

Hearing:
February 16, 2005

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed:
May 17 2005
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Jet, Inc.

v.

Sewage Aeration Systems, Inc.

Cancellation No. 92025587
against Registration No. 1739664

Roger P. Furey and Sylvia Denise Davis of Katten Muchin
Zavis Rosenman for Jet, Inc.

Jeffrey D. Harty, Edmund J. Sease and John D. Goodhue of
McKee Voorhees & Sease, PLC for Sewage Aeration
Systems, Inc.

Before Bucher, Holtzman and Drost, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

On October 9, 1996, Jet, Inc. (petitioner) filed a
petition to cancel Registration No. 1739664, owned by
Sewage Aeration Systems, Inc. (respondent). This
registration is for the mark **AEROB-A-JET** (standard
character drawing). The involved registration issued on
December 15, 1992, as a result of an application filed on
April 6, 1992. The product in the registration is

identified as a "sewage aeration unit comprising an electric motor and electronic monitoring sensor to oxygen enrich sludge to enhance decomposition," in International Class 11. The registration alleges dates of first use and dates of first use in commerce of January 1971.¹

Petitioner seeks to cancel respondent's registration on the ground that there is a likelihood of confusion with its JET and JET AERATION and design marks, allegedly first used in 1955 and first used in commerce in 1956, and that petitioner has continuously used these marks until the present (Petition to cancel, ¶4 and ¶5). Petitioner alleges that through long and continuous use, these trademarks have become well-known to consumers;² that the parties' marks are both used in connection with sewage treatment units; that the goods are likely to travel and be promoted through the same or similar channels of trade for sale to the same or a similar class of purchasers" (Petition to cancel, ¶6); and that petitioner owns two

¹ Registration No. 1739664, Section 8 affidavit accepted; renewed.

² Although petitioner included Section 2(a) as an additional basis for cancellation in its Petition to cancel (in ¶10), we find that this issue was not tried by the parties and is no longer before us.

valid, subsisting and incontestable registrations on the Principal Register, for these two marks, as follows:

REGISTRATION NO. 0881991

JET (STANDARD CHARACTER DRAWING)

for "sewage treatment and disposal units and parts thereof," in International Class 11;³ and

REGISTRATION NO. 0727404



for "sewage treatment and disposal units for private residence and semipublic use," in International Class 11.⁴

Respondent denied the salient allegations of the petition to cancel.

The Record

The record consists of the file of the involved registration; petitioner's petition to cancel and respondent's answer; petitioner's notice of reliance filed on July 2, 2003; the trial testimony deposition, with accompanying exhibits, of petitioner's president, David MacLaren; the trial testimony deposition, with

³ Registration No. 0881991 issued on December 9, 1969, reciting a date of first use anywhere at least as early as August 1, 1955, and alleging a date of first use in commerce at least as early as March 8, 1956; Second Renewal.

⁴ Registration No. 0727404 issued on February 13, 1962, reciting a date of first use anywhere at least as early as August 1, 1955, and alleging a date of first use in commerce at least as early as March 8, 1956; Second Renewal.

accompanying exhibits, of William Neal, petitioner's employee in sales for thirty-six years who continued as an outside consultant thereafter; the trial testimony deposition, with accompanying exhibits, of Scott Golden, assistant bureau chief for the Bureau of Environmental Health of the Ohio Department of Health; the trial testimony deposition, with accompanying exhibits, of Professor Edward Condren; respondent's notice of reliance filed on September 24, 2003; the testimony depositions with exhibits taken by respondent of Larry A. Messer, Dr. Terrell Hoage, Amy Hoage and Jerard B. Hoage; petitioner's rebuttal notice of reliance with exhibits filed on December 23, 2003; and rebuttal testimony deposition with exhibits taken by petitioner of Professor Walter Kocher taken during the petitioner's rebuttal testimony period.

The parties have fully briefed the case, and both appeared at an oral hearing held before this panel of the Board on February 16, 2005.

