

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB

SEPT 30, 98

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Rexall Sundown, Inc.  
v.  
Sukrol Laboratories Inc.

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Opposition No. 97,562  
to Application No. 74/456,171  
filed on November 5, 1993

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M. W. Webner of Sughrue, Mion, Zinn, MacPeak & Seas for  
opposer.

Stanley J. Brassington, Esq. for applicant.

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Before Seeherman, Hairston and Walters, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Rexall Sundown, Inc. filed its opposition to the  
application of Sukrol Laboratories Inc. to register the  
mark VIGOROL for "high potency vitamins for human  
consumption" in International Class 5.<sup>1</sup>

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<sup>1</sup> Application Serial No. 74/456,171, filed November 5, 1993, based upon  
use of the mark in commerce, alleging dates of first use and first use  
in commerce as of October 29, 1993.

As grounds for opposition, opposer asserts that applicant's mark, when applied to applicant's goods, so resembles opposer's previously used and registered<sup>2</sup> mark IN-VIGOR-OL for "homeopathic drug/tonic" as to be likely to cause confusion, under Section 2(d) of the Trademark Act. Opposer asserts that the dominant portion of its mark is the root word VIGOR-OL, and that applicant's mark is identical thereto.

Applicant, in its answer, denies the salient allegations of the opposition and asserts that VIGOR is the dominant portion of opposer's mark; that the dominant portion of opposer's mark is not identical in spelling to the dominant portion of applicant's mark; that the goods of the parties "serve wholly dissimilar purposes"; and that "the common term VIGOR is used and registered by third parties in the dietary supplement-related field."

*The Record*

The record consists of the pleadings; the file of the involved application; and the testimony deposition by opposer of Armend Szmulewitz, senior vice president of research and product development for the Rexall Showcase Division of opposer, with accompanying exhibits. Only

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<sup>2</sup> Registration No. 1,751,784. For the reasons stated herein, this registration is not considered part of the record in this proceeding.

opposer submitted any evidence and only opposer filed a brief on the case. A hearing was not requested.

*The Parties*

According to the testimony of Mr. Szmulewitz and the accompanying exhibits, opposer's IN-VIGOR-OL product is a homeopathic remedy available in liquid and capsule form and it is often sold as part of opposer's "Natural Health Remedies" pack with other homeopathic products of opposer. Mr. Szmulewitz stated that IN-VIGOR-OL is "an energy type tonic [that] the ultimate consumer would take as a stimulating, invigorating tonic" and that "[IN-VIGOR-OL] is promoted for whatever you would need an invigorating tonic for ... just being tired, everyday stress, just your daily work load, just an everyday product for everyone." The promotional literature, a sample of which is shown below, and product labels indicate that the IN-VIGOR-OL product includes, among other ingredients, alfalfa and echinacea.

IN-VIGOR-OL is sold throughout the United States to independent distributors, who either consume the product themselves or re-sell it to their customers. During cross-examination, Mr. Szmulewitz confirmed that the date of first use indicated on opposer's registration, October 24, 1991, is the date opposer first distributed its IN-VIGOR-OL

product.<sup>3</sup> The record indicates that total sales of INVIGOR-OL were in excess of \$3 million for the period January 1, 1992, through November 30, 1996, with sales in excess of \$1 million occurring between August 1995 and November 1996.

There is no evidence in the record with regard to applicant or the nature of its business. The application file includes, as a specimen of use, a label wherein the mark appears as shown below.

(image not available)

The ingredients printed on the label include various vitamins, a type of ginseng, an herb, and an ingredient identified as "Glukrol," which includes lecithin, yeast and alfalfa.

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<sup>3</sup> Opposer cannot rely on its asserted registration in support of its claim of priority, as opposer has neither submitted a status and title copy of its registration nor established, through the testimony of its witness, the current status and title of that registration. We do not consider applicant, by its lack of presentation of evidence or briefing, to have treated opposer's registration as being of record such that we would so consider it to be of record. However, because of Mr. Szmulewitz's position with opposer and his tenure, we accept his testimony as establishing opposer's date of first use of the mark INVIGOR-OL in connection with a homeopathic tonic.

*Analysis*

Although we do not consider opposer's registration to be properly of record in this proceeding, we do find sufficient evidence of opposer's first use of its mark in commerce in connection with a homeopathic tonic as of October 24, 1991. Inasmuch as this date precedes the filing date of the application herein, we find that opposer has adequately established its priority.

