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THIS DISPOSITION IS NOT
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DEB

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Amway Corporation
v.
AmeriChem Distributors, Inc.

Opposition No. 107,048
to application Serial No. 75/139,534
filed on July 15, 1996

Jeffrey A. Handelman of Brinks Hofer Gilson & Lione for Amway Corporation.

James C. Overby, *pro se*, for AmeriChem Distributors, Inc.

Before Hanak, Hohein and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Amway Corporation (opposer) has opposed the application of AmeriChem Distributors, Inc. (applicant) to register the mark "VOOM" for a "multi use cleaning and degreasing preparation for industrial use and household use,"¹ in International Class 3.

¹ Serial No. 75/139,534, alleging use of the mark since November 1, 1993.

In the notice of opposition, opposer asserts that it is the owner of the previously used and registered mark "ZOOM" for a "cleaning preparation to be used for rugs, upholstery, clothing, and for surfaces of furniture, woodwork and walls,"² and for "cleaning preparations; namely, an all-purpose cleaning preparation,"³ both in International Class 3; that the goods of the respective parties are directly competitive and are intended for the same end uses; and that applicant's mark, as applied to applicant's goods, so resembles opposer's previously used and registered mark as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant, in its answer, admitted that it filed its involved application, but denied that these marks "VOOM" and "ZOOM" are confusingly similar, and hence, denied that there was any likelihood of confusion in the instant proceeding.

A trial was conducted and legal briefs have been filed.⁴ Both parties were represented at an oral hearing before this Board.

The record consists, in part, of the pleadings, the file of the opposed application, the affidavit of Lynn Wendyger,

² Opposer owns the following valid and subsisting registration: Registration No. 884,310, issued on January 13, 1970; first renewal in 1990.

³ Opposer owns the following valid and subsisting registration: Registration No. 1,757,910, issued on March 16, 1993; §8 affidavit accepted and §15 affidavit received.

opposer's marketing manager, with exhibits, including certified copies of its pleaded registrations, and the affidavit of Cheryl Muller, with exhibits such as dictionary entries and media articles.⁵ As part of its case-in-chief, opposer also offered under 37 C.F.R. §2.120(j)(1) portions of the discovery depositions of James Overby and Mary Overby, applicant's co-owners, with related exhibits, and copies of applicant's responses to opposer's interrogatories, both introduced under a notice of reliance pursuant to 37 C.F.R. §2.120(j)(3)(i).

Applicant submitted no testimony or other evidence.

The record shows that opposer, Amway Corporation, was founded in 1959 and has been manufacturing, marketing and selling a wide variety of goods and services, nation-wide and globally. The Home Care business, one of Amway's seven core businesses, includes the sale of a complete line of cleaning products.⁶

According to opposer's marketing manager, opposer has sold cleaning preparation products under the "ZOOM" trademark continuously since 1969. The record shows that between

⁴ While opposer is correct in noting that applicant's trial brief was late, nonetheless, we have exercised our discretion to consider the arguments contained therein in reaching our decision.

⁵ The parties agreed pursuant to 37 CFR §2.123(b) that the testimony of the witnesses could be submitted in affidavit form. Ms. Muller is a paralegal in the firm of Brinks Hofer Gilson & Lione.

⁶ Lynn Wendyger affidavit, ¶¶ 2-5.

January 1990 and March 1998, opposer sold more than \$41 million worth of "ZOOM" products in the United States alone.⁷

Opposer argues that the marks "ZOOM" and "VOOM" look and sound alike and have the same or similar meaning.

By contrast, applicant argues that these two marks are distinct, that the parties' markets have no overlap, and that it chose its mark in good faith after applicant's co-owner, Mr. Overby, conducted a trademark search. Throughout its presentation of this case, applicant has made much of the fact that its mark is "unique."

Initially, we note that opposer's priority is not in issue in light of opposer's reliance on the status and title copies of its valid and subsisting registrations. King Candy Co., Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Further, the parties have agreed in their briefs that priority is not an issue.⁸ Finally, opposer's prior use of its "ZOOM" mark is also clear from the testimony of Lynn Wendyger, opposer's marketing manager.⁹

Turning, therefore, to the issue of likelihood of confusion, we have followed the guidance of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973), which sets forth the factors that should

⁷ Lynn Wendyger affidavit, ¶¶ 5, 9.

⁸ Opposer's brief, p. 1; applicant's brief, p. 1

⁹ Lynn Wendyger affidavit, ¶¶ 5, 9.

be considered, if relevant, in determining such issue under Section 2(d) of the Trademark Act.

