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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Power Detergents, LLC¹

Serial No. 76571013

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

Opinion by Drost, Administrative Trademark Judge:

On January 20, 2004, Power Detergents, LLC (applicant) applied to register the mark shown below on the Principal Register for goods identified as "cleaning products, namely, stain remover, laundry detergent, namely laundry detergent booster, all purpose cleaning preparation, degreasing preparation not used in manufacturing processes

¹ The application was originally filed by Diamond Chemical Company, Inc. and it was subsequently assigned to applicant in an assignment recorded at Reel/Frame No. 3049/0013.

for household use, and spot remover" in Class 3.² The application (Serial No. 76571013) alleges a date of first use anywhere and in commerce of January 7, 2004.

The image shows a stylized mark consisting of a large, bold, black-outlined letter 'O' followed by a smaller superscript '2'. The 'O' is a simple circle with a thick black border, and the '2' is positioned to the upper right of the 'O'.

The examining attorney³ refused to register applicant's mark under Section 2(d) of the Trademark Act because of a prior registration for the mark O2 POWER (standard character drawing) for "general and multi-purpose stain removers and soaps for laundry and general household use" in Class 3. 15 U.S.C. § 1052(d).⁴

The examining attorney's position (Brief at 6, citation to record omitted) is that:

Although the applicant utilizes stylized lettering in its mark, registrant already has a claim to use any lettering style, including superscript, in its depiction of its mark. Arranging the standard characters of registrant's mark in a stylized form does not serve to obviate a likelihood of confusion between the two marks.

Applicant also contends that the "O2" in registrant's mark is weak, and that there are "substantial

² It is clear from the specimen that "laundry detergent" is limited to "laundry detergent booster" and that is how we have treated this identified item in rendering our decision.

³ The current examining attorney was not the original examining attorney in this case.

⁴ Registration No. 2,770,398 issued on September 30, 2003.

differences ... which consumers will readily recognize" between registrant's and applicant's mark. However, applicant fails to support this assertion by pointing out any differences between the marks aside from the minor difference discussed above, which does not change the commercial impression of the marks and does not obviate a likelihood of confusion between the marks.

The examining attorney (Brief at 8) also argues that applicant's and registrant's goods are "closely related, and many of the goods of applicant and registrant are identical."

Applicant maintains that its mark "is 'O²', not 'O2.'" In the Applicant's mark, the '2' is presented [in] superscript relative to the 'O.' The raised '2' is in stylized form, which is an essential part of the commercial impression of the Applicant['s] mark." Reply Brief at 2. Applicant goes on to explain that "a superscript or exponential '2' connotes the meaning that something is 'squared,' whereas a standard numeral '2' merely connotes the presence of 'two' of something." Reply Brief at 3.

After the examining attorney made the refusal final, this appeal followed.

In likelihood of confusion cases, we consider the facts as they relate to the 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 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he 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." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin our discussion by looking at applicant's and registrant's goods. Applicant's goods are "cleaning products, namely, stain remover, laundry detergent, namely laundry detergent booster, all purpose cleaning preparation, degreasing preparation not used in manufacturing processes for household use, and spot remover." Registrant's goods are "general and multi-purpose stain removers and soaps for laundry and general household use." Both applicant's and registrant's goods include "stain removers" and registrant's soaps for laundry use are very similar to applicant's laundry detergent booster. Moreover, applicant's other cleaning products are also related to registrant's stain removers and soap for household use. Therefore, the goods are identical in part and otherwise closely related. When "marks would appear on

virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992). Furthermore, because the goods include general purpose stain removers, we must assume that channels of trade are the same and that the purchasers overlap. Genesco Inc. v. Martz, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"). See also In re Smith and Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

In addition, because the identification of goods includes stain removers and laundry products, the purchasers of these goods would be ordinary consumers who would not necessarily be sophisticated purchasers. Morton-Norwich Products, Inc. v. N. Siperstein, Inc., 222 USPQ 735, 736 (TTAB 1984). ("Since there is no limitation in

applicant's identification of goods, we must presume that applicant's paints move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers").

