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PTH

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 30, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Portable Floor Makers, Ltd.

v.

Florlok USA, Inc.

Opposition No. 92,747
to application Serial No. 74/373,406
filed on March 30, 1993

George F. Dvorak, Patricia A. Cigelnik and Keith Orum of
Dvorak & Orum for Portable Floor Makers, Ltd.

Louis Weinstein of Weinstein & Kimmelman for Florlok USA,
Inc.

Before Simms, Cissel and Hairston, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Florlok USA, Inc. has filed an application to register
the mark FLORLOK for "portable dance floors composed
primarily of non-metallic materials." ¹

Registration has been opposed by Portable Floor Makers,

¹ Serial No. 74/373,406 filed March 30, 1993, which alleges a
date of first use of January 30, 1993.

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Ltd., an English corporation. Opposer essentially alleges that it used the mark FLORLOK in connection with portable dance floors in the United States prior to applicant's claimed date of first use; and that such use establishes ownership of the mark with opposer.

Applicant, in its answer, has denied the salient allegations of the notice of opposition.

The record consists of the pleadings; the file of the involved application; opposer's notice of reliance on applicant's responses to opposer's discovery requests; and the trial testimony, with exhibits, of opposer's witnesses Mary Weston-Webb, Joseph Weston-Webb, Bernard Shipper III, Keith Furniss, Richard Andrews II, George Strickland, and Russ Rollins and applicant's witnesses Geoffrey Crawford and Guy Hill.

Both parties filed briefs on the case and were represented by counsel at the oral hearing.

Before turning to the merits of this case, we must first consider an evidentiary dispute that has arisen between the parties. In particular, applicant has moved to strike the rebuttal testimony, with exhibits, of opposer's witnesses Joseph (hereinafter "Joe") and Mary Weston-Webb. Applicant maintains that the testimony, which concerns the development of the FLORLOK portable dance floor and the selection of the mark FLORLOK, should have been presented

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during opposer's testimony-in-chief. Opposer, however, argues that the purpose of the testimony was to refute and discredit portions of the testimony of applicant's witnesses and, thus, was proper rebuttal. In this case, we agree with opposer that the rebuttal testimony was proper. We note that opposer, during its testimony-in-chief, did offer some testimony from Joe and Mary Weston-Webb concerning the invention of the FLORLOK portable dance floor and the selection of the FLORLOK mark. Applicant, in turn, during its testimony period, offered testimony which was in direct contravention thereto. Thus, it was not improper for opposer, during its rebuttal testimony period, to offer testimony to refute and discredit applicant's testimony. Under the circumstances, applicant's motion to strike the rebuttal testimony is denied.

The issue to be decided in this proceeding is which party is the owner of the FLORLOK mark for portable dance floors. The parties have offered differing versions of, inter alia, their relationship with each other, the invention of what is known as the FLORLOK portable dance floor, the selection of the FLORLOK mark, the marketing of FLORLOK portable dance floors, and the first use of the FLORLOK mark in the United States. Because both parties

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have put forth a substantial amount of information concerning these matters, we have attempted to summarize the parties' respective positions.

We begin with opposer's version of the story which begins on the other side of the Atlantic. Opposer, Portable Floor Makers, Ltd. is a limited liability company in England and was formed in September 1992. The sole owners and officers are Joe and Mary Weston-Webb, husband and wife. Opposer's predecessor was Unusual Attractions Ltd., which was dissolved upon the formation of opposer and all assets and liabilities of Unusual Attractions Ltd. were assumed by Joe and Mary Weston-Webb. In 1989 Joe Weston-Webb, who was in the business of making, selling and renting portable dance floors, invented the portable dance floor known as FLORLOK. It consists of parquet wood panels which interlock without screws or tools. Joe's wife, Mary Weston-Webb, came up with the FLORLOK mark shortly after the product was invented. The Weston-Webbs showed the FLORLOK product to Geoffrey Crawford and Guy Hill, at which time Hill offered to sell FLORLOK portable dance floors for the Weston-Webbs. At the time, Crawford and Hill were doing business as Braewell Limited, a company of England. An oral agreement was reached that Hill would sell FLORLOK portable dance floors only to hotels in England. The Weston-Webbs retained the right to sell to the rental market because they had

