

THIS DISPOSITION IS
NOT CITABLE AS
PRECEDENT OF THE TTAB

Mailed:
March 30, 2005
AD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

C & D Detergents, Inc.¹
v.
Spraytec Systems, L.L.C.

Opposition No. 91112834
to application Serial No. 75206932

Robert G. Shepherd of Mathews, Collins, Shepherd & McKay for
C & D Detergents, Inc.

William L. Klima, Esq. for Spraytec Systems, L.L.C.

Before Walters, Rogers, and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On November 26, 1996, Spraytec Systems, L.L.C.
(applicant) applied to register the mark EXTRA (typed) for
goods ultimately identified as "all purpose hard surface
cleaning preparations, namely, solutions and concentrates

¹ The opposition was initiated by USA Detergents, Inc. In a paper dated November 28, 2001, opposer provided a Certificate of Amendment of Certificate of Incorporation to show that the "name of this corporation shall be C&D Detergents, Inc." USPTO records for opposer's registration reflect that these documents were recorded at Reel/Frame No. 2401/0155. Subsequently, additional documents were recorded to indicate that the current owner is Church & Dwight Co., Inc. See Reel/Frame Nos. 2417/0351, 2426/0045, and 3007/0206.

Opposition No. 91112834

thereof provided in packaging receivable by spray bottle and into which said solutions and concentrates are released as needed for dispensing therefrom" in Class 3. The application (No. 75206932) is based on an allegation of a bona fide intention to use the mark in commerce.

C & D Detergents, Inc. (opposer) has opposed registration on the ground that its mark XTRA for "laundry detergent" in Class 3² has been used "continuously and for a long time prior to any date claimed by or available to Applicant. Consequently, Opposer avers that confusion, mistake and deception in the trade and in the minds of the purchasers as between Opposer's and Applicant's Marks, and as to the origin of their respective goods, will be likely." Notice of Opposition at 4.³

Applicant has denied the salient allegations of the notice of opposition.

The Record

The record consists of the pleadings; the file of the involved application; opposer's notice of reliance on status and title copies of its registration and an intent-to-use application of opposer; the testimonial and rebuttal depositions with exhibits of Bruce Y. Prince, a former vice

² Registration No. 1,637,328 issued March 12, 1991, renewed.

³ In the Notice of Opposition, opposer also referred to a second registration for CLASSIC XTRA for "laundry detergent" (No. 2,133,908), but this issue was not separately tried.

Opposition No. 91112834

president of opposer's predecessor; the testimonial deposition with exhibits of William L. Klima, applicant's vice president (and an attorney); and the testimonial deposition with exhibits of Anthony M. "Mickey" Veich, applicant's investigator.

Discussion

Opposer, as plaintiff in the opposition proceeding, bears the burden of proving, by a preponderance of the evidence, priority and likelihood of confusion. See Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); Cerveceria Centroamericana, S.A. v. Cerveceria India Inc., 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989).

Priority is not an issue here inasmuch as opposer relies on its ownership of a valid Principal Register registration (No. 1,637,328). See King Candy Co. v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Therefore, the question that we must address is whether there is a likelihood of confusion between applicant's EXTRA mark for its hard surface cleaning preparations and opposer's XTRA registration for laundry detergents. In likelihood of confusion cases, we analyze the facts in light of the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d

Opposition No. 91112834

1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

We begin by comparing the marks. Applicant's mark is the single word EXTRA and registrant's mark is XTRA. Both the application and the registration depict that mark in typed form, which means that by "presenting its mark merely in a typed drawing, a *difference* cannot legally be asserted by that party." Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). The words "Extra" and "Xtra" would be pronounced identically and their meanings would be the same, i.e., "extra." XTRA, Inc. v. Warren Petroleum Corp., 175 USPQ 660, 662 (TTAB 1972) ("`XTRA' being the equivalent of `EXTRA'"). Furthermore, the appearance and commercial impressions of the marks are very similar with the only difference being that registrant does not include the initial letter "e," a letter that does not change the meaning or pronunciation of the mark. Therefore, we find that the marks are very similar, if not virtually identical.

Next, we compare the goods of the parties. Opposer's goods are laundry detergent while applicant's goods are "all purpose hard surface cleaning preparations, namely, solutions and concentrates thereof provided in packaging receivable by spray bottle and into which said solutions and

concentrates are released as needed for dispensing therefrom."

It "has often been said that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services."

