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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Visionaire Lighting LLC

Serial No. 85590109

Michael J. Moffatt of Fulwider Patton LLP for Visionaire Lighting LLC.

William T. Verhosek, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Cataldo, Mermelstein, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Visionaire Lighting LLC filed an application to register on the Principal Register the mark BOW in standard character form for the following goods:

LED (light emitting diode) lighting fixtures, in
International Class 11.¹

The trademark examining attorney refused registration under § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, as used in connection with applicant's goods, so resembles the mark BOWPERF as to be likely

¹ Application Serial No. 85590109, filed under Trademark Act § 1(b), 15 U.S.C. § 1051(b), on April 5, 2012.

to cause confusion, or to cause mistake, or to deceive. The cited mark is registered in standard character form for “lighting fixtures.”² When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs, and applicant has filed a reply brief.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion as set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services at issue. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In this case, applicant and the examining attorney have also submitted evidence and arguments regarding trade channels, conditions of sale, and sophistication of buyers.

1. Evidentiary issue.

We turn first to an evidentiary objection raised by the examining attorney. Applicant submitted with its brief, for the first time, a one-page advertisement having an illustration of its goods. The examining attorney objected to this evidence on the ground that it is untimely.³ The examining attorney did not address the evidence in his brief.

“The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider

² Reg. No. 4076044, issued on December 27, 2011.

³ Examining attorney’s brief at 2.

additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed.” 37 C.F.R. § 2.142(d). *See also* TBMP § 1207.01 (3rd ed., revision 2, June 2013). In accordance with this general rule, the Board has not considered the evidence attached to applicant’s brief. The applicant has the responsibility to make sure that the record is complete prior to filing a notice of appeal. *In re Van Valkenburgh*, 97 USPQ2d 1757, 1768 n. 32, 1769 (TTAB 2011).

2. The goods at issue.

With respect to the goods of applicant and registrant, we find that they are legally identical. The identification of goods in the cited registration is “lighting fixtures,” which encompasses within its scope applicant’s more specifically identified LED lighting fixtures.

Applicant argues that its goods are specifically for parking garages, “typically indoor parking structures.”⁴ However, the application defines the scope of the registration requested, and applicant’s goods, as identified in the application, are not limited to lighting fixtures for parking garages. We must therefore regard applicant’s goods as including all types of LED lighting fixtures. *Octocom Syst. Inc. v. Houston Computers Svcs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Similarly, in considering the scope of the cited registration, we must look to the language of the registration itself and consider that registrant’s “lighting fixtures” encompass all LED lighting fixtures, including those for parking garages. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), *citing Kalart Co., Inc. v. Camera-*

⁴ Applicant’s brief at 1, 3.

Mart, Inc., 119 USPQ 139 (CCPA 1958). Accordingly, the *du Pont* factor relating to the similarity or dissimilarity of the goods at issue weighs in favor of a finding of likelihood of confusion.

3. Trade channels; conditions of sale; customers.

As applicant's goods are legally identical to those of registrant, we must presume that the goods of applicant and registrant move in the same channels of trade and are available to the same classes of customers for such goods. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994).

With respect to trade channels, applicant contends that its field of lighting fixtures for parking structures "is a niche market" and that registrant's "general lighting fixtures ... are unlikely to cross channels with the highly specialized indoor parking garage lighting fixtures."⁵ Applicant further warns that "the mere fact that the goods might potentially be vaguely similar or overlap" does not warrant a finding of likelihood of confusion.⁶ These arguments are unpersuasive. As we discussed above in Part 2, the goods of applicant and registrant, as identified in the application and the registration, are not merely "potentially ... vaguely similar." Rather, they are legally identical because applicant's identified goods are entirely

⁵ *Id.* at 3.

⁶ *Id.*

encompassed by those of the registrant. Accordingly, we must presume that they are found in the same trade channels.

Regarding its customers, applicant argues that they are “savvy customers well versed in the products and manufactures in the industry.”⁷ This argument is unavailing, as neither the application nor the registration is limited to a class of sophisticated customers; we must therefore presume that the goods of applicant and registrant are available to all classes of purchasers for such goods. *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973). Nor is there any evidence of record to indicate that customers of LED lighting fixtures are better informed or more careful in their selection of products than ordinary consumers. In sum, the *du Pont* factors relating to the similarity or dissimilarity of trade channels and the conditions under which and the buyers to whom sales are made favor a finding of likelihood of confusion.

4. The marks at issue.

We next consider the similarity or dissimilarity of the marks in appearance, sound, meaning, and overall commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). We must compare the marks at issue in their entireties. However, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a

⁷ *Id.*

consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant and the examining attorney have disagreed pointedly as to which portion of the registered mark BOWPERF is the dominant portion of the mark. Applicant objects that the examining attorney, in finding the element BOW- to be the dominant element of the mark, has “basically disregarded” the -PERF element of the mark: “In essence, the Examiner selects the portion of the marks that it [*sic*] chooses to focus on, and disregards the rest as inconsequential. In this case this was clearly error.”⁸ In applicant’s view, the element -PERF “particularly stands out” because of its reference to perforations in the structure of the goods.⁹

We do not agree that the examining attorney has wholly disregarded the element -PERF in the cited mark. In arguing that BOW- is dominant and plays a greater role in creating the overall commercial impression of the mark, he expressed a number of rational reasons for his determination. His argument that “consumers are generally more inclined to focus on the first word, prefix or syllable” in a trademark is supported by relevant precedents. *Palm Bay*, 73 USPQ2d at 1692. He also noted evidence of the descriptive or suggestive nature of the element -PERF (which we will discuss below), and the lack of any evidence to show that BOW has descriptive or suggestive meaning with respect to registrant’s goods.¹⁰ Ultimately, we agree with the examining attorney that BOW- is the dominant component of the

⁸ Applicant’s reply brief at 2.

