

THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B.

Mailed: February 8, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Crosstex International, Inc.

Serial No. 77753025

Laura E. Smith for Crosstex International, Inc.

Evelyn Bradley, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Zervas, Kuhlke and Taylor Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

On June 5, 2009, Crosstex International, Inc. applied
to register the following mark *SaniTyze* on the Principal
Register based on an allegation of use in commerce under
Section 1(a) of the Trademark Act, 15 U.S.C. §1052(a), for
goods ultimately identified as "antimicrobial waterless gel
for use as a hand cleanser" in International Class 5. In
response to a refusal based on mere descriptiveness under
Section 2(e)(1) of the Trademark Act, applicant requested

amendment to the Supplemental Register. The examining attorney granted that request on April 13, 2010.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used with its identified goods, so resembles the standard character mark SANI-TYZE registered on the Supplemental Register for "all purpose sanitizer and deodorizer for industrial and commercial use," in International Class 5, as to be likely to cause confusion, mistake or deception.¹

When there is a question of likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

In determining the similarity between the marks, we analyze "the marks in their entirety as to appearance,

¹ Registration No. 3199936, issued January 16, 2007.

sound, connotation and commercial impression." Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) quoting du Pont, 177 USPQ at 567.

The marks *SaniTize* and SANI-TYZE are identical in sound.² Applicant's argument that the marks are not phonetic equivalents is not tenable. Applicant argues that consumers "will recognize that the 'i' [in registrant's mark] is pronounced like a long 'e' and that the entire mark is pronounced san-ee-tize; the emphasis or accent is on the long 'e' at the center of the mark." As applicant states, there is no correct pronunciation because it is impossible to predict how the public will pronounce a particular mark. Thus, whether the hyphen may or may not prompt a different pronunciation is not probative and in any event the proffered difference would be minimal. Moreover, the marks, spelled the same, would share all possible pronunciations making them phonetically equivalent. They are also identical in meaning, inasmuch

² Applicant's argument that phonetic similarity is of no importance here inasmuch as both applicant's and registrant's goods are sold over the internet is not persuasive. We make analysis of the du Pont factors based on the identifications present in the application and registration and cannot read limitations into those identifications based on argument and/or evidence of actual use.

as they are both the misspelling of the word sanitize and are both used in connection with cleaning/sanitizing agents. They are nearly identical in appearance - but for the hyphen in registrant's mark. However, the presence or absence of a hyphen, like other items of punctuation or similar symbols does not change the commercial impressions of these marks. In re White Swan Ltd., 8 USPQ2d 1534, 1535 (TTAB 1988) (when the same words are used in marks, the presence or absence of hyphens or other punctuation marks generally will be of little significance); In re Burlington Industries, Inc., 196 USPQ 718, 719 (TTAB 1977) ("[A]n exclamation point does not serve to identify the source of the goods"). Applicant's stylization does not factor into our analysis because the registered mark is in standard character form and we must consider all normal displays of that mark including applicant's stylization. In re RSI Systems, LLC, 88 USPQ2d 1445 (TTAB 2008). Finally, the marks are very similar in overall commercial impression.

We turn then to consider the du Pont factors of the relatedness of the goods, channels of trade and classes of consumers. We make our analysis based on the identification of goods listed in the application and registration. Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed.

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Cir. 1990). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

In support of her argument that the goods are related, the examining attorney submitted third-party registrations for, *inter alia*, all purpose sanitizers and/or deodorizers and hand cleansers. See, e.g., Reg. Nos. 2108254 ("all purpose disinfecting preparations for janitorial use, namely ... sanitizers, antimicrobial hand cleaners"), 3441682 ("all purpose disinfectants; antimicrobial sanitizers for household use; hand and surface sanitizing and disinfecting preparations"), and 2414424 ("hand cleansers ... general purpose germicide; and sanitizers for household use, and industrial and institutional areas"). In *re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) (third-party registrations probative to the extent they show that the goods listed therein are of a kind that may emanate from a single source). The examining attorney also submitted printouts of third-party websites showing goods similar to applicant's and registrant's *identified* goods being offered by the same entity on the same website. See, e.g., www.colpalcommercial.com (Colgate-Palmolive website); and www.dialprofessional.com (Dial website), attached to January 25, 2010 Office Action. In addition, applicant's and registrant's websites show

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they sell both hand cleansers and surface sanitizers. See www.crosstex.com and www.spartanchemical.com., attached to January 25, 2010 Office Action.

While we are not convinced that registrant's identification "all purpose sanitizer and deodorizer" would encompass "hand cleansers," as the examining attorney contends, the record does show that these types of products, "all purpose sanitizers and deodorizers" and "antimicrobial hand cleansers" are of a kind that emanate from the same source and potential purchasers have been exposed to seeing such products emanate from the same source. Thus, the evidence supports a finding that the goods are related such that source confusion is likely.

With regard to the channels of trade and classes of purchasers, as noted above, we cannot limit registrant's or applicant's goods to what any evidence shows their "actual" goods or channels of trade to be. In re Bercut-Vandervoort & Co., 229 USPQ 763 (TTAB 1986) ("It is well settled that in a proceeding such as this, the question of likelihood of confusion must be determined by an analysis of the marks applied to the goods as identified in the application vis-à-vis those recited in the registration, rather than what extrinsic evidence shows those goods to be.") As identified, registrant's goods are limited to "industrial

and commercial" use and applicant's goods have no limitation as to channels of trade. In view of the close relationship of the goods and the absence of any limitations in the application we presume that the purchasers and channels of trade for such goods would overlap as to the "industrial and commercial" trade channel.³ See *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003).

Finally, we acknowledge that registrant's mark is weak, and is, in fact, registered on the Supplemental Register. However, even marks on the Supplemental Register are afforded protection, in particular, where the marks are nearly identical and goods are closely related. In re *Clorox Co.*, 578 F.2d 305, 198 USPQ 337 (CCPA 1978). See also *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

In conclusion, we find that because the marks are very similar, the goods are related, and, as identified, the channels of trade and purchasers overlap, confusion is likely between applicant's mark and the mark in the cited registration. To the extent there are any doubts, we resolve them, as we must, in registrant's favor. In re

³ Contrary to applicant's assertion, "commercial" would include applicant's actual uses in dental and medical facilities.

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Hyper Shoppes (Ohio), Inc., 837 F.2d 840, 6 USPQ2d 1025
(Fed. Cir. 1988).

Decision: The refusal to register under Section
2(d) of the Trademark Act is affirmed.