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MARK: POWERMAX



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

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CORRESPONDENT'S REFERENCE/DOCKET NO:

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the examining attorney's refusal to register the trademark POWERMAX on the grounds that it is likely to cause confusion within the meaning of Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d).

FACTS

On October 11, 2007, the applicant filed an application to register the mark POWERMAX for "Industrial food processing machines, namely, machines for slicing food products for packing and packaging in commercial quantities, and parts therefor".¹

The examining attorney refused registration on the basis that applicant's mark, when applied to the identified goods, so resembles the mark in U.S. Registration No. 2817553,

¹ The identification was later clarified to indicate that the goods were electric.

POWERMAX, for “electric food blenders,” as to be likely to cause confusion under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d). The refusal was ultimately made final. This appeal followed.

ARGUMENT

APPLICANT’S MARK “POWERMAX,” AS USED ON THE APPLICANT’S GOODS,
IS LIKELY TO CAUSE CONFUSION WITH THE REGISTERED MARK
“POWERMAX” AS USED ON REGISTRANT’S GOODS.

A. APPLICANT AND REGISTRANT USE THE IDENTICAL MARK

Each case must be decided in two steps to determine whether there is a likelihood of confusion. First, the examining attorney must look at the marks themselves for similarities in appearance, sound, connotation and commercial impression. *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the examining attorney must compare the goods or services to determine if they are related or if the activities surrounding their marketing are such that confusion as to origin is likely. *In re August Storck KG*, 218 USPQ 823 (TTAB 1983).

Applicant concedes that the marks are identical but argues that the marks are weak and refers to 32 third party registrations that were attached to its July 17, 2008 office action

response.² All the “power max” marks referred to by applicant are totally unrelated to the applicant’s and registrant’s goods. For example, in class 7 there are 12 marks which include the term “power max” or “powermax” and, other than the cited registration, they are used for the following totally unrelated goods that have absolutely no connection to food processing or preparation found on pages 2-20 of the August 24, 2008 final refusal:

*hand held power tools, namely, drill bits, screwdriver bits, saw blades, hole saws, sandpaper, router bits and templates, wood Boring / spade bit, countersink bit, nut drivers, polishing / Grinding bit; spark plug wires;

*commercial and domestic laundry, dry cleaning and wet cleaning machines and machine parts, all for clothes, namely, clothes washers, dry cleaning machines for clothes, non-toxic dry cleaning machines for clothes, wet cleaning machines for clothes, spotting tables for pretreating spots on clothes prior to further cleaning and commercial clothes pressing machines;

*commercial and domestic laundry, dry cleaning and wet cleaning machine parts, all for clothes, namely, steam traps and steam regulators;

*agricultural vehicle internal engine parts, namely, sleeves, pistons, rings, bearings and gaskets;

*snowthrowers and structural parts thereof; hand-held, portable corded and cordless power tools, namely, drills, saws, jigsaw, sander, palm sander, circular saw, grinder, angle grinder, reciprocal saw, hobby rotary tool, polisher, bench grinder, bench grinder with light, screwdriver, planter, belt sander, biscuit joiner, random orbital sander;

*plasma arc cutting machines and replacement parts therefore;

*motors, namely standard and enhanced step motors for machines; and

*industrial power transmission belts.

² Applicant incorrectly represents that “the Examining Attorney does not dispute that the weakness of the POWERMAX mark means that multiple users of the identical mark can co-exist without confusion.” Weakness of a mark is considered in relation to the goods. The mark is not weak when used on electric food blenders.

POWERMAX is a strong mark when used on electric food blenders and industrial electric food processing machines, namely, machines for slicing food products for packing and packaging in commercial quantities, and parts therefore or any food processing machine.

The first tier is met by virtue of the fact that the marks are identical. The inquiry must move on to the second tier, a consideration of the goods.

B. RELATEDNESS OF APPLICANT'S AND REGISTRANT'S GOODS

1. Industrial electric food processing machines, namely, machines for slicing food products for packing and packaging in commercial quantities, and parts therefore and electric food blenders are related goods.

