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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Repro-Med Systems, Inc.

Serial No. 76562723

Myron Amer of Myron Amer, P.C. for Repro-Med Systems, Inc.

Steven Fine, Trademark Examining Attorney, Law Office 110 (Chris A. F. Pedersen, Managing Attorney).

Before Hohein, Chapman and Walsh, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Repro-Med Systems, Inc. has filed an application to register on the Principal Register the mark "DENTAL-EVAC" for a "portable dental suction pump activated by hand" in International Class 8.¹

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 mark "E-VAC," which is registered on the Principal Register for a "removable protective tip for dental aspirators" in International

¹ Ser. No. 76562723, filed on November 17, 2003, which is based on an allegation of a bona fide intention to use such mark in commerce.

Class 10,² as to be likely to cause confusion, or to cause 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 or dissimilarity in the goods at issue and the similarity or dissimilarity of the respective marks in their entireties.³

Turning first to consideration of the respective goods, applicant takes issue with the assertion by the Examining Attorney in the final refusal that, as also noted in the initial Office action, "the respective goods are complementary in that dental aspirators remove fluids from the mouth through suction, apparently by means of a dental suction pump." Applicant, in particular, argues among other things that:

² Reg. No. 1,951,512, issued on January 23, 1996, which sets forth a date of first use anywhere and in commerce of October 22, 1979; 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." 192 USPQ at 29.

Also questionable is the Examining Attorney's contention that "the respective goods are complementary in that dental aspirators remove fluids from the mouth through suction["]--so far so good--["]apparently by means of a dental suction pump["]--not so good--since it must be a dental suction pump activated by hand (underlining added).

The word "aspirator," ... using the reference dictionary of RANDOMHOUSE WEBSTER'S College Dictionary, is defined as "a suction pump that operates by the pressure differential created by the high-speed flow of a fluid past an intake orifice." Thus, as between the two products of applicant and the registrant, two entirely different operation modes, namely a pressure differential activated by hand (applicant) and that created by high-speed fluid flow (registrant), are involved which leads away from concluding that the goods are "complementary."

The Examining Attorney, on the other hand, insists in his brief that the respective goods are related items of dental equipment which would be sold to, and for use by, dentists through the same dental supply channels of trade. Specifically, the Examining Attorney contends that:

The goods ... [at issue] need not be identical or directly competitive to find a likelihood of confusion. Instead, they need only be related in some manner, or the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993), and cases cited therein

The registrant's product is a "removable protective tip for dental aspirators," while the applicant's product is a "portable dental suction pump activated by hand." Although the products of the applicant and the

registrant are not identical, they are related in the sense that they would both be marketed to dentists. Therefore, they would be marketed in the same channels of trade to the same class of purchasers.

It is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are respectively set forth in the particular application and the cited registration, and not in light of what such goods are 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 the goods in the application at issue and in the cited registration are broadly described as to their nature and type, such that there is an absence of any restriction as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods encompasses not only all goods of the nature and type described therein, but that the identified goods are provided in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Here, it is clear that, as identified, applicant's "portable dental suction pump activated by hand" is closely

related to a dental aspirator, which is the product with which registrant's "removable protective tip for dental aspirators" is used. We judicially notice in this regard that, for instance, Merriam-Webster's Collegiate Dictionary (11th ed. 2003) at 73 defines "aspirator" as "an apparatus for producing suction or moving or collecting materials by suction; *esp* : a hollow tubular instrument connected with a partial vacuum and used to remove fluid or tissue or foreign bodies from the body."⁴ In a like manner, The American Heritage Dictionary of the English Language (4th ed. 2000) at 107 defines "aspirator" as "1. A device for removing fluids or gases by suction, especially an instrument that uses suction to remove substances, such as mucus or serum, from a body cavity. 2. A suction pump used to create a partial vacuum." Similarly, The Random House Dictionary of the English Language (2d ed. 1987) lists "aspirator" as meaning "1. an apparatus or device employing suction. 2. *Hydraul.* a suction pump that operates by the pressure differential created by the high-speed flow of a fluid past an intake orifice. 3. *Med.* An instrument for removing body fluids by suction."⁵

⁴ It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and *Marcal Paper Mills, Inc. v. American Can Co.*, 212 USPQ 852, 860 n. 7 (TTAB 1981).

