THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Date: 12/21/2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Nation/Ruskin, Inc.
v.
Nice-Pak Products, Inc.

Opposition No. 91124138
to application Serial No. 75470709
filed on April 20, 1998

Roberta Jacobs-Meadway and Troy E. Larson of Ballard Spahr Andrews & Ingersoll for Nation/Ruskin, Inc.

Samantha M. Kameros of Lerner, David, Littenberg, Krumholz & Mentlik for Nice-Pak Products, Inc.

Before Quinn, Drost and Walsh, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Nice-Pak Products, Inc. to register the mark EZ ONES for "moist baby wipes."[1]

Nation/Ruskin, Inc. opposed registration pursuant to Section 2(d) of the Trademark Act on the ground that applicant's mark, if used in connection with applicant's goods, would so resemble opposer's previously used and

[1] Application Serial No. 75470709, filed April 20, 1998, based on an allegation of a bona fide intention to use the mark in commerce.

registered mark EZ-ONE for a variety of cleaning items, including soft cleaning cloths, terry cloth towels, cheesecloth, cleaning rags, chamois for cleaning, sponge cloths, and detailing towels, as to be likely to cause confusion.

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

The record consists of the pleadings; the file of the involved application; testimony, with related exhibits, taken by opposer; status and title copies of opposer's registrations, certain of applicant's responses to opposer's discovery requests, and copies of third-party registrations, all introduced by way of opposer's notices of reliance. Applicant neither took testimony nor offered any other evidence at trial. Both parties filed briefs on the case. An oral hearing was not requested.

Opposer has been engaged for over sixty years in manufacturing, distributing and selling various house wares, paint and sundry products, including wipes, cloth and sponge cleaning items. Raymond Adolf, opposer's president, testified that opposer's mark EZ-ONE was first used in 1984, and he identified EZ-ONE as opposer's signature brand under which a wide range of wipes, rags, cloths, and sponges are sold. Mr. Adolf estimated that opposer's total sales in 2003 were $10 million, and that EZ-ONE brand products

accounted for approximately 70% of opposer's business. Opposer's EZ-ONE brand goods are sold in grocery stores, drug stores, house ware stores and retail home centers.

Little is known about applicant's business activities, other than as revealed by certain of its answers to discovery requests. Pages of applicant's web site, furnished by applicant in response to an interrogatory and introduced by opposer in one of its notices of reliance, indicate that applicant is a "global wet wipes supplier for almost 50 years." The web site also states the following: "Through our Consumer, Institutional, PDI Healthcare and Contract Divisions, we supply superior quality wet wipe products to nearly every class of trade. From the softest, gentlest baby wipe, to strong, effective infection control wipes and germ-killing surface wipes, [applicant] is the single source supplier to satisfy any need, at every price point." Applicant's "Consumer" division, according to the web site, "is the single source supplier for virtually every need, whether at home or on the go," taking care of "a vast variety of wet wipe needs, from baby and facial wipes to kitchen and bath surface wipes." Applicant admitted that it intends to sell its EZ ONES brand products "through stores selling cleaning products for general cleaning purposes" and that these products are intended to be "purchased by members of the general public, including men."

Opposer introduced status and title copies of its five EZ-ONE registrations covering a wide variety of cleaning products, including cleaning cloths and rags, flannel dusting cloths, polishing cloths, soft cloths used for cleaning, terry cloth towels, genuine chamois skin and man-made chamois towels for drying, hand-held sponges, and cheesecloth.[2]

In view of opposer's ownership of valid and subsisting registrations, there is no issue regarding opposer's standing and priority. King Candy, Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Thus, the only issue to decide herein is likelihood of confusion.

Our determination under Section 2(d) is based on an analysis of all of the 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). The relevant du Pont factors in the proceeding now before us are discussed below.

The first factor we consider is the similarity between opposer's mark EZ-ONE and applicant's mark EZ ONES. The

[2] Registration Nos. 1359255; 1467193; 2221346; 2287667; and 2864393. Office records show that opposer owns all registrations, and all are valid and subsisting. Two of the registrations, namely, Registration Nos. 1467193 and 2287667, include design features, and the later registration also includes the words "POCKET RAGS."

marks are virtually identical in terms of sound and appearance. Applicant's mark is merely the plural form of opposer's mark, minus the hyphen. As to meaning, the marks have the same connotation, that is, that the products sold thereunder are easy ones to use. When the marks are applied to the respective parties' products, the marks engender virtually identical commercial impressions.

In finding that the marks are similar, we have considered, of course, the suggestiveness of the marks. As noted above, however, the marks suggest the same thought. We further note that the record is devoid of any third-party uses or registrations of marks that are the same as or similar to opposer's EZ-ONE mark.

