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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Fisi Fibre Sintetiche S.p.A.

Serial No. 76583503

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Before Grendel, Zervas and Kuhlke, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Fisi Fibre Sintetiche S.p.A. seeks registration on the Principal Register of the mark ECODOWN (in standard character form) for goods identified as "pillows; pillowforms" in International Class 20.¹

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

¹ Application Serial No. 76583503, filed March 26, 2004, alleging a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b).

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resembles the registered mark shown below for "down comforters" in International Class 24, "HYPO-ALLERGENIC" disclaimed, as to be likely to cause confusion, mistake or deception.²



In addition, registration has been refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that applicant's mark is deceptively misdescriptive of its goods, and Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a), on the ground that applicant's mark is deceptive.

When the refusals were made final, applicant appealed and briefs have been filed. We affirm the refusals to register.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201

² Registration No. 2559620, issued April 9, 2002.

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(Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In comparing the marks, we must determine whether they are sufficiently similar that there is a likelihood of confusion as to source and, in doing so, we must consider the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). We find the marks to be similar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. The dominant element in registrant's mark is the term ECODOWN. The image of the bird merely reinforces the DOWN portion of the word ECODOWN in the mark, and the remaining literal elements, HYPO ALLERGENIC, are disclaimed. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987) (literal portion of mark more dominant than design because consumers will call for the goods by literal element); *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987) (JM ORIGINALS

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with ORIGINALS disclaimed confusingly similar to JM COLLECTABLES). In any event, applicant "admits that despite the existence of design and stylistic differences the marks are similar." Br. p. 4.

Overall, we find that the marks have a very similar commercial impression and that the factor of the similarity of the marks weighs in favor of likelihood of confusion.

We now consider the goods, the channels of trade and the class of purchasers. In making our determination, we must consider the cited registrant's and applicant's goods as they are described in the registration and application, and we cannot read limitations into those goods. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). If the cited registration and application describe goods broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration and application encompass all goods of the type described, that they move in all channels of trade normal for these goods, and that they are available to all classes of purchasers for the described goods. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

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In support of her argument that the goods are related, the examining attorney submitted evidence in the form of several third-party use-based registrations to show that numerous entities have adopted a single mark for applicant's "pillows" and registrant's "comforters." See, e.g., Reg. No. 2840740 (MY WORLD for, inter alia, pillows and comforters); Reg. No. 2851333 (BEDSOFT for, inter alia, pillows and down comforters); Reg. No. 2812195 (BEDDING CLUB for, inter alia, pillows and comforters); Reg. No. 2695940 (PLUSH PARTY for, inter alia, pillows and comforters); Reg. No. 2855129 (LOFT STYLE for, inter alia, pillows and comforters); Reg. No. 2889891 (ROOM READY for, inter alia, pillows and comforters); Reg. No. 2863677 (GRAND KING for, inter alia, pillows and comforters); Reg. No. 2883076 (NATURE'S PREFERENCE for, inter alia, pillows and comforters); and Reg. No. 2869573 (GOSSAMER for, inter alia, pillows and comforters). See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). We find this evidence sufficiently persuasive to support a determination that the goods are related.

Further, inasmuch as there are no limitations in the identification of goods, we must presume that the goods will be offered in some of the same channels of trade and will be used by some of the same purchasers. See *Canadian*

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Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and In re Smith and Mehaffey, 31 USPQ2d 1531 (TTAB 1994). In this connection, there is evidence of record consisting of excerpts from website pages where comforters and pillows are sold on the same website. These are related bedding items and would certainly be sold in close proximity to each other in the same stores. Applicant's argument that the goods "are not classified in the same International Classes and do not fall within the same or similar channels of trade," is misplaced. The classification of goods is not relevant to the issues of relatedness or channels of trade. Jean Patou Inc. v. Theon Inc., 9 F.3d 971, 29 USPQ2d 1771 (Fed. Cir. 1993). Moreover, even if the products are, as applicant states, "structurally different," the question is not confusion as to the goods, but rather as to the source of those goods.

