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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Response USA, Inc.
v.
Recall Services, Inc.

Opposition No. 117,487 to application Serial No. 75/399,233
filed on December 3, 1997

Shruti D. Engstrom of Akin, Gump, Strauss, Hauer & Feld,
L.L.P. for Response USA, Inc.

John P. Iwanicki of Banner & Witcoff, Ltd. for Recall
Services, Inc.

Before Simms, Hohein and Hairston, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Recall Services, Inc. has filed an application to
register the mark "HEALTH WATCH" for "programmable devices
which schedule and alert a person to take and refill

medications and which records [sic] information of scheduled events."¹

Response USA, Inc. has opposed registration on the ground that "[o]pposer and its predecessors in interest and title have for many years provided personal emergency response systems, namely, transmitters and monitors which, when activated, cause emergency personnel to be dispatched"; that "[t]his system records, stores, and causes vital health and personal information, ... including an individual's medications and allergies, to be relayed to responding emergency personnel, as well as provides for emergency contacts to be notified if an emergency occurs"; that opposer, "through its predecessor in title and interest, began [continuously] using the mark 'HEALTH WATCH' ... in connection with a personal emergency response and life safety system comprising a remote transmitter, receiver, and the parts therefor" since "at least as early as August 31,1992"; that opposer is the owner of a valid and subsisting registration for the mark "HEALTH WATCH" for a "personal emergency response and life safety system comprising a remote transmitter,

¹ Ser. No. 75/399,233, filed on December 3, 1997, which alleges, based upon an amendment to allege use, a date of first use anywhere and in commerce of December 26, 1997. The word "WATCH" is disclaimed.

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receiver, and the parts therefor";² that opposer's "'HEALTH WATCH' transmitter can be worn as a pendant or attached to a belt," while applicant's "'HEALTH WATCH' device is worn on the wrist and resembles a wrist watch"; that the respective goods "are promoted and provided to an overlapping class of purchasers, both parties marketing their goods to the elderly, the disabled, and those with chronic illnesses"; and that applicant's mark is likely to cause confusion with opposer's mark in view of the relationship between the parties' goods and the fact that such marks are identical.

Applicant, in its answer, has admitted that its product "is worn on the wrist," but otherwise has denied the remaining salient allegations of the notice of opposition.

The record consists of the pleadings; the file of the opposed application; and, as opposer's case-in-chief, a notice of reliance on a certified copy of its pleaded registration, showing that the registration is subsisting and owned by opposer, and the testimony of opposer's chief executive officer, Jeffrey Queen. Applicant did not take testimony or introduce any other evidence in its behalf. Briefs have been filed, but an oral hearing was not requested.

² Reg. No. 1,914,619, issued on August 29, 1995, which sets forth a date of first use anywhere and in commerce of August 31, 1992; combined affidavit §§8 and 15.

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Priority of use is not in issue in this proceeding inasmuch as opposer has established that, as noted above, its pleaded registration is subsisting and is owned by opposer. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). The testimony of its witness, Mr. Queen, indicates that in any event opposer has continuously used its "HEALTH WATCH" mark in connection with its personal emergency response systems since approximately 1990. Such date obviously is earlier than the December 3, 1997 filing date of the involved application, which is the earliest date for priority purposes upon which applicant, in the absence of having taken testimony or offering any other proof of an actual date of first use of its "HEALTH WATCH" mark for its identified goods, can rely in this proceeding. See, e.g., Lone Star Mfg. Co., Inc. v. Bill Beasley, Inc., 498 F.2d 906, 182 USPQ 368, 369 (CCPA 1974); Columbia Steel Tank Co. v. Union Tank & Supply Co., 277 F.2d 192, 125 USPQ 406, 407 (CCPA 1960); Zirco Corp. v. American Tel. & Tel. Co., 21 USPQ2d 1542, 1544 (TTAB 1991); and Miss Universe, Inc. v. Drost, 189 USPQ 212, 213 (TTAB 1975). Thus, the sole issue to be determined in this case is whether contemporaneous use by the parties of the identical mark "HEALTH WATCH" in connection with their respective goods is likely to cause confusion as to the source or sponsorship thereof.

