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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

24 MAR 1998

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Paper No. 19
RFC

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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stuff*

Clear Choice, Inc.
v.
Mission Kleensweep Products, Inc.

25-47

Cancellation No. 22,249

John DaLuz, Petitioner's President, for Clear Choice, Inc.

Brian W. Kasell of Brobeck, Phleger & Harrison for Mission
Kleensweep Products, Inc.

Before Simms, Cissel and Hanak, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge.

Mission Kleensweep Products, Inc. applied for
registration of its trademark on February 11, 1991, and on
March 30, 1993, Registration No. 1,760,900 issued on the
Principal Register for the mark "CLEAR CHOICE." The goods
were identified as "all purpose cleaner degreaser, spot and
stain remover, in Class 3," and use of the mark on these
products since February 1, 1991 was claimed.

On October 7, 1993, a timely petition to cancel the
registration was filed by Clear Choice, Inc. As grounds for

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cancellation, petitioner pleaded prior use of the same mark in connection with a cleaner, stain and spot remover for carpets, and that respondent's use of the registered mark in connection with the goods set forth in the registration is likely to cause confusion.

Respondent denied the salient allegations in the petition to cancel. A trial was conducted in accordance with the Trademark Rules of Practice. Petitioner was initially represented by counsel, but on November 30, 1994, petitioner revoked its power of attorney and proceeded to represent itself through its president, John DaLuz.

Only petitioner took testimony. That testimony, of three witnesses, Manual Anthony Lucas, Cheryl DaLuz, and John DaLuz, was taken on September 27, 1995. Although properly notified by petitioner, respondent apparently chose not to attend. Petitioner submitted a brief on March 25, 1996, but respondent did not file a brief.

Based on careful consideration of the record in this case, we hold for petitioner.

The record clearly establishes that petitioner was the first to use this mark. Mr. DaLuz and Mr. Lucas testified that petitioner began using "CLEAR CHOICE" in connection with its product in 1987, and that such use has been continuous since then. In contrast, the earliest date upon which respondent may rely, in the absence of any testimony

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or evidence on the subject, is the February 11, 1991 filing date of the application which matured into the challenged registration. In re Phillips-Van Heusen Corp., 228 USPQ 949 (TTAB 1986), and cases cited therein.

In addition to establishing petitioner's priority, the record is also clear that the goods of the parties are virtually identical products, moving in the same trade channels until they are bought by the same classes of purchasers and are then used for the same purposes.

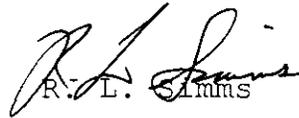
This record leads us to the inescapable conclusion that the use of the same mark on these identical products is likely to cause confusion.

Moreover, the record shows that respondent's use has in fact resulted in actual confusion. Mr. DaLuz testified concerning complaints he has personally received wherein it turned out that the goods in question had come from respondent, rather than from petitioner. Evidence that confusion has occurred is notoriously difficult to come by, especially where the products are inexpensive consumer items such as the goods in the instant case, so Mr. DeLuz' testimony that actual confusion has occurred is strong evidence that confusion is likely. See Miles Laboratories, Inc. v. SmithKline Corp., 189 USPQ 290 (TTAB 1975); Union Carbide Corp. v. Ever-Ready, Inc., et al., 188 USPQ 623

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Cir. 1976); and Amstar Corp. v. Domino's Pizza, Inc., et al., 205 USPQ 969 (5th Cir. 1980);

In summary, because petitioner has priority and because the use of identical marks on identical goods makes confusion not just likely, it makes it inevitable, as is further established by the testimony that confusion has in fact occurred, the petition to cancel is granted. Respondent's registration will be canceled in due course.


R. L. Simms


R. F. Cissel


E. W. Hanak
Administrative Trademark Judges,
Trademark Trial & Appeal Board

24 MAR 1986