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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nupo Inc.

Serial No. 75/141,607

Robert A. Vanderhye of Nixon & Vanderhye for Nupo Inc.

John E. Michos, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Simms, Hairston and Bucher, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Nupo Inc. has filed an application to register the asserted mark set forth below

for "electrically powered flea traps and adhesive pad refills for flea traps."[1]

Registration was finally refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that the mark is merely descriptive of applicant's identified goods.[2] Also, registration was finally refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark, if used in connection with the identified goods, would so resemble the registered mark set forth below

for "flea cleaning comb with flea trap,"[3] as to be likely to

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[1] Application Serial No. 75/141,607 filed June 25, 1996 alleging a bona fide intention to use the mark in commerce. Applicant has disclaimed the "illustration of the flea" apart from the mark as shown.

[2] We note that pursuant to TMEP §1105.01(a)(iii), Examining Attorneys are not to refuse registration in the case of an intent-to-use application on the basis of failure to function as a mark.

[3] Registration No. 2,041,149 issued February 25, 1997. The registration states that: "No claim is made to the exclusive

cause confusion, mistake, or to deceive.

Section 2(e)(1) Refusal

We turn first to the refusal to register on the ground that the mark is merely descriptive of the identified goods. In urging reversal of the refusal to register on this ground, applicant argues that there are literally thousands of ways of representing a flea and that its particular representation is distinctive; that its mark includes an outer ring, such that the mark consists of more than simply the representation of a flea and the universal prohibition symbol; and that applicant's mark is registered in Canada, a country which applies the same standards as the United States in determining whether a mark is merely descriptive.

While we have carefully considered applicant's arguments, we nonetheless agree with the Examining Attorney that the asserted mark is merely descriptive of the identified goods. First, we should point out that the fact that applicant's mark has been registered in Canada is of no consequence in the determination of mere descriptiveness

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right to use the representation of the universal prohibition symbol apart from the mark as shown."

under the Trademark Act in this country. Also, as noted by the Examining Attorney, the outer circle in applicant's mark has little trademark significance and would not detract from any merely descriptive significance. See e.g., Dena Corp. v. Belvedere International Inc., 950 F.2d 1555, 21 USPQ2d 1047 (Fed. Cir. 1991). Because applicant has disclaimed the illustration of a flea in its mark, it has conceded that the illustration is descriptive matter as used in connection with its goods. In any event, we disagree with applicant that its representation of a flea is distinctive. We see nothing fanciful or cartoon-like about this particular representation. It appears to us to be a rather realistic depiction of a flea. Further, as noted by the Examining Attorney, the universal prohibition symbol means "no." Thus, when this symbol is used in connection with a realistic representation of a flea, it would immediately convey to prospective purchasers that the purpose or use of applicant's electrically powered flea traps and refills therefor is to trap and eliminate fleas from the home or other area. Stated differently, when one uses applicant's goods, there will be "no fleas." And because a mark which directly conveys information regarding the purpose or use of the goods is considered merely descriptive, applicant's mark is not entitled to

registration. See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978).

Section 2(d) Refusal

This brings us to the refusal to register based on Section 2(d) of the Act (likelihood of confusion).[4] Applicant maintains that the marks are very different because the registered mark includes the words LAST STOP and the flea is seen from the rear, whereas in applicant's mark the flea is seen from the side. Also, applicant argues that the goods are very different, i.e., the registrant's comb is a relatively small item which requires active participation by the user, whereas applicant's flea trap is electrically powered and does not require active participation by the user. In addition, applicant points out that there is no evidence that flea cleaning combs and electrically powered flea traps are manufactured by the same companies.

Turning then to the respective marks, we find that they convey similar meanings and engender similar commercial impressions. We recognize that it is generally appropriate to give more weight to the word than the design

[4] For purposes of this refusal, we are assuming that the design applicant here seeks to register is a "mark" under the provisions of Section 2(d) of the Trademark Act.

portion of a mark. However, marks must be considered in their entireties and the design portion in registrant's mark cannot be ignored.[5] In finding that the marks are similar, we have kept in mind the normal fallibility of human memory over time and the fact that the average consumer retains a general rather than a specific impression of trademarks encountered in the marketplace.

Turning next to the goods, it is well settled that they need not be identical or even competitive in nature to support a finding of likelihood of confusion. Instead, it is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

In this case, both applicant's electrically powered flea traps and registrant's flea cleaning combs are used for the same purpose, i.e., to trap fleas. Moreover, these

[5] We should note that, contrary to applicant's argument, in the registered mark, the flea is seen from the side and not the rear.

goods would be purchased by the same class of purchasers, namely, pet owners. In addition, the products are complementary, that is, an individual may purchase registrant's flea cleaning comb to use on his/her pet and an electrically powered flea trap to use in the home. These kinds of goods are sold to ordinary consumers and because of their inexpensive nature, it is unlikely that consumers will exercise a great deal care in purchasing them. Under the circumstances, we find that the goods are sufficiently related that, when sold under substantially similar marks, confusion is likely to occur among purchasers.

In reaching our decision, we have not overlooked the highly suggestive nature of registrant's mark. Nonetheless, suggestive marks are entitled to protection against the registration by a subsequent user of a substantially similar mark for related goods.

One additional matter raised by applicant requires comment. Applicant maintains that likelihood of confusion and mere descriptiveness are mutually exclusive refusals. Applicant states that it has not located a single case wherein both grounds are upheld. We would simply direct applicant's attention to In re Copytele Inc., 31 USPQ2d

1540 (TTAB 1994) and In re Home Builders Association of Greenville 18 USPQ2d 1313 (TTAB 1990).

Finally, to the extent that there is any doubt on the issue of likelihood of confusion, it is settled that such doubt must be resolved in favor of the prior registrant. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

In sum, purchasers familiar with registrant's flea cleaning comb sold under the mark LAST STOP and design, would be likely to believe, upon encountering applicant's substantially similar design mark for electrically powered flea trap and refills therefor, that the respective products originated with or were somehow associated with or sponsored by the same entity.

Decision: The refusals to register under Sections 2(d) and 2(e)(1) are affirmed.

R. L. Simms

P. T. Hairston

D. E. Bucher
Administrative Trademark Judges, Trademark Trial and Appeal Board