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AD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Eveready Battery Company, Inc.

Serial No. 75/654,413

Thomas A. Polcyn of Howell & Haferkamp, L.C. for Eveready
Battery Company, Inc.

Kelly F. Boulton, Trademark Examining Attorney, Law Office
102 (Thomas Shaw, Managing Attorney).

Before Simms, Cissel and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On March 5, 1999, Eveready Battery Company, Inc.
(applicant) filed an intent-to-use application to register
the mark ENERGIZER ACCU RECHARGEABLE (typed drawing) for
goods subsequently identified as "batteries and battery
chargers, not for use with solar energy cells" in
International Class 9.¹ Applicant has disclaimed the word

¹ Serial No. 75/654,413.

RECHARGEABLE and claimed ownership of numerous registrations for marks containing the word ENERGIZER.

The Examining Attorney² ultimately refused to register the mark under Section 2(d) of the Trademark Act because the Examining Attorney believed that registration of the mark for the identified goods would likely cause confusion, or cause mistake or deception because of the prior registration of the mark ACCU-CHARGER for "battery chargers and electrical power supplies"³ and the mark ACCU-CHARGE CONTROL for "control mechanisms for battery chargers and electrical power sources."⁴ The same party owns both cited registrations.⁵

After the Examining Attorney made the refusal final, this appeal followed. Both applicant and the Examining Attorney filed briefs. Applicant did not request an oral argument.

The Examining Attorney's position is that the marks share the same common term ACCU and a variation of the term CHARGE, and the addition of the term ENERGIZER does not

² The current Examining Attorney was not the original Examining Attorney for this application.

³ Registration No. 1,228,318, issued February 22, 1983; Section 8 and 15 affidavits accepted or acknowledged.

⁴ Registration No. 1,673,329, issued January 28, 1992; Section 8 and 15 affidavits accepted or acknowledged. The registrant disclaimed the word "control."

⁵ Prestolite Electric Inc. See Reel and Frame Nos. 2158/0835 and 1459/0750.

eliminate the likelihood of confusion. The Examining Attorney also points out that the goods are, at least in part, identical because both the applicant's goods and the goods in Registration No. 1,228,318 are for battery chargers. The goods in Registration No. 1,673,329 include control mechanisms for battery chargers. The Examining Attorney concludes that the mark, when used on the identified goods, is confusingly similar to the marks ACCU-CHARGER and ACCU-CHARGE CONTROL for battery chargers and electrical power supplies and control mechanisms for battery chargers and electrical power sources.

In response to applicant's argument that the registered mark is not entitled to a broad scope of protection, the Examining Attorney submits that, even if this were the case, a registered mark is entitled to protection when the public may mistakenly attribute the goods to a common source.

Applicant argues that there is no likelihood of confusion. It makes the following points. ACCU is weak due to its widespread use in the industry. There are visual and phonetic differences between its mark and the registered marks. There have been no instances of actual confusion. Specifically, applicant provided printouts of several registrations that contained the term ACCU or ACU,

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and it relied heavily on a prior registration of the mark ACCUCHARGE for "rechargeable battery power handle for diagnostic medical instruments"⁶ to support its argument that the registered marks were not entitled to a broad scope of protection and that the Examining Attorney's refusal should be reversed.

We have considered the arguments and the evidence presented by the applicant and the Examining Attorney, and we agree with the position of the Examining Attorney. Therefore, we affirm the refusal to register the mark under Section 2(d) of the Trademark Act.

Determining whether there is a likelihood of confusion requires consideration of the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

⁶ Registration No. 813,531. While applicant and the Examining Attorney discuss this registration, no copy of the registration appears in the file.

First, the goods in this case involve goods that are identical to the extent that applicant's battery chargers not for use with solar energy cells would overlap with registrant's (Registration No. 1,228,318) battery chargers. In addition, the goods in Registration No. 1,673,329 include parts for battery chargers, i.e., control mechanisms for battery chargers. Thus, the goods are either identical (battery chargers) or are closely related (control mechanisms for battery chargers). Because there are no limitations on channels of trade, we must assume that the goods of the registrant and applicant would move through the same channels of trade to the same customers. Kangol Ltd. v. KangaROOS U.S.A. Inc., 23 USPQ2d 1945, 1946 (Fed. Cir. 1992); CBS Inc. v. Morrow, 218 USPQ 198, 199-200 (Fed. Cir. 1983).

The next question is whether the marks ENERGIZER ACCU RECHARGEABLEABLE, ACCU-CHARGER, and ACCU-CHARGE CONTROL are similar in sound, appearance, meaning, or commercial impression. The cited registrations are for the terms ACCU-CHARGER and ACCU-CHARGE CONTROL, both in typed form. Applicant's mark is ENERGIZER ACCU-RECHARGER. The marks contain the same term ACCU, which applicant claims to be in widespread usage in the industry in connection with batteries and battery products. While it is reasonably

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clear that the term ACCU is not a unique or arbitrary term in connection with batteries and battery products, applicant's evidence falls short of convincing us that it is a weak term that deserves only very narrow protection. Applicant has submitted numerous Internet printouts. See Applicant's Request for Reconsideration, Ex. B. However, the bulk of these printouts concern foreign companies, primarily German, Dutch, Swiss, French, and United Kingdom companies. Many pages and entries are not even in English. See, e.g., the seven pages apparently in Dutch from the www.accuhandel-utrecht.nl website with the ending ".nl" (Netherlands) and the two pages apparently in German from the www.accuzentrale.de and www.accu-profi.de websites with the ending ".de" (Federal Republic of Germany). The printout from the website for Penta-Accu is for a United Kingdom site that lists: "Price information Austria Belgium Switzerland Germany Denmark France UK Netherlands Sweden." No listing for prices in the United States is given. Thus, this evidence is not evidence of the strength or weakness of the mark in the United States, which is the country we are concerned with. Accord In re Societe Generale des Minerales de Vittel S.A., 824 F.2d 957, 3 USPQ2d 1450, 1452 (Fed. Cir. 1987) (Board "properly ignored an article cited by the Examining Attorney from the

Manchester Guardian Weekly saying, 'this British publication is not evidence of the perception of the term (Vittel) by people in the United States'").