In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991).
See also Time Warner Entertainment Co. v. Jones, 65 USPQ2d 1650, 1661 (TTAB 2002).

Here, as evidence that laundry detergent and applicant's hard surface cleaners are related, opposer's witness testified that opposer's predecessor is also the source of a hard surface cleaner and laundry detergent.

Q. Now, when you first went to work for USA Detergents in 1997, what were the products that the old USA Detergents was selling at that time?

A. USA Detergents sold at that time both laundry detergent and fabric softeners, as well as household cleaners, hard surface cleaners, and candles, as well.

Prince Dep. at 9.

Opposer's witness also testified that, while it did not use the XTRA mark on hard surface cleaners, it did use at least two marks, the USA DETERGENTS and AMERICA'S VALUE marks, on both laundry detergent and hard surface cleaners. Prince Dep. at 20. Opposer's witness also testified that it

Opposition No. 91112834

was aware of two other companies that "manufacture both laundry detergent and hard surface cleaners ... Proctor and Gamble, [and] Colgate-Palmolive." Prince Dep. at 11. In addition, the witness testified that "in a larger store there would be, as well, household cleaners sold in the same aisle" as laundry detergents. Prince Dep. at 12. Also, the evidence shows that opposer's detergent and all purpose hard surface cleaners are advertised together. Prince Ex. 9.

Based on the evidence of record, we hold that laundry detergent and all purpose hard surface cleaning preparations are related products inasmuch as if consumers encountered very similar marks on these products, they would likely assume that there is some sponsorship, association, or relationship between the sources of the products. We note that applicant's products are not merely "all purpose hard surface cleaning preparations." They are specifically "solutions and concentrates provided in packaging receivable by spray bottle and into which said solutions and concentrates are released as need for dispensing therefrom." We have considered the entire identification of goods in our analysis because we must consider the goods as they are identified in the respective identifications of goods. Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of

an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). See also Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"). This additional language in the identification of goods does not result in the goods being unrelated because the identification of goods does not change the purchasers or the channels of trade. Nothing in the identification of goods would prevent applicant's hard surface cleaning preparations from being sold in the same retail establishments as opposer's laundry detergent.

In addition to the similarities of the marks and the relatedness of the goods, we take several other factors into consideration.⁴ Opposer argues that its "mark has achieved

⁴ We also note that during the taking of depositions each party highlighted arguably inconsistent statements made by the other during the ex parte prosecution of their applications. See Klima Dep. at 31-33 and Prince Dep. at 44. While we have considered these statements, they are not determinative. "That a party earlier indicated a contrary opinion respecting the conclusion in a similar proceeding involving similar marks and goods is a fact, and that fact may be received in evidence as merely illuminative of shade and tone in the total picture confronting the decision maker. To that limited extent, a party's earlier contrary

a level of fame in the detergent field." Brief at 17.

Opposer has submitted some evidence that indicates that its XTRA mark has acquired a degree of recognition in the marketplace.

Q. And through what channels is that product [XTRA detergent] distributed?

A. It's sold throughout almost every channel of trade in North America.

Q. In other words, all retail stores that carry detergents at all would carry the Xtra detergent product?

A. Approximately 98 percent ACT, All Cumulative Volume, which is the rating that is used to gauge penetration by any consumable product is the amount that it is sold in the United States.

Q. Who establishes that rating?

A. That rating is established by a company called IRI, Information Resources, who tracks products' penetration as well as product sales success. The only customer that it does not gauge because it doesn't participate in its sales data is Wal-Mart who has all Xtra products as mandatory distributed products world wide.

Prince Rebuttal Dep. at 7.

In addition, opposer's witness testified that "Xtra is the number 1 selling value brand in North America as rated by IRI." Prince Rebuttal Dep. at 10. Also, "the Xtra brand's power is demonstrated in any given retailer's shelf

opinion may be considered relevant and competent. Under no circumstances, may a party's opinion, earlier or current, relieve the decision maker of the burden of reaching his own ultimate conclusion on the entire record. Interstate Brands Corp. v. Celestial Seasonings, Inc., 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978).

Opposition No. 91112834

space as viewing how much - how many faces a given retailer will give to Xtra, and Wal-Mart particularly, it gives Xtra 24 faces on its shelf to show the prominence of the brand." Prince Rebuttal Dep. at 11. This evidence, while lacking specifics, does support opposer's argument that its mark has achieved some recognition. Furthermore, we note that opposer's mark is registered on the Principal Register.

