

10/29/01

**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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In re Petcraft, Inc.  
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Serial No. 75/144,439  
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Robert J. Schaap for Petcraft, Inc.

Brian A. Rupp, Trademark Examining Attorney, Law Office  
105, (Thomas G. Howell, Managing Attorney).  
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Before Hanak, Bucher and Drost, Administrative Trademark  
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Petcraft, Inc. (applicant) seeks to register  
ODORSORB in the form shown below for "cat litter  
containing a scent modifying additive and scent modifying  
additives for application to cat litter." The intent-to-  
use application was filed on August 5, 1996.

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The Examining Attorney has refused registration on two grounds. First, citing Section 2(d) of the Trademark Act, the Examining Attorney contends that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark ODOR-SORB, previously registered in typed drawing form for "minerals in powder or granular form for absorbing odors." Registration No. 2,081,256. Second, citing Trademark Rule 2.71(a), it is the contention of the Examining Attorney that applicant's most recent identification of goods is impermissible in that it broadens an earlier identification of goods.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant requested and later waived 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

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differences in the marks.")

Considering first the marks, they are virtually identical. The cited mark is ODOR-SORB and applicant's mark is ODORSORB in a very slightly stylized form. Thus, in terms of pronunciation, the two marks are identical. Likewise, in terms of connotation, the two marks are identical in that they suggest that the products will absorb odors. Finally, the presence of the hyphen in the cited mark does little to distinguish said mark from applicant's mark which lacks a hyphen. Moreover, because the cited mark is in typed drawing form, the registrant would be free to depict its mark in a slightly bowed manner, as does applicant.

At this point, one matter should be clarified. Throughout its brief applicant incorrectly refers to the cited mark as ODOR ABSORB. At page 14 of its brief, applicant argues that the two marks "are not very similar" because the cited mark "ODOR ABSORB is made-up

of two common English words, [whereas applicant's mark] ODORSORB is the combination of two words with a modification in the spelling."

Frankly, this Board is at a loss to understand why

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applicant repeatedly refers to the cited mark as ODOR ABSORB. The cited mark ODOR-SORB is identical to applicant's mark ODORSORB in terms of pronunciation and connotation, and is virtually identical to applicant's mark in terms of visual appearance. Thus, the first Dupont "factor weighs heavily against applicant" because the two word marks are virtually identical. In re Martin's Famous Pastry Shoppe Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Turning to a consideration of applicant's goods and registrant's goods, we note that because the marks are virtually identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). However, in this case we find that applicant's scent modifying

additives for application to cat litter and litter containing such additives are clearly related to registrant's minerals in powder or granular form for absorbing odors. Indeed, because registrant's minerals for absorbing odors are broadly described in that there is no limitation as to which odors

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they will absorb, registrant's identification of goods is arguably broad enough to include scent modifying additives (minerals) for application to cat litter.

In sum, given the fact that applicant's mark is virtually identical to registrant's mark and the fact that registrant's goods and applicant's goods are, at an absolute minimum, clearly related if not overlapping, we find that there exists a likelihood of confusion, and accordingly affirm the refusal to register pursuant to Section 2(d) of the Trademark Act.

We turn now to the second ground of refusal, namely that applicant is impermissibly seeking to broaden its identification of goods. As previously noted, this application was originally filed on August 5, 1996. Applicant has had at varying times four different

identification of goods. The first reads as follows:  
"scent modifying additive for cat litter to reduce odors  
and litter containing such additive." Applicant then  
amended its identification of goods to "scent and odor  
modifying additive for cat litter." On a third occasion,  
the identification of goods was amended to read as  
follows: "cat litter containing a scent modifying  
additive." Applicant's

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fourth and final identification of goods reads as  
follows: "cat litter containing a scent modifying  
additive and scent modifying additives for application to  
cat litter."

In arguing that this second ground of refusal is  
impermissible, applicant takes the position that its  
fourth identification of goods is essentially a mere  
rewording of its initial identification of goods. On  
this point, we do not take issue with applicant.  
However, what applicant fails to appreciate is that it  
repeatedly modified its identification of goods such  
that, as previously noted, the third identification of  
goods reads as follows: "cat litter containing a scent

modifying additive." Applicant's fourth and final identification of goods is a clear expansion of this third identification of goods in that it adds the following additional goods: "scent modifying additives for application to cat litter." When an applicant initially sets forth a broad identification of goods and then narrows that identification, it may not at a later time revert to the broad identification of goods. In re Swen Sonic Corp., 21 USPQ2d 1794, 1795 (TTAB 1991). Applicant's fourth and final identification of goods represents a clear broadening of the identification of goods set forth in applicant's

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third identification of goods, and therefore is impermissible. Accordingly, the refusal to register on the second ground is likewise affirmed.

Decision: The refusal to register on both grounds is affirmed.

