

U.S. CHEMICAL & PLASTIC, INC.,	)	INTER PARTES CASE NOS. 3147 & 3538
)	
Petitioner,)	
	)	PETITION FOR CANCELLATION:
)	
	)	Cert. of Regn. No. SR-6946
	)	Issued : May 31, 1985
	)	Registrant : Dynex Industrial Corporation
	)	Trademark : KWIK PUTTY
	)	Used on : Acrylic spot and glazing putty
- versus -	)	- and -
)	
	)	Cert. of Regn. No. 43191
	)	Issued : February 24, 1989
	)	Registrant : Dynex Industrial Corporation
	)	Trademark : KWIK PUTTY
	)	Used on : Acrylic spot and glazing putty
)	
)	
DYNEX INDUSTRIAL CORPORATION,	)	<u>DECISION NO. 92-27 (TM)</u>
Respondent-Registrant.	)	November 12, 1992
x-----x)	

DECISION

This refers to the consolidated cases docketed as Inter Partes Case No. 3147 and Inter Partes Case No. 3538.

In Inter Partes Case No. 3147, Petitioner US CHEMICAL AND PLASTICS, INC., a corporation organized and existing under the laws of Ohio, U.S.A., with principal office at 1446 W. Tuscarawas St., Canton, Ohio, U.S.A. filed on 05 July, 1988 a Petition for Cancellation of the trademark KWIK PUTTY for glazing putty under Certificate of Registration No. SR-6946 issued on 31 May 1985 in the name of the Respondent-Registrant, DYNEX INDUSTRIAL CORPORATION with postal address at 340-C on Carlos Sevilla St., Pasay City.

Petitioner alleged the following grounds for cancellation:

- "1. The Respondent-Registrant's registration was obtained fraudulently or contrary to the provision of Section 4, Chapter II of R.A. 166 as amended.
- "2. The Petitioner is the owner of the trademark KWIK MAGIC and it is also the assignee of Certificate of Registration No. SR-5385 issued on 19 March, 1981 for the trademark KWIK MAGIC.
- "3. Respondent-Registrant's Registration and use of KWIK PUTTY will cause confusion or mistake in view of the fact that it is confusingly similar to the KWIK MAGIC mark of herein Petitioner.

On 26 August, 1988, the Respondent-Registrant filed its Answer to the Petition by denying all the material allegations thereof.

In the meantime, Application Serial No. 54298 of the Respondent-Registrant for KWIK PUTTY (PUTTY DISCLAIMED) for glazing putty in the Principal Register matured into Certificate of Registration No. 43191 issued on 24 February, 1989. Consequently, another petition for cancellation was filed by U.S. CHEMICALS INC. to this Registration and became the subject matter of Inter Partes Case No. 3538. The Petitioner alleged practically the same grounds for Cancellation averred in its Petition in IPC 3147. The Respondent filed its Answer on 08 October, 1990 by denying the material allegation of the Petition.

In both cases, pre-trial conferences were conducted but parties failed to reach an amicable settlement. Full blown trial was conducted in IPC 3147 and both parties adopted the evidence presented in that case as part of their evidence-in-chief in IPC 3538.

On 15 February, 1991 this Office issued Order No. 91-51 granting Petitioner's Motion to Consolidate these cases for the purpose of expediting their disposition.

To support its Petition, Petitioner offered Exhibit "A" in evidence which is a License Agreement executed on 30 December, 1980 between US CHEMICAL AND PLASTICS INC., as Licensor and DYNEX INDUSTRIES INC., as Licensee, the parties herein, the pertinent portion of which is hereto reproduced as follows:

"WHEREAS, Licensor is now and has been in the business of manufacturing and selling body fillers identified as body fillers identified by the following trade names: Kwik Magic, White Chief, Kwik Magic Lightweight, all of which fillers are referred to hereinafter as Licensor Products; and

"WHEREAS, Licensor possesses engineering data and technical information on all of the Licensor Products that it is willing to divulge to Licensee so that Licensee may itself manufacture such Products; and

"WHEREAS, Licensee is desirous of using Licensor's information and data, entering into this Agreement for the manufacture, use and sale of the Licensor Products;"

The aforesaid License Agreement clearly shows that the Respondent had knowledge of the ownership by the Petitioner of the trademarks "KWIK MAGIC" and "KWIK MAGIC LIGHT WEIGHT" used on body fillers. As Licensees, the Respondent agreed to use its best efforts to exploit and promote the increasing demand for Licensor products to the greatest extent possible throughout the Licensed territory (please see paragraph 5(A) of the said agreement).

To prove further its ownership over the mark "KWIK MAGIC", and knowledge thereof by the Respondent, Petitioner formally offered the following documents in evidence:

"a.) Exhibit "B-1" which is the Deed of Assignment of the mark KWIK MAGIC under Registration No. SR-5385 to the Petitioner by the Respondent.

