

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB 4/27/00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Greenwood Mop & Broom, Inc.

Serial No. 75/267,780

Richard M. Moose of Dority & Manning, P.A. for Greenwood
Mop & Broom, Inc.

Amos T. Matthews, Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney).

Before Cissel, Bucher and Bottorff, Administrative
Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On April 1, 1997, applicant applied to register the
mark "EZY SWEEPER" on the Principal Register for "brooms,"
in Class 21. Use of the mark in commerce since 1996 was
asserted as the basis for filing the application.

The Examining Attorney required applicant to disclaim
the term "SWEEPER" apart from the mark as shown, holding
that the word is merely descriptive of the goods with which

applicant uses its mark. Additionally, registration was refused under Section 2(d) of the Act on the ground that applicant's mark, when used in connection with brooms, so resembles the mark "EAZY SWEEP," which is registered¹ for identical goods, that confusion is likely.

Applicant responded to the requirement for a disclaimer of the word "SWEEPER" by arguing that that term is not descriptive of brooms within the meaning of Section 2(e)(1) the Lanham Act.

Applicant also presented arguments in support of its contention that confusion with the mark in the cited registration is not likely. In support of its arguments, applicant attached printouts from a search of a private database asserted to include Federal registrations. Exhibit A is a single sheet appearing to indicate only that "93 record(s) were found" when the letters "EZ" were searched in Class 21. No references to specific marks are made, and no other information is provided. Exhibit B is likewise simply a notation that two records were found when the letters "EZY" were searched in Class 21, although a summary of the information concerning the instant application is provided on a second sheet which was

¹ Registration No. 1,453,230, was issued on the Principal Register on August 18, 1987 to Vining Broom Co.; combined

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affidavit under Sections 8 and 15 of the Act filed and accepted.

attached as part of Exhibit B. The third page of this exhibit is another sheet with information about a purported registration of the mark "EZY GRIP" for plastic containers for pharmaceuticals, personal care items and cosmetics. Exhibit C appears to be another brief indication of the number of records found when "EASY" was searched in that database. Again, no specific trademarks, or the goods or services in connection with which they are purported to be registered, were specified.

The Examining Attorney was not persuaded by applicant's argument or evidence, and in his second action, he made final both the requirement under Section 6 for disclaimer of the term "SWEEPER" and the refusal to register under Section 2(d) the Act. Submitted with that Office Action in support of the disclaimer requirement was a copy of a dictionary definition of the verb "sweep."

Applicant timely filed a notice of appeal, which was timely followed with an appeal brief. The Examining Attorney then filed his brief on appeal, and applicant filed a reply brief. Applicant did not request an oral hearing before the Board.

We note that the Examining Attorney attached to his brief on appeal a definition of the word "SWEEPER" copied from the 1996 edition of the Random House Compact

Unabridged Dictionary, Special Second Edition. The word is listed there as a noun which means "a person or thing that sweeps." In his brief, the Examining Attorney asks that the Board take judicial notice of this definition. It is well settled that the Board may take judicial notice of dictionary definitions, and we exercise our discretion to do so in this case. See TMBP 712. Accordingly, the cited definition is entered into this record, and the Board has considered it, just as we have considered the definition from the Meriam-Webster's Collegiate Dictionary, 10th edition, (1993), which applicant submitted with its brief on appeal. That definition identifies a "sweeper" as "one that sweeps."

A further comment with respect to the record properly before us in this appeal is in order at this juncture. The Examining Attorney properly accorded no persuasive weight to the aforementioned exhibits which applicant attached to its response to the first Office Action. Simply put, although applicant's report indicates the raw numbers of "record(s)" that the computer apparently found when the various terms were searched, the evidence submitted by applicant is of no value in establishing that third parties have registered marks which are similar to the marks at issue in this proceeding because the evidence submitted by

applicant does not identify what those marks are or what the goods or services listed in the registrations are. Moreover, the evidence does not establish that whatever the marks are, they are in use to the extent that the consuming public has been widely exposed to them and is therefore so familiar with the component in such marks consisting of "EASY" or its phonetic equivalent that these terms have diminished capacity to function as identifications of source for such products.