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prior experience selling portable dance floors to this market. According to the terms of the agreement, Hill was to add his commission to the sales price of the product. By the end of 1989 Hill had made two sales of FLORLOK to hotels on behalf of the Weston-Webbs. The Weston-Webbs terminated their relationship with Hill in February 1990 when he attempted to sell FLORLOK portable dance floors to rental companies in violation of the parties' agreement. Several months later, in May 1990, Hill approached the Weston-Webbs again about selling the FLORLOK product. In May 1990 a meeting took place between the Weston-Webbs and Hill and Crawford. There was an understanding between the parties that they would form Florlok UK Ltd. for the sole purpose of marketing the FLORLOK product. Florlok UK Ltd. was subsequently formed with all expenses paid by Unusual Attractions, Ltd. Hill then resumed selling the FLORLOK product. Again, he was strictly limited to selling to hotels in England.

Also, in 1990 the Weston-Webbs showed the FLORLOK portable dance floor to Keith Furniss, a customer who had purchased another type of portable dance floor from the Weston-Webbs known as Weblok. Mr. Furniss offered to try to sell some of the FLORLOK product for the Weston-Webbs in the United States while he was attending a trade show in Dallas in February 1991. He took some literature that the Weston-

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Webbs had prepared as well as a sample of the product to the trade show. Furniss visited approximately 10-12 booths at the trade show, showing the sample and leaving copies of the literature. Even though there was a positive response to the product, potential customers considered the product to be too expensive.

In December 1991, at the request of Hill, the Weston-Webbs shipped around five hundred FLORLOK panels to Crawford, who was in the United States. Crawford had taken orders for several floors and he had sent a fax to the Weston-Webbs outlining the requirements for each floor. Prior to shipping the goods, an invoice from the Weston-Webbs was delivered to Hill at Florlok UK Ltd. in England, requesting his signature to confirm that payment would be made within seven days of delivery of the products or at the latest, on January 1, 1992. When it became apparent to the Weston-Webbs that they might not receive immediate payment for the shipment of the goods, they came to the United States in late December 1991. The primary purpose of the trip was to collect payment for the floors that had been shipped to Crawford in the United States. The Weston-Webbs stayed in Orlando, Florida, which was where Crawford was living at the time. When the Weston-Webbs were unable to collect the money owed them, Crawford arranged for them to pick up the unsold floors, which were in storage in a

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warehouse in Savannah, Georgia. The Weston-Webbs rented a truck, drove to the warehouse in Savannah, and picked up the floors. On their return to Orlando, they stopped at several party supply rental stores. At each store they showed an actual floor along with product literature. At the Rollins Party World store in Orlando, the owner, Russ Rollins, offered to store the flooring for the Weston-Webbs and assist in selling the product in the United States.

While in Orlando, the Weston-Webbs became aware that Hill and Crawford had formed applicant, Florlok USA, Inc., without their knowledge. The Weston-Webbs requested that Hill and Crawford change the structure of the company to include them. Also, around the same time, the Weston-Webbs were told by Crawford of the existence of a patent that he and Hill had obtained. The Weston-Webbs insisted that Crawford provide them with details of the patent as well as transfer ownership of the patent to Florlok UK Ltd., of which the Weston-Webbs believed they were part owners at the time. Crawford assured the Weston-Webbs that this would be done as soon as he returned to England. On May 25, 1992 the Weston-Webbs received a fax from Crawford providing the patent information and indicating it was assigned to "Florlok." The Weston-Webbs understood that this meant that the assignment to Florlok UK Ltd. had been completed.

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In September 1992, while preparing to register opposer, Portable Floor Makers, as a limited liability company in England, the Weston-Webbs learned, much to their surprise that they no longer had any interest in Florlok UK Ltd. Until this time, the Weston-Webbs were under the impression that they were shareholders in Florlok UK Ltd. The Weston-Webbs then wrote a letter to Hill and Crawford, setting forth the terms upon which they would agree to continue their distributorship arrangement. When Hill and Crawford refused to agree to the terms, opposer insisted that they discontinue selling the FLORLOK portable dance floors in the United States. The Weston-Webbs subsequently retained another company to act as their exclusive United States distributor. During meetings that were held in 1993 Hill and Crawford continued to express interest in selling FLORLOK portable dance floors in the United States, but the Weston-Webbs agreed to allow them to continue selling only to hotels in England. When the Weston-Webbs learned in May 1993 that Hill and Crawford had sold a portable dance floor by another manufacturer under the FLORLOK mark in England, they terminated their relationship with Hill and Crawford.

