

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: October 31, 2007
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Multibrands International Ltd.

Serial No. 78406127

Peter B. Kunin, Esq. of Downs Rachlin Martin PLLC for
Multibrands International Ltd.

Jason Paul Blair, Trademark Examining Attorney, Law Office
104 (Chris Doninger, Managing Attorney).

Before Hairston, Walters and Bergsman, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Multibrands International Ltd. has filed an
application to register the mark SUPACELL and design, as
reproduced below, for "alkaline and zinc chloride consumer
battery cells" in International Class 9.¹

The logo for Supacell, featuring the word "Supacell" in a bold, italicized, sans-serif font with a thick black outline.

¹ Serial No. 78406127, filed on April 22, 2004, which is based on
a bona fide intention to use the mark in commerce.

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 used in connection with its goods, so resembles the mark SUPERCELL (typed form), which is registered for "electric batteries"² in International Class 9, as to be likely to cause confusion, mistake or deception.

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

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In*

² Registration No. 2250889, issued June 8, 1999 on the Principal Register under the provisions of Section 2(f) of the Trademark Act; affidavits under Section 8 and 15 have been accepted and acknowledged respectively.

re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Two other key factors in this case concern the number and nature of similar marks in use on similar goods and a registration recently issued to applicant by the United States Patent and Trademark Office.

Turning first to a consideration of the respective goods, we observe that applicant's identified goods, "alkaline and zinc chloride consumer battery cells" are closely related, if not legally identical, to the goods in the cited registration, "electric batteries." Applicant does not take issue with the fact, and we find that the respective goods are closely related and that such goods would be sold in the same channels of trade to the same classes of consumers.

We turn, therefore, to a consideration of the respective marks. The examining attorney maintains that the respective marks are highly similar in sound, appearance, meaning and commercial impression. Specifically, the examining attorney argues that there is no correct pronunciation of a trademark and that SUPACELL may be pronounced in a manner that is very similar to SUPERCELL; that the respective marks are similar because they consist of SUPA/SUPER and CELL; that the font style of applicant's mark is not particularly unique, and inasmuch

as the cited registrant's mark is in typed form, it may be depicted in the same font style as applicant's mark; and that the term "supa" is a mere misspelling and a slang term for the word "super," and thus, applicant's mark SUPACELL and design and the cited registrant's mark SUPERCELL have the same meaning. In the latter regard, the examining attorney submitted an entry from the Urban Dictionary wherein the term "supa" is defined as, *inter alia*, "a *bastardized version of the word or prefix 'super'*" and several Internet printouts where the term "supa" appears to be a slang term for the word "super."

Applicant, in urging reversal of the refusal to register, argues that the respective marks are not substantially similar and that the cited registrant's SUPERCELL mark is a weak mark entitled to a limited scope of protection. Specifically, applicant maintains that the term "supercell/super cell," as applied to batteries, is highly suggestive as evidenced by its frequent use by third parties "to identify batteries." (Brief at 9). In this regard, applicant submitted twelve Internet printouts showing uses of "supercell/super cell" in connection with batteries. The following are representative excerpts from these printouts and none of the references identifies either applicant's or registrant's products:

The MFJ-92AAA04 is a four pack of super high capacity 600 mAh rechargeable Ni-MH AAA battery. MFJ's SuperCell batteries have twice the power of standard Ni-Cd's at about the same price.
(<http://www.mfjenterprises.com/products>)

The K80 FIRECAM
OPTIONS AND ACCESSORIES

- 7-HOUR SUPERCELL BATTERIES When you need the extra time and security of longer run times, for those special response situations.
(<http://www.generalfire.com>)

Ultra Alkaline Supercell Batteries, Size C by Walgreens
(<http://www.walgreens.com>)

Super Cell phone battery for Ericcson T10, T18 ...
(<http://www.shopping.com>)

DigiTrak Replacement Components
Long life batteries for DigiTrak transmitters. 240 hours life with the Standard Range Transmitter. 120 hours life with the Extended Range Transmitter.
Use the DigiTrak SuperCell lithium battery to extend your downhole time.
(<http://www.melfredborzall.com>)

Further, applicant argues that the applied-for mark is entitled to registration because applicant's "other Application for SUPACELL and design (U.S. Serial No. 79/016,237) for highly related goods was approved for publication by the USPTO over the same [cited] registration for the mark SUPERCELL," and that this "application for SUPACELL has now matured into U.S. Reg. No. 3,194,477." (Brief at 11).

There is no dispute that the respective goods are closely related and for the reasons cited by the examining attorney, there are similarities in the respective marks. However, the similarities between the goods and the marks are outweighed by two other factors in this case.

Because the cited registration issued under Section 2(f) of the Trademark Act, this indicates that the mark SUPERCELL had become distinctive of registrant's goods prior to the issuance of the registration. However, applicant's evidence of third-party uses of the term "supercell/super cell" in connection with batteries demonstrates that today such term is highly suggestive of batteries which have longer life. Thus, the cited mark SUPERCELL, as applied to electric batteries, must be regarded, on this record, as a weak mark which merits only a correspondingly narrow scope of protection.

Further, as previously noted, applicant argues that its applied-for SUPACELL and design mark for "alkaline and zinc chloride consumer battery cells" is entitled to registration because the Office recently allowed applicant's other application for a virtually identical SUPACELL and design mark for "alkaline and zinc chloride batteries for general use" over the cited SUPERCELL mark. While we recognize that each case must be decided on its

own merits based on the evidence of record, we are nonetheless troubled by the Trademark Examining Group's different treatment of the two applications. The examining attorney does not dispute that the marks in the two applications are virtually identical and that the goods are highly related.³ In fact, the examining attorney never responded to applicant's argument in this regard. Although applicant first raised the argument in its request for reconsideration, the examining attorney's response to the request for reconsideration is silent on this matter as is his brief.

In this case, applicant's registration of the mark SUPACELL and design for highly related goods over the SUPERCELL mark along with the third-party uses of "supercell/super cell" serves to suggest that the use of the term "supercell" in connection with batteries is not particularly distinctive or unique and that applicant's applied-for SUPACELL and design mark is sufficiently different to distinguish the marks.

³ Indeed, we consider "alkaline and zinc chloride consumer battery cells" and "alkaline and zinc chloride batteries for general use" legally identical.

In view of the foregoing, we find that the limited scope of protection to which the cited SUPERCELL mark is entitled, and the fact that applicant was recently issued a registration for a virtually identical mark for highly related goods over the SUPERCELL mark are dominant factors in this case. When we combine these factors, we conclude that notwithstanding any similarities in the goods and the marks, applicant's intended use of the mark SUPACELL and design for alkaline and zinc chloride consumer battery cells is not likely to cause confusion with the mark SUPERCELL for electric batteries.

Decision: The refusal to register under Section 2(d) is reversed.