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Upon consideration of the pertinent factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), for determining whether a likelihood of confusion exists, we concur with opposer that, contrary to the arguments set forth by applicant in its brief, opposer has met its burden of demonstrating that confusion is likely to occur. Specifically, applicant notes by way of background to its contentions that it successfully overcame the citation of opposer's pleaded registration as a bar to registration of its mark in that:

Applicant responded to the refusal to register based on a likelihood of confusion by submitting the Opposer's own advertising literature and arguing dissimilarity of goods, channels of trade and consumer groups. Applicant argued that the opposer's system is used to call for help by alerting a response center when a user is in need of assistance, i.e. the so-called "I've fallen and I can't get up" situation. The user and the response center can communicate via the transmitter and receiver and the response center can send help, such as an ambulance, if necessary. Applicant also submitted its own advertising materials and explained ... that the mark was used with a programmable messaging watch used by individuals who desire scheduled reminders as to when medication is due to be taken and at what dose or when prescription refills or medical tests are needed.

Opposer, in addition to the certified copy of its pleaded registration for the mark "HEALTH WATCH" for a "personal emergency response and life safety system comprising

a remote transmitter, receiver, and the parts therefor," relies in its brief solely upon the advertising, by both a third-party with respect to applicant's goods and by opposer for its goods, which applicant made of record in connection with the prosecution of the involved application and the statements made by applicant in response to the refusal to register.³ Opposer asserts that such advertising and statements by applicant demonstrate, inter alia, that opposer's goods are "directed towards the elderly, recuperating medical patients, people with long-term illnesses, [and] people who are physically challenged," and that its goods are "presumed to travel through all trade channels appropriate for such goods, namely hospitals and home

³ As the parties correctly realize, Trademark Rule 2.122(b)(1) provides that "[t]he file ... of the application against which a notice of opposition is filed ... forms part of the record of the proceeding without any action by the parties and reference may be made to the file for any relevant and competent purpose." However, as set forth in TBMP §704, "statements made by counsel, and exhibits filed, in an application ... do not constitute admissible evidence in the applicant's ... behalf in an inter partes proceeding; the statements must be established by competent evidence, and the exhibits must be properly identified and introduced into evidence, at trial." Nevertheless, such section further provides that (*emphasis in original*):

Although the allegations made and documents and things filed in an application ... are not evidence, in a Board inter partes proceeding, on *behalf* of the applicant ... (unless they are properly proved at trial), they may be used as evidence *against* the applicant ..., that is, as admissions against interest and the like.

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health care agencies, in addition to [being sold] directly to the end user."

Such evidence, opposer further contends, establishes that applicant's goods "are presumed to travel through all trade channels appropriate for the goods, e.g. hospitals, home health care agencies and medical supply companies"; that applicant's "product essentially acts a[s] a medical reminder system that alerts its user that it is time to take [a] certain dose of medication"; and that "the product alerts its users to perform home health tests and reminds the user if the prescription needs to be refilled." The application file history also shows, according to opposer, that "[t]he typical user" of applicant's product "is a medical patient on a strict medical schedule." Thus, because the respective marks are identical and the parties' goods "are used in the patient care industry, [and are] sold through the same or similar [trade] channels," opposer maintains that confusion is likely to take place. In particular, opposer points out that the advertisement promoting applicant's goods additionally states, as evidence that the same party would market both applicant's goods and those of the kind sold by opposer, that: "Don't forget to ask the Pioneer representative about the personal emergency response systems and medical monitoring services provided by Pioneer Medical Systems."

Applicant asserts in its brief, however, that opposer has failed to sustain its burden of proof that confusion is likely, arguing that (**emphasis in original**):

Despite having every opportunity to obtain discovery from Applicant and to provide its own testimony, Opposer's trial brief is devoid of any factual evidence of record **not already considered by the Examining Attorney** to support its position of a likelihood of confusion. In fact, Opposer requested no discovery from Applicant and only took the self-serving testimony of its President, Jeffrey Queen. Opposer has not used any portion of that testimony in support of its Trial Brief.

