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Paper No. 8
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Crosstex International

Serial No. 76428814

Myron Amer of Myron Amer, P.C. for Crosstex International

John E. Michos, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Hohein, Holtzman and Rogers, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Crosstex International has filed an application to
register the mark "ISOLATOR" for "dental face masks."¹

Registration has been finally 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 goods, so resembles the
mark "ISOLATOR," which is registered for a "dental device for use

¹ Ser. No. 76428814, filed on July 5, 2002, which alleges as the basis
thereof a date of first use anywhere and in commerce of September 1,
1996. Applicant claims ownership of Reg. No. 2,143,277, which issued
on March 10, 1998 in connection with the mark "ISOLATOR" for "face
masks for the non-dental medical field"; combined affidavit §§8 and
15.

in a patient's mouth to hold cotton rolls,"² as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods and the similarity of the marks.³

Turning first to consideration of the respective marks, applicant essentially contends that they are highly suggestive and therefore neither is entitled to a broad scope of protection. Specifically, applicant asserts that the marks at issue "are merely the addition of the ending 'or' to the word 'isolate,' a word which is highly descriptive of the functioning of the goods and, as such, is of minimal effect in conveying source-identification."

² Reg. No. 1,502,931, issued on September 6, 1988, which sets forth a date of first use anywhere and in commerce of July 7, 1982; combined affidavit §§8 and 15.

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."

The Examining Attorney, on the other hand, maintains that not only are applicant's and registrant's marks identical in all respects, but that "registrant's mark ISOLATOR must be considered to be a 'strong' mark which is entitled to a 'wide range' of protection from the registration of confusingly similar marks." In particular, the Examining Attorney insists that:

Registrant's mark ISOLATOR is, at worst, mildly suggestive of healthcare products. There is no evidence that the term "isolator" is used or has ever been used in connection with dental products other than as the registered trademark of the registrant. In the absence of such evidence, it must be concluded that the mark ISOLATOR is a strong mark without any relevant meaning of any kind in relation to registrant's goods. Words that may be in common linguistic use but which, when used with products or services they represent, neither suggest nor describe any characteristic of those goods or services, are entitled to protection from the registration of confusingly similar marks.

....

While we concur with applicant that, when used in connection with applicant's and registrant's respective goods, the mark "ISOLATOR" is indeed highly suggestive of such goods, we nonetheless agree with the Examining Attorney that registrant's mark is entitled to protection from the registration of applicant's mark. Specifically, as applicant points out in its reply brief, the information which it made of record concerning registrant's "ISOLATOR" product states that the use thereof is "[t]o isolate an area of the mouth and keep it dry." In a like manner, the use of applicant's "ISOLATOR" dental face mask, as applicant indicated in its response to the initial Office Action, "is to isolate the wearer from an airborne virus." Thus, in each

instance, the mark "ISOLATOR" is highly suggestive of a device which is designed to isolate or provide isolation.

However, the fact that such a mark is weak in terms of its trademark significance does not mean that registrant's mark is entitled to protection only against the same or a virtually identical mark for the same or essentially the same goods. It is well established, instead, that even a weak mark is entitled to protection against the registration of the same or a substantially similar mark for identical and/or closely related goods. See, e.g., *Plus Products v. Physicians Formula Cosmetics, Inc.*, 198 USPQ 111, 114 (TTAB 1978); and *In re Textron Inc.*, 180 USPQ 341 (TTAB 1973), *citing* *Eastern Industries, Inc. v. Waterous Co.*, 289 F.2d 952, 129 USPQ 422, 424 (CCPA 1961). Here, not only is applicant's mark identical to registrant's mark in sound and appearance, but it is essentially the same in connotation and contains no additional element which might serve to distinguish such mark from registrant's mark. Accordingly, the overall commercial impression engendered by applicant's "ISOLATOR" mark is virtually identical to that conveyed by registrant's "ISOLATOR" mark, such that if the respective marks were to be used in connection with the same or closely related goods, confusion as to the source or sponsorship thereof would be likely to occur. As stated by our principal reviewing court in, for example, *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974):

Confusion is confusion. The likelihood thereof is to be avoided, as much between "weak" marks as between "strong" marks, or as between a "weak" and a "strong" mark.

