

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

J&J Technology, Inc.
v.
Ralph Edward Taylor

Opposition No. 91165996
to application Serial No. 76597002
filed on June 14, 2004

Jordan S. Weinstein of Oblon, Spivak, McClelland, Maier & Neustadt, P.C. for J&J Technology, Inc.

Ralph Edward Taylor *pro se*.

Before Hohein, Bergsman and Wellington, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

On June 14, 2004, Ralph Edward Taylor filed an intent-to-use application to register the mark RE-NEW-IT, in standard character form, for goods ultimately identified as "household fabric spray for releasing wrinkles, softening fabric, firming fabric, stiffening fabric, and easing the ironing of cotton and cotton blend clothing; household spray for softening towels," in International Class 3 (Serial No. 76597002).

J&J Technology, Inc. filed an opposition to the registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground of priority of use and likelihood of confusion. Opposer alleged that applicant's mark, when used in connection with applicant's goods, so resembles opposer's mark RENUIT for use in connection with cleaning preparations as to be likely to cause confusion. In the notice of opposition, opposer claimed ownership of two intent-to-use applications, filed on March 28, 2003 and set forth below, for the mark RENUIT, in standard character form:

1. Serial No. 76501897 for "cleaning products, namely, exterior wood cleaner for decks, fences, lawn furniture, and buildings, interior wood and floor cleaner, aluminum and vinyl siding cleaner, concrete and asphalt cleaner, mold and mildew cleaner, multi purpose cleaner for household, commercial and industrial use, all purpose degreasing preparations not for use in manufacturing processes for use in the household, commercial and industrial fields, house wash, super metal polish, cleaning preparations for use on marine vehicles, carpet cleaners, floor cleaners, spot and spray cleaners for clothing and fabrics," in International Class 3;¹ and,

¹ This application matured into a registration on October 16, 2007 (Registration No. 3313015). Opposer claimed January 2005 as its dates of first use anywhere and first use in commerce.

2. Serial No. 76976334 for "cleaning products for vehicles, namely, waterless car wash preparations," in Class 3.² Because Serial No. 76501897, now Registration No. 3313015, *supra*, has the more relevant description of goods, we will focus our decision on this registration, and give no further consideration to Serial No. 76776334.

Applicant denied the salient allegations in the notice of opposition. The opposition was fully briefed.

The Record

By operation of Trademark Rule 2.122, 37 CFR §2.122, the record includes the pleadings and the application file for applicant's mark. The record also includes the following testimony and evidence:

A. Opposer's evidence.

1. Declaration trial testimony of Joseph D. Blankenship, M.D., President and CEO of opposer, with attached exhibits;³

2. Notice of reliance on applicant's responses to specific interrogatories and requests for admission;

3. Notice of reliance on the following items:

² This application was published for opposition on May 31, 2005. The notice of allowance issued on August 23, 2005. The fourth extension of time to file a statement of use was granted on September 12, 2007.

³ Pursuant to Trademark Rule 2.123(b), 37 CFR §2.123(b), the parties stipulated to the submission of testimony by written declarations or affidavits.

- a. A copy of the file history for opposer's application Serial No. 76501897;
- b. A copy of the file history for opposer's application Serial No. 76976334;
- c. Copies of printouts of third-party registrations from the U.S. Patent and Trademark Office electronic database purporting to show that household cleaning products and fabric softeners may emanate from a single source;
- d. A copy of the Webster's II new College Dictionary (2001) providing the definition of the word "renew"; and,
- e. A copy of the Merriam-Webster's Collegiate Dictionary (10th ed. 1997) providing the definition of the word "renew"; and,

4. The rebuttal testimony declaration of Georgia Blankenship with attached exhibits.

B. Applicant's evidence.

Applicant filed his own testimony declaration.

Standing

A party who demonstrates a real interest in the proceeding has standing to litigate. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 188

(CCPA 1982). Opposer may establish its standing by proving that it has a real commercial interest in its own mark, and a reasonable basis for its belief that it would be damaged by the registration of applicant's mark. *Id* at 213 USPQ 189. To establish a reasonable basis for a belief that one is damaged by the application sought to be registered, an opposer, as in the case *sub judice*, may assert a likelihood of confusion that is not wholly without merit. *Id.* See also *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (petitioner's production and sale of merchandise bearing its mark is sufficient to establish standing).