We note from the respective identifications of goods that both parties are marketing multi-purpose cleaning preparations. The evidence shows that both cleaning products are sold in a concentrated form to be diluted with water before using. Both parties market their products, *inter alia*, in one-gallon, plastic containers. In their respective printed materials, both products are touted as being effective in cleaning crayon marks, smeared lipstick and grease stains from fabrics or hard surfaces.¹⁰ Hence, we conclude that opposer is correct in its contention that the parties' products are directly competitive and are intended for the same class of potential and actual purchasers. Because nothing in the record supports a different conclusion, there is no doubt but that the parties' goods are substantially identical.

Given the not insubstantial level of sales, advertising, and length of use of the mark "ZOOM," we agree with opposer that, in view of the fanciful nature of its mark, the mark should be given a broad scope of protection, and thus it is not necessary to decide whether or not it is well known.

Applicant agrees that opposer's "ZOOM" mark is strong, but contends that this is true *only among Amway members*:

"Applicant agrees with the Opposer that the Amway ZOOM Trademark is strong, recognized and sold by way of Amway distributors. Amway products have to be purchased by a knowledgeable individual who is privy to the Amway line of products, and can only be purchased by personal contact with an Amway member or through an Amway Distributor. Since the ZOOM product has to be purchased from an Amway Distributor, there can be no possibility of confusion between the parties marks..."

Applicant's brief, p. 7.

However, we agree with opposer that even if the goods herein reach the consumer through different channels of trade, these identical goods are sold to the same residential customers for household use. These goods are relatively inexpensive, impulse items bought by ordinary purchasers without a great deal of care. Further, likelihood of confusion under Section 2(d) of the Act extends beyond purchasers to include confusion among ultimate users of the products (e.g., after the trademarked product has entered the public arena, when a prospective consumer observes someone else using a cleaning preparation). See [Payless Shoesource Inc. v. Reebok International Ltd.](#), 998 F2d 985, 989, 27 USPQ2d 1516, 1519 (Fed. Cir. 1993). Moreover, in the absence of a specific limitation in the registration certificate, we must assume that opposer's goods travel in the usual channels of trade for such goods, which in this case are the same as those for applicant's goods, since the respective products

¹⁰ Deposition of James Overby, exhibit #22 "VOOM Demo," p. 2;

are identical. Squirtco v. Tomy Corp., 697 F.2d 1038, 1042-43, 216 USPQ 937, 940 (Fed. Cir. 1983); and In re Elbaum, 211 USPQ 639 (TTAB 1981).

We turn then to what is certainly the most contentious issue between the parties herein, and may well be the single determinative issue before us - whether applicant's mark so resembles opposer's mark as to be likely to cause confusion.

We find that the marks "VOOM" and "ZOOM" are words that sound quite similar when spoken. Inasmuch as both are four letter words, beginning with a hard consonant and ending with the letters "-OOM," they also have a similar appearance.

Applicant argues that the word "VOOM" is quite unique as a source indicator, having been borrowed from a well-known children's book by "Dr. Seuss."¹¹ However, opposer has demonstrated multiple uses of the word by writers in a variety of general media publications. Reviewing the word "voom" in the context of these uses, we agree with opposer's contention that the words "voom" and "zoom" do indeed have quite similar connotations in modern parlance. As used in context, within the dozens of contemporary stories opposer has culled from the print media, "voom" shares with "zoom" the connotations of a sudden burst of energy, a sharp acceleration to high speeds within short distances, and often

Lynn Wendyger affidavit, Exhibit 35H (p. "AMW00094").

the act of movement is accompanied by appropriate noises. Hence, in addition to their similarities in sound and appearance, we conclude in light of their connotations that the marks "VOOM" and "ZOOM" are also substantially similar in overall commercial impression.

Moreover, as has been stated in prior cases, a lesser degree of similarity between marks is required to support a finding of a likelihood of confusion when, as here, the marks are applied to identical goods. See *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

Given that all the *du Pont* factors reviewed above point to a likelihood of confusion, we find the extent of potential confusion in the instant case to be substantial.

Our conclusion that confusion is likely is not altered by the absence of any reported incidents of actual confusion during a period of five years of contemporaneous use by the parties of their respective marks. This is because the absence of any instances of actual confusion is a meaningful factor only where the record indicates that, for a significant period of time, an applicant's sales of its services or goods and any advertising thereof have been so appreciable and continuous that, if confusion were likely to happen, any actual incidents thereof would be expected to

¹¹ As opposer correctly notes, applicant failed properly to submit for the record the relevant portions of the well-known children's book by Dr. Seuss, "*The Cat In the Hat Comes Back.*"

have occurred and would have come to the attention of one or both of the parties. See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992). In this case, not only is a five-year period a relatively short interval, but there is no indication as to the extent of applicant's sales and advertising of its services under its "VOOM" mark. The lack of any instances of actual confusion, therefore, is not indicative of an absence of a likelihood of confusion.

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

E. W. Hanak

G. D. Hohein

D. E. Bucher

Administrative Trademark
Judges, Trademark Trial
and Appeal Board