The virtual identity between the marks EZ-ONE and EZ ONES weighs heavily in opposer's favor.

The crux of this controversy centers on the similarity between the parties' goods. With respect to the goods, it is well established that the goods of the parties need not be similar or competitive, or even that they are offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that

could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. See Hilson Research, Inc. v. Society for Human Resource Management, 27 USPQ2d 1423 (TTAB 1993); and In re International Telephone & Telephone Corp., 197 USPQ 910, 911 (TTAB 1978). The issue, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. In re Rexel Inc., 223 USPQ 830 (TTAB 1984).

In comparing the goods, we initially note that where virtually identical marks are involved, as is the case here, the degree of similarity between the parties' goods that is required to support a finding of likelihood of confusion is less. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1688-1689 (Fed. Cir. 1993); NASDAQ Stock Market Inc. v. America S.r.l., 69 USPQ2d 1718, 1733 (TTAB 2003); and Time Warner Entertainment Co. v. Jones, 65 USPQ2d 1650, 1661 (TTAB 2002).

Opposer claims that its "wipes, cloths, towels, sponges, in addition to being used for cleaning counters, bathrooms, tools and cars can also be used for personal use, wiping hands and the like" and that applicant's moist baby wipes "can, of course, be used for wiping hands as well as babies, and for cleaning otherwise." Opposer's cleaning towels, cloths, rags and sponges are distinctly different

from applicant's moist baby wipes. Having said this, however, some of opposer's specific products, as for example, "soft cloths used for cleaning" and "terry cloth towels" could be employed for personal use like cleaning a baby or wiping one's hands. And, indeed, moist baby wipes could be used for cleaning one's hands.

Opposer has introduced two use-based third-party registrations (Registration Nos. 2579046 and 2716561) listing cleaning cloths and wipes, as well as baby wipes, for which the same mark was adopted by a single entity.[3] This evidence has probative value to the extent that the registrations serve to suggest that such goods are of a type that emanates from the same source. In re Infinity Broadcasting Corp. of Dallas, 60 USPQ2d 1214, 1218 (TTAB 2001); and In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785 (TTAB 1993). Further, as shown by the record, applicant itself sells both types of products (albeit under different marks); that is, applicant's products include both baby wipes and personal hygiene wipes as well as general household cleaning wipes.

In sum, the totality of the evidence shows that the goods are commercially related. The similarity between the

[3] A third registration, Registration No. 2679620, is based on a foreign filing. In addition, the other three third-party registrations relied upon by opposer do not cover the goods involved herein. Accordingly, these four registrations are immaterial to our decision.

goods is a factor that favors a finding of likelihood of confusion in this case.

In the absence of any limitations in the parties' identifications of goods, we must presume that the goods move through all reasonable trade channels for such goods. Schieffelin & Co. v. Molson Companies Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989); Morton-Norwich Products, Inc. v. N. Siperstein, Inc., 222 USPQ 735, 736 (TTAB 1984); and In re Elbaum, 211 USPQ 639, 640 (TTAB 1981)["[W]here the goods in a cited registration are broadly described and there are no limitations in the identifications of goods as to their nature, type, channels of trade or classes of purchasers, it is presumed that the scope of the registration encompasses all goods of the nature and type described, that the identified goods move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers."]. Customary trade channels for baby wipes would include grocery stores and drug stores, and applicant indicated, in a response to a request for admission, that its products also would be sold through stores selling cleaning products for general cleaning purposes. These trade channels, as indicated by Mr. Adolf's testimony, are the very same trade channels in which opposer's goods travel.

The mere fact that the parties' goods may be sold in the same kind of establishments is not entitled to as much weight as opposer gives it in determining the relatedness of the products. We recognize that grocery stores and drug stores sell a wide range of products, and that merely because goods are sold within one store does not automatically mean that buyers are likely to be confused as to source. See Federated Foods, Inc. v. Ft. Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)["A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the consumer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion."]. See also Hi-Country Foods Corp. v. Hi Country Beef Jerky, 4 USPQ2d 1169 (TTAB 1987)[not all food products are related merely because they are sold in the modern supermarket "with its enormous variety of food, cleaning, paper and other products"]. In the present case, goods of the types sold by opposer and applicant would, in all likelihood, be found in different aisles in different sections of the stores. In this connection, Mr. Adolf readily acknowledged that opposer's cleaning cloths and towels would not be found in the same section or aisle as "products for cleaning babies." (Adolf dep., p. 35).