Opposer has proven that it has a real commercial in this proceeding by the testimony of Joseph Blankenship that opposer has used the mark RENUIT on exterior wood and deck cleaner, house siding cleaner vehicles, namely waterless car wash preparations, metal cleaner, brick, stone, and concrete cleaner, carpet cleaner, universal cleaner/degreaser, window cleaner, and jewelry cleaner,⁴ and that it has filed applications for the mark RENUIT for its goods, including cleaning products, namely, interior wood and floor cleaner, mold and mildew cleaner, multi-purpose cleaner for household use, and floor cleaners, and spot and spray cleaners for clothing and fabrics. Because opposer's claim of likelihood

⁴ J. Blankenship Dec., ¶¶12 and 13.

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of confusion is not wholly without merit, opposer has established its standing. *Lipton Industries, Inc. v. Ralston Purina Co.*, *supra* 213 UPSQ at 189.

Priority

Applicant is entitled to rely upon the June 14, 2004 filing date of his intent-to-use application as his constructive use date for purposes of priority in this opposition proceeding, subject to applicant's establishment of constructive use by filing an acceptable allegation of use resulting in issuance of a registration. See Section 7(c) of the Trademark Act of 1946, 15 U.S.C. 1057(c). See also, *Larami Corp. v. Talk To Me Programs, Inc.*, 36 USPQ2d 1840, 1844 (TTAB 1995); and *Zirco Corp. v. American Telephone and Telegraph Co.*, 21 USPQ2d 1542 (TTAB 1991). Likewise, the earliest date upon which opposer may rely for purposes of priority in this opposition proceeding is the March 28, 2003 filing date of its intent-to-use application, subject to opposer's establishment of constructive use by filing an acceptable allegation of use resulting in issuance of a registration (which opposer has attained). See Section 7(c) of the Trademark Act of 1946. See also, *Larami Corp. v. Talk To Me Programs, Inc.*, *supra* at 1845 n.7 Because opposer's application filing dates are earlier than applicant's filing date, opposer has priority of use.

Likelihood Of Confusion

Our determination under Section 2(d) 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. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

- A. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

The first *du Pont* factor focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, *supra*. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). *See also, In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988). In comparing the marks, we are mindful 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 so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

We begin our analysis of the marks by noting that the marks are phonetically identical.

Also, the marks have the identical meaning (*i.e.*, to restore), and when they are used in connection with the cleaning products offered by the parties, the marks engender the same commercial impression (*i.e.*, to restore or revive something). Mr. Blankenship testified that opposer selected RENUIT to suggest that its products would "bring the materials to which they were applied back to life."⁵

⁵ J. Blankenship Declaration, ¶7.

Likewise, applicant testified that he selected RE-NEW-IT "because it will do exactly what the word means according to Webster's New Twentieth Century Dictionary RE-NEW or RE-NEW-It in the same dictionary has the meaning of 'to make new', or as if new again, to make young, fresh or strong again, to bring back to into good condition, to become restored or new again."⁶

While the marks are not identical in appearance, the visual differences between the marks does not outweigh the identity of the sound, meaning, and commercial impression of the marks. In view thereof, the similarity of the marks is a factor that favors finding a likelihood of confusion.

B. The similarity or dissimilarity and nature of the goods.

Applicant is seeking to register RE-NEW-IT for "household fabric spray for releasing wrinkles, softening fabric, firming fabric, stiffening fabric, and easing the ironing of cotton and cotton blend clothing; household spray for softening towels." Opposer's application Serial No. 76501897 (now Registration No. 3313015) for the mark RENUIT includes spot and spray cleaners for clothing and fabrics. The products of both parties are fabric sprays. Applicant's fabric spray is an alternative to starch⁷ while opposer's fabric spray is for cleaning clothing and fabrics.

⁶ Taylor Declaration, ¶6.

⁷ Taylor Declaration, ¶4, 5, and 10.