Turning, then, to the goods at issue, applicant insists that the evidence, consisting of copies of eight prior use-based registrations which the Examining Attorney relies upon to support the contention in his final refusal that "manufacturers market dental face masks and other goods like the registrant's under the same trademark," fails to show that applicant's dental face masks and registrant's dental devices for use in a patient's mouth to hold cotton rolls are so related that confusion as to the origin or affiliation thereof would be likely when marketed under the identical mark "ISOLATOR."⁴ Specifically, applicant urges that (footnote omitted):

One registration, however, is applicant's ([No.] 2,327,775) and another five ... have to be discounted because they relate to medical and not to dental use (Nos. 2,739,120, 2,383,136, 2,451,731, 2,197,281, and 1,983,715). The two remaining registrations, 2,151,499 and 2,106,889[,] relate to face masks, but probably those worn by the dentist and not the patient[,] and the other goods thereof do not include those of the nature of registrant's goods.

The Examining Attorney, however, maintains that applicant's and registrant's goods "are closely related goods which, contrary to applicant's assurances, are marketed and sold in the same channels of trade" to the same customers. In particular, and notably without any discussion of applicant's

⁴ Applicant also sets forth, as a plausible explanation as to why its registration for the mark "ISOLATOR" for "face masks for the non-dental medical field" issued over the registration cited as a bar herein, the asserted fact that "[t]here is a distinct difference between face masks for dental use, [which is] the product of this application, and face masks for non-dental medical use, as evidenced by applicant's ownership of Registration No. 2,143,277[as] noted in the application as filed."

criticism of the evidence relied upon, the Examining Attorney claims that:

The evidentiary record consists of copies of [eight] federal trademark registrations which show that the same business entities provide both dental face masks and a wide variety of other dental devices under the same trademark. Accordingly, customers for these particular goods are accustomed to seeing them offered for sale under the same ... marks by the same companies.

Any doubt, the Examining Attorney adds, as to whether there consequently is a likelihood of confusion "should be resolved in favor of the prior registrant and against the applicant."

It is well settled that, for the purpose of demonstrating that there is a likelihood of confusion, an applicant's goods and those of a registrant need only be 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 producer or provider. See, e.g., 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). One way of showing such a relationship is to make of record copies of prior use-based registrations for marks which, in each instance, set forth goods which are the same as or substantially similar to those listed in both the application on

appeal and the cited registration. While, admittedly, such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, it is nevertheless well established that they have some probative value in that they serve to suggest that the goods listed therein are of the kinds which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988).

In the present case, we agree with applicant to the extent that, of the eight prior registrations made of record by the Examining Attorney, only the three which list various dental supply items have sufficient probative value since the remaining five cover medical and surgical supplies rather than dental products. Nonetheless, we concur with the Examining Attorney that customers for applicant's and registrant's goods would consider the respective products to be related dental supply items. In this regard, it is noted that three registrations specifically set forth a variety of such dental supplies as "face masks," on the one hand, and "cotton filled sponges," "cotton rolls ... [and] cotton-tipped applicators," or "mouthguard polypropylene sheets for use by dentists," on the other hand.⁵ Particularly telling, in fact, is the prior registration which applicant claims to own, which covers "[s]upplies for dentists[,], namely, exdontia sponges, cotton rolls, bracket covers, face

⁵ See, respectively, Reg. Nos. 2,106,889, 2,327,775 and 2,151,499.

masks, head rest covers, cotton-tipped applicators, examination gloves and tongue depressors." Furthermore, as is made clear by the product information furnished by applicant with respect to the "dental device for use in a patient's mouth to hold cotton rolls" listed in the cited registration, "[e]ach clamp firmly holds two cotton rolls" and is "[a]daptable to cotton roll sizes 1, 2 and 3," while the product's touted benefits are that it is "[e]asy to insert any size cotton roll and is patient friendly."

In view thereof, customers for applicant's dental face masks and registrant's dental devices or clamps for holding cotton rolls in a patient's mouth would regard such goods as commercially related items of dental supplies which, like sponges, cotton rolls, cotton-tipped applicators and examination gloves, would be commonly used by dentists and dental hygienists in their care of patients. We thus agree with the Examining Attorney's conclusion that the goods at issue herein are closely related and would be sold through the same channels of trade (e.g., distributors of dental supplies) to the same classes of purchasers (e.g., dentists, dental hygienists and dental office managers).

Accordingly, we conclude that dental professionals, who are familiar or acquainted with registrant's "ISOLATOR" mark for its "dental device for use in a patient's mouth to hold cotton rolls," would be likely to believe, upon encountering applicant's identical "ISOLATOR" mark for "dental face masks," that such closely related dental supply items emanate from, or are sponsored by or associated with, the same source. Such

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customers, for instance, could reasonably regard applicant's "ISOLATOR" dental face masks as part of an expanded product line from registrant or vice versa. Moreover, to the extent that we nevertheless may entertain any possible doubt as to this conclusion, we resolve such doubt, as we must, in favor of the registrant. See, e.g., In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); and In re Pneumatiques Caoutchouc Manufacture et Plastiques Kelber-Columbes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

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