⁵ In addition, we note that the Examining Attorney, with his initial Office Action, made of record (from an unknown source) the following pertinent definition of "aspiration": "1. Removal, by suction, of a gas, fluid, or tissue from a body cavity or organ from unusual accumulations, or from a container."

Thus, although hand-powered, it is apparent in light of the above definitions that applicant's hand-activated portable dental suction pump could be used, like the dental aspirator for which registrant markets a removable protective tip, to aspirate saliva or other fluids during a dental procedure. Also, while applicant's "portable dental suction *pump* activated by hand" may not technically be "complementary" to registrant's "removable protective *tip* for dental aspirators," it is plain that both products are for use in connection with apparatus for providing dental aspiration. Such goods, therefore, would clearly be purchased and used by dentists, dental hygienists, oral surgeons and other dental professionals for suctioning patients' mouths.

Furthermore, although not mentioned by the Examining Attorney in his brief, the record contains a copy of a webpage advertisement by applicant for its "DENTAL-EVAC™ Non-Electric Oral Suction System" which appeared at <http://www.dental-evac.com> and was attached to the initial Office Action. Such ad confirms that applicant's goods, including its hand-activated pump, and the goods of registrant are indeed closely related in that, besides indicating that applicant's goods are "For Dentists and Oral Surgeons" and are "ideal for: Emergency Suction Back-up[,] Surgery and Anesthesia," touts applicant's goods--which can be equipped with tips like the kind provided by registrant under its "E-VAC" mark-- as follows (underlining in original; emphasis added):

Suction any time you need it, anywhere. An ideal emergency backup allowing you to complete a procedure, or assist retrieving a

lost crown, **DENTAL-EVAC** from Repro-Med Systems, Inc. **can be equipped with interchangeable tips** to increase its versatility. Each kit ships with a high volume evacuator and with a separate tubing assembly and saliva ejector. The tubing assembly may also connect to many standard evacuators.

Consequently, not only would the goods at issue herein, as noted previously, be sold to and for use by dentists, oral surgeons, dental hygienists and other dental professionals, but it is obvious that such goods would necessarily be advertised and sold through identical channels of trade, including, for example, dental supply companies. If such commercially related goods were to be marketed under the same or similar marks, confusion as to the source or sponsorship thereof would be likely to occur.

Turning, therefore, to consideration of the respective marks, applicant essentially argues that, contrary to the Examining Attorney's assertion in his initial Office Action, its "DENTAL-EVAC" mark is not dominated by the term "EVAC" when considered in its entirety. Specifically, while the Examining Attorney had initially required, in view of applicant's original presentation of a drawing of its mark as "DENTAL EVAC," that applicant disclaim the term "DENTAL"⁶ and had further stated that, inasmuch as "the term DENTAL is merely descriptive of the applicant's goods, the dominant wording in the applicant's mark for purposes of a Section 2(d) analysis is EVAC," applicant contends in its initial brief that:

⁶ Applicant, in response, submitted a substitute drawing showing its mark as "DENTAL-EVAC," thereby obviating the disclaimer requirement.

In [subsequently] withdrawing the requirement to disclaim DENTAL, it is presumed that the Examining Attorney is also withdrawing from the opinion that DENTAL is of nominal source-identifying significance and, pertinent to the Section 2(d) refusal, also withdrawing from the opinion that as between the word DENTAL and the word EVAC, that EVAC dominates over the word DENTAL in the perception of a purchaser upon seeing the two-word combination DENTAL-EVAC.

Applicant, with respect to the term "EVAC" in its mark, further asserts in its initial brief that:

The word fragment EVAC, being short for "evacuation," is defined in RANDOMHOUSE WEBSTER'S College Dictionary as "the removal of ... things," which, in this case, would be "saliva," and thus, like DENTAL, is of nominal source-identifying significance. Thus, the Examining Attorney's conclusion that EVAC is the dominant wording in applicant's two-word trademark is questionable.

