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

Paper No. 10
HRW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Modern Media

Serial No. 75/872,263

Ellsworth R. Roston of Fulwider Patton Lee & Utecht, LLP
for Modern Media.

Curtis W. French, Trademark Examining Attorney, Law Office
115 (Tomas Vlcek, Managing Attorney).

Before Seeherman, Hairston and Wendel, Administrative
Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

Modern Media has filed an application to register the
mark FAT SWEEPER for "vitamins, herbal supplements,
nutritional supplements and dietary supplements."¹ A
disclaimer has been made of the word "FAT."

Registration has been finally refused under Section
2(d) of the Trademark Act on the ground of likelihood of

¹ Serial No. 75/872,263, filed December 15, 1999, based on an
allegation of a bona fide intention to use the mark in commerce.

confusion with the mark SUPER SWEEPER which is registered for a "nutritional supplement."²

The refusal has been appealed and applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

We make our determination of likelihood of confusion on the basis of those of the *du Pont*³ factors that are relevant in view of the evidence of record. Two key considerations in any analysis are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods or services with which the marks are being used, or are intended to be used. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999).

Looking first to the respective goods, we note that both registrant's and applicant's goods include nutritional supplements. The remainder of applicant's goods are closely related supplements for dietary or nutritional purposes. Accordingly, we find the goods in part identical and otherwise closely related for purposes of our analysis. Applicant has made no argument to the contrary.

² Registration No. 2,150,283, issued April 14, 1998. A disclaimer has been made of the word "SUPER."

Furthermore, in the absence of any limitations in the identification of the goods, we assume that the goods of both registrant and applicant would travel in the same channels of trade and be available to the same purchasers. See *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Turning to the respective marks, we are guided by the general principle that the greater the similarity of the goods, the lesser the degree of similarity of the marks which is necessary to support a conclusion that there will be a likelihood of confusion. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). While the marks must be considered in their entireties, there is nothing improper, under appropriate circumstances, in giving more or less weight to a particular portion of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Although descriptive or disclaimed matter cannot be ignored in comparing the marks, it is also a fact that consumers are more likely to rely on the non-descriptive portion of a mark as an indication of source. See *Hilson Research Inc.*

³ *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

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v. Society for Human Resource Management, 27 USPQ2d 1423
(TTAB 1993).

We agree with the Examining Attorney that the dominant feature of both applicant's and registrant's marks is the term SWEEPER. The additional term in each mark is highly descriptive or laudatory and has been acknowledged as such, by disclaimer thereof. The source-indicating function of these descriptive or laudatory terms is by their very nature less than the term SWEEPER, which on the record before us appears to be arbitrary for the goods with which it is being used, or is intended to be used.

Although applicant argues that registrant is wrongfully being given a "monopoly" on the term SWEEPER, applicant has failed to introduce any evidence which might show that SWEEPER has any suggestive significance when used in connection with goods of this type or that the term has been used by others in the field for similar goods. By contrast, the Examining Attorney has made search results of record showing that registrant's mark is the only mark including the term SWEEPER presently registered in Class 5. Thus, on the record before us, we must deem the registered mark to be strong and entitled to a broad scope of protection. See Triumph Machinery Co. v. Kentmaster Manufacturing Co., 1 USPQ2d 1826 (TTAB 1987). That

registrant has only used its mark since 1996 and obtained its registration in 1998 is irrelevant to the issue of the scope of protection to which registrant is entitled under this registration.

While, as strongly argued by applicant, the additional words FAT and SUPER obviously lead to differences in appearance and sound in the marks as a whole and even lend somewhat different connotations to the marks, the overall commercial impressions created by the marks are very similar. The emphasis must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1976). These are both SWEEPER nutritional supplements. If attention is drawn to the differences in the additional term (FAT versus SUPER), we agree with the Examining Attorney that purchasers might well believe that registrant's SUPER SWEEPER supplement is simply a higher potency or better quality version of applicant's FAT SWEEPER supplement.

While applicant also argues that, because the term FAT or SUPER is the first word in each mark, it should be given more emphasis or significance, we do not find this to be true when the first terms are so highly descriptive/laudatory. Any significance of these terms is

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more as to the nature of the goods, rather than as to the source thereof.

Finally, although applicant has undergone great efforts to distinguish the cases cited by the Examining Attorney, we would simply point out that likelihood of confusion is determined on a case-specific basis, using the *duPont* factors as our guide. See *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2 1557 (Fed. Cir. 2001). We must focus our analysis on the respective marks and goods before us.

Applicant and the Examining Attorney have raised no other factors for our consideration. Accordingly, on the basis that the involved goods are either identical or closely related and that the respective marks create similar overall commercial impressions, we find confusion likely.

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

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