

5/29/02

THIS DECISION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB

Paper No. 9  
JQ

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Moor Systems International, Inc.

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Serial No. 75/933,706

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Denise C. Mazour of Thomte, Mazour & Niebrgall for  
applicant.

Warren L. Olandria, Trademark Examining Attorney, Law  
Office 107 (Thomas Lamone, Managing Attorney).

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Before Seeherman, Hanak and Quinn, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Moor Systems  
International, Inc. to register the mark NATURE'S CODE  
SKIN. HEALTH. LIFE. for "facial maske, body wrap, body  
lotion, skin creams, skin soap, skin toner, herbal bath,  
shampoo, and toothpaste" and "body essential oils" (in

International Class 3), and "herbal supplements" (in International Class 5).<sup>1</sup>

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to "herbal supplements," so resembles the previously registered mark NATURE'S CODE for "vitamins and nutritional supplements" as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney filed briefs. An oral hearing was not requested.

At the outset, it should be noted that, although no indication was ever made that the Section 2(d) refusal pertained to International Class 5 only, it is clear from the Office actions and the briefs that the likelihood of confusion refusal is so limited.<sup>2</sup> The prosecution history

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<sup>1</sup> Application Serial No. 75/933,706, filed March 2, 2000. Applicant has alleged an intention to use the mark in commerce in connection with "body essential oils" in International Class 3 and "herbal supplements" in International Class 5. With respect to the other goods in International Class 3, applicant has alleged a date of first use anywhere and first use in commerce of November 5, 1999.

<sup>2</sup> Section 1113.05 of the *Trademark Manual of Examining Procedure* provides that "[a] refusal to register or a requirement may be made with regard to less than the total number of classes in the application" and that "[i]f appropriate, the Examining Attorney should clearly indicate the class to which the refusal or requirement pertains and that the refusal or requirement does not pertain to the remaining classes."

shows that the Examining Attorney has referred exclusively to applicant's goods in International Class 5, and applicant filed only one appeal fee. Thus, the only likelihood of confusion issue for us to consider pertains to registrability in International Class 5.

Applicant argues that the involved marks are dissimilar in appearance, sound and meaning due to the additional wording in applicant's mark. Applicant also contends that the goods are different, but states that "[t]he fact that applicant's and registrant's goods may be related does not automatically lead one to the conclusion that confusion is likely." Further, applicant asserts that purchasers are likely to take more care when buying health care products.

The Examining Attorney maintains that the marks are similar and that the additional wording in applicant's mark does not sufficiently distinguish it from registrant's mark. With respect to the goods, the Examining Attorney asserts that they are directly competitive, pointing to his submission of four NEXIS articles indicating that vitamins and herbal supplements are manufactured and sold by the same companies.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant

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to the factors bearing on the likelihood of confusion issue. 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 or dissimilarities between the marks and the similarities or dissimilarities between the goods.

Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to compare the goods, we start with the premise that they need not be identical or even competitive to support a holding of likelihood of confusion. It is sufficient that the goods are related or that conditions surrounding their marketing are such that they are encountered by the same persons who, because of the relatedness of the goods and the similarities between the marks, would believe mistakenly that the goods originate from or are in some way associated with the same producer. In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978).

In the present case, we find that vitamins, nutritional supplements and herbal supplements are related products. They are health care products which are used for the same purpose, that is, to improve the condition of the human body. The products are likely to be sold in the same

trade channels to the same classes of purchasers. Further, the NEXIS evidence shows public exposure to articles about the same entities' manufacturing and selling these types of products. Other than a bald statement that the goods are different, applicant has failed to show any meaningful distinction among vitamins, nutritional supplements and herbal supplements.

With respect to considering the marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but whether they are sufficiently similar in their overall commercial impression so that confusion as to the source of the goods marketed under the respective marks is likely to result. "[T]here is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant's mark NATURE'S CODE SKIN. HEALTH. LIFE. is dominated by the term NATURE'S CODE which is identical to the entirety of registrant's mark NATURE'S CODE. The term NATURE'S CODE is the first term in applicant's mark and it is followed by suggestive words which, in our view, do not serve to sufficiently distinguish the marks. The product

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would be called for by the term NATURE'S CODE. Further, the dominance of the NATURE'S CODE portion of applicant's mark is clearly shown by the way applicant uses the mark on packaging. The specimens show use of NATURE'S CODE in capital letters on a separate line above the words "skin. health. life." which appear in small letters. See: Phillips Petroleum Co. v. C.J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971); and INB National Bank v. Metrohost Inc., 22 USPQ2d 1585, 1588 (TTAB 1992) [when an applicant seeks a typed registration of its word mark, then the Board must consider all reasonable manners in which those words could be depicted, and in particular, the Board should give special consideration to the manners in which the applicant has actually depicted its mark].

Although we have given more weight to the NATURE'S CODE portion of applicant's mark, we have considered the marks in their entirety. The marks are similar in sound and appearance in that both begin with the term NATURE'S CODE. As to meaning, the marks convey the same thought, that is, that the product contains ingredients from nature which hold the code to unlock the feeling of well being. In sum, the marks, when considered in their entirety, engender similar overall commercial impressions.

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Lastly, we are not persuaded by applicant's argument that purchasers of health care products are discriminating. Although we find it reasonable to assume that purchasers may exercise some care when it comes to deciding what types of supplements they should ingest, these consumers are still likely to be confused given the similarities between the marks herein. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Decision: The Section 2(d) refusal is affirmed as to International Class 5. The application will be forwarded in due course to the Examining Attorney for appropriate action with respect to International Class 3.