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OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Fred Knapp Engraving Co. Inc.

v.

Advanced Lab Concepts, Inc.

Opposition No. 116,763
against Application No. 75/269,032,
filed April 3, 1997
and
Opposition No. 118,040
against Application No. 75/269,033,
filed April 3, 1997

Edward R. Antaramian of Jansson, Shupe & Munger, Ltd. for
Fred Knapp Engraving Co. Inc.

Nathan C. Belzer of Locke Liddell & Sapp, LLP for Advanced
Lab Concepts, Inc.

Before Simms, Chapman and Rogers, Administrative Trademark
Judges:

Opinion by Simms:

Fred Knapp Engraving Co. Inc. (opposer), a Wisconsin
corporation, has opposed the application of Advanced Lab

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Concepts, Inc. (applicant), a Texas corporation, to register the mark AIR LOGIC ("AIR" disclaimed) for the following goods and services:

air distribution devices and handling equipment for laboratories, namely, air flow measuring devices which measure air velocity and pressure, in Class 9;

air distribution and handling equipment for laboratories, namely, fume ventilation hoods, local fume exhaust vents, air distribution devices, namely, fans, airflow measuring devices, exhaust vents and snorkels and exhaust sinks, in Class 11;

conducting training classes in maintaining laboratories, clean rooms and critical spaces, in Class 41; and

consulting in the field of maintenance and cleanliness standards for laboratories, clean rooms and critical spaces, in Class 42.¹

Opposer also filed an opposition against applicant's application to register the following mark:

¹Application Serial No. 75/269,032, filed April 3, 1997, based upon applicant's allegation of a bona fide intention to use the mark in commerce.



for the same goods and services.² Both parties have taken testimony and opposer has filed notices of reliance upon an unpleaded registration as well as on documents produced by applicant during discovery.³ Both parties have filed briefs but no request for an oral hearing was submitted.

The Pleadings

In the notices of opposition, opposer alleges that it has previously used the mark and trade name "AIR LOGIC" for such goods as pneumatic and vacuum control equipment and air supply systems including control accessories and components such as switches that interface from pressure signals to electrical control circuits and from vacuum signals to electrical systems; that it has used its mark on

²Application Serial No. 75/269,033, filed April 3, 1997. Applicant has also disclaimed the word "AIR" in this application.

³While a party may not generally rely upon documents produced by another party pursuant to a request for production, here opposer also submitted these documents during the testimony deposition of its officer. These documents are considered of record. Further, applicant has not objected to the introduction of the unpleaded registration, and we have considered it to be of record, although it has taken no part in our consideration of the issue of likelihood of confusion between opposer's mark AIR LOGIC and applicant's mark AIR LOGIC.

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some of these goods since as early as 1975, and on other goods since 1977 and 1978; that opposer's goods are sold for instrumentation, medical and industrial applications; that substantial goodwill has been developed in its "distinctive and memorable mark"; that applicant's goods are closely related to opposer's and sold to the same target customers; that applicant's adoption of the identical mark indicates applicant's intent to trade on opposer's goodwill; and that applicant's mark, when used on or in connection with applicant's goods and services, so resembles opposer's mark as to be likely to cause confusion, to cause mistake or to deceive. With its pleading, opposer submitted status and title copies of Registration No. 1,774,920, issued June 8, 1993, Sections 8 and 15 affidavit filed, for the mark AIR LOGIC for the following goods:

machine parts; namely, pneumatic components and systems, pneumatic valves and pneumatic amplifiers, in Class 7;

gauges, electric switches and sensory devices; namely, pressure switches, vacuum switches, pressure gauges, vacuum gauges and spring sensors, in Class 9; and

plastic fittings; namely, reducing, straight tube, swivel tee and elbow connectors and restrictors, in Class 17.

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In its answer, applicant has denied the allegations of opposer's pleadings except that it has admitted that the marks (AIR LOGIC) of the parties are identical. As affirmative defenses, applicant has asserted laches, estoppel and acquiescence on the basis that opposer has unreasonably delayed in asserting its rights, and that applicant has relied on this delay to its detriment. Applicant has also asserted the affirmative defense of unclean hands.⁴ On August 15, 2000, the Board consolidated Opposition No. 116,763, involving applicant's attempt to register the mark AIR LOGIC in typed form, with Opposition No. 118,040, involving applicant's application seeking to register the mark shown in design format.

Opposer's Record

Opposer took the testimony of its president and the manager of its Air Logic Division, Mr. Jay R. Haertel. Mr. Haertel testified that in 1975 opposer acquired the air flow system manufacturing part of Johnson Controls Fluidics. Opposer first used the mark AIR LOGIC on its goods in September 1975. Opposer's mark is used in the following style:

⁴ There has been no testimony offered relating to these defenses, nor has applicant argued in its brief that it should prevail because of these defenses. Accordingly, we have given no consideration to these defenses in this opinion.

