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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ambu Inc.

Serial No. 76131964

Paul Grandinetti of Levy & Grandinetti for Ambu Inc.

John D. Dalier, Trademark Examining Attorney, Law Office 106
(Mary I. Sparrow, Managing Attorney).

Before Hanak, Quinn and Walsh, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Ambu Inc. (applicant) seeks to register in standard character form RES-CUE MASK for "medical apparatus, namely, reusable resuscitation mask." The application was filed on September 20, 2000 with a claimed first use date of January 1997. Applicant has disclaimed the exclusive right to use MASK apart from the mark in its entirety.

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that

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applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark HOPKINS RES Q MASK previously registered in standard character form for "face mask, for medical use, with a disposable one way filter valve to protect a wearer from a victim's bodily fluids and to avoid possible cross contamination." Registration No. 2,505,918. This registration issued on November 13, 2001 with a claimed first use date of February 1, 1999. Registrant, like applicant, disclaimed the exclusive right to use MASK apart from the mark in its entirety.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Considering first the marks, we are obligated to compare the marks "in their entirety." In re National Data Corp.,

753 F.2d 1056, 224 USPQ 749, 750 (Fed. Cir. 1985). However, in comparing the marks in their entirety, it is entirely appropriate to give less weight to a portion of a mark that is merely descriptive of or generic for the relevant goods or services. National Data, 224 USPQ at 751 ("That a particular feature is descriptive ... with respect to the relevant goods or services is one commonly accepted rationale for giving less weight to a portion of the mark.").

Obviously, both marks end with the generic term MASK. However, upon seeing the two marks, purchasers would not assume they are similar simply because they share a common generic term. Likewise, both marks contain distinctly different misspellings of the word "rescue." As applied to applicant's goods and registrant's goods, the term "rescue" is, at a minimum, very highly suggestive of the respective goods. Accordingly, the highly suggestive character of this term and the fact that applicant and registrant have misspelled this term in distinctly different ways are factors which enable consumers to distinguish the marks.

What clearly distinguishes registrant's mark from applicant's mark is the presence of the arbitrary term HOPKINS. Not only is HOPKINS the only arbitrary term in either mark, but of additional importance is the fact that

HOPKINS is the first word in registrant's mark. As a general rule, consumers are more inclined to focus on the first word in any trademark or service mark. Palm Bay Imports, Inc. v. Veuve Clicquot, 396 F.3d 1396, 73 USPQ2d 1689, 1690 (Fed. Cir. 2005). See also Presto Products v. Nice-Pak Products, 9 USPQ2d 1895, 1897 (TTAB 1998) ("It is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered."). Obviously, the general rule that the first word in a mark is the most critical portion of the mark does not apply if the first word is itself descriptive or generic, or if the first word is a commonly used word like "the" or "a." However, this is not the case before us inasmuch as HOPKINS is the only arbitrary word in either of the two marks.

Turning to a consideration of the relationship between applicant's goods and registrant's goods, we note that the Examining Attorney has made of record absolutely no evidence whatsoever showing how they are related. Of course, the Examining Attorney is correct in contending that both applicant's goods and registrant's goods are medical apparatus. However, based on the identifications of the goods, there are significant differences in applicant's goods and registrant's goods.

Applicant's goods are resuscitation masks designed to be worn by the patient, that is, the person to be resuscitated. On the other hand, registrant's goods are masks which are not to be worn by the patient, but rather are to be worn by the caregiver (i.e. a first responder, a nurse, a doctor) to protect the caregiver from the victim's bodily fluids. Thus, the two masks serve distinctly different purposes.

Moreover, only professionals would purchase and use resuscitation masks and masks to protect care givers from a victim's bodily fluids. Applicant submitted the declaration of its president (Frank Homa) who stated he had been marketing medical masks for 33 years and that purchasers of such goods are sophisticated professionals. (Homa declaration para. 7). At page 5 of his brief, the Examining Attorney concedes that the purchasers and users are "sophisticated and knowledgeable."

Our primary reviewing Court has made it clear that with regard to the issue of likelihood of confusion, purchaser "sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care." Electronic Design & Sales v. Electronic Data Systems, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992). Given the clear differences in the marks and the differences in the

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goods, we find that sophisticated professionals would not be confused by the contemporaneous use of the two marks.

Decision: The refusal to register is reversed.