Applicant may have recognized that its earlier submission of the three pages from the the report on the search it conducted had no persuasive value, because applicant submitted with its reply brief additional evidence which appears to relate to the specific marks discovered by that search. Applicant's submission of this evidence with its reply brief is manifestly untimely, however. Under Trademark Rule 2.142(d), the record is closed with the filing of a notice of appeal, and applicant did not request the Board to allow additional evidence as provided by the rule. Accordingly, we have not considered the evidence submitted with applicant's reply brief, but even if we had, because it would not be evidence of use of the marks listed therein, it would have been of little

probative value with respect to resolving the issue of likelihood of confusion in the instant case.

Turning to the issue of whether the requirement for a disclaimer of "SWEEPER" is proper, we note at the outset that Section 6(a) of the Lanham Act allows the Examining Attorney to require an applicant to disclaim any unregistrable component of a mark which is otherwise registrable. Further, Section 2(e)(1) of the Act provides that terms which are merely descriptive of the goods in connection with which registration is sought are not registrable. A term is merely descriptive of a product if it immediately and forthwith conveys significant information about the nature of the product. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978). This determination is not made in the abstract, but rather, the descriptiveness of a word is determined by considering it in connection with the goods specified in the application. That a word may have other meanings in other contexts, e.g., that a "sweeper" is a player on a soccer team, is not significant.

When the evidence of record is considered in light of these principles, we must conclude that "SWEEPER" is unregistrable under Section 2(e)(1) of the Act, and therefore that it must be disclaimed under Section 6. The

dictionary definitions of record, including the one submitted by applicant, clearly show that a broom is a sweeper. It is difficult to imagine a more descriptive term for a product than a synonym for the generic name of it.

Even the definition applicant itself submitted is clear. Contrary to applicant's argument, it does not indicate that a sweeper is "a person who sweeps." Applicant's dictionary defines a sweeper as "one that sweeps," not "one who sweeps." [emphasis added]. Because the word "SWEEPER" is merely descriptive of a broom, the requirement to disclaim it apart from the mark as a whole is entirely appropriate.

We next turn to the issue of whether confusion is likely in view of the cited registered mark. Our determination in this regard is governed by the principles set forth by our primary reviewing court in *In re E. I. DuPont de Nemours & Co.*, 467 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the case at hand, the factors relative to which we have evidence are the similarity of the trademarks and the relationship between the products of the applicant and the registrant. It is well settled that when the goods are identical, the trademarks used on them need not be as similar in order to cause confusion as would be the case if

the goods were not the same. Mobil Oil v. Pegasus Petroleum, 818 F.2d 254, 2 USPQ2d 1677 (2d Cir. 1987).

In the instant case, the critical factors are that the goods are identical and the marks are nearly so. Both marks have the same highly suggestive meaning. They are nearly identical when spoken, and they are also nearly identical in appearance. Although small distinctions between these two marks can be articulated, in the marketplace the marks will not necessarily be compared with each other on a side-by-side basis. The commercial impressions these two marks create in connection with the same products, brooms, are almost indistinguishable. Under these circumstances, confusion is plainly likely.

Applicant makes a number of arguments in support of its contention that confusion is not likely, but none is well taken. As noted above, applicant has not established that similar marks are in use on the same or similar products. Contrary to applicant's argument, the weakness of the cited registered mark has not been shown on this record. Similarly, applicant has not demonstrated that consideration of both of these marks in their entireties mandates the conclusion that applicant's mark creates a commercial impression distinct from that created by the

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registered mark. Applicant has presented neither evidence nor reasoning upon which we could base such a conclusion.

Accordingly, for the reasons set forth above, the requirement for a disclaimer and the refusal to register under Section 2(d) of the Act are both affirmed.

R. F. Cissel

D. E. Bucher

C. M. Bottorff
Administrative Trademark Judges
Trademark Trial & Appeal Board

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