Facts

Petitioner is an Ohio corporation that manufactures and distributes products and equipment in the wastewater and sewage treatment industry, including products and equipment designed for use in home sewage systems. David

MacLaren Testimony, p. 18. Petitioner's products are priced in the range of \$400 to \$500 per unit, and are sold initially to distributors who in turn sell them to homeowners and homebuilders. David MacLaren Testimony, pp. 34-36, 83-84, 281-283. Petitioner's involved products are installed underground in the backyards of homeowners. Petitioner's various models of sewage treatment products utilize an aerator containing a hollow shaft opening that allows ambient air from outside the system to be sucked down the shaft into the wastewater. Air is pulled into the plant when the rapid rotation of an impeller creates vortexes of empty space in the water.

Respondent also produces products and equipment designed for use in home sewage treatment systems. Jerard B. Hoage Testimony, pp. 5 and 23. Under its AEROB-A-JET mark, respondent manufactures and sells an aerator for use in existing sewage treatment systems - for septic tanks as well as for aerobic treatment plants like the systems offered by petitioner. Respondent's aerator introduces oxygen into existing home sewage tanks in a manner similar to that of petitioner's aerator. In fact, the record shows that respondent currently markets its AEROB-A-JET product as being a retrofit, or as a supplement, to

petitioner's JET aerators within JET sewage treatment systems.

Although respondent first made use of the AEROB-A-JET mark in January 1971 in connection with sewage aeration units to oxygenate sludge on hog farming lagoons, dairy production and similar agricultural settings, it was not until 1991 that respondent started marketing its product directly to homeowners and others for non-agricultural sewage treatment systems.

Evidentiary Objections

Before turning to the merits of the case, we must consider several evidentiary disputes that have arisen between the parties.

Most of these disputes involve objections by both parties on the basis of relevance and hence inadmissibility under Rule 402 of the Federal Rules of Evidence.⁵ We overrule these objections, making a clear distinction between evidence considered not relevant and

⁵ Petitioner's objections went to the relevance of third-party trademark registrations and patents introduced by notice of reliance, as well as Internet evidence offered during trial depositions. Similarly, respondent's objections went to the relevance of W. Kocher's testimony as to the meaning of the terms "jet" and "jet aeration" drawn from technical dictionaries, as well as Prof. E. Condren's testimony regarding the similarities of the parties' marks.

evidence of little probative value. Similarly, as to respondent's objections to Prof. Edward Condren's status as an expert witness, we overrule this objection and have evaluated his claims to be an expert along with the reliability of the specific testimony he proffered in the instant case.

Reconsideration of "Issue Preclusion" as to JET mark

Respondent has asked for a "reconsideration" of the Board's decision of February 13, 2003. In response to an earlier motion for summary judgment in this case, and in the face of a remand from our principal reviewing Court,⁶ the Board considered whether the doctrine of issue preclusion prevents petitioner from relitigating the question of likelihood of confusion between JET and AEROB-A-JET when applied to the respective goods.⁷ The Board

⁶ "A prior trademark infringement action will not, by action of claim preclusion, bar the subsequent prosecution of a petition for cancellation of the defendant's registered trademark. However, where common issues, such as likelihood of confusion, are actually litigated in the earlier proceeding, issue preclusion will prevent their relitigation." *Jet Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 55 USPQ2d 1854, 1859 (Fed. Cir. 2000).

⁷ "[T]he undisputed facts of this case establish that Jet and SAS are in direct competition, selling related goods through the same marketing channels. However, a reasonable jury could not conclude that

ultimately concluded that the underlying facts were *not* identical in both cases.⁸ In spite of respondent's protestations to the contrary, we find that respondent has not convinced us that this earlier panel of the Board erred in reaching the decision it issued on February 13, 2003. Based upon the facts of this case, and in light of the applicable law, we find the Board's earlier ruling is not in error and requires no change.

