

THIS OPINION
IS NOT A PRECEDENT
OF THE TTAB

Mailed: February 12, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Invite Health, Inc.

v.

Jared R. Wheat

Opposition No. 91171458
to Application No. 78644404
filed on June 6, 2005

Larry Miller of Feder, Kaszovitz, Isaacson, Weber, Skala,
Bass & Rhine, LLP for opposer.

Joseph P. Schilleci, Jr. of Natter & Fulmer, P.C. for
applicant.

**Before Quinn, Mermelstein, and Bergsman, Administrative
Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

Invite Health, Inc. filed an opposition to the application of Jared R. Wheat to register the mark DIGEST-RX (in standard characters) for "vitamins and dietary supplements," in International Class 5.¹ Opposer asserts that applicant's mark, when applied to applicant's goods, so resembles opposer's previously registered mark DIGESTIVE HX (in standard characters) for "dietary and nutritional

¹ Application Serial No. 78644404, filed June 6, 2005, based upon an allegation of a *bona fide* intention to use the mark in commerce in connection with the identified goods.

supplement,"² as to be likely to cause confusion, under Section 2(d) of the Trademark Act. Applicant denied the salient allegations of opposer's notice of opposition.

Opposer filed a brief on the case. Applicant did not file a brief, nor did it submit evidence or testimony.

We dismiss the opposition.

I. Record

The record consists of the file of the subject application, the pleadings, and opposer's pleaded registration, a title and status copy of which opposer submitted under notice of reliance on March 26, 2007.³

II. Analysis

A. Standing

Because opposer has properly made its registration of record, we find that opposer has established standing to oppose registration of applicant's mark. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir.

² Registration No. 3124598, issued August 1, 2006, in International Class 5. Registrant disclaimed the exclusive right to use the term "digestive" apart from the mark as shown. When the notice of opposition was filed, opposer's registration had not yet issued, and was therefore identified by its application serial number. We deem the pleadings to have been amended to plead ownership of the later-issued registration. Fed. R. Civ. P. 15(b)(2).

³ Although opposer made passing reference in the notice of opposition to its use of the mark, ("[o]pposer distributes a proprietary line of nutritional products..."), no evidence was submitted regarding such use, and we therefore give the allegation no further consideration.

2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

B. Priority

Opposer has established its priority by making its pleaded registration of record. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

C. Likelihood of Confusion

Our determination of likelihood of confusion under Section 2(d) must be based on an analysis of all of the probative 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); see also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on the relevant factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA

1976); see also *In re Azteca Restaurant Enter., Inc.*, 50 USPQ2d 1209 (TTAB 1999) (and cases cited therein). Finally, we note that "[i]t is beyond question that an opposer alleging likelihood of confusion under Section 2(d) has the burden of proof to establish that applicant does not have the right to register its mark." *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1007 (Fed. Cir. 1988).

1. Similarity of the Goods

Applicant's goods are identified as "vitamins and dietary supplements," while the goods covered by opposer's registration are "dietary and nutritional supplements." The parties' goods are identical to the extent that they both include dietary supplements.⁴ *Octocom Sys., Inc. v. Houston Computers Serv. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to

⁴ Opposer submitted no evidence or argument as to whether applicant's "vitamins" are encompassed within "nutritional supplements" and, thus, may be related to opposer's goods. In any event, it is unnecessary to decide this question, because we recognize that the goods are at least partly identical, and a likelihood of confusion with respect to any of the goods in the opposed class would support refusal of registration as to all of them. *Tuxedo Monopoly, Inc. v. General Mills Fund Group, Inc.*, 648 F.2d 1335, 209 UPSQ 986, 988 (CCPA 1981) (likelihood of confusion 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).

the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed").

2. Similarity of the marks

Applicant's applied-for mark is DIGEST-RX, while opposer's registered mark is DIGESTIVE HX. We find that these marks have different connotations.

With little explanation, opposer asserts that

[t]he DIGEST-RX mark is closely related to the prior registered DIGESTIVE HX with respect to ... [t]he sound, commercial meaning and impression of the marks.... In particular, the dominant term of both marks, DIGESTIVE-HX and DIGEST-RX are practically identical. ... The dominant term creates the greatest commercial impression in the marks. Both marks suggest that the applicant's and the registrant's product will contribute to healthy digestion.

