

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JAN. 28,00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Homedics, Inc.

Serial No. 75/206,728

Paul M. Schwartz and Maria Franek Angileri
of Brooks & Kushman, P.C. for Homedics, Inc.

Marc J. Leipzig, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Walters, Wendel and Bottorff, Administrative
Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

Homedics, Inc. has filed an application to register
the mark FOOT PLEASER for "electric massaging foot pad."¹

¹ Serial No. 75/206,728, filed December 2, 1996, based on an
assertion of a bona fide intention to use the mark in commerce.
By amendments filed by applicant in a reply brief, the previously
unacceptable identification of goods was amended to that set
forth above, which was accepted by the Examining Attorney. A
disclaimer of the word FOOT was also made of record, thus
complying with the requirement which had been made final for such
a disclaimer.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 USC § 1052(d), on the ground of likelihood of confusion with the registered mark BODY PLEASER for "massager."² Applicant and the Examining Attorney have filed briefs, but no oral hearing was requested.

Here, as in any determination of likelihood of confusion, two key considerations in our analysis are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods with which the marks are being used. See *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

It is well established that likelihood of confusion must be determined on the basis of the goods as identified in the application and in the cited registration. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). As pointed out by the Examining Attorney, the identification of the goods in the registration as "massagers" is very broad and would encompass applicant's more specific foot massagers, or as

² Registration No. 1,169,128, issued September 15, 1981. Section 8 and Section 15 accepted and acknowledged, respectively. A disclaimer has been entered of the word BODY.

now identified, "massaging foot pads." Thus, the goods of the parties are closely related. Applicant has made no argument to the contrary in its brief and earlier in the examination process conceded that the goods of both are "types of massagers."

Similarly, since there are no restrictions in either the registration or the application as to channels of trade, it must be presumed that goods of both parties would travel in all the normal channels of trade for these goods. See Kangol Ltd. v. KangaROOS U.S.A. Inc., 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992). Thus, the channels of trade and the potential purchasers for the goods of each would be the same.

It is the similarity or dissimilarity of the marks which is the major contention in this case. The Examining Attorney argues that applicant's mark FOOT PLEASER and the cited mark BODY PLEASER are similar in overall commercial impression. He maintains that the "distinctive" term PLEASER is the dominant portion of both marks, with applicant simply using a different descriptive term as the remainder of its mark. From his viewpoint, just as registrant uses BODY to refer to its massagers as ones for the body, applicant uses FOOT for its massagers for the feet.

Applicant argues that when the marks are considered in their entireties, the differences in FOOT PLEASER and BODY PLEASER are obvious. From applicant's viewpoint, the marks are totally different not only in appearance and sound, but also in connotation and commercial impression. Applicant asserts that the common word PLEASER is a weak term in the relevant market, pointing to third-party registrations which have been made of record for other marks containing the term PLEASER for allegedly related goods³ and also to its own registration for BACK PLEASER for back massage cushions,⁴ all of which issued subsequently to the cited registration. Applicant contends that purchasers have learned to distinguish between various marks containing the term PLEASER in this market and thus confusion is unlikely between applicant's present mark FOOT PLEASER and the cited mark.

Although it is true that in determining likelihood of confusion, marks must be considered in their entireties, it

The registrations being relied upon by applicant are:

Registration No. 2,011,013 for the mark POSTURE PLEASER for "weighted lumbar support mounted on suspenders, smocks or vests for therapeutic and stress relief purposes";
Registration No. 1,404,964 for the mark SEAT PLEASER for "spring deck for upholstered seating"; and
Registration No. 1,041,790 for the mark BODY PLEASER for "mattresses used with sofas convertible to beds."

⁴ Registration No. 1,747,806, issued January 19, 1993. A disclaimer has been made of the word BACK.

is well established that there is nothing improper in giving more or less weight to a particular feature of a mark. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Although descriptive portions of a mark cannot be ignored, the fact remains that the purchasing public is more likely to rely upon the non-descriptive portion as the indication of source. See Hilson Research Inc. v. Society for Human Resource Management, 27 USPQ2d 1423 (TTAB 1993).

We agree with the Examining Attorney that the term PLEASER is the dominant portion of both applicant's mark and the cited mark. The terms FOOT and BODY are highly descriptive of the type of massager with which the marks are being, or are intended to be, used and would most likely be viewed by purchasers as such. The same format is used for both marks and creates similar commercial impressions for the marks as a whole.

Moreover, we do not find the evidence submitted by applicant adequate to establish that the term PLEASER is so weak in the relevant market that purchasers would attach little trademark significance to that term per se in viewing the respective marks. We accept applicant's argument that the marks of the third-party registrations upon which it is relying are for related goods, despite the

Examining Attorney's contentions otherwise, since all are for products having therapeutic bodily benefits, regardless of the class in which the registration issued.

Nonetheless, without any evidence of actual use of these registered marks, we have no way for making an assessment as to what, if any, impact the marks may have made in the marketplace. See *Charrette Corp. v. Bowater Communication Papers Inc.*, 13 USPQ2d 2040 (TTAB 1989) and the cases cited therein. In addition, we do not consider four marks containing the term PLEASER for varied items offering physical body relief sufficient to demonstrate that the term is so weak that it has minimal trademark significance when used with massage products. Applicant's attempt to rely upon the third-party registrations as evidence that a term has a well-known and understood meaning when used with goods of this nature and thus the inclusion of this term may be an insufficient basis upon which to predicate a holding of likelihood of confusion is simply not well taken.

Furthermore, even if the term PLEASER has been used by others in connection with products in this general field, we do not believe that applicant should be permitted to register a mark so very similar to BODY PLEASER for such a closely related type of massager which would reasonably be

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assumed to emanate from registrant.⁵ See OPTOmechanisms, Inc. v. Optoelectronics, Inc., 175 USPQ 246 (TTAB 1972). If there were any doubt in our minds, this too would be resolved in favor of registrant, applicant being the newcomer in the field. See In re Hyper Shoppes (Ohio) Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); Giant Food Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

Decision: The refusal to register under Section 2(d) is affirmed.

C. E. Walters

H. R. Wendel

C. M. Bottorff
Trademark Administrative Judges,
Trademark Trial and Appeal Board

⁵ The registration issued to applicant of the mark BACK PLEASER, despite the existence of the cited registration, is not an issue before us.

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