

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 8, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **HWE, Inc.**

Serial No. 75/216,681

Syed A. Hasan and Peter J. Reitan of Christie Parker & Hale
for applicant.

Ira Goodsaid, Trademark Examining Attorney, Law Office 115
(Thomas Vlcek, Managing Attorney).

Before Quinn, Hairston and Rogers, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by HWE, Inc. to register
the mark FOOT SOOTHER for "foot massagers."¹

The Trademark Examining Attorney has refused
registration under Section 2(d) of the Trademark Act on the
ground that applicant's mark, if applied to applicant's

¹ Application Serial No. 75/216,681, filed December 21, 1996,
alleging a bona fide intention to use the mark in commerce. The
term "Foot" is disclaimed apart from the mark.

goods, would so resemble the previously registered mark BODY SOOTHER for "electric hand held massager"² as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney submitted briefs. An oral hearing was requested, but later was waived by applicant.

Before turning to the merits of the appeal, an evidentiary matter requires our attention. During the ex parte prosecution of its application prior to appeal, applicant did not submit any evidence in support of its arguments. It was not until after the appeal was filed that applicant first submitted any evidence. More specifically, the evidence accompanied applicant's appeal brief. The Examining Attorney, in his brief, asserted that the evidence was untimely and urged that the Board disregard the exhibits attached to the appeal brief. The Examining Attorney went on to indicate that even if the evidence were considered, it would not mandate a withdrawal of the refusal.³

² Registration No. 1,742,233; combined Sections 8 and 15 affidavit filed.

³ As indicated by the Examining Attorney, the materials comprising Exhibit D are not in the file.

Trademark Rule 2.142(d) provides, in relevant part, that the record in an application should be complete prior to the filing of an appeal and that the Board will ordinarily not consider additional evidence filed with the Board after the appeal is filed. See also: *TBMP* §1207. In the present case, applicant's submission of the exhibits accompanying the appeal brief is clearly untimely. The evidence was available prior to the appeal and easily could have been introduced at that time to rebut the Examining Attorney's contentions. Accordingly, the evidence does not form part of the appeal record, and it has not been considered in reaching a decision in this case.⁴ We hasten to add, however, that even if considered, we agree with the Examining Attorney's assessment that the evidence is not persuasive of a different result in this case.

Turning now to the merits, applicant "acknowledges certain superficial similarities between its mark and the prior registration as well as between the goods associated with each mark." Applicant contends, however, that "those

⁴ Inasmuch as dictionary definitions are proper subject matter for judicial notice, we take judicial notice of the definition of the term "soothe" (Exhibit A). Moreover, we note that the Examining Attorney has stipulated to the introduction of the definition. We likewise take judicial notice of the definition of "body" which the Examining Attorney has relied upon in his brief.

similarities are not sufficient to raise a likelihood of confusion sufficient to prevent registration" of applicant's mark. (brief, p. 2) Applicant points to specific differences between the marks and the goods. As to the marks, applicant argues that the only commonality between the marks is a suggestive term, and that the marks are readily distinguishable by the addition of two different terms. As to the goods, applicant essentially states that foot massagers generally are not held by hand, and that hand-held massagers typically are not used on feet.

The Examining Attorney maintains that the marks and goods are sufficiently similar to result in a likelihood of confusion.

Our determination under Section 2(d) is 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). In any likelihood of confusion analysis, two key considerations 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 (CCPA 1976).

We first turn to consider the goods. It is well settled that the issue of likelihood of confusion between applied-for and registered marks must be determined on the basis of the goods as they are identified in the involved application and cited registration, rather than on what any evidence may show as to the actual nature of the goods, their channels of trade and/or classes of purchasers. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and In re Elbaum, 211 USPQ 639 (TTAB 1981). Thus, we agree with the Examining Attorney that applicant's "foot massagers" would be encompassed within registrant's broadly worded identification "electric hand held massager." In any event, with respect to the goods, it is well settled that they need not be identical or even competitive in nature to support a finding of likelihood of confusion. Instead, it is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., In re International Telephone & Telegraph Corp., 197 USPQ

910, 911 (TTAB 1978). In spite of the specific differences pointed to by applicant ("[f]or reasons of sanitation and convenience, foot massagers are not typically held by hand and hand-held massagers are not typically used for the feet"), we find that the respective massagers are substantially similar. In the absence of probative evidence to the contrary, we see no reason why an electric hand-held massager would not be used to massage a person's feet. Further, the goods certainly would move in the same channels of trade and would be purchased by the same classes of purchasers.

Insofar as the marks are concerned, we acknowledge the suggestiveness of the common term "SOOTHER," and that the generic terms "FOOT" and "BODY" are different. Nonetheless, the marks FOOT SOOTHER and BODY SOOTHER are identical in construction, with the marks' comprising a generic anatomical term followed by the term "SOOTHER." We find that the marks convey similar meanings (soothing to the foot and soothing to the body). Notwithstanding this suggestiveness, however, the record is devoid of evidence showing any third-party uses or registrations of the same

and/or similar marks for the types of goods involved here.⁵ In sum, the similarities between the two marks in overall commercial impression outweigh the differences. We find that the Examining Attorney is quite reasonable in suggesting that purchasers may well believe, in view of the similarity between registrant's mark BODY SOOTHER and applicant's mark FOOT SOOTHER, that applicant's foot massager is merely another type of massager marketed by registrant. In finding a likelihood of confusion between the marks as applied to substantially similar goods, we have kept in mind the fallibility of human memory over time and the fact that consumers usually retain a general rather than a specific impression of trademarks encountered in the marketplace.

Lastly, to the extent that any of the points argued by applicant cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); and In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

⁵ Even if the third-party registrations attached to applicant's appeal brief were properly of record and considered, we would point out that none covers massagers or like products.

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We conclude that purchasers familiar with registrant's electric hand-held massager sold under its mark BODY SOOTHER would be likely to believe, upon encountering applicant's mark FOOT SOOTHER for foot massagers, that the goods originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.

T. J. Quinn

P. T. Hairston

G. F. Rogers
Administrative Trademark
Judges, Trademark Trial
and Appeal Board

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