The logo for "Air Logic" is written in a bold, italicized, sans-serif font. The word "Air" is positioned above "Logic", and the two words are slanted to the right. The "i" in "Air" has a dot, and the "i" in "Logic" has a dot. The "c" in "Logic" has a tail that curves upwards and to the right.

It has been used for such goods as pneumatic controls for the medical (including laboratory applications), semiconductor, general industrial and heating, ventilating and air conditioning (HVAC) industries, the latter industry including fume hood manufacturers. It has also used this mark for plastic fittings, control equipment, pressure and vacuum switches, pressure regulators, check valves, needle valves and flow controls.

Opposer's goods are sold to engineers of original equipment manufacturers (OEM) for use in the products of the OEMs. Opposer sells its goods directly and through distributors. Opposer's sales in the year 2000 were in the low seven figures while its advertising expenses in the same year were in the six figures.⁵ Opposer advertises in trade magazines and at trade shows as well as through the

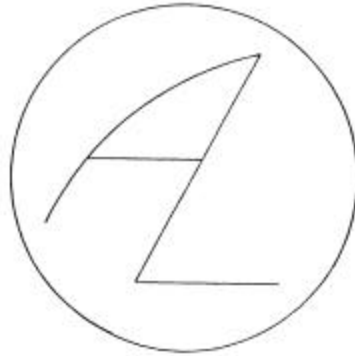
⁵The parties submitted a stipulated protective order and these figures are considered confidential. .

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distribution of promotional items bearing the mark. At trade shows, opposer has displayed what it calls "Air Logicasaurus," a pneumatically operated, interactive "dinosaur." Over the last 25 years, opposer has spent over \$1 million in advertising its goods under the mark. Although opposer's goods are fairly inexpensive (Haertel dep., 83-84), Mr. Haertel testified that opposer's customers are not impulse purchasers. There have been no instances of actual confusion.

Mr. Haertel further testified that he has seen fume hood manufacturers (but not applicant) displaying their products at HVAC trade shows which opposer has attended. Haertel dep., 67, 70 and Haertel rebuttal dep., 13. Mr. Haertel testified that confusion would be likely because the marks of the parties are "stacked" (one word displayed above the other) with the sweeping "L" under the "O", and that both parties' goods involve pneumatic controls and are sold to the HVAC industry.

Opposer also filed a notice of reliance upon the following unpleaded registered mark (Registration No. 1,752,598, issued February 16, 1993, Section 8 accepted, Section 15 affidavit acknowledged) covering plastic fittings and connectors for pneumatic and vacuum control systems:



Applicant's Record

Applicant took the testimony of its founder, president and CEO, Mr. Mark Etheridge. According to Mr. Etheridge, applicant makes, sells and installs laboratory furniture and furnishings, countertops for laboratories and fume hoods, and provides related services, and has done so since 1995.

Fume hoods are made of sheet metal, glass and a chemically resistant media and are designed to exhaust potentially hazardous fumes and thereby protect users thereof. They vary in price but, on average, cost several thousand dollars. Typically, the fume hood may comprise up to 40 percent of the cost of the project. Applicant sells its goods as complete systems primarily through its own sales force but also through a few distributors. Applicant's products are sold mainly to architects but also

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to research and development personnel for use in laboratories. Concerning the sales process of applicant's goods, Mr. Etheridge testified, at 18-19, as follows:

Designing lab space is a specialty. Usually you have architects that specialize in the area of laboratory environment because it is a critical space. It is dangerous. So very rarely would you find someone that would just go buy a hood. They have got to really think about the space, the application and integrate the entire building to it. So there is an incredible amount of talent involved in order to make it work properly.

The ultimate purchasers of applicant's goods are, primarily, colleges and universities. However, applicant also sells to high schools and to research personnel in private companies (pharmaceutical, biotechnology, and industrial). Applicant began selling its goods in the states of Oklahoma, Texas, Louisiana and Mississippi, but now sells its goods throughout the United States. Mr. Etheridge testified that there are six or seven fume hood manufacturers in this country.

Mr. Etheridge also testified that applicant does not sell the goods listed in opposer's registrations; that applicant's primary purchasers--architects--do not purchase or use opposer's goods; that opposer's products are not used in fume hood systems; and that applicant does not sell

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its goods to original equipment manufacturers. If applicant's fume hoods need to be replaced, applicant sometimes receives calls directly from the chemist or researcher needing the replacement. Etheridge dep., 110-111.

Applicant's goods do use air flow valves, air flow monitors, pneumatic valves and flow sensors, and its fume hoods have needle valves. Mr. Etheridge testified, however, that opposer's valves and fittings are used for different applications. The testimony is contradictory on whether applicant sells separately the component parts which are included in its fume hoods. See Etheridge dep., 76-77, 100, 106 and 118.

