

HEARING: October 3, 2000

Paper No. 19
DEB

03/07/01

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re DeRoyal Industries, Inc.

Serial No. 74/665,896

Mark S. Graham of Luedeka Neely & Graham, P.C. for DeRoyal Industries, Inc.

Howard B. Levine, Trademark Examining Attorney, Law Office 115 (Tomas Vlcek, Managing Attorney).

Before Quinn, Hohein and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

DeRoyal Industries, Inc. has filed an application to register the mark KALGINATE for "wound dressings comprising calcium alginate fibers" in International Class 5.¹

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark CALGONATE, which is registered for "topical calcium

¹ Ser. No. 74/665,896, filed on April 25, 1995, based upon an allegation of a *bona fide* intention to use the mark in commerce.

gluconate gel for the treatment of burns,"² also in International Class 5, as to be likely to cause confusion, to cause mistake or to deceive.

Applicant has appealed. Briefs have been filed and an oral hearing was held before this Board. We affirm the refusal to register.

Applicant argues, in urging that the refusal be reversed, that both marks are highly suggestive and that the only shared element, the common chemical suffix "-ate," cannot induce confusion because the dominant portions of the respective marks ("KALGIN-" vs. "CALGON-") are readily distinguishable as to sound, meaning and appearance.

The Examining Attorney maintains that the marks are similar, contending that applicant's mark could well be pronounced the same as registrant's mark. The Examining Attorney also contends that the goods are both "products in the nature of calcium-based wound dressings" and hence are closely related and travel in the same channels of trade to the same classes of purchasers.

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. See In re E. I. du Pont de Nemours & Co., 476 F.2d

² Reg. No. 2,027,492, issued on December 31, 1996.

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). The goods 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 In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Applicant's wound dressings consist of a calcium alginate fiber preparation. In this context, the term "wound" would include burns. Registrant's product is a topical gel for treating burns. Similarly, applicant concedes that its product may be used in treating burns. While it is not clear from the record whether or not registrant's gel might be used in conjunction with applicant's dressings, both are materials designed for wound care, and both will be used in the repair, protection, healing and remediation of injured skin surfaces. In sum, given the close relationship of the goods, and the fact that they appear to be sold to ordinary consumers, confusion is likely to occur if these items were to be sold under similar marks.

We thus turn our attention to a comparison of applicant's KALGINATE mark and registrant's CALGONATE mark. The Trademark Examining Attorney argues that these two marks are similar in sound and appearance:

Evaluated in their entireties, the marks KALGINATE and CALGONATE are plainly similar in appearance and sound and overall commercial impression. They both have the same number of letters, 9. They both have the same number of vowels, 4. They both have the same number of consonants, 5. They both contain the same number of syllables, 3. All vowels and consonants in the marks have the same placement, which creates a high degree of phonetic similarity. They both begin with the same hard "K" sound, followed by the "ALG" and concluding with the "-ATE" suffix. In fact,

every letter but two are identical in both marks. The only difference in the appearance of the marks is the K/C (which sound the same ...) and the O/I (which may very likely be pronounced the same...). This simple examination of the marks establishes, prima facia, that the marks are similar in sound and appearance.

By contrast, applicant argues that the "-ATE" suffix is generic and extremely diluted in this class of goods. Hence, applicant contends that the dominant portions of the respective marks are the first two syllables (KALGIN- and CALGON-), and that they are each highly suggestive of different types of goods -- KALGIN- of calcium alginate dressings and CALGON- of a calcium gluconate-based ointment.

We begin our analysis of these marks by noting that each appears to be a coined term. Even if these respective terms may have suggestive components, we do not assume that the average purchaser faced with applicant's mark will be able to decipher the origins of KALGIN- with calcium alginate, or when seeing or hearing registrant's mark, will readily recognize CALGON- as suggesting a calcium gluconated-based product.

Viewing these two marks in their entirety, we agree with the Trademark Examining Attorney that they are quite similar as to appearance and sound. As pointed out by the Trademark Examining Attorney, the two words are structured quite similarly. As to sound, we begin with the postulate

that there is no correct pronunciation of a trademark, and the difference in the middle letter of the respective marks, between an "O" and an "I," is a *de minimis* difference in sound. If called for orally, the chance for confusion is great.

Finally, although applicant has produced fifty-one registrations in the field of medical preparations having the "-ATE" suffix, this evidence demonstrates that there are no third-party trademarks for related products which resemble either of these marks to the extent that the involved marks are similar to each other.

In summary, we find these marks to be quite similar as to sound and appearance, and we find the goods to be closely related.

Decision: The refusal to register is affirmed.