Likelihood of Confusion

The issues to be decided in this proceeding are which party has priority of use of its mark and, if priority lies with petitioner, whether there is a likelihood of confusion from contemporaneous use of the parties' marks in connection with their respective goods.

the marks JET and AEROB-A-JET are confusingly similar, and the very high degree of care that purchasers in this market -- both contractors with the skills and responsibility for installing home sewage treatment systems and homeowners spending hundreds or thousands of dollars to buy or repair such systems -- can be expected to exercise eliminates virtually any possibility that SAS's use of AEROB-A-JET will cause confusion."

Jet, Inc. v. Sewage Aeration Sys., 165 F.3d 419, 49 USPQ2d 1355, 1359 (6th Cir. 1999).

⁸ For example, the Board noted that registrant now has a website accessible by homeowners who may be directly involved with registrant as part of the purchasing decision. See Board Order of February 13, 2003, p. 18.

We keep in mind that in the context of this cancellation proceeding, respondent's AEROB-A-JET mark is entitled to all the statutory presumptions of §7(b) of the Lanham Act, forcing petitioner to rebut these presumptions by a preponderance of the evidence. See West Florida Seafood Inc. v. Jet Restaurants Inc., 31 F.3d 1122, 31 USPQ2d 1660 (Fed. Cir. 1994}.

Applying these standards, we find that petitioner has established its priority, but has failed to demonstrate a likelihood of confusion herein by a preponderance of the evidence.

Petitioner's Standing and Priority

A party petitioning to cancel a federally registered trademark must plead and prove that it has standing and that there is a valid ground for the cancellation of the registration. Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998) ["Section 14 has been interpreted as requiring a cancellation petitioner to show (1) that it possesses standing to challenge the continued presence on the register of the subject registration and (2) that there is a valid ground why the registrant is not entitled under law to maintain the registration."]

There is no question but that petitioner has standing to bring this action. Because petitioner has made status and title copies of its registrations of record and because its likelihood of confusion claim is not without merit, we find that petitioner has established its standing in this case. See Lipton Industries, Inc. v. Ralston Purina Company, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

The earliest date upon which respondent may rely for priority purposes, absent other evidence, is the April 6, 1992 filing date of the application which matured into its involved registration. Petitioner has introduced into the record by way of its notice of reliance certified copies of its pleaded registrations, which show that they are valid, subsisting and owned by petitioner. Petitioner's Section 2(d) priority is established as to the marks depicted in its pleaded Registration Nos. 0727404 and 0881991, each of which covers "sewage treatment and disposal units," because the filing dates of the applications that matured into those registrations predate April 6, 1992.⁹ Thus, the critical issue remaining before

⁹ Petitioner's registrations also predate respondent's claimed date of first use of its AEROB-A-JET mark of January 1971.

the Board is whether respondent's mark is likely to cause confusion with petitioner's marks.

Applying the *du Pont* factors

Our determination on the issue of likelihood of confusion under Section 2(d) of the Trademark Act must be based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

We turn first to the *du Pont* factor focusing on the similarity or dissimilarity and nature of the goods as described in respondent's registration and in connection with which petitioner's prior marks are in use.

The record demonstrates that with its technological advances of the early 1990's, respondent's aeration devices were structurally modified so that they could be used for improved aeration of home septic tanks, even those containing high levels of non-biodegradable materials. As noted above, respondent has been marketing its AEROB-A-JET product as a retrofit or a supplement to petitioner's JET aerators. Hence, we find that these aeration system components are clearly related.

As to a related du Pont factor, namely the similarity of established, likely-to-continue trade channels, we agree with petitioner that since 1991, when respondent started marketing its product directly to homeowners and others for non-agricultural sewage treatment systems, respondent's trade channels started overlapping with petitioner earlier established channels of trade and classes of customers.

On the other hand, we agree with respondent that several du Pont factors weigh decidedly in respondent's favor, more than balancing out the close relationship of the goods and the overlapping channels of trade.