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. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In view of the limited record before us, key considerations in this case are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We conclude that applicant's identified "high potency vitamins for human consumption" are closely related to the "homeopathic drug/tonic" identified in opposer's registration. While the goods are obviously not the same, the record establishes that both parties' goods are nutritional supplements to increase a person's energy

level. Further, as noted from the labeling of the parties' products, they share at least one common ingredient, alfalfa. It is reasonable for consumers to mistakenly conclude that the source of such products, if sold under substantially similar marks, is the same or related.

Regarding channels of trade and classes of purchasers for the parties' goods, the evidence establishes that opposer sells its goods through independent distributors and that the ultimate consumer is the general consumer, including its independent distributors themselves. Applicant's identification of goods is broadly worded, without any limitations as to channels of trade or classes of purchasers.<sup>4</sup> Thus, we must presume that applicant's goods are sold in all of the normal channels of trade to all of the normal purchasers for goods of the type identified. *See, Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). It is reasonable to conclude that both parties' nutritional supplements would be sold to the same class of purchasers, namely, the general consuming public. In view of opposer's testimony that, in some instances, its independent

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<sup>4</sup> While applicant's identification includes the limitation "for human consumption," we assume from the evidence of record that opposer's goods are similarly limited. Thus, the channels of trade are unaffected by this limitation.

distributors are the ultimate consumers of opposer's products, we presume that opposer's independent distributors are individuals. It is reasonable to conclude that these individuals and the people to whom they might sell opposer's products are the same members of the general consuming public who would see vitamins, such as those sold by applicant, on the shelves in retail establishments such as pharmacies. In other words, we conclude that the class of purchasers of the parties' goods is the same.

Turning to the marks, we note that while we must base our determination on a comparison of the marks in their entireties, we are guided, equally, by the well-established principle that, in articulating reasons for reaching a conclusion on the issue of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

We take judicial notice of the definition, in the *Random House Dictionary of the English Language* (2<sup>nd</sup> ed., unabridged, 1987), of "vigor" as "n. 2. Healthy physical or mental energy or power; vitality" and "invigorate" as "v.t.

to give vigor to; fill with life and energy; energize." Clearly, in relation to both parties' goods, VIGOR is suggestive of the desired result of the use of either product.

Both parties' marks consist of the root word VIGOR and end in the syllable "OL." Opposer, in its promotional literature and on its labels, emphasizes the VIGOR portion of its mark by separating the syllables, *i.e.*, IN•VIGOR•OL, often with the VIGOR portion in larger and bolder print. Applicant, on its specimen label reproduced above, emphasizes the VIGOR portion of its mark by the addition of the phrase, immediately below the mark on the label, "Virility Vigor." The only difference between the parties' marks is the prefix "IN" in opposer's mark. It is our view, based on the dictionary definitions, that this would be perceived as suggesting the word "invigorate," which is merely the verb transitive form of the noun VIGOR. As such, we perceive only a minor difference between the parties' marks which does not change the connotation of opposer's mark. Opposer's mark is not distinguished from applicant's mark simply because of the suggestive connotation of VIGOR in relation to the goods. As used in both marks, VIGOR conveys the same suggestive significance.

Nor do we believe that the prefix "IN" in opposer's mark is sufficient to differentiate the marks in appearance or pronunciation. Under actual marketing conditions, consumers do not always have the luxury to make side-by-side comparisons between marks. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255 (TTAB 1980). Because of the fallibility of memory and the consequent lack of perfect recall, consumers will retain a general rather than a specific impression of trademarks or services marks. *Spoons Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992); and *In re Steury Corporation*, 189 USPQ 353 (TTAB 1975). In this case, we find that the overall commercial impression of opposer's mark, INVIGOROL, and applicant's mark, VIGOROL, is substantially similar.

We also point out that, although applicant alleged in its answer that VIGOR is a common term used and registered by numerous third parties in the dietary supplement field, there is nothing in the record to support this contention. Therefore, we have no evidence that consumers are so familiar with "VIGOR" marks that they are able to differentiate between such marks on the basis of such small differences as whether one has the prefix "IN" and the other does not.

Applicant also alleged in its answer that consumers purchase the parties' products with care. No evidence has been submitted in support of this assumption. As stated herein, these goods appear to be sold to ordinary consumers as over-the-counter items. These goods are not prescription medicines, nor are they restricted in their sale to doctors or other health-care professionals. Even if we were to assume that consumers of these goods are careful simply because the products are health-related, we still find that, for the reasons stated above, the marks are so similar in commercial impression that members of the general public, even if they exercise more than ordinary care in selecting these products, are likely to believe that the parties' products emanate from the same source.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of opposer's mark, INVIGOROL, and applicant's mark, VIGOROL, and because the goods must be deemed to be purchased by the general consuming public, their contemporaneous use on the goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

*Decision:* The opposition is sustained.

E. J. Seeherman

P. T. Hairston

C. E. Walters  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board