

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

Hearing:
April 9, 2008

Mailed:
August 5, 2008
jtw

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Wyeth
v.
Walgreen Co.

Opposition No. 91165912
to Application Serial No. 76594301
filed on 5/25/2004

Bruce R. Ewing and Sandra Edelman of Dorsey & Whitney LLP
for Wyeth.

Mark J. Liss and Mark A. Nields of Leydig Voit & Mayer for
Walgreen Co.

Before Drost, Walsh and Mermelstein, Administrative
Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

Wyeth (opposer) has opposed the application by Walgreen Co. (applicant) to register the mark WAL-VERT in standard characters on the Principal Register for goods identified as "antihistamines and allergy relief preparations" in International Class 5. The application was filed on May 25, 2004, based on a claim of a bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

Both parties filed briefs, and both parties took part in an oral hearing in the case on April 9, 2008.

The Grounds

As grounds for the opposition opposer claims priority and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d).¹ Specifically, opposer bases its claim on its prior use of and registration of the mark in Registration No. 2835071, a registration on the Principal Register for the mark ALAVERT in standard characters for goods identified as "pharmaceutical preparations, namely allergy relief and antihistamine preparations" in International Class 5. The registration issued on April 20, 2004, and states a date of first uses of the mark anywhere and first use of the mark in commerce on December 20, 2002.

The Record

The record consists of the pleadings and the file of the opposed application.

In addition, opposer submitted notices of reliance, which include: a title and status copy of opposer's ALAVERT registration; publications regarding opposer's ALAVERT product; excerpts from the discovery depositions of applicant's officials, Richard Rinka (Rinka Disc.), Ronald

¹ In the notice of opposition, opposer also asserted dilution as a ground, but opposer has not maintained the dilution ground in its trial briefs. Accordingly, we conclude that opposer has abandoned the dilution ground.

Belmonte (Belmonte Disc.), David Van Howe (Van Howe Disc.) and Mark DiFillipo (DiFillipo Disc.) and related exhibits; copies of certain trademark registrations owned by applicant; and copies of USPTO records related to opposer's ALAVERT application and registration. Opposer also submitted the testimonial deposition of Christopher Marschall (Marschall Test.), one of its officials, with related exhibits.

Applicant submitted notices of reliance, which include: copies of discovery depositions of opposer's officials, Christopher Marschall (Marschall Disc.) and Roger Gravitte (Gravitte Disc.). Applicant also submitted the testimonial deposition of its official, David Van Howe (Van Howe Test.), and the testimonial deposition of Barbara Deradorian, a third-party witness (Deradorian Test.).

Both parties claim that a significant amount of the evidence is confidential. Consequently, both parties also have redacted passages in their briefs which refer to this evidence. We find the claims generally reasonable. Therefore, we will refrain from referring to evidence designated as confidential in this opinion, except in instances where the parties have discussed it in their briefs without redaction or where the evidence is obviously public. This will limit our ability to discuss some of the evidence in detail.

There is only one dispute regarding the evidence remaining.² Opposer objects to the admissibility of the Deradorian survey report and related testimony. Schering-Plough, a third-party competitor of opposer, commissioned the survey to evaluate consumer perception of opposer's ALAVERT mark prior to opposer's use of the ALAVERT mark. Applicant made the report, which is designated confidential, of record and attempts to use the report to show the weakness of the ALAVERT mark. Opposer asserts that the report should be excluded because it lacks objectivity, because the questions were biased, because no control was used and because the report is outdated. Applicant offers counter arguments as to each of these points, and ultimately concludes by arguing that opposer's objections go to the weight of this evidence not to its admissibility.

We agree with applicant's ultimate argument regarding admissibility. We conclude that the survey report, and the related testimony, are minimally relevant and admissible. The criticisms regarding matters, such as the design and timing of the survey, go to the probative value or weight to

² Opposer had also objected to our consideration of certain search reports applicant submitted as exhibits to the Marschall Discovery Deposition, but at the oral hearing applicant stated that it was not relying on those search reports. Accordingly, we have not considered those reports and consequently need not consider opposer's objection to their admissibility.

be accorded this evidence. For reasons discussed below, we conclude that this evidence has limited probative value.

Standing

Opposer has both asserted and established its interest in the proceeding, and thereby satisfied the standing requirement, by submission of a status and title copy of the ALAVERT registration. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999).

Priority

Furthermore, priority is not an issue in the proceeding in view of opposer's reliance on and submission of the ALAVERT registration. See *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). In fact, applicant concedes opposer's priority and argues only that there is no likelihood of confusion. Applicant's Brief at 8.

Findings of Fact

We have already identified the most significant facts in the case, namely: (1) opposer's registration for the ALAVERT mark in standard characters for goods identified as "pharmaceutical preparations, namely allergy relief and antihistamine preparations" in International Class 5; and (2) the opposed application for the WAL-VERT mark in standard characters for goods identified as "antihistamines and allergy relief preparations" in International Class 5.



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