

Hearing:
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PTH

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MAY 30, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Synthes (U.S.A.)
v.
Charmant, Inc. U.S.A.

Opposition No. 100,294
to application Serial No. 74/618,022
filed on January 5, 1995

John B. Pegram of Fish & Richardson P.C. for Synthes
(U.S.A.).

Brooks R. Bruneau of Matthews, Collins, Shepherd & Gould for
Charmant, Inc. U.S.A.

Before Cissel, Hanak and Hairston, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Charmant, Inc. U.S.A.
to register the mark SYNTHES-EYEZ for "eyeglass frames."¹

Registration has been opposed by Synthes (U.S.A.) on
the ground that applicant's mark, when applied to
applicant's goods, so resembles opposer's previously used

¹ Serial No. 74/618,022, filed on January 5, 1995, alleging a
bona fide intention to use the mark in commerce.

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and registered mark SYNTHES for instruments and apparatus for surgical, medical and veterinary purposes, as to be likely to cause confusion under Section 2(d) of the Trademark Act. Opposer pleaded ownership of Registration No. 999,397 for the mark SYNTHES for "instruments and apparatus for surgical, medical and veterinary purposes solely for bone surgery, namely, instruments and implants for osteosynthesis, including bone screws, bone nails, bone plates and splints; injection needles, and gum plates."²

Applicant, in its answer, denied the salient allegations of likelihood of confusion.

The record consists of the pleadings; the file of the involved application; and trial testimony, with related exhibits, taken by each party. In addition, opposer submitted by way of notice of reliance a status and title copy of its pleaded registration; and applicant submitted by way of notice of reliance the discovery depositions of James E. Gerry and Kevin Carouge; opposer's responses to applicant's discovery requests; a copy of an agreement between opposer and a third-party; and copies of third-party registrations for marks which include "SYNT for various medical products."³ Both parties filed briefs on the case,

² Issued December 10, 1974; renewed.

³ We note that opposer has objected to the agreement on the grounds of hearsay and relevancy and to the third-party registrations on the ground of relevancy. We have reviewed the

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and both were represented by counsel at an oral hearing held before the Board.

The record shows that opposer manufactures, distributes and sells orthopedic, maxillofacial, and spine instruments and implants for use by surgeons and hospitals. Opposer markets and sells its products to hospitals, clinics and medical doctors. Through its Synthes Maxillofacial Division, opposer sells implants and tools for use on the human skull. With regard to the human eye, in particular, opposer offers a series of plates and screws which are used to reconstruct the orbit, which is the bony structure which surrounds the globe of the eye. The customers of these products are ophthalmologists and oculoplastic surgeons. Opposer's sales of SYNTHES products have exceeded \$100 million annually.

Opposer has spent many millions of dollars advertising, promoting and marketing its products under the SYNTHES mark.⁴ Opposer advertises by distribution of catalogs and product brochures, which are sent or delivered to physicians and hospital personnel. In addition, opposer conducts continuing education programs in relation to the use of its products. The SYNTHES mark appears on opposer's products as

objections and accorded these materials such consideration and weight, if any, as deemed warranted.

⁴ Opposer's precise advertising figures have been made of record under seal.

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well as on technique guides and sales brochures related thereto.

Applicant is in the business of manufacturing eyeglass frames for sale at retail stores throughout the United States. Applicant has approximately 20,000 retail store customers nationwide and primarily sells its eyeglass frames to independent optician offices, optometry practices and dispensing ophthalmology offices.

Applicant created the SYTNHES-EYEZ mark in 1994 for use with an eyeglass frame with a screwless hinge. Because the screwless hinge was a "synthesis" of ideas from a number of people, e.g., consumers, retailers, applicant's sales force and other personnel, applicant came up with the mark SYNTHES-EYEZ as a play on the word synthesis. The SYNTHES-EYEZ mark appears on eyeglass frame cases and the demonstration lenses that are placed into frames for display at retail stores.⁵ Applicant's SYNTHES-EYEZ eyeglass frames retail for about \$200.00 each.