Opposer's position is simply that [the] Examining Attorney ... got it wrong. However, the Examining Attorney engaged in the analysis of *DuPont* factors using the very same evidence now before the Board. The Examining Attorney found no likelihood of confusion based on a combination of the dissimilarity of goods, channels of trade and consumer groups based on the very same advertising literature now before the Board. Opposer does focus on the following statement in Applicant's advertising literature: "Don't forget to ask the Pioneer representative about the personal emergency response systems and medical monitoring services provided by Pioneer Medical Systems." Opposer concludes that this statement is evidence of overlapping channels of trade. However, Opposer has taken no discovery to identify whether the personal emergency response systems and medical monitoring services referenced in the advertisement have any relation to the transmitter and receiver product identified in Opposer's registration. Opposer has offered no factual evidence of its own. There is absolutely no evidence of record that would support a conclusion that

Opposer's transmitter and receiver product has any similarity to the personal emergency response systems and medical monitoring services identified in the advertisement. Without such evidence, Opposer's argument to convince the Board of overlapping channels of trade must fail.

Applicant's watch is dissimilar from Registrant's receiver and transmitter. The channels of trade and consumer groups are sufficiently dissimilar. The Examining Attorney found no likelihood of confusion. Opposer has not sought through discovery and in fact has not provided any factual evidence of record to support a contrary finding. This opposition should be dismissed.

It is well established, however, that the Board is not bound by an Examining Attorney's prior determination as to the issue of likelihood of confusion. See, e.g., *Jean Patou, Inc. v. Aristocrat Products Corp.*, 202 USPQ 130, 133 (TTAB 1979); *Formica Corp. v. Saturn Plastics & Engineering Co.*, 185 USPQ 252, 253 (TTAB 1975); *John B. Stetson Co. v. Globe Rubber Works, Inc.*, 180 USPQ 655, 655 (TTAB 1973); *Anderson Clayton & Co. v. Losurdo Foods, Inc.*, 175 USPQ 363, 365 (TTAB 1972); and 5 J. McCarthy, McCarthy on Trademarks & Unfair Competition §32:103 (4th ed. 2002). Moreover, while we find that the evidence relied upon by opposer in its brief is sufficient to sustain its burden of proof in this opposition, we note that the testimony of its witness, as discussed below, serves to bolster opposer's case and eliminates any possible doubt as to there being a likelihood of confusion.

In particular, Mr. Queen, who formerly was president of a company known as Health Watch,⁴ which opposer acquired in 1998 and which is now its primary business, testified that through such predecessor in interest, opposer has continuously used the mark "HEALTH WATCH" in connection with its personal emergency response system and associated monitoring service, which operate as follows:

Q. How does the Health Watch product work?

A. The Health Watch product consists of a personal transmitter which is worn like a watch or a pendant around the neck, a help counsel [sic, console] and a response center here in Boca Raton. When the personal transmitter or help counsel [sic, console] are activated, it sends a signal to the response center, opens up a two-way voice channel, and at the response center we have all the information that the provider has given us on the subscriber. We speak to them through the unit to ascertain that the person's okay.

Q. When would someone activate the personal Health Watch device?

A. If they had an event, an emergency event, if they were at risk or just wanted to have somebody to talk to.

Q. What do you do when you receive a call from someone who's having an emergency event?

⁴ The certified copy of opposer's pleaded registration, we observe, shows that such registration issued in the name of Health Watch, Inc., a Florida corporation.

A. Well, all calls are immediately handled as if they were emergency events. We then ascertain the severity of the emergency. Once it has been verified that it is a true emergency, we will send our responders, these are family members, neighbors or friends that have keys and EMS to transport.

....