Not surprisingly, applicant has a somewhat different version of the story. Applicant, Florlok USA, Inc., is a Delaware corporation and was formed in 1991. One of its principals, Guy Hill, created the portable dance floor known

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as FLORLOK in July 1989 in England and Joe Weston-Webb aided in the construction of the floor in exchange for the right to sell the portable dance floors to rental companies. It was Hill and applicant's other principal, Geoffrey Crawford who came up with the mark FLORLOK. At the time, Hill and Crawford were doing business as Braewell Limited and Braewell's telemarketing staff contacted hotels in England to develop customers for the FLORLOK product.

In order to help out Joe Weston-Webb with mortgage problems, Hill met with Andrew Lane, an accountant. A proposal was drawn up and a new limited liability company, Florlok UK Ltd. was formed with Braewell Limited and the Weston-Webbs as majority shareholders, and Andrew Lane as a minority shareholder. Hill and Crawford thereafter took responsibility for advertising and marketing the product, as well as making deliveries, handling complaints and repairs.

From May 18 to May 22, 1991 Hill and Crawford manned a booth at a trade show in Chicago, Illinois where they displayed a portion of a FLORLOK portable dance floor. The FLORLOK logo and a sample panel from one of the floors were affixed to the booth wall. There was strong interest in the product and in August 1991 Hill and Crawford returned to the United States and traveled to a number of hotels where they demonstrated the product. Fourteen orders were placed for the floors. A fax was sent to Joe Weston-Webb with a

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breakdown of the floor requirements for each hotel. Joe Weston-Webb constructed the floors and they were shipped to the United States. Joe Weston-Webb billed Hill and Crawford for the dance floors and Hill signed the bill agreeing to pay within seven days of delivery and at the latest by the first of January 1992. The dance floors were needed for occasions such as Thanksgiving and Christmas. Delays in England and in clearing customs resulted in losses of orders. In late December 1991 Joe Weston-Webb arrived in Orlando demanding payment for the dance floors because he was in desperate need of money. Crawford refused to sell the dance floors to rental companies at discount prices as Joe Weston-Webb recommended, but gave permission to Joe Weston-Webb to pick the unsold floors from the warehouse in Savannah, Georgia where they were in storage. Also, around this time, Crawford advised Joe Weston-Webb that he and Hill were going to apply for a patent in the United States, to which Joe Weston-Webb had no objection.

Over the next year the relationship between the Weston-Webbs and Hill and Crawford deteriorated and in September 1993 Joe Weston-Webb filed suit against Florlok UK Ltd. maintaining that Florlok UK Ltd. infringed his "copyrights", i.e., drawings of the FLORLOK portable dance floor. The suit was subsequently withdrawn. Hill and Crawford have made improvements to the FLORLOK portable dance floor and

have since retained another company to manufacture the floors.

As is apparent from the above, there are many facts which are in dispute in this case. However, there is no dispute that Joe Weston-Webb was the manufacturer of the portable dance floors known as FLORLOK and Guy Hill and Geoffrey Crawford marketed and sold the floors. It is well settled that the question of ownership of a trademark as between the manufacturer of a product to which a mark is applied and the exclusive distributor of that product is a matter of agreement between them, and in the absence of any such agreement, there is a legal presumption that the manufacturer is the owner of the mark. In this case, there was no written agreement between Joe Weston-Webb and Hill and Crawford. Thus, we begin with the legal presumption that Joe Weston-Webb is the owner of the FLORLOK mark. While applicant is correct that this presumption is rebuttable, applicant has failed to rebut the presumption in this case.

As indicated, there was no written agreement between Joe Weston-Webb and Crawford and Hill. However, there are two documents, even though they pertain to the parties' dealings in England, which indicate that Hill and Crawford were merely sales agents. Exhibit 14 (Hill Deposition) is entitled "Florlok Proposal" and was used in connection with

securing financing to set up Florlok UK Ltd. At the time this document was prepared, Braewell Limited was the company owned by Hill and Crawford. The "Introduction" section of the document states:

In line with Braewell's plan to find suitable products and markets to make sales agency agreements with, Braewell has identified an excellent prospect within [sic] the product Florlok.