If the marks of the respective parties are identical, the relationship between the goods and/or services of the respective parties need not be as close to support a finding of likelihood of confusion as might apply where differences exist between the marks. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *Ancor, Inc. v. Ancor Indus., Inc.*, 210 USPQ 70, 78 (TTAB 1981); TMEP §1207.01(a).

Additionally, the goods of the parties need not be identical or directly competitive to find a likelihood of confusion. They need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods

come from a common source. *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); TMEP §1207.01(a)(i).

There is no per se rule for finding a likelihood of confusion between marks used in connection with industrial electric food processing machines, namely, machines for slicing food products for packing and packaging in commercial quantities, and parts therefor and electric food blenders. However, the marks in the instant case are likely to cause confusion for several reasons. First, identical marks are being used on goods which are used in food processing. Furthermore, the third party registrations of record demonstrate that it is common practice to use the same mark for electric food blenders and electric food processing machines and/or electric food slicers. To evidence the relatedness of the goods see the copies of third party registrations from the USPTO X-Search database showing the same mark used for “electric food blenders” and “electric food slicers” or “power operated food service machines, namely, meat slicers, food mixers and blenders.” See pages 2, 3, 9, 12, 17, 20 26 and 28 the January 17, 2008 office action; pages 33, 36, 40, 43, 51 and 53 in the August 24, 2008 final refusal; and pages 27 and 36 of the March 21, 2009 office action for a total of 16 pertinent third party registrations.

These printouts have probative value to the extent that they serve to suggest that the goods listed therein, namely electric food blenders and electric food processors and/or power operated food service machines, namely, meat slicers, food mixers and blenders, are of a kind that may emanate from a single source. See *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-1218 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d

1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988). Therefore, it would be reasonable for prospective purchasers to assume that the goods of applicant and registrant emanate from the same source.

Applicant argues that the applicant and registrant goods upon which the applicant and registrant use their respective POWERMAX marks are unrelated and sufficiently distinguishable so as not to cause a likelihood of confusion. In support, applicant would like the examining attorney to look beyond the goods as identified in the application and registration to make her determination. Specifically, applicant argues that “the principal error on the part of the Examining Attorney is the failure to recognize that Applicant’s goods do not consist of merely a commercial food slicer of the sort that may be found in a deli, but are rather industrial packing and packaging machines used in a meat-packing plant, cheese packaging facility and other food packing, processing and packaging plants.” Applicant’s brief at page 1. Applicant’s identification, however, is not so narrowed to those trade channels, and could encompass food slicers used in other commercial facilities such as delis and stores that utilize the packaging function. Applicant places emphasis on the industry and use of the goods but does not acknowledge that the registrant has not stated an industry or use for its electric food blenders. In fact, applicant goes outside the registration identification to limit the registrant’s goods to household use. Applicant’s brief at page 4. An applicant may not restrict the scope of its goods and/or the scope of the goods covered in the registration by extrinsic argument or evidence. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

Applicant argues that “the Examining Attorney failed to submit any evidence that countertop meat slicers are related in any way to an ‘industrial’ machine used in ‘packing and packaging in commercial quantities.’” Applicant’s brief at page 9. Page 45 of the March 21, 2009 office action is about meat slicers. It states that there are two types of meat slicers, namely, “The Medium Duty or the Economy Slicers and the Heavy Duty or the Industrial Slicers”. The following appears under the title The Heavy Duty Industrial Slicers: “The Heavy Duty Industrial Slicers start with a blade capacity of 12 inches and can go up to 14 inches. They are manufactured in the United States. These slicers are so manufactured so as to suit the needs of medium to heavy commercial operators like grocery stores, caterers, commissaries, restaurants, delis, meat shops, and for continuous heavy use.”

The applicant disregarded the fact that, for purposes of the 2(d) analysis, only the goods as identified in the application and registration may be taken into account. In this case, the registrant’s goods are identified broadly. Therefore, it is presumed that the registration encompasses all goods of the type described, including commercial goods in applicant’s more specific identification, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re Optica Int’l*, 196 USPQ 775, 778 (TTAB 1977); TMEP §1207.01(a)(iii). This includes commercial and industrial electric food blenders as discussed in detail below.