We now compare applicant's and registrant's mark. Applicant's mark is "O²" in a stylized form and registrant's mark is "O2 POWER." We compare the marks to determine if there are similarities and differences in sound, appearance, meaning, and commercial impression. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The marks are similar because they both consist of the letter "O" and the number "2." They are different to the extent that applicant's mark is stylized and it depicts the number in superscript while registrant's mark adds the word "Power."

Perhaps the central issue in this case is the way the examining attorney and applicant view the common term "O2" in the marks. Applicant argues that "'O2 POWER' has a meaning of powerful oxygen, whereas, the superscript position of the '2' in the Applicant[s] mark 'O²' imparts the mathematical meaning of 'O' squared." Brief at 6. On the other hand, the examining attorney maintains that "the marks in question could clearly be pronounced the same

regardless of superscript or subscript. A reasonable consumer may also pronounce applicant's mark as 'Oh Two.'" Brief at 7.

We begin our discussion here by pointing out that there is no correct pronunciation of a trademark.

Interlego AG v. Abrams/Gentile Entertainment Inc., 63

USPQ2d 1862, 1863 (TTAB 2002):

[E]ven if applicants had hypothetically made some effort to educate the public to pronounce their mark MEGO as "me go," the fact remains "that there is no correct pronunciation of a trademark." In re Belgrade Shoe, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969). Even if applicants were in the future to make efforts in attempting to educate the public as to how to pronounce their mark, we are of the firm belief that a significant portion of the public would still pronounce applicants' mark as "Meg O."

We also note Judge Rich's observation that "the users of language have a universal habit of shortening full names -- from haste or laziness or just economy of words." In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring). Inasmuch as this case involves a trademark and not a chemical formula in a patent, even purchasers familiar with the "squared" meaning of the superscript may be inclined to shorten the mark to the more concise and common pronunciation (Oh Two).

In this case, both marks contain the letter "O" and the number "2." We cannot conclude that potential

purchasers will consistently pronounce applicant's mark as "Oh squared." We find that the observations of the Court in K2 Advisors, LLC v. K2 Volatility Fund, LP, No. 02 Civ. 3984 U.S. Dist LEXIS 18801, 2002 WL 31235701 at *6 (S.D.N.Y. 2002) involving the mark K2 relevant here:

[T]he pronunciation of such famous formulae [$E=MC^2$ and πr^2] ha[s] little bearing on the instant action. While the superscript "2" may be pronounced "squared" in the context of those specific well-known instances, defendants have offered no evidence - beyond the conclusory allegations of its principals - that a superscript "2" used in a hedge fund name would be pronounced "squared" by the relevant segment of the population.

We are convinced that many purchasers would simply pronounce applicant's mark as they see it, i.e., the letter "O" and the number "2."

Second, regarding the appearance of the marks, we also find that they are very similar. The differences between the appearance of the marks consists primarily of the addition of the word "Power" in the registered mark and the size and placement of the numeral "2" in applicant's mark. We note that registrant's mark is displayed in a standard character drawing. As such, registrant is not limited to any particular stylization. "[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a *difference* cannot legally

be asserted by that party. Tomy asserts rights in SQUIRT SQUAD regardless of type styles, proportions, or other possible variations. Thus, apart from the background design, the displays must be considered the same."

Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). We note applicant's statement that standard form drawings do not permit the display of subscripts or superscripts, but that is because these features are simply "not in the USPTO's standard character set." TMEP § 807.03(a) (4th ed. April 2005). See also In re AFG Industries Inc., 17 USPQ2d 1162, 1164 (TTAB 1990):

It is obvious that the raised numeral "2" is just one of the several special form features of applicant's mark and that these features are essential parts of the commercial impression of the mark. It is even more obvious that it would be impossible to recreate the mark as it is used on applicant's specimens by means of a typewriter. Applicant would have been entitled to register the mark in typed form only if the mark had been so used, without special features, prior to the filing of the application and if specimens supporting such had been provided.

Registrant's standard character drawing permits registrant to display its mark in various stylizations including with a lowercase for the letter or with the letter and number in different font sizes, even if the standard character drawing would not encompass a superscript. Thus, registrant's registration entitles it to display its mark in such a manner that the difference in appearance between

the displays of the common portion of these marks would not be significant.