Applicant itself installs the fume hoods which it sells but contractors may install the fittings (needle valves) needed for the installation.

Concerning the selection and significance of applicant's mark, Mr. Etheridge testified, at 102:

And it complemented the products we sold, it presents air which is what drives the hood in a logical approach to fume hood operation, and that's what we thought we needed to do...

Mr. Etheridge testified that he was not aware of opposer or its mark when applicant's application was filed.

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Applicant does not advertise in any of the trade magazines in which opposer advertises, and applicant does not display its goods at any of the trade shows where opposer appears. Applicant is aware of no instances of actual confusion.

Arguments of the Parties

It is opposer's position that there is a likelihood of confusion because of the substantial similarity of the marks and the relationship of the goods. With respect to the marks, while opposer acknowledges that the marks must be compared by their general overall impressions rather than side-by-side, opposer contends that even a side-by-side comparison shows that the marks are substantially similar.

The logo consists of the words "Air" and "Logic" stacked vertically. Both words are written in a bold, italicized, sans-serif font. The "Air" is positioned above the "Logic".The logo consists of the words "AIR" and "LOGIC" stacked vertically. The letters are bold and blocky. The "L" in "LOGIC" is stylized to resemble a right-pointing arrow. The "AIR" is positioned above the "LOGIC".

Opposer points to the fact that both marks are in "stacked logo" form with the word "AIR" appearing above the word

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"LOGIC" with the "L" of both marks extending under the "O" of the word "LOGIC."

Opposer argues that its air flow system components are sold to laboratories (in the medical and educational fields) as well as to manufacturers in the semiconductor, general industrial and HVAC fields. According to opposer, applicant's goods "impermissibly extend into the family" of opposer's goods (reply brief, 8), because the goods of both parties relate to the "air flow industry." Opposer notes that applicant's goods use pneumatic valves, needle valves and air flow modulators while its own goods are suitable for "the HVAC industry in laboratory settings." Reply brief, 15. While opposer states that its goods are inexpensive and that purchasers may be unsophisticated, applicant's high-cost products include inexpensive components similar to opposer's components. That is to say, opposer's components are of a type, opposer argues, that could be found in applicant's goods. Moreover, opposer points out that parties need not be competitors for there to be a likelihood of confusion. Opposer also notes that the respective goods are sold by similar means--trade magazines, trade shows, Web sites.

Opposer also contends that, while the mark AIR LOGIC has inherent strength, opposer has developed considerable

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renown in the mark through over twenty-five years' use and promotional efforts including current advertising in seventeen trade publications and at 10 to 20 trade shows per year. Opposer discounts the lack of actual confusion because, until recently, applicant had sold its goods in only a four-state area. Opposer contends that we should resolve doubt in its favor since it is an established prior user, and contends that purchasers are likely to believe that the goods of the parties come from the same source or, at least, that some of the components of applicant's goods emanate from opposer.

Applicant, of course, contends that confusion is unlikely. First, applicant notes specific differences in the marks--opposer uses initial capitals while applicant displays its mark in all capitals, the marks are in different fonts, the "L" in opposer's mark is placed under the "I" of the word "AIR," while the "L" in applicant's mark is placed under the "A" of the word "AIR," that only the "L" in applicant's mark is slanted and that the base of the "L" in applicant's mark has an arrow.

Applicant emphasizes that its goods are sold to architects that design laboratories, while opposer's goods are not specifically designed for laboratories. Applicant points out that opposer sells its pneumatic controls and

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other goods to original equipment manufacturers such as manufacturers of HVAC equipment, of laboratory analysis equipment and of hospital and dental equipment. Opposer's goods could be used in the manufacture of laboratory equipment but applicant's fume hood is laboratory equipment itself, applicant maintains. Applicant argues that although both products can be described as related to the air flow industry, this fact alone is not sufficient for one to conclude that the respective goods are similar, and that over the years opposer has made only minimal sales of components to laboratories. Therefore, it is only theoretically possible that opposer's goods would end up in the same laboratories that purchase applicant's fume hoods. Also, applicant sells its expensive goods to educational institutions for research and to other laboratories for use by doctors and PhDs, which sophisticated purchasers acquire these goods only after careful consideration. Applicant also notes that while it seeks to register its mark for goods *and services*, opposer does not offer any services under its mark.

Finally, applicant notes that there have been no instances of actual confusion despite over six years of contemporaneous use. It is applicant's position, therefore, that the potential for confusion is *de minimus*.

Opinion

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973).

However, as indicated in *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood-of-confusion analysis, two key considerations are the similarity of the marks and the similarity of the goods and/or services. We find that applicant's mark for its goods and services so resembles opposer's almost identical mark for its goods that confusion is likely.