Opposer's fabric spray is applied to clothing before laundering while applicant's fabric spray will be applied to clothing after laundering.⁸ Because the products of parties are fabric sprays used in connection with clothing, consumers encountering the products of the parties may mistakenly believe that they emanate from the same source because of the similarity of the marks. Contrary to applicant's arguments, the differences between the fabric sprays is not sufficient to dissuade us from finding that the products of the parties are similar. *In re Albert Trostel & Sons, Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993) (goods are considered similar/related if the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with a single source).

The fact that applicant's goods are closely related to some of opposer's goods is sufficient to support a finding of likelihood of confusion. The listing of additional products in opposer's registration does not obviate the relatedness of the parties' fabric sprays. *Tuxedo Monopoly, Inc. v. General Mills Fund Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion

⁸ Taylor Declaration, ¶¶9 and 10.

must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application).

However, the similarity of the goods is not limited to fabric spray. Opposer also uses its mark in connection with cleaning products, namely, interior wood and floor cleaner, mold and mildew cleaner, multi-purpose cleaner for household use, carpet cleaners, and floor cleaners. To prove that opposer's cleaning products are related to applicant's fabric spray for softening fabrics and towels, opposer introduced into evidence nine (9) use-based, third-party registrations for both cleaning products and fabric spray. Third-party registrations based on use in commerce that individually cover a number of different items may serve to suggest that the listed goods are a type that may emanate from a single source. *In re Albert Trostel & Sons Co.*, *supra* at 1785-1786; *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Opposer introduced the following third-party registrations into evidence:⁹

Mark	Reg. No.	Goods
HYPOALLERGENIC PRODUCTS THAT WORK	31331196	All purpose cleaner; fabric softener
PRO VALUE	2838632	All purpose cleaner; fabric softener

⁹ In the following table, we have not included the entire description of goods for each of the subject registrations. Only the goods analogous to those found in the application and opposer's application/registration are listed.

Mark	Reg. No.	Goods
PRO PRIDE	2840101	All purpose cleaner; fabric softener
OSI	2992790	All purpose cleaner; fabric softener
USA and design	1691110	All purpose cleaner; fabric softener
REGENCY	2044282	All purpose cleaner; fabric softener
STANPRO	1766492	All purpose cleaner; fabric softener
NO-SCRUB	1678207	All purpose cleaner; fabric softener
NATURE	1669992	All purpose cleaner; fabric softener

In view of the foregoing, we find that the goods of the parties are closely related.

C. The similarity or dissimilarity of established, likely-to-continue trade channels.

When the goods in the application and registration at issue are broadly identified, and there are no limitations in either opposer's registration or the subject application, we must presume that the goods of the parties will be sold in the same channels of trade and will bought by the same classes of purchasers. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1984). Because both fabric sprays identified by the parties

may be used in connection with clothing, they clearly move in the same channels of trade and share the same customer base. Moreover, because there are no restrictions on how or to whom applicant's fabric spray is sold, or on how or to whom opposer's cleaning products are sold, these products must be presumed to move in all channels of trade normal for such goods and to be available to all consumers likely to purchase such goods. Fabric sprays and cleaning products are sold in a wide variety of venues, including supermarkets, convenience stores, and department stores, and they are purchased by virtually every household. In view thereof, applicant's fabric sprays and opposer's cleaning products move in the same channels of trade and are sold to the same classes of consumers.

In view of the foregoing, the similarity of the trade channels is a factor that favors finding that there is a likelihood of confusion.

D. Balancing the factors.

After carefully reviewing the relevant facts regarding the likelihood of confusion, we find that because the marks of the parties are similar and because the goods set forth in opposer's registration are in part closely related and move in the same channels of trade, there will be a likelihood of confusion. In view thereof, applicant's mark RE-NEW-IT when used in connection with "household fabric

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spray for releasing wrinkles, softening fabric, firming fabric, stiffening fabric, and easing the ironing of cotton and cotton blend clothing; household spray for softening towels," so resembles opposer's mark RENUIT used in connection with spot and spray cleaners for clothing and fabrics as to be likely to cause confusion.

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