2. The applicant’s goods and registrant’s goods may have the same trade channels and the same classes of purchasers.

The presumption under Trademark Act Section 7(b), 15 U.S.C. §1057(b), is that the registrant is the owner of the mark and that use of the mark extends to all goods and/or services identified in the registration. The presumption also implies that the registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified goods and/or services. *In re Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1899 (TTAB 1989); *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964-5 (TTAB 1980).

Electric food blenders and electric food slicers are related goods for the purposes of likelihood of confusion. The applicant's goods and the registrant's goods may be sold to the same class of purchasers because of the nature of the goods. Both applicant's goods and registrant's goods are used in food preparation.

Applicant presents several arguments as to why the goods are different and have different trade channels. Applicant goes into detail as to the nature of the applicant's goods and their high costs and then states that the registrant's goods are household/domestic electric food blenders. Applicant has not, however, acknowledged that the registrant's goods are identified broadly in the registration and could include industrial electric food blenders for blending food for packing and packaging in commercial quantities. Also, attached to the March 21, 2009 office action is evidence that industrial food slicers and industrial food blenders are sold together. See pages 4-6 (commercial blenders and slicers), pages 8-11 (Empire baking equipment – mixers and slicers), pages 12-15 (Gemini food processing and baking equipment), 16-20 (Hobart Food Preparation equipment).

Pages 38-54 of the March 21, 2009 office action are the results of a Thomas.Net search showing industrial blenders and slicers. For example, pages 38 states: "...We supply a broad range of blenders including industrial blenders, food screw, cement, chemical and custom blenders. An example is Whirl-Air-Flow Corp.: "Custom manufacturer & distributor of pneumatic batch blenders systems including tumble-in-container blending systems. Features include solid state blender controls, stainless or mild steel construction..." Another example is Marion Mixers, Inc.: "Custom manufacturer of blenders, including mixers." The Ross Ribbon Industrial Blender may be seen on page 42. Pages 43-45 feature industrial food mixers and pages 45-46 feature industrial meat slicers. Pages 50-53 show Industrial Food Machinery which includes both food blenders and slicers. Page 54 features Food Processing Equipment: Industrial Food Processors, Commercial Mixers, Commercial Slicers, Food Choppers and states: "Food Service Equipment carries only high quality food processing equipment. Choose from a great selection of food processors, mixers, slicers and food choppers. Our food processing equipment is perfect for any commercial restaurant or kitchen needs."

Although applicant has a giant food slicer, the evidence of record demonstrates that it is still similar in use and purpose to the other commercial slicers of record that occupy the same trade channels as commercial blenders.

Furthermore, the applicant's identification is limited to the goods set forth in the application regardless of what the record reveals as to the particular nature of applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed. *Octocom Systems, Inc. v. Houston Computer Services Inc.*, 918 F.2d

937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant has included extra information about their product and the registrant's product that is not relevant to this ex parte proceeding and is not a factor in determining likelihood of confusion. See pages 3, 4, 8 and 9 of applicant's brief. As stated above, the likelihood of confusion determination is determined by the identification in the application and registration regardless of what the record reveals as to the particular nature of goods. Similarly, since the registrant has not specified the type of electric food blender it is presumed that it could be a commercial or industrial blender. The evidence of record demonstrates that commercial blenders and food processors and food slicers are sold together.

Applicant argues that purchasers of applicant's goods are not of the general public while purchasers of the registrant's goods are the general public just purchasing a kitchen appliance. Applicant's brief at page 14. Again applicant has gone outside the application and registration record to draw that conclusion. Nonetheless, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); see *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). When the relevant consumer includes both professionals and the general public, the standard of care for purchasing the goods is that of the least sophisticated purchaser. *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004). Both the applicant's and registrant's goods could travel in the same trade channels and be encountered by the same prospective purchasers as demonstrated by the evidence of record.

Finally, applicant has given no weight to the fact that both parties are using identical marks to identify highly related goods. Based upon the goods as they are identified in the application and registration, the relatedness of the goods as demonstrated by the evidence of record, and the fact that the marks are identical, there is a great likelihood of customer confusion as to the source of the goods.

CONCLUSION

For the foregoing reasons, the refusal to register on the basis of Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d), should be affirmed.

Respectfully submitted,

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