by identical marks, originate from the same or a related source. *Helene Curtis Industries Inc. v. Suave Shoe Corp.*,

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13 USPQ2d 1618 (TTAB 1989); and *In re Rexel*, 223 USPQ 830 (TTAB 1984).

Applicant also contends that the trade channels for the respective goods are different; that the classes of purchasers are distinct and highly knowledgeable, i.e., sophisticated; and that its goods are expensive. Applicant submitted with its brief an excerpt about dental laboratory technicians from a Bureau of Labor Statistics handbook, as support for its claim that the trade channels are different, arguing that the technicians in dental laboratories purchase and use applicant's products in making dental prostheses and the like, and that its products are unlikely to be purchased by dental offices. This evidence was submitted in an untimely manner with applicant's brief and the examining attorney has objected to its consideration under Trademark Rule 2.142(d).

We agree with the examining attorney that this document was submitted late. However, because it is a public document prepared and distributed by the Federal government, it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). *Massachusetts v. Westcott*, 431 U.S. 322, 323 n. 2, 97 S.Ct. 1755, 52 L.Ed.2d 349 (1977) (judicial notice taken of fishery licenses as reflected in Coast Guard records). As such, it is analogous to standard

reference works such as encyclopedias and dictionaries. See *In re Broyhill Furniture Industries Inc.*, 60 USPQ2d 1511, 1514 n. 4 (TTAB 2001 (dictionaries and other standard reference works are amenable to judicial notice); *In re Astra Merck Inc.*, 50 USPQ2d 1216, 1219 (TTAB 1998) (judicial notice taken of *Physician's Desk Reference* and other PDR publications); *Sprague Electric Co. v. Electrical Utilities Co.*, 209 USPQ 88 (TTAB 1980) (judicial notice taken of standard reference work). See also *U.S. v. Bailey*, 97 F.3d 982, 985 (7th Cir. 1996) (judicial notice taken of facts from Census Bureau's Statistical Abstract of the United States); *Goldblatt v. F.D.I.C.*, 105 F.3d 1325, 1329 n. 3 (9th Cir. 1997) (judicial notice taken of Congressional Record for statements made during debate); and *Knox v. Butler*, 884 F.2d 849, 852 n. 7 (5th Cir. 1989) (judicial notice appropriately taken of census data). Thus, the contents of this publication are amenable to judicial notice and we exercise our discretion to take judicial notice of the relevant statements therein as these statements constitute "adjudicative facts" appropriate for judicial notice. In particular, the following statements are relevant:

In some laboratories, technicians perform all stages of the work, whereas, in other labs, each technician does only a few. Dental laboratory technicians can specialize in 1 of 5 areas: Orthodontic appliances, crowns and bridges, complete dentures, partial dentures, or ceramics.

. . .
Around 7 out of 10 jobs were in medical equipment
and supply manufacturing laboratories

. . .
Some dental laboratory technicians work in offices
of dentists. Others work for hospitals providing
dental services

We find the record sufficient to support the conclusion that general dental, cosmetic dental and orthodontic services may be offered in the same office and, as such, the supplies for these services are likely to be purchased by the same office, regardless of whether the same persons within that office make use of the same supplies. There is also sufficient evidence in the record to find that both dentists and orthodontists utilize the services of dental technicians, both within their offices and from laboratories; that the supplies used by dentists, orthodontists and dental technicians are at least overlapping; and that supplies, including those of applicant and registrant, may be purchased by dentists, orthodontists and/or dental technicians from the same sources.

This establishes that, while the respective goods are not the same, they are available from the same sources and are sold to overlapping classes of purchasers, i.e., dental and orthodontic professionals and technicians. Thus, we find that the goods are sufficiently related that, when identified by identical marks, confusion as to source will be likely. Similarly, the purchasers and channels of trade

for the respective goods are overlapping, if not the same. The goods, at least applicant's goods, may be somewhat expensive, so it is likely that a certain degree of care will be used. However, even sophisticated purchasers are susceptible to source confusion, particularly under circumstances where, as here, the goods are dental products sold through overlapping trade channels under identical marks. See *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers ... are not infallible."). See also *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289 (CCPA 1962); and *In re Pellerin Milnor Corp.*, 221 USPQ 588 (TTAB 1983).

Therefore, we conclude that in view of the identical REFLEX marks of applicant and registrant, their contemporaneous use on the related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

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