Q. What are some examples of emergency situations?

A. Heart attacks, falls. We deal with life-threatening situations on a daily basis.

(Queen dep. at 11-12.)⁵

According to Mr. Queen, opposer sells its personal emergency response products directly to end user subscribers,

⁵ The product literature for opposer's goods which applicant submitted in connection with its involved application is to the same effect, stating in pertinent part that (**bold in original**):

The Health Watch Personal Response System consists of three parts:

First, a slim profile **Personal Transmitter** that you wear around the neck as a pendant or at the waist on a belt clip. While wearing the Personal Transmitter you can walk around your home and yard. And, of course, it is WATERPROOF so that you may wear it when you bathe or shower.

The second part is the **Help Console** which is placed on a table or hung on the wall and is connected to a phone line.

The third is our **Health Watch Response Center** which monitors your system 24 hours a day, 365 days a year. Our operators are trained to respond to any emergency, to offer reassurance and to dispatch help immediately if warranted.

of which it has 15,000 such customers as of the February 15, 2001 date of his deposition. Opposer also "distributes its products through hospitals and home care companies throughout the U.S. who in turn distribute it to end user subscribers." (Id. at 10.) In all, opposer "currently has 47,000 subscribers with ... recurring revenue of approximately \$975,000 a month from those subscribers. The company has an enterprise value based on those two figures [of] between thirty and fifty million." (Id. at 13.) Opposer's "HEALTH WATCH" products are "used by the elderly, recuperating patients, people with long-term illnesses, [and the] physically challenged," among others. (Id. at 10.) However, the typical "end user is primarily an elderly individual who is at medical risk and would not be savvy on this type of product." (Id. at 14.)

As to the actual manner of use of the transmitters for opposer's "HEALTH WATCH" personal emergency response systems, Mr. Queen presented the following testimony:

Q. And you mentioned before that the end user has a Health Watch transmitter?

A. Correct.

Q. And that can be worn on the body?

A. Correct.

Q. Where can it be worn?

A. The majority of our subscribers today wear it on their wrist.

Q. Okay. Does it strap on like a watch?

A. Correct.

(Id. at 12.) Mr. Queen also noted that opposer has discontinued use of an earlier model of the transmitter for its "HEALTH WATCH" goods, stating that "[w]e used to make a larger transmitter[,] which we have since obsoleted to a new smaller one." (Id. at 15.)

In addition, Mr. Queen testified as follows concerning opposer's having spent approximately half a million dollars on development of a new version of its goods which, like applicant's product, will remind the end users thereof to take their medication:

Q. Okay. Are there any plans to expand the Health Watch product line?

A. Yes, there are.

Q. To what other products and services?

A. We currently have prototypes that include medication reminders.

Q. When you say medication reminder, what do you mean?

A. The next generation Health Watch product using the response center will remind the subscriber of when to take their medication.

Q. How will it do that?

A. Through voice or tones to remind them to do so.

Q. And is that product currently being developed?

A. Yes, it is.

Q. How far along has development gone?

A. The product itself is completed. It is currently undergoing circuit level testing.

Q. When do you expect it to be sold on the market?

A. Six to twelve months.

(Id. at 15-16.)

Opposer advertises and promotes its "HEALTH WATCH" goods, according to Mr. Queen, "[p]rimarily through literature and trade shows to the health care industry," although it also directs its advertising, including a website, "[o]n a lesser extent to end users." (Id. at 15-16.) In addition, the health care providers that sell its goods advertise and promote them to end user subscribers using "[b]asically every marketing means," including newspaper, radio and billboard ads. (Id. at 19.) Opposer, through its predecessor, has advertised and promoted its "HEALTH WATCH" goods since 1990, expending approximately \$200,000 thereon each year.