Turning first to the marks, there can be no doubt that applicant's typed mark AIR LOGIC as well as its AIR LOGIC and design mark are substantially identical to opposer's registered mark AIR LOGIC and to the mark in the stylized form which opposer uses. All of these marks are very similar in pronunciation and appearance. While there are minor differences in the "stacked logo" appearance of the respective marks, there are also the striking similarities noted by opposer in its brief, including the tail of the letter "L" extending under the letter "O" of the word

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"LOGIC." The substantial similarity of the marks weighs heavily against applicant. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Furthermore, not only are the marks extremely similar, but in addition they appear to be totally arbitrary, a fact which only enhances the likelihood of confusion. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), aff'd 88-1444 (Fed. Cir. 1988).

We note also that opposer's mark has been in use since 1975 and that its goods have been the subject of considerable sales and advertising over the years. Although we do not find opposer's mark to be a famous one, it certainly has achieved some degree of renown. In this connection, we observe that there is no evidence of the use of similar marks by third parties.

Because the marks are nearly 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) and *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983). That is to say, the greater the degree of similarity between applicant's mark and opposer's

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mark, the lesser the degree of similarity between applicant's goods and services and opposer's goods that is required to support a finding of likelihood of confusion.

Turning now to the goods of the parties, it is well settled that goods and/or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods and/or services are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the goods and/or services. See *In re Martin's Famous Pastry Shoppe, Inc.*, *supra*, and *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001). That is, likelihood of confusion may exist even if the parties are not direct competitors, and the rights of the owner of a mark extend to any goods and services that potential purchasers might think are related or put out by the same producer.

We note that applicant is not only seeking registration of its mark for fume hoods but also for other goods including air flow measuring devices, fans and

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exhaust vents. In this regard, it is well settled that the issue of likelihood of confusion must be determined in light of the goods set forth in the opposed application and pleaded registration and, in the absence of any specific limitations therein, on the basis of all normal and usual channels of trade and methods of distribution for such goods. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Applicant's argument, therefore, that opposer's goods are sold only to OEMs for use in other equipment while its goods are sold only to laboratories is of little persuasive value. We must presume that opposer's pneumatic parts such as valves and amplifiers, as well as its gauges, pressure switches and plastic fittings, and applicant's air measuring devices, fans and exhaust vents, as well as its other goods, are sold in all normal channels of trade for those goods. Moreover, the record in fact demonstrates that opposer's goods are displayed at HVAC trade shows where applicant's competitors have appeared. Also, opposer's air flow parts may be sold to the same laboratories that

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purchase applicant's fume hoods and other goods. In addition, while fume hoods are relatively expensive, some of applicant's other products are lower-priced, as are opposer's goods, and purchasers may exercise less care and discrimination in the purchase of those goods.

The fact that opposer sells a variety of goods ranging from pneumatic valves to gauges, pressure switches and plastic fittings is another factor which tends to increase the likelihood of confusion. That is to say, potential purchasers seeing the mark AIR LOGIC on applicant's air flow measuring devices, fume hoods, exhaust fans, etc., may well believe that opposer has expanded into those products.

Although opposer's registration and its testimony fail to reflect any use of opposer's mark with respect to related services, we believe that applicant's use of the AIR LOGIC mark in connection with consulting services and training classes in maintaining laboratories, clean rooms and critical spaces is also likely to cause confusion with opposer's mark. Purchasers and recipients of applicant's services may well believe that these services are offered by the provider of opposer's AIR LOGIC products.

While there have apparently been no incidents of actual confusion, evidence of actual confusion is notoriously difficult to come by and, in any event, such

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evidence is not required in order to establish likelihood of confusion. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992); *Block Drug v. Den-Mat Inc.*, 17 USPQ2d 1315, 1318 (TTAB 1989); and *Guardian Products Co. Inc. v. Scott Paper Co.*, 200 USPQ 738, 743 (TTAB 1978).

The absence of evidence of actual confusion in this case is somewhat offset by the absence of sufficient evidence upon which we might base a conclusion that there has been any meaningful opportunity for actual confusion to have occurred. As opposer has pointed out, until recently applicant has only offered its goods and services in a four-state area.

Finally, to the extent we have any doubts on the issue of likelihood of confusion, we must resolve them in favor of the prior user and registrant. *Kenner Parker Toys v. Rose Art Industries*, 963 F.2d 350, 22 USPQ2d 1453, 1458 (Fed. Cir. 1992). See also *CAE, Inc. v. Clean Air Engineering, Inc.*, 267 F.3d 660, 60 USPQ2d 1449 (7th Cir. 2001)(reversing the Board's decision and finding likelihood of confusion of the mark CAE for opposer's aircraft simulators, air traffic control equipment and other goods and services and applicant's environmental consulting services).

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Decision: The oppositions are sustained and registration to applicant is refused in each application.