Brief at 3-4.

The main similarity between the marks at issue (and the visually dominant element of both) is the word DIGEST or its adjectival form, DIGESTIVE. However, both terms are at least highly suggestive of dietary supplements, which we must presume include such supplements intended to improve or aid digestion. We take judicial notice of the following dictionary definitions:⁵

⁵ The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

digest [*transitive v*]... **2:** to convert (food) into absorbable form ... [*intransitive v*] **1:** to digest food

digestive: ... *n* ... an aid to digestion esp. of food

MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 324 (1998).

We note that in connection with its registration, opposer disclaimed the exclusive right to use the term "DIGESTIVE" apart from the mark as shown. A disclaimer does not remove the disclaimed material from the mark, *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985), and we must consider the marks as a whole, including terms which might not be separately registrable.

Nonetheless, such matter is usually less significant in forming a commercial impression because of its low degree of distinctiveness. *Tektronix Inc. v. Daktronics, Inc.* 534 F.2d 915, 189 USPQ 693 (CCPA 1976). Accordingly, because DIGEST appears to be at least highly suggestive and DIGESTIVE appears to be at least merely descriptive as applied to the goods at issue, we conclude that those terms have very little source-identifying capacity in the context of the identified goods.

Of course, both marks include another term: HX in opposer's mark, and RX in applicant's. While these terms also share a superficial visual similarity (both two-letter terms, ending in "x"), the similarity ends there. These

terms carry different impressions because of their different meanings. In this regard, we take judicial notice of the meaning of "RX:"

Rx ... n [alter. of R_x symbol used at the beginning of a prescription, abbr. for L *recipe*, lit. take...] ... a medical prescription

MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1027 (1998).

Applicant's use of the well-known medical abbreviation "RX" in DIGEST-RX would clearly suggest in relation to these goods that applicant's vitamins and dietary supplements are (or are of a type or potency which would be) prescribed by a doctor or other health-care professional to help the patient "digest" his or her food.

By contrast, opposer's mark does not carry the meaning of something that must be prescribed by a professional. The DIGESTIVE part of opposer's mark connotes any product, which is believed to merely aid digestion. In addition, unlike applicant's mark, the "HX" portion of opposer's mark does not suggest that opposer's goods are professionally prescribed or are of particular potency or efficacy. We are unclear as to what HX means (if anything) in this context,⁶

⁶ "Hx" is apparently used in the medical field as an abbreviation for "history," *i.e.*, medical history. See <http://dictionary.reference.com/> based on THE AMERICAN HERITAGE ABBREVIATIONS DICTIONARY (3d ed. 2005). However, it is not clear that such meaning is commonly known outside the medical field; the term appears in few general-purpose dictionaries. Because the meaning of HX and its relevance to opposer's goods appears to be obscure, we do not consider it an appropriate topic for judicial notice. Fed. R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute....").

but in the absence of evidence to the contrary, we consider it arbitrary, and we find that it does not carry the same impression as "RX" in applicant's mark.

Thus, although both marks at issue include variations on a common term, the only major similarity between them is in their use of the term DIGEST and the term's adjectival form, DIGESTIVE. Not only are these terms somewhat different in their meaning, but they are also either highly suggestive or descriptive of the goods (which must be construed to include dietary supplements taken to aid digestion). Because these terms have little or no source-identifying capacity, consumers would be unlikely to assume a common source for the parties' goods on that basis. Moreover, although the second term in both marks is a two-letter combination ending in "x," RX, as used in applicant's mark, has a specific and immediately recognizable meaning relevant to the goods, a meaning which is not shared by opposer's mark. Based on this meager record, and considering the marks at issue in their entirety, we conclude that the differences between these marks outweigh their similarities.

Conclusion

While we readily admit the possibility that our decision would be different based on a more robust record, we are required to constrain ourselves to consideration of

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the evidence proffered by the parties. Although applicant has not been heard from in this proceeding since he filed his answer, it is opposer that bears the burden of proving its case by a preponderance of the evidence, and we find that its burden has not been met. Accordingly, we conclude that confusion is not likely.

Decision: The opposition is dismissed.