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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re T & C Imports

Serial No. 85570200

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Before Grendel, Kuhlke and Adlin, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, T & C Imports, filed an application to register on the Principal Register the mark EWETOPIA in standard characters for goods identified as “knitting yarn,” in International Class 23.¹

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

¹ Application Serial No. 85570200, filed on March 15, 2012, based on allegations of first use and first use in commerce on November 17, 2011, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

goods, so resembles the registered mark UTOPIA in typed form² for “handknitting yarn,” in International Class 23³ as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed and briefs have been filed.

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to a consideration of the goods, channels of trade and class of purchasers. We must make our determinations under these factors based on the goods as they are recited in the registrations and application. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Thus, we turn to consider the *du Pont* factors of the relatedness of the goods and channels of trade. We base our evaluation on the goods as they are identified in the registration and application. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed.

² Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings.

³ Registration No. 1925521, issued on October 10, 1995, combined Section 8 and 15 declaration accepted and acknowledged, renewed.

Cir. 2002); and *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Applicant's "knitting yarns" encompass registrant's "handknitting yarns" and, as such, are legally identical thereto. Considering the channels of trade and classes of purchasers, because the goods are identical and there are no limitations as to channels of trade or classes of purchasers in either the application or cited registration, we must presume that applicant's and registrant's goods will be sold in the same channels of trade and will be bought by the same classes of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 62 USPQ2d 1001; *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) and *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

Applicant's arguments regarding the differences in the actual goods and channels of trade are not persuasive inasmuch as we must make our determination based on the goods as identified, and here, the identifications of goods in the registration and application are not limited to any particular type of yarn, e.g., merino or acrylic. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

In view of the above, the *du Pont* factors of the similarity of the goods, the channels of trade and classes of purchasers favor a finding of likelihood of confusion.

With regard to the conditions of sale, again, because we are bound by the description of goods in the application and registration and because the descriptions of goods are not restricted as to price or channel of trade, the goods at issue must include inexpensive as well as more expensive yarns and all channels of trade and classes of consumers, including professionals and the general public. The standard of care for our analysis is that of the least sophisticated purchaser. *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004).

As a general proposition, inexpensive goods may be purchased with less care, which increases the likelihood of confusion. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) (“When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care”) (citations omitted). Moreover, even if purchasers are sophisticated or knowledgeable in a particular field that does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *Imagineering Inc. v. Van Klassens Inc.*, 53 F.3d 1260, 1265, 34 USPQ2d 1526, 1530 (Fed. Cir. 1995). Thus, despite the possibility that the purchasers of yarn may exercise a certain amount of care to ensure they are purchasing what they require, we find this factor also favors likely confusion.

We next consider the marks EWETOPIA and UTOPIA and compare them “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396

F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) *quoting du Pont*, 177 USPQ at 567. We must also keep in mind that “when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

Applicant’s mark EWETOPIA is phonetically equivalent to registrant’s mark UTOPIA, and in certain circumstances similarity in sound alone may be sufficient to find marks confusingly similar. *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). In this case, it is the replacement of the letter U with the name of a female sheep, EWE,⁴ that creates the differences in appearance, connotation and commercial impression. However, despite the double entendre in applicant’s mark, one of the perceived meanings, utopia, remains identical to registrant’s mark. When we consider the marks, we do so based on the average purchaser retaining a general rather than specific impression of a mark. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Here, because the goods are identical, the marks are phonetically identical and share the meaning “utopia” we find on balance that the similarities in the marks outweigh their differences. *Viterra Inc.*, 101 USPQ2d 1905.

⁴ EWE is defined as “a female sheep, especially when fully mature.” App. Response (July 27, 2012) Exh. 4 www.dictionary.com.

Applicant argues that there are several “topia” marks in this general field having the effect of narrowing the scope of protection for registrant’s UTOPIA mark. Applicant has only submitted six third-party registrations which have little weight in determining the strength of a mark because they do not establish that the registered marks identified therein are in actual use in the marketplace or that consumers are accustomed to seeing them. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (CCPA 1973); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009). Moreover, only one of the third-party registrations is for goods similar to applicant’s and registrant’s yarns (Reg. No. 3351477 for the mark YARNTOPIA for yarns). This evidence is not sufficient to establish that the mark in the cited registration is weak. However, even if we were to consider registrant’s mark weak, even weak marks receive protection against likely confusion where the goods are identical and the marks are similar. *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974).

Applicant’s argument that there have been no known instances of actual confusion is not persuasive. The contemporaneous use of applicant’s and registrant’s marks for a period of over two years without actual confusion is entitled to little weight. *See Majestic Distilling Co., Inc.*, 65 USPQ2d at 1205 (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value”). *See also In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of applicant’s corporate

president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). The lack of evidence of actual confusion carries little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965), especially in an *ex parte* context. In any event, the record is devoid of probative evidence relating to the extent of use of registrant's marks and, thus, whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

Finally, applicant's argument that the owner of the cited registration has abandoned its trademark due to nonuse constitutes an impermissible collateral attack on the cited registration and such evidence and argument are not relevant in the context of an *ex parte* appeal. *Dixie Rests.*, 41 USPQ2d at 1534-35.

In conclusion, because the marks are similar, the goods are legally identical, and the channels of trade and consumers are the same or overlapping, confusion is likely between applicant's mark EWETOPIA and the mark UTOPIA in the cited registration. Finally, to the extent that any of the points argued by applicant cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve

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that doubt, as we must, in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register based on a likelihood of confusion under Section 2(d) of the Trademark Act is affirmed.