This evidence of public recognition is balanced against the fact that "[b]eing suggestive of quality, 'XTRA' is not entitled to a broad scope of protection." XTRA, Inc., 175 USPQ at 662 (XTRA on trailer leasing services not confusing similar to XTRA for gasoline and motor oil). See also ITT Corp. v. XTRA Corp., 225 USPQ 723, 728 (D. Mass. 1985) ("XTRA leases 'boxes,' trucks, and warehouse space. ITT sells personal computers. No one seeking intermodal transport services could buy one from XTRA"). In addition, opposer's witness has agreed that the "word 'extra' and variations thereof are commonly used adjectives." Prince Dep. at 43.

Finally, applicant introduced evidence of third-party use of the term "Xtra" or "Extra." The evidence consists of (1) a brochure from LABCO that on page 2 mentions X-Tra Punch Built Alkali (Veich Ex. A-3); (2) Extravac® EX17PR Self-Contained Carpet Extractor (Ex. A-4); (3) Hillyard Extra Strength CSP "Fast Acting Restroom/Shower Cleaner"

Opposition No. 91112834

(Ex. A-5); a photo of XTRA LEMON and XTRA PINE that is apparently a cleaning product (Ex. A-7 and A-10); X-TRA TOUCH POWDERS All Purpose Kleaner (Ex. A-8); X-TRA SHINE extended gloss vinyl sealer and protectant (Ex. A-12); "Extra" Disinfectant germicidal concentrate (Ex. A-13); Whisk - For Those EXTRA Dirty Hands® Industrial Hand Towels (Ex. A-14); and Extra restroom disinfectant (Ex. A-15; Veich Dep. at 21⁵).

Most of the above evidence involves goods that are more remote from opposer's goods and/or marks that include more than just the word XTRA or EXTRA. In addition, we have no indication of the amount of market penetration and recognition of these marks. Indeed, many of the exhibits would indicate that the products have a relatively limited market presence. There is not enough evidence about other exhibits to form much of a conclusion. For example, the photos in Exhibits A-7 and A-10 are similar. When the investigator was asked on cross-examination whether the photos were taken in the same store, the witness replied: "I'm not positive. I suspect it was, but I'm not sure." Veich Dep. at 16-17. When asked about how Exhibit A-6 was discovered, and specifically "Was that searched through the computer," the witness replied: "Could have been. I

⁵ The mark is not visible in the exhibit.

suspect it was. I do most of my Internet searching on the computer." Veich Dep. at 18.

In a somewhat similar case, the board noted:

We see some other problems which limit the probative value of the evidence of third-party use. Many of the marks being used are less similar to opposer's marks than are applicant's marks. Further, applicant has not furnished any evidence regarding the extent of use of the marks by these third parties... Moreover, the pictures of these restaurants tend to indicate that the operations are small and local in nature.

Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ 1125, 1131 (TTAB 1995).

We also do not find that the number of relevant third-party uses is so extensive that it would demonstrate that the term XTRA is only entitled to a very narrow scope of protection.

We are not the least bit surprised that the word "star" and/or various star designs appear in connection with restaurants, as they undoubtedly do in connection with many other goods and/or services. That is to say, we recognize that a star design is a common shape, and that such designs, as well as the word "star," are laudatory in nature. Nonetheless, applicant's evidence of third-party use is balanced by opposer's evidence of its marks' considerable notoriety.

Id.

We add that prospective purchasers of laundry detergent and applicant's hard surface cleaning preparations would at least overlap. The purchasing of laundry detergent and hard surface cleaning preparations is not normally a purchase that requires a great deal of care. Applicant's witness gave an example as follows: "You don't go in and ask for

Opposition No. 91112834

Windex. You just go up to the shelf and buy Windex." Klima Dep. at 8. Opposer's witness estimated that purchasers of its detergent "will take upwards of two minutes and not more to make their choice." Prince Dep. at 13. Furthermore, the evidence shows that ordinary purchasers would purchase these products in retail stores.

Therefore, we have considered the laudatory nature of the term XTRA and the fact that it not a unique term. However, when we balance this evidence with the fact that opposer's mark has acquired some recognition, that the goods would be sold in the same stores and in the same section of stores to the same purchasers, and that opposer and other producers are the source of hard surface cleaning preparations and laundry detergent, we determine that there is a likelihood of confusion in this case.

Decision: The opposition is sustained.