

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Paper No. 38
ejs

Mailed: February 12, 2003

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Sharp Kabushiki Kaisha
a/t/a Sharp Corporation

v.

Lee A. Namisniak and Dianna L. Namisniak

Opposition No. 113,941
to application Serial No. 775/294,205
filed on May 19, 1997

Robert W. Adams of Nixon & Vanderhye P.C. for Sharp
Kabushiki Kaisha a/t/a Sharp Corporation

Lee A. Namisniak and Dianna L. Namisniak, pro se.

Before Seeherman, Quinn and Hohein, Administrative Trademark
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Sharp Kabushiki Kaisha, a/t/a Sharp Corporation, has
opposed the application of Lee A. Namisniak and Dianna L.
Namisniak, joint applicants, for the trademark SHARP
KITCHEN, with the word KITCHEN disclaimed, for "food storage
tracking system consisting of electronic timers, inventory
lists, liquid crystal displays, database featuring common

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food item names, estimated food lifetimes and recipes, warning devices, namely flashing characters in a liquid crystal display, for use in monitoring the storage and replenishment of perishable food."¹ As grounds for opposition, opposer has alleged that it is the owner of the mark SHARP as well as a family of SHARP trademarks including SHARP CARD, SHARP CORPORATION and SHARPVISION and design for a wide variety of electrical and/or electronic products; that "since its initial use many years ago," opposer has sold such products under the mark SHARP in the United States; that opposer's SHARP mark and SHARP family of marks have become famous within the United States and throughout the world in the field of electric and electronic products; that it owns a number of federal registrations for the mark SHARP, as well as a registration for SHARPVISION and design and for SHARP CORPORATION, and pending applications for the mark SHARP or the SHARP family of marks; that applicants' use of SHARP KITCHEN for their identified goods is likely to cause confusion, mistake or deception; and that the registration of the mark SHARP KITCHEN by applicants is likely to injure and/or dilute the strength of opposer's trademarks and its related goodwill.

¹ Application Serial No. 75/294,205, filed May 19, 1997, and based on an asserted bona fide intention to use the mark in commerce.

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In their answer applicants have denied the salient allegations of the notice of opposition, and asserted affirmatively that the notice of opposition failed to state a claim upon which relief can be granted, and that dilution was not a permissible basis for opposing the application. However, applicants never filed a motion to dismiss.

In view of applicants' affirmative defenses, we will begin our discussion with the grounds for this opposition. It is clear that the notice of opposition adequately sets forth opposer's standing and a claim of likelihood of confusion based on opposer's pleaded registrations pursuant to Section 2(d) of the Trademark Act. We agree with applicants that the notice of opposition fails to adequately plead the ground of dilution, but it does not appear to us that opposer ever intended to actually assert dilution as a separate ground. Opposer's main brief asserts, under "Statement of the Issues," that "the only issue before the Board is whether Applicant's mark is registrable under the provisions of §2(d) of the Lanham Act, Title 15 U.S.C. §1052(d) bearing in mind Opposer's allegations of a likelihood of confusion and a likelihood of dilution." In the brief it appears that opposer's arguments regarding a likelihood of dilution go more to the strength of opposer's mark and the fame of that mark as they relate to the likelihood of confusion factors than they do to the issue of

dilution. In fact, opposer does not cite any cases in its main brief that deal with the ground of dilution.

Accordingly, we have treated the opposition as proceeding solely on the ground of likelihood of confusion under Section 2(d) of the Trademark Act.

The record includes the pleadings; the file of the opposed application; the testimony, with exhibits, of opposer's witness, Donald Mossman; and status and title copies of opposer's twenty pleaded registrations, applicants' responses to opposer's requests for admission and applicants' answers to certain of opposer's interrogatories, submitted under opposer's notice of reliance.² Applicants did not submit any evidence. The case was fully briefed, and although opposer initially requested an oral hearing, when applicants advised the Board

² In their brief on the case applicants state that they never received a copy of Mr. Mossman's deposition. This was apparently due to applicants' failure to advise the Board and opposer of their change of address. Opposer has submitted proof that it served a copy of the deposition on applicants at the address which was of record at the time, and that it was returned by the U.S. Postal Service because the forwarding time had expired. See opposer's reply brief. A similar situation occurred with an order mailed by the Board to applicants on May 29, 2002. Presumably applicants had obtained a copy of the deposition transcript at the time they filed their brief; certainly they did not indicate any need for additional time to file their brief because they needed to obtain a copy of the deposition, and their brief indicates knowledge of Mr. Mossman's testimony. In any event, because opposer complied with the rule regarding the service of the testimony deposition/notice of reliance, and because applicants' failure to receive it was due to applicants' own negligence in advising the Board of their current address, we have proceeded with rendering our decision in this matter.

that they would not attend the hearing, opposer withdrew its request.

The record shows that opposer markets a wide variety of electric and electronic goods under the mark SHARP. Its consumer products include microwave ovens, electronic ovens, vacuum cleaners, air conditioners, washing machines, electronic organizers (PDAs), telephones, televisions, radios, stereo systems and camcorders; its office products include copiers, printers, calculators and facsimile machines; and its component parts products include LCD screens and semiconductors. Opposer has used the SHARP mark on its various products since prior to the May 1997 filing date of applicants' intent-to-use application.

Applicants have not submitted any evidence whatsoever, so the only information we have about applicants and their activities is from applicants' discovery responses which opposer has made of record. Essentially applicants have not made any use of their mark, and were unable to give any information about their business, projected channels of trade or purchasers for their product.