Also, the "Florlok History" section of the same document states:

The product was designed by Mr. Webb who owns a marquee hire business and has been making flooring products for 15 years for the marquee industry. His desire to get involved in manufacture only, led to the creation of Florlok based on a successful principle used in marquee flooring. Realising that a major part of the market was the hotel industry, he offered Braewell involvement.

We note that the document refers to Braewell's plan to "make sales agency agreements", and it appears from this statement that Braewell was to act as a sales agent for the FLORLOK product.

Also, the document states "[r]ealising that a major part of the market was the hotel industry, he [Webb] offered Braewell involvement." Similarly, it appears that Joe Weston-Webb was simply offering Braewell, i.e., Hill and Crawford, a role in marketing the FLORLOK products.

Further, we note the statement that "the product was designed by Mr. Webb." While the inventor of a product is

not necessarily the owner of the trademark therefor, this statement is, nonetheless, contrary to Hill's testimony that he created the FLORLOK portable dance floor. While Hill testified that the statement was made in the document simply to secure financing, it strikes us as highly unusual that Hill would acquiesce in such a statement unless it was true.

Exhibit 19 (Mary Weston-Webb Rebuttal Deposition) is a letter dated December 1, 1989 from Guy Hill on behalf of Braewell Limited to Unusual Attractions Limited. Braewell Limited is identified therein as "UK Agents For Florlok (UK)." Hill testified that Braewell was identified in this manner to establish "credibility" for Florlok UK and Braewell. However, it is not clear from the testimony exactly what Hill meant by this and, on its face, it appears that Braewell Limited was simply a sales agent for the FLORLOK product.

The purchasing arrangement between Joe Weston-Webb and Hill and Crawford also supports a sales agency or distributorship relationship. Although Hill and Crawford maintained that Joe Weston-Webb built the portable dance floors to their specifications, they never purchased the floors outright from Joe Weston-Webb. Rather, they took orders for floors, forwarded the orders to Joe Weston-Webb, who in turn constructed the floors, and Hill and Crawford received payment for the floors after they were delivered to

the customers. Not until customers paid for the floors did Hill and Crawford receive their commission. Although Hill and Crawford testified that they set the selling price as well as the amount of their commission, this is not necessarily inconsistent with a sales agency or distributorship relationship. Neither is it inconsistent with such a relationship that Hill and Crawford were responsible for advertising the FLORLOK product, delivering it to customers, and handling any complaints and repairs.

Also, while Hill and Crawford point out they were the first ones to physically affix the FLORLOK mark to the product, it nonetheless appears that they did so as agents of Joe Weston-Webb.

Further, while Hill and Crawford point to a letter from James Blowers as recognition that they own the FLORLOK mark, we disagree with their characterization of the letter. Hill and Crawford maintain that Blowers is requesting their permission to use the FLORLOK mark. We view the letter as a request by Blowers for permission to sell FLORLOK portable dance floors to hotels in a certain area of England. This would not be inconsistent with the sales agency or distributorship relationship between Joe Weston-Webb and Hill and Crawford, since Hill and Crawford had the entire hotel market.

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Two additional factors weigh against applicant in this case. First, it seems more than just a coincidence that applicant filed its application on March 30, 1993, around the time the relationship between the Weston-Webbs and Hill and Crawford came to an end. Second, applicant asserted first use of the FLORLOK mark just two months prior to the filing date of the application. It seems to us that if applicant had begun use of the mark two years earlier, as it now claims, it would have set forth this date in the application, particularly since Geoffrey Crawford, who signed the application, had first-hand knowledge of applicant's activities. The foregoing would tend to indicate that applicant considered itself a sales agent or distributor during the period from 1991 to 1993.

In view of the foregoing, we find that opposer is the owner of the FLORLOK mark for portable dance floors.

Decision: The opposition is sustained.

R. L. Simms

R. F. Cissel

P. T. Hairston
Administrative Trademark Judges
Trademark Trial and Appeal Board

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