In view of the above, the du Pont factors of the similarity of the goods, the channels of trade, and class of purchasers favor a finding of likelihood of confusion as to the mark in the cited registration.

With regard to the conditions of sale, contrary to applicant's position, these goods include general consumer

items that would not be purchased with a great deal of care or require purchaser sophistication.

In conclusion, we find that because the marks are similar, the goods are related, and the channels of trade and purchasers overlap, confusion is likely between applicant's mark and the mark in the cited registration.

Deceptive Misdeshriptiveness

The test for deceptive misdescriptiveness has two parts. First it must be determined if the matter sought to be registered misdescribes the goods. If so, then it must be ascertained if it is also deceptive, that is, if anyone is likely to believe the misrepresentation. In re Quady Winery Inc., 221 USPQ 1213, 1214 (TTAB 1984). See also In re Phillips-Van Heusen Corp., 63 USPQ2d 1047 (TTAB 2002).

Applicant has indicated that the goods do not contain down but argues that the mark ECODOWN is a fanciful word without any meaning and therefore does not misdescribe the goods. Rather, applicant argues, its mark implies that the product is an alternative to ones with down feathers, and "[a]t most the mark [is] suggestive to the consumer that the goods are soft, yet ecological products." Br. p. 8. Applicant relies on the dictionary definitions of DOWN which has many different meanings and the origin of the prefix ECO which "evokes many possible meanings" including

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"ECOLOGY, ... ECONOMY, ECONOMIC, ECOSPHERE, ECOSYSTEM, ECOTYPE." Br. p. 7. The fact that DOWN may have other meanings (grassy hill, down payment in cash, set down or feeling down), is not relevant. We must look to the meaning in relationship to the goods in issue, pillows and pillowforms. In re Chopper Industries, 222 USPQ 258 (TTAB 1984). Taken in the context of these goods, the relevant meaning would be "fine soft fluffy feathers." The American Heritage Dictionary of the English Language (3d ed. 1992). We do not believe that the prefix ECO detracts from this meaning or serves to indicate that the goods do not include down. While the prefix ECO may suggest an ecological product, that does not exclude the use of down.

With regard to the next inquiry, whether consumers would believe the misrepresentation, printouts from several websites in the record show pillows or pillow forms made of or consisting of down feathers. In fact, it is quite common for pillows to contain down and consumers would certainly believe pillows contained down feathers.

In view of the above, applicant's mark is deceptively misdescriptive of its goods.

Deceptiveness

The test for determining whether a mark is deceptive under Section 2(a) has been stated by the Court of Appeals

for the Federal Circuit as: 1) is the term misdescriptive of the character, quality, function, composition or use of the goods; 2) are prospective purchasers likely to believe that the misdescription actually describes the goods; and 3) is the misdescription likely to affect the decision to purchase. In re Budge Manufacturing Co., Inc., 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988).

The first two factors have already been established in connection with the refusal under Section 2(e)(1) discussed above. What remains is to determine whether the misdescription is likely to affect the decision to purchase.

The examining attorney submitted printouts from several websites to show that down is a desirable material for comforters and pillows. See, e.g., allergybuyersclub.com ("These better quality 85% white goose down pillows are guaranteed to be reaction free for 10 years."); bedbathandbeyond.com ("Plush and cozy, this pillow is a great addition to your bed. Cover is made of ... a new, breathable natural fiber with a super soft finish and has a 312 thread count. Down ... has anti-microbial protection. Siberian white goose down fill."); and nenature.com ("A soft, fluffy outer layer of premium

goose down surrounds long-lasting goose feathers in this unique chambered pillow.”)

As shown by the evidence of record, down is perceived as a desirable component of pillows. Several of the excerpts in the record tout the quality and fluffy characteristics of the pillows filled with down. This evidence is sufficient to establish that the qualities of down in pillows and pillow forms would be attractive to prospective purchasers and would materially affect the purchasing decision. Thus, we conclude that the mark ECODOWN is deceptive in connection with the identified goods.

Decision: The refusals to register under Sections 2(d), 2(e)(1) and 2(a) of the Trademark Act are affirmed.