For example, turning to the du Pont factor focusing on the marketplace conditions under which sales are made, these are clearly not "impulse" purchases. We readily agree with the conclusions of the Sixth Circuit Court of Appeals that purchasers will exercise a relatively high degree of care given the cost of these sewage treatment products:

... the very high degree of purchaser care that purchasers in this market - both contractors with the skills and responsibility for installing home sewage treatment systems and homeowners spending hundreds or thousands of dollars to buy or repair such systems - can be expected to exercise eliminates any possibility that

[Respondent's] use of AEROB-A-JET will cause confusion.

Jet Inc. v. Sewage Aeration Sys., 49 USPQ2d at 1359.

Next, we turn to another relevant du Pont factor herein, namely, the strength of petitioner's claimed mark. On the one hand, petitioner repeatedly stresses the "strength and fame of petitioner's marks."¹⁰ On the other hand, respondent has raised as an "affirmative defense" that the term "'Jet' has been so extensively and commonly used in the waster water treatment field by others that it is not distinctive of anyone as a single source ...". Respondent's answer, affirmative defenses, ¶4.

Respondent has not filed a counterclaim to cancel petitioner's registrations as being generic. To the extent respondent argues that the involved marks are merely descriptive, respondent is definitely not permitted to attack collaterally petitioner's incontestable registrations in this proceeding. On the other hand, we cannot agree with petitioner that the record demonstrates that its involved marks are arbitrary, strong or famous.

¹⁰ Petitioner's president, David MacLaren, testified that his father selected "JET" as petitioner's trade name in the 1950's when jet aircraft technology was quite new, in order to create for the company a connotation of speed, efficiency and modernity. David MacLaren Testimony, pp. 8-9.

In any case, in order to understand the strength of petitioner's marks in this field, we must turn to dictionary definitions, relevant testimony as to the technology involved, and indications of third-party usage.

Lay dictionaries (e.g., non-engineering, non-technical, non-scientific sources) define the word "jet" with references to a stream of liquid or gas as well as a device like a nozzle.¹¹ Dr. Kocher takes the position that this general definition is not sufficiently accurate from a scientific or engineering standpoint, going on to discuss true "jet" devices as "turbo-machines" where "a propulsive thrust is created on the device."¹²

As noted by respondent, among the literature in the record for aerobic equipment for treating wastewater, the word "jet" appears routinely in the context of terms such as "jet aeration," "jet aspiration," and "jet mixing." However, we find that none of these uses of the word "jet" in the wastewater treatment context would seem to fit

¹¹ **Jet:** n. 1. A high-velocity fluid stream forced under pressure out of a small-diameter opening or nozzle. 2. Something emitted in or as if in such a stream... 3. An outlet, such as a spout or nozzle, for emitting such a stream. 4.a. A jet-propelled vehicle,; especially a jet-propelled aircraft. B. A jet engine. The American Heritage Dictionary of the English Language, p. 703 (1975).

¹² We note in this regard that the magistrate concluded that "[petitioner] confuses jet propulsion with jet aeration." p. 9.

within Dr. Kocher's technical definition. In fact, none of the third-party systems discussed in this record reflect submerged jet aerators - a usage that Dr. Kocher acknowledges would involve generic uses of the word "jet" in the context of related technologies accomplishing the same aerobic process for treating wastewater. Kocher declaration, ¶9.

All of these wastewater treatment products (petitioner's, respondent's and those of third parties) depend upon a biochemical process in which aerobic bacteria consume the organic pollutants in wastewater. The efficiency of the bacteria's consumption is dependent upon the amount of available oxygen dissolved in the liquid sludge. "Jet aeration," "jet aspiration," and "jet mixing" all seem to be related to differing techniques for encouraging this oxygen transfer by improving the aeration efficiency, which in turn can significantly reduce the cycle times of the processes and hence the costs of operation.

