

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Mailed: November 13, 2002

Paper No. 10
ejs

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *The Butcher Company, Inc.*

Serial No. 76/127,919

Renee J. Rymarz for The Butcher Company, Inc.

Michael E. Hall, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Seeherman, Hanak and Rogers, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

The Butcher Company, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register GREAT WHITE as a trademark for a "mold and mildew removing and tile and grout cleaning compound."¹ Registration has

¹ Application Serial No. 76/127,919, filed September 15, 2000, asserting first use and first use in commerce on December 7, 1999.

Ser No. 76/127,919

been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles two marks, registered by different entities, that, when used on applicant's goods, it is likely to cause confusion, mistake or to deceive. The cited registrations are for GREAT WHITE for "marine cleaning preparations, namely, wash and wax, bug and tar removers, and streak removers"² and for GREAT WHITE FINISH MOP and design, as shown below, with the words FINISH MOP disclaimed, for "mops for cleaning or applying finish or other products to walls or floors."³



The appeal has been fully briefed, but an oral hearing was not requested.

We turn first to a procedural matter. With its reply brief applicant has submitted as exhibits material taken from the website "www.dictionary.com" which purports to show that there is no listing for "great white" per se, but

² Registration No. 2,111,362, issued November 4, 1997.

³ Registration No. 2,086,084, issued August 5, 1997.

which does give definitions for "great white heron," "great white shark" and "Great White Way" which have been taken from a source identified as "WordNet 1.6", copyright 1997 Princeton University. Although the Board will take judicial notice of dictionary definitions, see **University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), we cannot ascertain whether this "WordNet 1.6" Internet source would qualify as a dictionary. The Board will not take judicial notice of definitions found only in on-line dictionaries and not available in a printed format; however, it will consider them if made of record during the prosecution of the application. **In re Total Quality Group Inc.**, 51 USPQ2d 1474 (TTAB 1999); See also, **In re Styleclick.com Inc.**, 57 USPQ2d 1445 (TTAB 2000). Therefore, we decline to consider the submissions in Exhibit A.

Exhibit B consists of excerpts taken from various websites purporting to show third-party uses of "great white" in trademarks and also in non-trademark formats. This evidence is manifestly untimely and has not been considered. See Trademark Rule 2.142(d). Applicant asserts in its reply brief that because the Examining Attorney has argued in his brief that the meaning of "Great

White" is that of a shark, applicant should be able to show that the term has other meanings. However, the connotation of the marks has been at issue throughout examination, with applicant itself contending that the commercial impression of the cited marks is that of the shark, and the Examining Attorney disputing applicant's assertion that "great white" would indicate the result of using the cleaning product. In any event, if applicant believed that it was entitled to submit evidence as to other meanings or usages of "great white," the proper procedure was to have requested that the application be remanded so that the Examining Attorney could consider such evidence.⁴ Clearly it was not proper for applicant to simply submit the evidence at a point that the Examining Attorney could not respond to it.

The substantive issue before us is whether applicant's mark, used on its identified goods, is likely to cause confusion with one or both of the cited registered marks. Our determination of this issue is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). We consider

⁴ We do not suggest by this statement that such a request for remand would have been granted. Certainly the statements made by applicant in its reply brief would not have constituted good cause.

these factors with respect to each of the cited registrations, keeping in mind that in any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the question of likelihood of confusion with respect to Registration No. 2,111,362, we note that the marks are identical, both being GREAT WHITE shown in typed form. Thus, the marks are legally identical in appearance and pronunciation. Applicant asserts that the marks differ in connotation because the image applicant wishes to suggest by "great white" is of something that is "sparkling clean," while the registered mark, because it is used for marine products, suggests a great white shark.

We do not agree with applicant that consumers, upon seeing GREAT WHITE for a "mold and mildew removing and tile and grout cleaning compound," would view the mark as meaning only that the product results in sparkling clean tile and grout. Whether or not applicant's mark may describe or suggest a product which produces a sparkling clean result, the term GREAT WHITE, particularly for any of the millions of people who saw the popular movie "Jaws,"

also has the connotation of a shark.⁵ This "double entendre" connotation of GREAT WHITE for applicant's goods is the same connotation that the mark GREAT WHITE is likely to have for the registrant's goods; after all, the registrant's goods are for cleaning preparations, and GREAT WHITE can as easily suggest that the use of registrant's products will produce a sparkling clean result as the mark can suggest applicant's products will produce that result. Thus, we find that the marks create the same commercial impression.

The goods, too, are related. Although the cited registration is specifically limited to "marine cleaning preparations," applicant's goods can also be used to clean boats. Applicant argues that the registrant's goods "are intended for outside surface use on a boat," and that applicant's tile and grout cleaner would not be used on the outside surface of a boat because tile and grout is not used on the outside of a boat. Reply brief, p. 4. The problem with this argument is that the registrant's goods, as identified, (and particularly its "wash and wax" and

⁵ As the Examining Attorney points out in his brief, were it not for this double entendre the Examining Attorney would have refused registration on the ground of mere descriptiveness, based on applicant's admission that "the goal in using [applicant's] products is to whiten or make a surface appear cleaner" (response filed August 6, 2001) and the laudatory nature of the word GREAT.

