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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Motomco Ltd.

Serial No. 76294290

Lydie Arthos Hudson of Lathrop & Clark LLP for Motomco Ltd.

Jean H. Im, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Seeherman, Walters and Bucher, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Motomco Ltd. seeks registration on the Principal
Register for the mark TOMCAT QUICKSTRIKE for
"rodenticides" in International Class 5.¹

This case is now before the Board on appeal from the
final refusal to register based upon Section 2(d) of the
Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining
Attorney has held that applicant's mark, when used in
connection with the identified goods, so resembles the mark

¹ Application Serial No. 76294290 was filed on August 2, 2001
based upon applicant's allegations of use in commerce at least as
early as June 1, 2001.

QUIKSTRIKE which is registered for "insecticides for agricultural, domestic and commercial use,"² also in International Class 5, as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney have fully briefed this appeal but applicant did not request an oral hearing.

We affirm the refusal to register.

Applicant contends that rodenticides and insecticides are not related goods; and furthermore, that the marks, when considered in their entirety, are not confusingly similar. In turn, the Trademark Examining Attorney argues that the marks are highly similar as to overall commercial impression; and that the record demonstrates that these goods are indeed related.

Our determination under Section 2(d) is based upon an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. 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

² Registration No. 2034468 issued on January 28, 1997; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

similarities between the marks and the relationship of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to the du Pont factor focusing on the relationship of the goods as described in the application and the cited registration. It is well settled that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same entity or provider. See Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

In support of applicant's position that these two chemical pesticides are not related, applicant's Marketing Manager, Todd Butzow, signed a declaration emphasizing the differing functions, applications and active ingredients of applicant's and registrant's respective products:

The definition of rodenticide is a chemical substance used to kill rodents. The definition of insecticide is a chemical substance used to kill insects. Practically, the two kinds of products are different in several ways:

1. First the products have two distinct targets. Customers buy rodenticides to kill mice or rats. Customers buy insecticides to either repel or kill insects. The need for a rodenticide is separate and unrelated to the need for an insecticide. For example, the need to eliminate mice from a barn is unrelated to the need to repel insects during a family picnic.
2. Second, the two kinds of products have different methods of application. A rodenticide must be ingested by the animal. An insecticide typically is effective on contact by the insect.
3. Third, the active ingredients of the two kinds of products are different. Rodenticides generally use anti-coagulants, and insecticides generally use a nerve toxin.

For all these reasons, rodenticides and insecticides serve unrelated purposes and are not used together.

On the other hand, the Trademark Examining Attorney attached to her initial Office action copies of a number of valid and subsisting third-party registrations where the same marks are registered for both insecticides and rodenticides.³ Although federal registrations are not evidence of what happens in the marketplace, third-party

³ See Reg. No. 0615591 for THIMET, Reg. No. 1117546 for BOLERO, and Reg. No. 1499179 for MOORMAN'S.

registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type that may emanate from a single source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

Among these registrations, she noted that one of applicant's own now-expired registrations belies Mr. Butzow's statement.⁴

Under our legal precedent, in order to find that these goods are related, it does not matter that the goods target distinctly different pests with dissimilar active ingredients applied by disparate methods. Rather, the focus of our inquiry must be on whether the goods are of a type which can come from the same source (viz. third-party registrations) and might well be encountered by the same members of the general public wanting to control a variety of pests in their homes (e.g., cockroaches and mice). Applying this standard, we concur with the position of the Trademark Examining Attorney on this question, and find that insecticides and rodenticides are related goods.

⁴ In a registration assigned to Motomco, the mark PIVALYN is registered for both "insecticides and rodenticides in liquid and solid form and plastic pellets having water soluble insecticide and rodenticide material deposited on the surface thereof." (Reg. No. 1172811 issued on October 13, 1981)

Turning then to the similarity or dissimilarity of the marks in their entirety, we find a strong similarity in the two marks. The Trademark Examining Attorney argues that applicant has essentially appropriated registrant's distinctive product mark QUIKSTRIKE / QUICKSTRIKE (the slight difference in spelling is unlikely even to be noticed by the average consumer), and simply added its house mark, TOMCAT. As noted by the Trademark Examining Attorney, the general rule is that the presence of a house mark in one of two otherwise confusingly similar marks will not serve to avoid a likelihood of confusion.⁵

Exceptions to this general rule are made (1) in cases where the two "product" marks have recognizable differences, such that the degree of similarity between

⁵ See In re Apparel Ventures, Inc., 229 USPQ 225 (TTAB 1986) (SPARKS for shoes, boots and slippers confusingly similar to SPARKS BY SASSAFRAS for women's clothing items); In re Riddle, 225 USPQ 630 (TTAB 1985) (RICHARD PETTY'S ACCUTUNE for automotive service centers confusingly similar to ACCUTUNE for automotive testing equipment); In re Champion International Corporation, 196 USPQ 48 (TTAB 1977) (HAMMERMILL MICR CHECK-MATE for paper for writing, printing, duplicating and office use confusingly similar to CHECK MATE for envelopes); In re C. F. Hathaway Company, 190 USPQ 343 (TTAB 1976) (HATHAWAY GOLF CLASSIC for men's knitted sport shirts confusingly similar to GOLF CLASSIC for men's hats); In re Christian Dior, S.A., 225 USPQ 533 (TTAB 1985) (LE CACHET DE DIOR for men's dress shirts likely to cause confusion with CACHET for dresses, cologne, etc.); In re Cosvetic Laboratories, Inc., 202 USPQ 842 (TTAB 1979) (HEAD START COSVETIC likely to cause confusion with HEAD START); In re The United States Shoe Corporation, 229 USPQ 707 (TTAB 1985) (CREST CAREER IMAGES v. CAREER IMAGES).

them is sufficiently slight that the addition of the trade name or house mark is enough to render the marks as a whole distinguishable;⁶ and (2) in cases where the product mark is merely descriptive of the goods or services and therefore would not be regarded by purchasers as a source-indicator.⁷ Neither of these exceptions to the general rule applies in this case. Accordingly, we find that these marks are confusingly similar.

In conclusion, given that the goods are related and the marks are confusingly similar, we find that TOMCAT QUICKSTRIKE for rodenticides is likely to cause confusion with QUIKSTRIKE for insecticides.

Decision: The refusal to register under Section 2(d) of the Trademark Act is hereby affirmed.

⁶ See The Morrison Milling Co. v. General Mills, Inc., 168 USPQ 591 (CCPA 1971) (MORRISON'S CORN-KITS for prepared corn bread mix not confusingly similar to KIX or CORN KIX for breakfast cereal); Rockwood Chocolate Co., Inc. v. Hoffman Candy Co., 152 USPQ 599 (CCPA 1967) (ROCKWOOD BAG-O-GOLD for candy not confusingly similar to CUP-O-GOLD for candy); and S.M. Flickinger Co., Inc. v. Beatrice Foods Co., 174 USPQ 51 (TTAB 1972) (MEADOW GOLD ZOOPER DOOPER for ice cream, ice milk, etc. is not confusingly similar to SUPER DUPER for ice cream).

⁷ See In re Application of Merchandising Motivation, Inc., 184 USPQ 364 (TTAB 1974) (MMI MENS WEAR for fashion consulting services not confusingly similar to MENSWEAR for a semimonthly magazine; and Food Specialty Co., Inc. v. Kal Kan Foods, Inc., 180 USPQ 136 (CCPA 1973) (KAL KAN KITTY STEW is not confusingly similar to KITTY for cat food).