

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Helen of Troy Limited  
v.  
ConairCIP, Inc.

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Opposition No. 91160544  
to application Serial No. 78133917  
filed on June 7, 2002

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Stewart L. Gitler of Hoffman, Wasson & Gitler, PC for Helen  
of Troy Limited.

Richard A. Margulies, Esq. for ConairCIP, Inc.

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Before Seeherman, Hairston, and Bucher, Administrative  
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Helen of Troy Limited (Opposer) has opposed the  
application of ConairCIP, Inc. (Applicant) to register the  
mark CERAMIC PULSE for "electric specialty styling irons,  
namely, flat irons, wave plates, crimp plates and electric  
curling irons" in class 9; "hair dryers" in class 11; and  
"non-electric hair brushes" in class 21.<sup>1</sup>

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<sup>1</sup> Serial No. 78133917, filed June 7, 2002, alleging a bona fide  
intention to use the mark in commerce. The word "Ceramic" is  
disclaimed apart from the mark as shown.

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In its notice of opposition, opposer alleges that applicant's mark, when used in connection with the identified goods, so resembles opposer's previously used and registered mark PULSE TECHNOLOGY for "electric hair curling irons and heat controllers sold as a component therewith,"<sup>2</sup> as to be likely to cause confusion.

Applicant, in its answer, admits that opposer is the owner of the pleaded registration and that such registration issued in 2000. Applicant denied the remaining salient allegations of the likelihood of confusion claim.

The record consists of the involved application; opposer's notice of reliance on applicant's responses to opposer's first set of interrogatories and first set of requests for admission;<sup>3</sup> and applicant's notice of reliance on opposer's responses to applicant's first set of interrogatories and request for production of documents.<sup>4</sup>

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<sup>2</sup> Registration No. 2374490, issued August 8, 2000. The word "Technology" is disclaimed apart from the mark as shown. Opposer submitted a plain (i.e., non-certified) copy of the registration as discussed infra.

<sup>3</sup> Other materials were listed in the notice of reliance. However, the Board, in an order issued March 1, 2006, granted applicant's motion to strike certain portions of the notice of reliance.

<sup>4</sup> Included in opposer's responses to applicant's request for production are copies of documents. Documents obtained in response to a request for production of documents generally may not be made of record by notice of reliance. See TBMP §704.11 (2d ed. rev. 2004). However, in this case, opposer did not object to the introduction of the documents, and has referred to certain of the documents in its brief. Thus, we consider opposer to have stipulated to the introduction of the documents.

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Neither party took testimony. Both parties filed briefs on the case.

Before turning to the merits of this case, we note that applicant, in its brief at 3, argues that opposer's PULSE TECHNOLOGY mark is a "descriptive and generic term." However, because this argument is an attack on opposer's pleaded registration, applicant was required to file a petition to cancel or a counterclaim seeking cancellation of opposer's pleaded registration. See TBMP §§313.01 and 313.04. Applicant has not done this. Accordingly, no further consideration has been given to applicant's argument in this regard.

This brings us to the ground of priority and likelihood of confusion. Because neither party took testimony herein, the only information we have about the parties comes from the materials opposer and applicant have made of record, specifically, the parties' discovery responses. Insofar as priority is concerned, as noted previously, opposer submitted a plain copy of its pleaded registration. While applicant, in its answer, admitted that opposer is the owner of the registration and that the registration issued in 2000, there is no proof that the registration is still valid. Moreover, applicant has not admitted the validity of the registration. Thus, opposer may not rely on its pleaded

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registration for purposes of priority. In any event, opposer states in response to applicant's interrogatory no. 1 that it sold electric curling irons and heat controllers sold as a component therewith under the mark PULSE TECHNOLOGY at least as early as March 1995. Thus, the evidence establishes opposer's use of its PULSE TECHNOLOGY mark prior to the filing date of applicant's intent-to-use application on June 7, 2002, which is the earliest date on which applicant is entitled to rely.

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. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., 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 re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

With respect to the goods of the parties, opposer's electric hair curling irons and heat controllers sold as a component therewith are legally identical to applicant's

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electric hair curling irons. In addition, applicant's flat irons, wave plates, crimp plates, hair dryers, and non-electric hair brushes and opposer's electric hair curling irons are all in the nature of hair styling appliances/tools which are related products. In this regard, applicant does not dispute the identity/relatedness of the goods. Insofar as the channels of trade and classes of purchasers are concerned, again, applicant does not dispute that opposer's and applicant's goods may be sold in the same channels of trade to the same classes of purchasers. These kinds of goods are sold in beauty supply stores and mass merchandisers to members of the general public, who are unlikely to exercise great care in purchasing the respective goods. We find, therefore, that if opposer's and applicant's goods are sold under the same or similar marks, confusion as to the origin or affiliation of the respective goods is likely to occur.

Turning then to a consideration of the marks, it is applicant's position that the marks are very different and that consumers would be able to ascertain the differences between the marks.

We begin our analysis of whether confusion is likely by keeping in mind the proposition set forth by the Court of Appeals for the Federal Circuit that "when marks would appear on virtually identical goods or services, the degree

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of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In this case, we find that the marks PULSE TECHNOLOGY and CERAMIC PULSE are sufficiently similar in sound, appearance, connotation and commercial impression that, when applied to identical and related goods, confusion is likely to result. Both marks include the identical word PULSE. In the case of opposer's mark, the word TECHNOLOGY is descriptive, a fact which opposer has acknowledged by its disclaimer of the word. Similarly, in applicant's mark, the word CERAMIC is descriptive, as evidenced by the disclaimer thereof. Thus, it is the word PULSE that has the strongest source-identifying significance in each of the parties' respective marks.

While we recognize that marks must be compared in their entirety, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. Descriptive matter, for instance, is generally viewed as a less dominant or significant feature of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Thus, in opposer's mark and applicant's mark the word PULSE is the dominant element and entitled to greater weight in our likelihood of confusion analysis.

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We find, therefore, that the similarities in the word PULSE in both marks outweigh the differences in the descriptive words TECHNOLOGY and CERAMIC. In finding that the marks are similar, we have kept in mind that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to occur. The focus is on the recollection of the average person, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Consumers could mistakenly believe, due to the similarity in the commercial impression formed by each mark, that CERAMIC PULSE electric hair curling irons and other hair styling appliances/tools are part of a line of such goods from the maker of PULSE TECHNOLOGY electric hair curling irons.

Lastly, applicant argues that confusion is not likely because there have been no instances of actual confusion. Although applicant states in its brief that it has used its mark since June 2002, there is nothing in the record regarding the extent of use (e.g., sales and/or advertising figures) of either applicant's CERAMIC PULSE mark or opposer's PULSE TECHNOLOGY mark. Thus, we do not know

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whether or not there has been any meaningful opportunity for confusion to occur in the marketplace.

In view of the foregoing, we conclude that purchasers familiar with opposer's PULSE TECHNOLOGY mark for electric hair curling irons, upon encountering electric hair curling irons and other hair styling appliances/tools bearing applicant's CERAMIC PULSE mark, are likely to believe that the goods originate from or are somehow associated with the same source.

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