We note that opposer has pleaded and argued that it has a family of SHARP marks, but we find that this has not been proved. What opposer has shown is that it has used and owns registrations for the mark SHARP for a wide variety of electric/electronic items, and that it also owns

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registrations for SHARP written in cursive, depicted within an oval (Registration No. 877,692), for SHARP CORPORATION (Registration No. 1,517,107) and for SHARPVISION and design (Registration No. 1,606,267). However, the mere ownership of a number of registrations for marks consisting of or containing the word SHARP is not sufficient to prove a family of marks. See **J & J Snack Foods Corp. v. McDonald's Corp.**, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991). Here, opposer has not submitted evidence sufficient to establish that it has promoted its SHARP, SHARP CORPORATION and SHARPVISION marks as a family. We should add, however, that it does not appear from opposer's arguments that it is using the term "family of marks" in the manner that the term is treated under the case law. Instead, it appears that opposer is simply using the phrase to refer to its mark SHARP which is used for a wide variety of goods, and also to refer to its large number of registrations for this mark for its various products.

Because virtually all of opposer's registrations are for the mark SHARP per se, and this mark is the closest to applicants' mark SHARP KITCHEN, we will focus our analysis on a consideration of whether applicants' mark is likely to cause confusion with opposer's mark SHARP per se.³

³ It should be noted that opposer's registration for SHARP and design is for electronic ovens, and opposer has made of record a registration for SHARP per se for electronic ovens. The

Our determination 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). The fifth duPont factor, fame of the prior mark, plays a dominant role in cases featuring a famous or strong mark. A mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark. **Kenner Parker Toys Inc. v. Rose Art Industries Inc.**, 22 USPQ2d 1453 (Fed. Cir. 1992). In this case, opposer has proven that its mark SHARP is famous. Opposer began using the mark for many of its consumer items over 30 years ago, and it has been used for microwave ovens for over 40 years. Opposer has provided sales figures for its various goods for the years 1996 through 2000. Because this information has been filed under seal as confidential,⁴ we cannot set forth the amounts in this opinion, although we can state that the sales figures are extremely high. Opposer's advertising costs

registration for SHARP CORPORATION is for blood pressure monitors, and these goods are not as similar to applicants' goods as those in many of opposer's SHARP registrations, while the registration for SHARPVISION and design is for LCD projectors, and opposer has a registration for SHARP for apparatus for the screen projection of images.

⁴ The exhibit itself states that it is "Confidential" and is to be viewed by "outside counsel only," although we note that applicants are not represented by counsel, and are appearing pro se in this proceeding. We do not know what arrangements the parties have made regarding the viewing of this confidential material, but the Board will hold the exhibit as confidential, and will not divulge the actual numbers of sales in this opinion.

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amount to at least 2% of its sales revenues, and the advertising expenditures are millions of dollars each year. Although applicants are correct that opposer has not broken down these figures to show the sales for each item, the figures are so high that even if we were to assume that the bulk of the sales were for audio and video products, for example, rather than the more closely related microwave ovens, the mark would still be considered famous. See **Recot Inc. v. M.C. Becton**, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000) (fame of a mark may affect the likelihood that consumers will be confused when purchasing goods that are not closely related).

Turning next to the marks, they are clearly very similar. Opposer's mark is SHARP; applicants' mark is SHARP KITCHEN. The first word in applicants' mark is identical in appearance, sound and connotation to opposer's mark. The additional word KITCHEN in applicants' mark does not distinguish it from opposer's mark. The word KITCHEN is descriptive for applicants' food storage tracking system, and applicants disclaimed this term in their initial application papers. It is well-established that, although marks must be compared in their entireties, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749 (Fed.

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Cir. 1985). In this case, SHARP is clearly the dominant element of applicants' mark SHARP KITCHEN.

With respect to the goods, we agree with applicants that there are clear differences between opposer's goods and applicants' food storage tracking system. However, applicants' system is related to opposer's goods in that both opposer's goods and applicants' goods are electronic products; both applicants' goods and many of opposer's products, most particularly its microwave ovens, are used in the kitchen; and both opposer's microwave ovens and applicants' food storage tracking system relate to the use of food, one in connection with food preparation and other in connection with food storage. There are also similarities in the features of opposer's microwave ovens and applicant's identified food storage tracking system, in that they both contain, for example, liquid crystal displays and electronic timers. Although the goods are not closely related, we think the relationship is sufficient, when the similarity of the marks and the fame of opposer's mark is considered, to support a finding of likelihood of confusion.

There are additional duPont factors which favor such a finding. Applicants' goods, as identified, can be sold to the public at large for use in home kitchens. Certainly applicants do not argue, nor have they submitted any evidence, to show that the use of their food storage

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tracking system would be restricted as to the classes of purchasers. These are the same consumers who would purchase opposer's consumer electronic products, including microwave ovens which are also used in home kitchens. Although applicants' food storage tracking system would presumably not be inexpensive, even careful purchasers are likely to assume a connection in source between a system sold under the mark SHARP KITCHEN and the various SHARP consumer electronic products sold by opposer, given the fame of opposer's mark.

The variety of goods on which opposer's mark is used is another factor which favors opposer. As already noted, opposer uses its mark SHARP on a wide variety of consumer electronic goods. In view of this, consumers encountering food storage tracking systems sold under the mark SHARP KITCHEN are likely to assume that opposer has expanded its line to include this product.

Finally, we note that there is no evidence of any third-party use or registration of SHARP marks that would suggest that the scope of protection for opposer's SHARP mark should be limited.

In view of the foregoing, we find that applicants' mark SHARP KITCHEN, if used on applicants' identified food storage tracking system, is likely to cause confusion with

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opposer's mark SHARP for its electronic goods, and in particular, with SHARP for microwave ovens.

Decision: The opposition is sustained.