While applicant also cited third-party registrations, these marks (ACCU-CHIP, ACCUCELL BY MULLER-GERMANY, ACCU-TEMP, ACCUFLOUR, ACUPORE, and ACUMETRICS) provide little support for its argument that applicant's mark is registrable in spite of the two cited registrations. These third-party registrations show that the term ACCU is not arbitrary or unique when it is applied to battery and battery chargers, but they do not demonstrate that an applicant can simply add the word ENERIGIZER to a highly similar variation of the registered mark ACCU-CHARGER and ACCU-CHARGE CONTROL and avoid a likelihood of confusion. Courts have long recognized that suggestive marks are often the best trademarks. "Every good trade-mark is suggestive; once seen or heard its association with the product is readily fixed in the mind. If there were no association of ideas between the two, it would require an independent effort of memory to recall the connection." United Lace & Braid Mfg. Co, v. Barthels Mfg. Co., 221 F. 456, 461 (D.N.Y 1915). This evidence simply reinforces the suggestiveness of the term.

Even if applicant had shown that the mark ACCU were in widespread use,⁷ this would not mean that the Examining Attorney's refusal should be reversed. It certainly is common for registrants to use similar root words, prefixes, and suffixes. The Court of Customs and Patent Appeals has rejected the argument that marks on the Supplemental Register can only be used to refuse registration for identical marks. In re The Clorox Co., 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978). Here, the registrations are on the Principal Register, and there is no reason to limit the scope of protection to nearly identical marks.

Also, while applicant points to the differences between registrant's terms "charger" and "charge" and its term "rechargeable," it would be difficult for most consumers to distinguish among these terms when they all have nearly the same meaning, sound, and appearance when they are applied to battery chargers that charge or recharge batteries.⁸

⁷ Applicant argues that the ACCU "is often used as an abbreviation for 'accumulator,' which means 'storage battery.'" Applicant's Brief, p. 6. We have no other evidence to this effect, and we note that applicant has not disclaimed the term. The third-party registrations support the suggestive nature of the term. See also Applicant's Response dated January 31, 2000, p. 8 ("'ACCU' is sometimes used as an abbreviation for the term 'accurate'").

⁸ The Examining Attorney requests that we take judicial notice of the definition of "charge" as "to energize (a storage battery),

Applicant's main argument is that the addition of its trademark ENERGIZER along with the words ACCU RECHARGEABLE avoids confusion. The addition of a trade name or house mark to a registered mark does not generally avoid confusion. Menendez v. Holt, 128 U.S. 514, 521 (1888). However, the addition of a house mark may avoid confusion when there are recognizable differences between the common elements of the marks. See Rockwood Chocolate Co. v. Hoffman Candy Co., 372 F.2d 552, 152 USPQ 599 (CCPA 1967) (ROCKWOOD BAG-O-GOLD for candy not confusingly similar to CUP-O-GOLD for candy). Here, the differences between ACCU RECHARGEABLE and ACCU-CHARGER and ACCU-CHARGE CONTROL are slight and the addition of applicant's ENERGIZER mark does not eliminate the likelihood of confusion. See In re C.F. Hathaway Co., 190 USPQ 343 (TTAB 1976) (HATHAWAY GOLF CLASSIC for knitted sports shirts confusingly similar to GOLF CLASSIC for men's hats).

In any case, where likelihood of confusion is the issue, we must view the marks in their entirety. When the word ENERGIZER is added to a term that is very similar to the registered marks for identical and closely related goods, there is a likelihood of confusion. Wella

which we do. Notre Dame du Lac v. J.C. Gourmet Food Imports, 213 USPQ 594, 596 (TTAB 1982), aff'd, 217 USPQ 505 (Fed. Cir. 1983).

Corp. v. California Concept Corp., 558 F.2d 1019, 1022, 194 USPQ 419, 422 (CCPA 1977)(CALIFORNIA CONCEPT and design held likely to be confused with CONCEPT for hair care products). Here, customers familiar with registrant's marks are likely to believe that, when the mark ENERGIZER is added to a very similar variation of the marks, it is identifying a previous anonymous source or a party that is now associated with the registrant.

To counter the argument that there is a likelihood of confusion, applicant argues, without any evidence, that it has been using its mark since April 1999 without any actual confusion. Applicant's Appeal Brief, p. 9. The absence of actual confusion does not equate to no likelihood of confusion. Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983); J & J Smack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991). Moreover, an ex parte proceeding provides no opportunity for the registrant to show instances of actual confusion and the limited period of alleged actual use in this case is not very long. Thus, even if the statement of applicant's attorney was supported by evidence of record, it would not eliminate the likelihood of confusion.

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Finally, applicant argues that the registration of the mark ACCUCHARGE for "rechargeable battery power handle for diagnostic medical instruments" supports the registration of its mark. We agree with the Examining Attorney that there are substantial differences between the goods in this third-party registration and registrant's goods. Even if they were not significantly different, third-party registrations may be used to demonstrate that a portion of a mark is suggestive or descriptive, but they cannot be used to justify the registration of another confusingly similar registration. In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1988).

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