"b.) Exhibit "C" which is the Deed of Assignment of the mark "KWIK MAGIC SUPER" under Application Serial No. 51763 to the Petitioner by the Respondent.

"c.) Exhibit "D" which is the Deed of Assignment of the mark "KWIK MAGIC SUPER" under Registration No. SR-7243 to the Petitioner by the Respondent".

The last two Deeds of Assignment enumerated above came about as a consequence of a Compromise Agreement entered into by the parties dated 18 October, 1988 (Exhibit R) to settle Inter Partes Case Nos. 3070 and 3071. The said Compromise Agreement was approved by this Office in its Decision No. 3070 refers to a Petitioner for Cancellation of Certificate of Registration for new mark KWIK MAGIC SUPER for flexible autobody fillers issued on 11 March,

1986 in the name of the herein Respondent while Inter Partes Case No. 3071 refers to an Opposition to the mark KWIK MAGIC SUPER per Application Serial No. 51763 used also as autobody fillers in the name of the herein Respondent. Both cases were initiated by the herein Petitioner.

The main issue in this case boils down to the question of confusing similarity between the mark "KWIK PUTTY (PUTTY DISCLAIMED)", the trademark of the Respondent and "KWIK MAGIC", the trademark of the Petitioner.

In Respondent's mark KWIK PUTTY, the word "KWIK" remains the only portion in respect of which proprietary rights are claimed, considering the disclaimer of the word "PUTTY". "KWIK" is also part of a two-word trademark of the Petitioner. In both trademarks, it is very apparent that the dominant feature is the word "KWIK".

Although Respondent's mark differs in style in the manner of presenting the KWIK (letters "K", "W" and "I" are connected), this mark easily attracts and catches the eye of ordinary purchasers and it is this word and none other that sticks in his mind when he thinks of putty or autobody fillers (Please see Philippine Nut Industry Inc. vs. Standard Brand G5 SCRA 575).

Respondent contends however that there are differences between the two trademarks such as the absence of a picture of a car with a person working on it found in Petitioner's label. It further argued that in Respondent's product, it proudly indicates that it is manufactured by DYNEX INDUSTRIAL CORPORATION. In the case of E. Spinner and Co. vs. Neus Nesslain Corp., 54 Phil. 224, it was held that it is not necessary that all the words used in a trademark should be used by the infringer, the illegitimate use of only one word in a registered trademark is sufficient. Furthermore in the case of Jordache v. Davila, CA-G.R. Sp Nos. 10997 & 10998, Feb. 14, 1989 (Affirmed by the Supreme Court in G.R. No. L-87993-94, July 24, 1989), the Court of Appeals ruled that the words "RAWHIDE" and "JORDACHE" which are printed boldly on the trademarks, more easily attract and catch the eye of the consuming public, and it is those words which would stick in their minds, and not the horsehead design, when the public thinks of buying clothes. When buying clothes, the customer would be more likely to say that he wants to buy "RAWHIDE" or "JORDACHE" pants, instead of saying that he wants the pair of jeans with a horsehead design. Each trademark if seen as a whole, would show features which draw the attention of the buyer, and not the horsehead design and, therefore, would lead the buyer to a conclusion that he has brought the right pair of jeans or clothes. In short, it is the words, not the image, the name, rather than the figure of a horsehead, which catches the attention of the public and which is etched in the mind's eye when thinking of a particular product.

The merchandise or goods being sold by the parties herein are commodities purchased by the average person who often times are ignorant and unlettered. These persons do not as a rule examine the printed small letterings on the container but will simply be guided by the presence of the striking mark KWIK on the label. In Philippine Nut Industry vs. Standard Brand 65 SCRA 575, it was held that "Differences there will always be, but whatever differences exist, these falls into insignificance in the face or evident similarity in the dominant feature and overall appearances of the labels.

It is also significant to note that the Petitioner uses the trademark in question for acrylic spot and glazing putty while the Respondent uses its own "KWIK" trademark for automotive fillers. Although the terminology used are different these products are not only related but identical in use. Both Petitioner' and respondent's products are intended for use to repair dents, holes and scratches in metals (Exhibit "V-2" for the Petitioner). Clearly, commercial application of these products refer to repair of bodies of automobiles.

The evidence on record clearly shows the Petitioner as the senior user of the mark KWIK.

WHEREFORE, premises considered, both Petitions for Cancellation are hereby GRANTED. Certificates of Registration No. SR-6946 issued on 31 May, 1985 and Certificate of Registration No. 43191 issued on 26 February, 1989 both in the name of the Respondent-Registrant are hereby CANCELLED.

Let the filewrapper of this case be forwarded to the EDP and Registry Division for appropriate action in accordance with this Decision.

SO ORDERED.

IGNACIO S. SAPALO
Director