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Paper No. 11
BAC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re L. Perrigo Company

Serial No. 75/588,268

H. W. Reick of Price, Heneveld, Cooper, DeWitt & Litton for
L. Perrigo Company.

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115 (Tomas V. Vlcek, Managing Attorney).

Before Seeherman, Chapman and Rogers, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

L. Perrigo Company has filed an application to
register on the Principal Register the mark shown below



for "dietary supplements." The application was filed on
November 13, 1998, based on applicant's claimed date of
first use and first use in commerce of July 6, 1998.

Registration has been 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 identified goods, so resembles the registered mark shown below



for "nutritional supplement"¹ as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed. Briefs have been filed, but an oral hearing was not requested.

We affirm the refusal to register. In reaching this conclusion, we have followed the guidance of the Court in *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 and/or services. See *Federated Food, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); and *In*

¹ Registration No. 2,033,890, issued January 28, 1997 on the Principal Register to Eye Communications, Inc.

re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209 (TTAB 1999).

Applicant's goods, "dietary supplements," and the cited registrant's goods, "nutritional supplement," are legally identical. Also, as identified, these goods would certainly travel through the same channels of trade to the same class of purchasers. See *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994). Applicant did not argue to the contrary.

Regarding the marks, we begin with the premise that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

It is well settled that marks must be considered in their entireties. However, our primary reviewing court has held that in articulating reasons for reaching a conclusion on the question of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature or portion of a mark. That is, one feature of a mark may have more significance than another. See *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793,

1798 (Fed. Cir. 1987); and *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

Moreover, under actual market conditions, consumers generally do not have the luxury of making side-by-side comparisons. The proper test in determining likelihood of confusion is not a side-by-side comparison of the marks, but rather must be based on the similarity of the general overall commercial impressions engendered by the involved marks. See *Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255 (TTAB 1980).

In this case, we acknowledge that there are some differences in the appearances of the marks. However, the dominant source-indicating feature of each mark is the term FORTIFY in applicant's mark and the term FORTIFEYE in registrant's mark. The black background rectangle and the stylized lettering in registrant's mark, and the food pyramid design (which is highly suggestive for the identified goods), the stylized lettering and the four black background lines in applicant's mark do not distinguish the marks. That is, the non-word portions of the marks do not offer sufficient differences such that the marks as a whole would create separate and different commercial impressions; and the stylistic differences are thus not sufficient to overcome the likelihood of

confusion. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In regard to sound, the marks are the same. Particularly when recommended by word of mouth (by health professionals or friends) or advertised on the radio, there is no distinction in sound.

Further, the terms "fortify" and "fortifeye" carry the same general connotation. Applicant contends that the term "fortify" is generic. However, the verb "fortify" has not been shown to be generic for the involved goods. The term "fortify" in applicant's mark is certainly highly suggestive, as evidenced by applicant's specimens of record which include the statement: "Vitamin Fortification For Every Body," and is likely to be taken as indicating the goods are fortified with vitamins and minerals.

Registrant's mark may connote a specialized reference to fortification especially helpful for the eyes. Nonetheless, the terms carry a similar connotation for both applicant's mark and the cited mark, specifically that the goods are "fortified" and/or that consumers can fortify themselves by taking the dietary or nutritional supplement.

Overall we find the marks are similar.

Although the common element fortify/fortifeye is highly suggestive of the goods, we have no evidence of

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third-party use of this term. Thus, we cannot find that consumers would distinguish between these marks by design element or misspelling or the like.

Finally, any doubt on the question of likelihood of confusion must be resolved against the newcomer as the newcomer has the opportunity to avoid confusion, and is obligated to do so. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, at 1440 (TTAB 1993).

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