Given the realities of the modern supermarket, the identity of trade channels for the parties' goods weighs only slightly in favor of a finding of likelihood of confusion. We hasten to add that, in the present case, there is other more probative evidence, as cited in this decision, to show a commercial relationship between the parties' goods.

The conditions of sale also increase the likelihood of confusion. The cost of the parties' goods, given their inherent nature, is relatively inexpensive. Further, cleaning wipes, towels, cloths and baby wipes are subject to frequent replacement, and the purchase of these products does not require deliberation or careful thought. Suffice it to say, we fail to comprehend applicant's statement that the parties' products are "sophisticated products"; we would point out that, in any event, applicant's statement is not supported by any evidence. See Kimberly-Clark Corp. v. H. Douglass Enterprises, Ltd., 774 F.2d 1144, 227 USPQ 541 (Fed. Cir. 1985). This du Pont factor weighs in opposer's favor.

As indicated above, in the absence of limitations in the identifications of goods, we must presume that all potential customers would purchase the parties' goods. Further, Mr. Adolf identified potential purchasers of opposer's goods as "anybody" (Adolf dep., p. 29), and

applicant indicated that its goods are intended to be purchased by “members of the general public, including men” (Request for Admission response, no. 18). Thus, both types of goods would be bought by the same classes of ordinary consumers. This overlap in classes of prospective purchasers favors opposer.

The absence of actual confusion in this case is irrelevant. The involved application is based on an intention to use the mark, and the application file does not include an amendment to allege use. Even if applicant had commenced use of the mark (a fact not shown by the evidence), the record is silent as to the extent of any use. Thus, it would be impossible to ascertain whether there has been any meaningful opportunity for confusion to occur in the marketplace among consumers. In re Kent-Gamebore Corp., 59 USPQ2d 1373 (TTAB 2001). In any event, the test for our purposes under Section 2(d) is likelihood of confusion. Giant Food, Inc. v. Nation’s Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983). Accordingly, this factor is neutral.

One final point requires our consideration. Applicant contends that opposer is estopped in the present case due to its actions in another opposition proceeding between the parties. Applicant raises this issue for the first time in its brief on the case, on the last page, in a half-page

argument. Opposer argues that the prior proceeding is irrelevant to the current one, stating that "each opposition stands on its own, and the action or inactions on the part of an opposer in a prior opposition proceeding involving a different mark have no bearing on the current opposition." (Reply Brief, p. 1).

Applicant is the owner of application Serial No. 76062710 to register the mark REAL CLOTH EZ ONES and design for "moist baby wipes." Opposer opposed registration of that mark (Opposition No. 91124788), but opposer, at trial, failed to take testimony or offer any other evidence. Applicant filed a motion to dismiss pursuant to Trademark Rule 2.132(a); opposer did not respond to the motion and the Board, on March 9, 2005, dismissed the opposition with prejudice. The Office issued a notice of allowance on May 24, 2005, and the Office subsequently granted a request for the first extension of time to file a statement of use.

No issues were actually litigated in the prior proceeding and, thus, no "issue" was determined or precluded. Mother's Restaurant, Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 221 USPQ 394, 397 (Fed. Cir. 1983). Therefore, if res judicata applies, it must rest on principles of claim preclusion.

Applicant's argument is clearly ill founded. Simply put, applicant's mark involved herein is different from the

one sought to be registered in application Serial No. 76062710. Thus, opposer's claim against EZ ONES herein is not the same claim as the one opposer raised against REAL CLOTH EZ ONES and design. Chromalloy American Corp. v. Kenneth Gordon (New Orleans), Ltd., 736 F.2d 694, 222 USPQ 187, 190 (Fed. Cir. 1984). Accordingly, opposer is not precluded from bringing its likelihood of confusion claim herein.

We have carefully considered all of the evidence pertaining to the relevant du Pont factors, as well as all of the parties' arguments with respect thereto (including any evidence and arguments not specifically discussed in this opinion), and we conclude that opposer has established its Section 2(d) claim of likelihood of confusion.

We conclude that consumers familiar with opposer's variety of textile cleaning cloths and towels sold under its EZ-ONE mark would be likely to believe, upon encountering applicant's EZ ONES for moist baby wipes, that the goods originated with or were somehow associated with or sponsored by the same entity.

All of the relevant du Pont factors (the actual confusion factor is neutral) favor opposer and a finding of likelihood of confusion. To the extent that the specific differences between the goods raise a doubt about our conclusion, all doubt on the issue of likelihood of

confusion must be resolved in favor of the prior registrant and against the newcomer. Hilson Research Inc. v. Society for Human Resource Management, supra at 1440.

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