Ser No. 76/127,919

"streak removers") are not limited to use on the outside surface of a boat, but could be used to clean interior areas where applicant's mildew removing and grout and tile cleaning compound might also be used.

Applicant also argues that the goods travel in different channels of trade, with registrant's goods being sold to the marine recreation industry. Although marine cleaning preparations would be sold in stores which are frequented by sailors and boat owners, applicant's cleaning compound might also be sold in such stores. More importantly, the same people who frequent marine supply stores are also likely to shop in consumer stores where general cleaning preparations are sold, and thus could encounter both applicant's and the registrant's goods.

Finally, although this point has not been raised by either applicant or the Examining Attorney, the goods themselves are inexpensive items which are likely to be purchased on impulse, rather than after careful deliberation. In view of this, consumers are likely to assume that the same mark used for different cleaning preparations indicates goods emanating from the same source. Accordingly, we affirm the refusal of registration based on Registration No. 2,111,362.

The second basis for refusal of registration is that applicant's use of its mark is likely to cause confusion with Registration No. 2,086,084 for GREAT WHITE FINISH MOP and design for "mops for cleaning or applying finish or other products to walls or floors." In considering the marks, we note that FINISH MOP appears in much smaller letters than the words GREAT WHITE, and that this term has been disclaimed, presumably because it is generic for a mop used to apply finish. (The material from the registrant's website, which applicant has made of record, shows that the registrant uses "finish mop" as a generic term.) Thus, it is the term GREAT WHITE which is the source-identifying portion of the mark. The design element, in which part of the letter "W" is elongated and, with the wave design forms a fin, merely emphasizes the shark connotation of the words GREAT WHITE. It is well-established that in determining the issue 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 of a mark. See **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). In this case, for the foregoing reasons, the words GREAT WHITE must be considered to be the dominant element of the registrant's mark.

Thus, although the cited mark contains additional words and a design element, they do not serve to distinguish the marks. The marks are extremely similar in appearance, and except for the presence of the generic terms in the registrant's mark, they are phonetically identical. Consumers who are familiar with the mark GREAT WHITE FINISH MOP used for a mop, and seeing GREAT WHITE on a cleaning compound, will assume that the generic term FINISH MOP has been omitted from the mark because it does not apply to a cleaning compound, rather than viewing the presence or absence of this term as indicating different sources for the goods. As for the connotation of the marks, as discussed previously with respect to the cited mark GREAT WHITE, while the registered mark has the connotation of the great white shark, applicant's mark is likely to have this connotation as well. Given the inexpensive nature of a mold and mildew removing and tile and grout cleaning compound, consumers are not likely to analyze the meaning of GREAT WHITE to determine whether the source of the goods is the same as or different from the source of registrant's mops.

Turning to the goods, applicant argues that its cleaning compound and the registrant's mop are not related goods because they are "not subject to complementary use."

Applicant points to its label, which shows that after its product is applied the user should "use a hand pad or brush to scrub away heavy soap scum buildup." The difficulty with this argument is that there is no restriction in the identification of goods which would mandate that the cleaning compound may only be used with a hand pad or brush. Certainly such cleaning compounds can be applied with a mop. It should also be noted that the mops identified in the cited registration are not limited to applying finish, but include use in cleaning walls or floors, and to applying products other than finish to walls or floors. And, as the Examining Attorney points out, applicant's identified tile and grout cleaning compound could be used on tiled walls and floors.

It is not necessary that the goods of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. **In re**

International Telephone & Telegraph Corp., 197 USPQ 910. 911 (TTAB 1978). Because of the complementary nature of the products as identified, consumers are likely to assume there is a connection or sponsorship between mold and mildew removing and tile and grout cleaning compound sold under the mark GREAT WHITE and mops for cleaning or applying finish or other products to walls or floors sold under the mark GREAT WHITE FINISH MOP and design.

Applicant also argues that the two cited marks are more similar to each other than is applicant's mark to either of them. We cannot ascertain from the file histories what the Examining Attorney for the later-filed application was thinking. The application for GREAT WHITE FINISH MOP was filed on October 4, 1996 and the application for GREAT WHITE was filed on April 14, 1996. The Examining Attorney for GREAT WHITE FINISH MOP never raised a concern about a potential conflict with GREAT WHITE, and it is possible that because the applications were filed so close in time the Examining Attorney was not aware of the earlier-filed application. In any event, we are not bound by the decisions of Examining Attorneys. As for applicant's assertion that the two cited marks have coexisted for almost five years and "there are no indications in the record that there have been any

Ser No. 76/127,919

conflicts between the owners of the registered marks,"
brief, p. 11, any such conflict would not appear in this
record. More importantly, the question before us is not
whether there is a likelihood of confusion between the two
cited marks, but whether applicant's mark is likely to
cause confusion with these marks. For the reasons given
above, we find that such confusion is likely.

Decision: The refusal of registration on the grounds
of likelihood of confusion with Registrations Nos.
2,111,362 and 2,086,084 is affirmed.