The Examining Attorney insists in his brief, however, that:

The applicant's mark is DENTAL-EVAC, while the registered mark is E-VAC. The term DENTAL is not a distinctive portion of the applicant's mark, since it describes dental equipment, including the applicant's "portable dental suction pump activated by hand." If the applicant's mark were not hyphenated, it would be necessary to disclaim the term DENTAL apart from the mark because it describes the applicant's goods. Therefore, the dominant source[-]identifying term in the applicant's mark is EVAC. This term is very similar in sight, sound and meaning to the registered mark E-VAC, the only difference being a hyphen in the registered mark.

As to applicant's arguments, the Examining Attorney states that "the disclaimer requirement was withdrawn only after the applicant had filed a substitute drawing which showed a

hyphenated mark" and that, "[i]n withdrawing the disclaimer requirement, the Examining Attorney in no way intended to suggest that the word DENTAL ... has source-identifying significance in relation to dental products." With respect to the assertion that the term "EVAC" is "short for 'evacuation'" and thus, "is also descriptive of the applicant's goods, and therefore should not be considered the dominant source identifier," the Examining Attorney urges that:

The applicant provides no evidence that EVAC is "short for 'evacuation'"; nor does the applicant provide a copy of the dictionary definition which it references. It is not even clear from the applicant's brief whether such definition pertains to "evac" or "evacuation." In short, there is no basis for the assertion that EVAC is, like DENTAL, "of nominal source-identifying significance."

Applicant, in its reply brief, professes with respect to the concluding sentence set above that it "is baffled by the inference of this sentence that ... applicant ... has asserted that DENTAL is 'of nominal source-identifying significance,'" claiming that "[p]resumably it is the Examining Attorney who makes this assertion." Applicant further states, however, that (in an apparent change of position from its initial brief) it "does subscribe to the view that there is no basis of record for an assertion that DENTAL is of nominal source-identifying significance." Applicant also maintains, with respect to the Examining Attorney's analysis of the marks at issue, that:

The Examining Attorney ... has dissected applicant's mark instead of [having], as he is required to do, considered the mark in its entirety. Thus, we have, he argues, DENTAL and EVAC, which is a mistake caused by

dissection, which he now compounds by attempting to deem one word as being dominant and thus making the other word otherwise or whatever.

Applicant insists, in conclusion, that when "[c]onsidered in its entirety, applicant's mark is sufficiently different in sound, meaning and appearance from the cited mark to obviate any likelihood of confusion."

We nonetheless agree with the Examining Attorney that applicant's mark "DENTAL-EVAC" so resembles registrant's mark "E-VAC" that the contemporaneous use thereof in connection with the closely related goods at issue herein would be likely to cause confusion as to the source or origin of such products. In this regard, however, we need not decide whether, as asserted by the Examining Attorney, the term "EVAC," which is the phonetic equivalent of registrant's mark "E-VAC," is the dominant and source-distinguishing element of applicant's "DENTAL-EVAC" mark. That is, while we concur with the Examining Attorney that the term "DENTAL" clearly is merely descriptive of applicant's "portable dental suction pump activated by hand" and therefore is of "nominal source-identifying significance" when used in connection with dental aspiration apparatus, we also agree with applicant to the extent that it is obvious that the terms "EVAC" and "E-VAC" are highly suggestive of "evacuation" and "evacuator," which are plainly synonyms for what dental aspiration apparatus does and functions as, and thus are likewise of limited source-indicative significance. Nevertheless, when considered in their entireties, applicant's "DENTAL-EVAC" mark is

very similar in sound, appearance and connotation to registrant's "E-VAC" mark. Both marks structurally feature a hyphen linking two terms and convey highly similar commercial impressions in relation to the respective goods at issue. Consequently, the presence of the term "DENTAL" in applicant's mark is considered insufficient to differentiate such mark from registrant's mark and avoid a likelihood of confusion.

Accordingly, we conclude that purchasers who are familiar with registrant's "E-VAC" mark for a "removable protective tip for dental aspirators" would be likely to believe, upon encountering applicant's highly similar mark "DENTAL-EVAC" for a "portable dental suction pump activated by hand," that such closely related products emanate from, or are otherwise sponsored by or affiliated with, the same source.

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