As indicated above, opposer made of record a status and title copy of its pleaded registration for the mark SYNTHES. Thus, there is no issue with respect to opposer's priority. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

⁵ Although applicant's application was filed based on a bona fide intention to use the mark in commerce, it appears from the record that applicant has begun use of the mark.

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We turn then to the issue of likelihood of confusion. Our determination under Section 2(d) of the Trademark Act 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. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Turning first to a consideration of the marks SYNTHES and SYNTHES-EYEZ, we find that, when considered in their entirety, they are dissimilar in appearance and connotation. Although applicant's mark encompasses opposer's entire mark, the addition of "EYEZ" in applicant's mark serves to distinguish it from opposer's mark. Opposer's SYNTHES mark appears to be an arbitrary term, whereas applicant's SYNTHES-EYEZ mark appears to be a play on the word "synthesize" incorporating a fanciful spelling of "eyes."

We turn next to the goods. Opposer contends that the respective goods are "closely related as metal products for correction of human body defects." (Brief, p. 21). However, in determining whether two or more products are closely related, the inquiry should be whether they are sold to the same market and not whether terminology can be found that describes all the various products. See Harvey Hubbell, Inc. v. Tokyo Seimitsu Co., Ltd., 188 USPQ 517 (TTAB 1975). In this case, the respective goods are vastly

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different in nature and use. Opposer's surgical implants and instruments are highly specialized products used in bone repair. Applicant's eyeglass frames, on the other hand, accommodate corrective lenses, which improve a person's vision.

The demarcation between the parties' goods is further highlighted by the differences in sophistication of purchasers and users of the products. Opposer's goods are sold for use by surgeons and hospital personnel. These well-educated and highly-trained individuals are likely to be careful and discriminating in their selection of surgical implants and instruments. We also note that opposer's surgical implants, in particular, are regulated by the Food and Drug Administration and cannot be sold to the average consumer who would be buying eyeglass frames.

We acknowledge that some overlap of the parties' customers could occur, e.g., in the case of surgeons and hospital personnel who wear eyeglasses and ophthalmologists who dispense eyeglasses. However, we are constrained to agree with applicant that the prospects for any kind of confusion as to the source or sponsorship of the parties' goods is de minimis. Surgeons, ophthalmologists, and the relevant hospital personnel are small in number. Also, as indicated above, they are highly sophisticated purchasers who, considering the highly specialized nature of opposer's

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goods, would not be likely to think that the parties' products emanate from or are otherwise associated with or sponsored by the same source.

In sum, there is no likelihood of confusion in this case because the involved marks are dissimilar in appearance and connotation, and the respective products are sold to different purchasers for vastly different purposes.

In reaching our decision, we have accorded little weight to the third-party registrations submitted by applicant. According to applicant, "SYNT" is an abbreviation of the word "synthesis," and applicant contends that marks containing "SYNT" are weak marks entitled to a narrow scope of protection.

We note that the common element in most of the third-party registrations is actually "SYNTH," not "SYNT," and in reviewing the identification of goods in these registrations, it appears that "SYNTH" connotes the word "synthetic," and not "synthesis." Thus, we are unable to conclude that opposer's mark is entitled to a narrow scope of protection because it includes "SYNT."

Finally, although opposer contends that its mark is famous, we agree with applicant that the evidence falls short of establishing the fame of opposer's mark. While it appears that opposer has enjoyed a degree of success with its surgical implants and instruments in the orthopedic,

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maxillofacial and spinal fields, we cannot conclude, based on the present record, that the mark has achieved the status of a famous mark. For example, opposer has not shown even in rough terms its share of the relevant market. Compare: *Kenner Parker Toys v. Rose Art Industries*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Decision: The opposition is dismissed.

R. F. Cissel

E. W. Hanak

P. T. Hairston
Administrative Trademark Judges
Trademark Trial and Appeal Board