In the case of both petitioner's and respondent's products, a stream or "jet" of air is drawn into the fluid of the reactor medium - in some cases with sufficient force to carry small air bubbles to the bottom of the

reactor vessel. Respondent refers to its particular variation on this theme as its "patented vacuum bubble transfer." Both these products fall into the category of "plunging jet aerators," and both petitioner's and respondent's products claim to provide effective methods for dissolving air into the aeration tank for bacteria growth.

Accordingly, while we must grant petitioner's marks all the presumptions to which they are entitled under the law, on the Abercrombie & Fitch spectrum of distinctiveness of marks, we find petitioner's marks to be at least highly suggestive - certainly not arbitrary. We conclude that there is no evidence in this record as to the intrinsic strength of these marks that would favor petitioner. Moreover, there is no showing that these marks have acquired the renown or fame that petitioner asserts for them.

As to the related du Pont factor focusing on the number and nature of similar marks in use on similar goods, respondent's has pointed out, *inter alia*, two registrations owned by Aqua-Aerobic Systems, Inc., covering the AQUA-JET series of marks in connection with industrial aerators:

REGISTRATION NO. 1703105 **AQUA-JET** (STANDARD CHARACTER DRAWING)

for "floating mechanical aerators used in industrial and municipal waste water treatment," in International Class 11;

REGISTRATION NO. 1834332 **AQUA-JET II** (STANDARD CHARACTER DRAWING)

for "contained flow floating mechanical aerators used in industrial and municipal waste water treatment," in International Class 11.

While this does not demonstrate use by competitors, it does suggest that "jet" is, at a minimum, highly suggestive of these goods. In view of the highly suggestive nature of the term "jet" in this field, respondent's addition of the prefatory term "Aerob-a-" is sufficient to distinguish it from petitioner's JET mark.

As to the du Pont factors focusing on actual confusion (e.g., the nature and extent of any actual confusion, and the length of time during and conditions under which there has been concurrent use without evidence of actual confusion), it is well settled that proof of actual confusion is not necessary for petitioner to prevail, as the test before us is likelihood of confusion. See Kangol Ltd. v. KangaROOS U.S.A. Inc., 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992).

On the other hand, to the extent that petitioner has shown overlapping trade channels herein, respondent should

be allowed, in fairness, to point out that petitioner has been unable to unearth a single instance of actual confusion despite the fact that they are competitors having a relatively long period of contemporaneous usage of their respective marks during which time the parties were both distributing their products nationwide through the same channels of trade to the same classes of purchasers.

Finally, we turn to what we consider to be one of the most critical du Pont factor in this case, namely, the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and overall commercial impression. See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

In a summary judgment decision during petitioner's (Jet, Inc.'s) infringement action against respondent (SAS) in the District Court for the Northern District of Ohio, the trial judge found as follows:

Deferring to the precedential guidance in this matter, the trademarks are not sufficiently similar to confuse the public when singly presented, although they all contain Jet. [Respondent] has shown that Jet is a very common element of trademarks. [citation omitted]. From the evidence it can be inferred that the public does not

perceive all trademarks containing the term Jet to have their origin or sponsorship by or with Jet, Inc.

Rather, there is significant dissimilarity when the trademarks are pronounced between "JET," and "JET AERATION" vs. "AEROB-A-JET." Thus, the terms are not pronounced or verbally translated in exactly the same way. [citation omitted]. The term "JET AERATION" conveys a meaning of water bubbling through a liquid. On the other hand, "AEROB-A-JET" refers to "natural aerobic bacteria" and thus conveys a meaning of purification.

Memorandum Opinion of Judge James S. Gallas, Case No. 1:94CV2490 (United States District Court for the Northern District of Ohio, Eastern Division), p. 20.