As to use of the mark "HEALTH WATCH" by others, Mr. Queen stated that the only such use by a competitor of opposer of which he is aware is applicant's use thereof in connection with the product which he characterized as applicant's "medication reminder watch." (Id. at 21.) In particular, he indicated that opposer's "dealings with the other Health Watch [product] are through their distribution by Pioneer Medical[,], which is another personal response system, and that's how we came to find out about them." (Id. at 22.)⁶ Mr. Queen, whose job duties include monitoring competitive activity, noted that not only does opposer target the same kinds of customers which applicant's goods would be targeted to, but that contemporaneous use by the parties of the "HEALTH WATCH" mark in connection with their respective products has caused actual confusion, as detailed below, in the home care trade:

Q. Do you know of any actual confusion between Response USA's Health Watch mark and Recall Services' Health Watch?

A. Yes, at the last trade show that we attended that they attended, they were represented at Pioneer Medical's booth, and it caused a great deal of confusion.

Q. Can you explain how?

⁶ The only other business, Mr. Queen testified, of which he is aware that uses the "HEALTH WATCH" mark is "NBC Evening News" (Queen dep. at 24), but there is no indication as to the particular goods and/or services with which such mark is used and there is no indication that opposer regards such business as a competitor.

A. Social workers, hospital administrators and other health care professionals were surprised to find Health Watch being sold by Pioneer Medical. We then told them that it wasn't us.

Q. So social workers and other health care providers asked you how come the Health Watch -- your Health Watch product [--] is being sold by Pioneer Medical?

A. Yes.

Q. So they believed that the Health Watch product being sold by Pioneer Medical was in fact the same Health Watch product being sold by Response USA.

A. Yes, or produced by Response USA.

(Id. at 25-26.)

It is well settled that the issue of likelihood of confusion must be determined in light of the goods set forth in the opposed application and pleaded registration and, in the absence of any specific limitations therein, on the basis of all normal and usual channels of trade and methods of distribution for such goods. See, e.g., CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Here, the evidence of record plainly establishes that applicant's goods are so closely related to those marketed by opposer that their

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contemporaneous sale and use under the identical mark "HEALTH WATCH" would be likely to cause confusion.

Specifically, applicant's programmable devices for scheduling and alerting a person to take and refill medications and for recording information as to scheduled events, and the transmitters for opposer's personal emergency response and life safety systems, are both worn on a person's wrist like a watch and are designed to provide an alert as to personal medical needs or emergency situations. Both applicant's goods and opposer's products are for use in assisting a person's ability to continue to live independently and to take care of himself or herself. In fact, like applicant's medication reminder "watches," the next generation of opposer's personal emergency response and life safety systems will include the identical function of providing information on when a person should take particular medicines. Both applicant's products and those of opposer are directed to the same classes of purchasers and users, including the elderly, recuperating medical patients, persons with long-term illnesses, and those who are physically challenged, and the respective goods travel through some of the same distribution and trade channels, such as hospitals and home health care and medical supply firms. Applicant's goods, in fact, are also sold by a dealer which, like opposer, markets personal

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emergency response systems and exhibits such systems, along with applicant's "HEALTH WATCH" goods, at the same trade shows where opposer displays its "HEALTH WATCH" personal emergency response and life safety systems. The latter, in fact, has even caused actual confusion as to the origin or affiliation of applicant's and opposer's goods among such relatively sophisticated and careful purchasers as social workers, hospital administrators and other health care professionals. Clearly, if those customers were confused by the identity of the marks at issue and the closely related nature of the respective goods, then the typical end user of such goods, which in the case of opposer's products its witness characterized as being "primarily an elderly individual who is at medical risk and would not be savvy on this type of product" (id. at 14), would in view of the lack of discrimination be likely to be confused as to the source or sponsorship of the parties' goods.

We accordingly conclude that customers and users familiar with opposer's "HEALTH WATCH" mark for its personal emergency response and life safety systems comprising a remote transmitter, receiver and the parts therefor would be likely to believe, upon encountering applicant's identical "HEALTH WATCH" mark for its programmable devices which schedule and alert a person to take and refill medications and which record

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information of scheduled events, that such closely related goods emanate from, or are sponsored by or affiliated with, the same source.

Decision: The opposition is sustained and registration to applicant is refused.