Another feature of the marks that we consider is their meanings. While applicant asserts that the registered mark is the chemical symbol for oxygen, significant numbers of ordinary purchasers could also assume that applicant's mark has the identical meaning. As previously discussed, applicant's and registrant's goods must be deemed to be sold in all normal channels of trade and to ordinary customers. These customers would include individuals who are not chemists or even able to recall their high school chemistry. Such customers are not likely to make a distinction in meaning between O² with the 2 shown in superscript, and O2 without the superscript. Also, the term "Power" has obvious suggestive significance when it is used with stain removers and laundry products. Therefore, these purchasers are unlikely to rely on this word to distinguish O² and O2 POWER. As for purchasers who have no knowledge of chemical symbols, the "O2" part of the marks is likely to have no clear meaning and these purchasers would have little basis to distinguish the marks even with the presence or absence of the suggestive word "Power."

Regarding the commercial impressions of the marks, they are also similar. The letter "O" and the number "2"

figure prominently in both marks and the suggestive word "Power" merely accentuates the O2 part of the marks.

Ultimately, we must compare the marks in their entireties to determine if there is a likelihood of confusion. The fact that the registered mark includes an additional word does not mean that, when the marks are used on identical and closely related goods, there is no likelihood of confusion. Squirtco v. Tomy Corp., 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983) (SQUIRT SQUAD for floating water toys confusingly similar to SQUIRT for balloons); Wella Corp. v. California Concept Corp., 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design likely to be confused with CONCEPT for hair care products). See also In re Chatam International Inc., 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (The marks JOSE GASPAR GOLD and GASPAR'S ALE determined to be similar). The inclusion of the suggestive word "Power" in registrant's mark is one factor to consider but it does not dictate a holding that there is no likelihood of confusion.

Furthermore, the slight design in applicant's mark is significant only because it represents the number "2" as a superscript. The stylization is hardly the same type of stylization that was found critical in the case of In re

Electrolyte Laboratories Inc., 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990). In that case, the Federal Circuit held that the marks K+ and design and K+EFF (stylized) for potassium supplements were not confusingly similar (K being the symbol for potassium and "EFF" is an abbreviation for effervescent) because "the design of the marks is significantly different." Here, there is no design in registrant's mark and applicant's design is minimal. The only possible difference between the designs is the placement of the number 2. This feature and the presence of the suggestive word POWER in registrant's mark does not sufficiently distinguish the marks. For example, in another case, the Federal Circuit held that the addition of the words "The" and "Cafe" and a diamond-shaped design to registrant's DELTA mark still resulted in a likelihood of confusion. In re Dixie Restaurants, 105 F.3d 1405, 1406, 41 USPQ 1531, 1534 (Fed. Cir. 1997).

Inasmuch as prospective purchasers include all types of purchasers, we are convinced that many purchasers would not be able to distinguish between the identical letter and number in slightly different scripts even if the suggestive word "Power" appeared in one of the marks. Many prospective purchasers would likely view the terms, "O2," "O₂" and "O²" as very similar, if not, identical. It is

important to note that a "[s]ide by side comparison is not the test." Grandpa Pigeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973). Purchasers may encounter these marks at different times. Furthermore, "[h]uman memories ... are not infallible." In re Research and Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), quoting, Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd., 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). While the word "oxygen" and its chemical symbol equivalent may, as the record suggests, be suggestive of stain removers and soap, registrant's mark with an additional suggestive word is still entitled to protection against registration by applicant of the "O2" portion of the registered mark with superscript stylization. "[E]ven weak marks are entitled to protection against registration of similar marks, especially identical ones, for related goods and services." In re Colonial Stores, 216 USPQ 793, 795 (TTAB 1982); In re The Clorox Co., 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978) (ERASE for a laundry soil and stain remover held confusingly similar to STAIN ERASER, registered on the Supplemental Register, for a stain remover).

We conclude by holding that the similarities in the marks' sound, appearance, meaning, and commercial

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impression outweigh their differences. While there are some differences in the marks, when the marks O2 POWER and O² (stylized) are used on identical and closely related goods sold to ordinary purchasers, confusion is likely.

Decision: The refusal to register is affirmed.