As noted earlier in this decision, the Sixth Circuit Court of Appeals has already ruled that it would be unreasonable to conclude that the marks JET and AEROB-A-JET are confusingly similar:

We have previously considered several cases involving a defendant whose mark contains all or a significant part of the plaintiff's mark. Jet relies primarily on Daddy's Junky Music and Induct-O-Matic. Daddy's Junky Music held that the defendant's mark, BIG DADDY'S FAMILY MUSIC CENTER, was not sufficiently distinct from the plaintiff's DADDY'S to justify summary judgment, especially in light of the defendant's use of abbreviations such as BIG DADDY'S. The two marks in this case, however, are more distinct than DADDY'S and BIG DADDY'S. The most prominent part of AEROB-A-JET is not the shared term JET but the initial syllables AEROB-A, and there is

no indication in the record that SAS or anyone else commonly abbreviates AEROB-A-JET as merely JET. In Induct-O-Matic, this court affirmed the district court's finding, after trial, that INDUCTO and INDUCT-O-MATIC were confusingly similar. Again, the marks in this case are more distinctive. The addition of the suffix MATIC adds little meaning to the mark, and MATIC is not so prominent in the pronunciation of INDUCT-O-MATIC that it would readily distinguish the parties' products in the marketplace.

Jet argues that the term AEROB-A is merely descriptive and therefore not eligible for trademark protection. Jet claims that we are therefore obliged, under Induct-O-Matic, to delete that portion of the mark when assessing similarity. The comparison would then be between JET and JET. However, while AEROB-A refers to the relationship of SAS's product to aerobic bacteria, it does not merely describe the product; it suggests the idea of bubbling air. AEROB-A in SAS's mark is a distinctive term which is not merely descriptive. It is not appropriate to delete this distinctive portion of SAS's mark when assessing similarity.

JET and AEROB-A-JET are visually and verbally distinct. AEROB-A-JET has four syllables to JET's one, and the first syllables of AEROB-A-JET are more prominent when the mark is pronounced. Both AEROB and JET are somewhat descriptive of how the parties' devices operate, but neither is generic or merely descriptive of the process. Considering the impression made by the marks as a whole, JET and AEROB-A-JET are not confusingly similar.

In sum, the undisputed facts of this case establish that Jet and SAS are in direct competition, selling related goods through

the same marketing channels. However, a reasonable jury could not conclude that the marks JET and AEROB-A-JET are confusingly similar

In support of its position that the marks are confusingly similar, petitioner includes the testimony of one of its expert witnesses, Professor Condren. He argues that in light of the "free floating nature" of the syllables in both marks, the JET AERATION mark shows up twice in the "metaconsciousness" of the person looking at the AEROB-A-JET mark, concluding therefore that the marks are visually and aurally similar.

While we have deemed Professor Condren's testimony to be admissible, we do not find it to be persuasive. The marks must be considered in their entirety, as prospective purchasers would view them. In the context of wastewater treatment equipment, all three involved marks have the connotation of a stream of fluid. Furthermore, both petitioner's JET AERATION & design mark and respondent's AEROB-A-JET mark contain suggestions of bubbles, bacteria and/or oxygen transfer.

In spite of these similarities in connotation, we find the marks of petitioner and respondent mark to be quite different as to sound and appearance. On this question, we agree with the Sixth Circuit that it would be

unreasonable to conclude that the marks JET and AEROB-A-JET are confusingly similar. How much more so would this conclusion hold true as to the marks JET AERATION & design and AEROB-A-JET. Although both "Aeration" and "Aerob-a" share similar etymological roots in "aero" / "air," we find that whatever similarities in connotation may exist herein, the differences in appearance, sound and overall commercial impression overwhelm that similarity in meaning.

In conclusion, we find that petitioner and respondent are marketing closely-related products through the same marketing channels. However, prospective purchasers will exercise a high degree of care; petitioner has not demonstrated that JET or JET AERATION & design are as strong in this field as it asserts them to be; despite many years of litigation, petitioner has not recited to a single instance of actual confusion; and most significantly, we find the marks to be quite different as to appearance, sound and overall commercial impression.

Decision: The petition to cancel is hereby denied.