⁹ Applicant’s brief at 1-2.

¹⁰ Examining attorney’s brief at 5-6.

cited mark, because it is the initial element of the mark, because its lack of meaning in the context of the goods gives it greater strength as a source indicator, and because the suggestiveness of the element -PERF reduces its inherent strength as a source indicator.

Turning to the marks' appearance, it is obvious that BOW and BOWPERF are not identical. It is equally obvious that the entirety of applicant's mark is included as the initial, dominant portion of the cited mark. To this extent the marks are similar in appearance.

In sound, it is clear that the marks would be pronounced differently. There is no evidence as to how customers would pronounce applicant's mark or the initial BOW- component of registrant's mark; this syllable could be pronounced so as to rhyme either with "cow" or with "go," and conceivably in other ways. However, there is no reason to believe that customers would pronounce this syllable differently in applicant's mark than in registrant's mark. Accordingly, applicant's mark bears a phonetic similarity to the dominant element of the registered mark. Otherwise, of course, the marks are different both visually and phonetically.

With respect to the meanings of the marks, the record does not reveal that applicant's mark BOW has any special meaning in the field of lighting fixtures. Applicant points out that "bow" may be understood to mean a bodily gesture of respect or salutation; the forward part of a ship; an implement for playing a stringed instrument; or an archer's weapon. Applicant states that BOW is not a term of art in the industry and that its goods are not bow-shaped, "although they

are suggestive of a bow shape.”¹¹ Applicant explains in its brief that the reflectors of applicant’s fixtures “call[] to mind an archer’s bow in their shape.”¹² However, there is no admissible evidence of record as to the shape or appearance of applicant’s goods; accordingly, there remains a question as to whether customers would perceive this suggestive meaning of the mark, rather than perceiving the mark as an arbitrary term in the context of the goods.¹³

As applicant notes, the registered mark BOWPERF has no apparent meaning. However, applicant and the examining attorney appear to agree as to the significance of the component -PERF. Applicant contends that -PERF “is likely intended to refer to the ‘perforations’ that make up the structure on which the mark is purportedly used.”¹⁴ The examining attorney has made of record an internet page that names the registrant (Vode) and describes the “BowPerf T5” product as having a “perforated aluminum diffuser”; the product is later described by the phrase “diffuser perforated throughout.”¹⁵ The examining attorney argues that -PERF is therefore a “descriptive or highly suggestive term.”¹⁶ Applicant argues that BOW, when it is combined with PERF, “does not lend itself to images of an archer’s bow,

¹¹ Applicant’s response of December 27, 2012, pp. 7-8.

¹² Applicant’s brief at 1.

¹³ Even if we were to consider the illustration of applicant’s goods attached to applicant’s brief, we would remain unpersuaded that customers would perceive applicant’s goods as resembling an archer’s bow.

¹⁴ Applicant’s brief at 1, 2.

¹⁵ Office action of January 4, 2013, pp. 6-7.

¹⁶ Examining attorney’s brief at 5.

or any of the other meanings of bow” as discussed above.¹⁷ The examining attorney points out that “there is no evidence to show that BOW is descriptive for registrant’s goods.”¹⁸

While we cannot know which meaning of “bow” – if any – customers would ascribe to either mark, nothing in the record indicates that they would ascribe one meaning to applicant’s mark and a different meaning to the BOW- component of the registered mark. Thus, applicant’s mark and the dominant portion of the registered mark are similar in meaning or lack thereof. However, we give due regard to the fact that the registered mark also includes the suggestion of perforation, which is, of course, completely absent from applicant’s mark.

In view of the foregoing analysis, we find that the overall commercial impressions created by the two marks are similar. BOW has relatively strong source-indicating power as used in connection with the goods in question, and both marks share this source-indicating element. Because of the admitted suggestive significance of -PERF, goods offered under the mark BOWPERF could be perceived as a line of BOW brand lighting fixtures having perforated features. Accordingly, we find that the *du Pont* factor of the similarity or dissimilarity of the marks favors a finding of likelihood of confusion.

5. Balancing the factors.

Having considered the evidence of record and all relevant *du Pont* factors, including those not specifically discussed herein, we find that applicant’s mark, as

¹⁷ Applicant’s brief at 2.

¹⁸ Examining attorney’s brief at 6.

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applied to applicant's identified goods, so closely resembles the cited registered mark for legally identical goods as to be likely to cause confusion, mistake or deception as to the source of applicant's goods.

Decision: The refusal of registration is affirmed.