

8/6/02

THIS DECISION IS NOT  
CITABLE AS PRECEDENT OF  
THE TTAB

Paper No. 34

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

NewAge Industries, Inc.  
v.  
Jet Spray Corporation

Opposition No. 100,940  
to application Serial No. 74/580,684  
filed on September 30, 1994

Roberta Jacobs-Meadway and Emily J. Barnhart of Ballard  
Spahr Andrews & Ingersoll for NewAge Industries, Inc.

Edward F. Perlman of Wolf, Greenfield & Sacks for Jet  
Spray Corporation.

Before Seeherman, Quinn and Hohein, Administrative  
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Jet Spray Corporation filed an application to  
register the mark NEWAGE JET SPRAY for "beverage  
dispensing machines."<sup>1</sup>

<sup>1</sup> Application Serial No. 74/580,684, filed September 30, 1994,  
alleging a bona fide intention to use the mark in commerce.  
Applicant claims ownership of Registration Nos. 778,989,  
1,460,763, and others.

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NewAge Industries, Inc. opposed registration under Section 2(d) of the Trademark Act. Opposer asserted that it manufactures and sells, under the mark NEWAGE, a full line of tubing, hoses, fittings and accessories for the food and beverage industry, that beverage dispensing machines such as applicant's normally use tubing, hoses, and fittings of the type sold under opposer's mark NEWAGE, and that applicant's mark, if applied to applicant's goods, would so resemble opposer's previously used and registered mark NEWAGE for "metal hardness testers" and "plastic tubing for general industrial and institutional use"<sup>2</sup> as to be likely to cause confusion.

Applicant, in its answer, denied the salient allegations in the notice of opposition.

The record consists of the pleadings; the file of the involved application; trial testimony, and related exhibits, taken by opposer; a certified copy of opposer's pleaded registration (showing that such is subsisting and owned by opposer), applicant's responses to certain of opposer's interrogatories and requests for admissions, and excerpts from a printed publication, all introduced by opposer's notices of reliance; and a stipulation to admit certain of opposer's catalogs and product

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<sup>2</sup> Registration No. 1,545,260, issued June 27, 1989; combined

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literature. Applicant did not take testimony or introduce any other evidence. Only opposer filed a brief.

Before turning to the merits of the opposition, we note that on May 28, 1999, during applicant's testimony period, a stipulation was filed to abandon the application without prejudice and to dismiss the opposition without prejudice. The stipulation was between opposer and IMI Cornelius Inc. ("IMI"), a non-party to this proceeding. IMI was identified as "the successor to [applicant] as evidenced by the transfer recorded November 16, 1998 at Reel 1817/Frame 0657." The Board, in an order dated September 21, 1999, indicated that Office records "do not show clear chain of title and there is no record on file of ownership [of the involved application] being transferred from Jet Spray Corp. To IMI Cornelius Inc." The Board noted that, based on the recorded document, "it appears IMI holds only a security interest in the mark." Applicant was allowed time to establish a chain of title to the involved application whereby the stipulation could be approved by the Board. Although applicant sought an extension of time to address this issue, nothing more was

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Sections 8 and 15 affidavit filed.

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heard from applicant. The Board, on October 5, 2000, noted that the Office records still failed to reveal any change in ownership of the involved application, and that the record of this proceeding failed to include proof of an assignment of the application to IMI. Accordingly, the Board did not approve the stipulation to abandon the application and dismiss the opposition, and allowed opposer time in which to advise the Board of its intentions in this proceeding. Opposer then withdrew its withdrawal of the opposition, and the Board rescheduled trial dates, beginning with applicant's testimony period. In the Board's order, it again was noted that Office records did not reflect any change in ownership of the involved application, and that the Office should be advised if the ownership situation changed. The Board never received any update on this point, and opposer's brief is silent with respect thereto.

According to Kenneth Baker, opposer's chief operating officer, opposer manufactures and sells a full line of tubing, hose, fittings and accessories for general and industrial use, including use in connection with applications in the food and beverage industry. Opposer has continuously used the mark NEWAGE on its goods since 1951, with sales to the food and beverage

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industry commencing in the late 1960's. The goods are sold directly to end-users in the food and beverage industry (including companies which purchase or maintain beverage dispensing equipment), as well as to food and beverage industry distributors. The goods are promoted through trade shows (including restaurant shows), in advertisements in Thomas Register and in trade industry publications such as Beverage World, and through product news releases and direct mailings.

Applicant is a customer of opposer's, and has purchased opposer's goods which, according to Mr. Baker, may be incorporated as a part of applicant's beverage dispensing machines. Applicant's goods are sold to the food service industry, including restaurants, and the goods are advertised through industry trade shows, trade magazines and catalogs.

We now turn to opposer's likelihood of confusion claim. With respect to priority of use, opposer's ownership of a valid and subsisting registration establishes opposer's priority. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are

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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).

In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the marks, applicant's mark comprises the entirety of opposer's mark, NEWAGE, with the additional wording JET SPRAY. The issue of likelihood of confusion must be determined based on a comparison of the marks in their entireties, but in so doing, it is not improper to give, for rational reasons, more or less weight to a particular feature of a mark, provided that the ultimate conclusion rests on a consideration of the marks as wholes. That is, in comparing marks in their entireties, the Board may indicate that some feature of a mark is more distinctive or significant than another, and may give greater force and effect to that feature. See: Kangol Ltd. V. KangaROOS U.S.A. Inc., 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992); and In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

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Considering, in their entirety, the marks NEWAGE and NEWAGE JET SPRAY, we are of the view that they are similar in sound, appearance and meaning, and create similar overall commercial impressions. The first term in applicant's mark is identical to the entirety of opposer's mark. Of course, applicant's mark also includes the words JET SPRAY. We have considered these words of applicant's mark in determining the issue of likelihood of confusion. However, we have given greater weight to the word NEWAGE in applicant's mark, because it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered, and we find that would be the case here. *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). Moreover, the term JET SPRAY for beverage dispensing machines appears to be suggestive, while the term NEWAGE appears to be arbitrary as applied to the involved goods. In this connection, we note that the parties are unfamiliar with any third-party uses or registrations of NEWAGE marks, or marks similar thereto, in the food and beverage industry. Simply put, the additional words in applicant's mark are unlikely to distinguish it from opposer's mark.

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With respect to the goods, they need not be identical or competitive in nature in order to support a finding of likelihood of confusion, it being sufficient for the purpose 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 circumstances that could give rise, because of the similarities between the marks used thereon, to the mistaken belief that they originate from or are in some way associated with the same source. See: *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *Chemical New York Corp. v. Conmar Form Systems, Inc.*, 1 USPQ2d 1139 (TTAB 1986).

In the present case, the goods are related and complementary. As explained by Mr. Baker, beverage dispensing machines such as applicant's incorporate tubing of the type sold by opposer under its mark NEWAGE, and applicant has admitted that its machines contain plastic tubing. In point of fact, Mr. Baker testified that applicant has been a customer of opposer's tubing which, according to Mr. Baker, could be used as a component of or as a replacement part for applicant's machines.

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In addition, the record shows that the parties advertise their goods in the same food and beverage industry trade publications. Moreover, the parties' goods travel in the same channels of trade to the same classes of purchasers in the food and beverage industry.

We conclude that purchasers familiar with opposer's plastic tubing sold under the mark NEWAGE would be likely to believe, upon encountering applicant's mark NEWAGE JET SPRAY for beverage dispensing machines, that the goods originated with or were somehow associated with or sponsored by the same entity.

Decision: The opposition is sustained and registration to applicant is refused.