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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Bose Corporation
v.
PWC Industries, Inc.

Opposition No. 91182396
to application Serial No. 77158037
filed on April 16, 2007

Charles Hieken and Amy L. Brosius of Fish & Richardson for
Bose Corporation.

William E. Noonan for PWC Industries, Inc.

Before Quinn, Zervas and Mermelstein, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

PWC Industries, Inc. filed an application to register
the mark FULL WAVE AUDIO ("AUDIO" disclaimed) for "marine
waterproof audio amplifier, and waterproof stereo speakers"
(in International Class 9).¹

Bose Corporation opposed registration under Section

¹ Application Serial No. 77158037, filed April 16, 2007,
asserting first use anywhere and first use in commerce on
February 15, 2007.

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2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the grounds of priority and likelihood of confusion. Opposer alleges that applicant's mark, when applied to applicant's goods, so resembles opposer's previously used and registered marks as to be likely to cause confusion. Opposer's pleaded marks are as follows:

WAVE (stylized and in standard characters, respectively) for

radios, clock radios, compact stereo systems, and portable compact disc players (in International Class 9);² and

music systems consisting of a loudspeaker system and amplifier and at least one of a radio tuner, compact disc player and digital music player; compact disc changer; digital music playing docking station (in International Class 9).³

ACOUSTIC WAVE (both typed) for

loudspeaker systems (in International Class 9);⁴ and

loudspeaker systems and music systems consisting of a loudspeaker system and amplifier and at least one of a radio tuner, compact disc player and audio tape cassette player (in International Class 9).⁵

Applicant, in its answer, denied the salient allegations of the notice of opposition.

² Registration No. 1633789, issued February 5, 1991; renewed.

³ Registration No. 3457854, issued July 1, 2008.

⁴ Registration No. 1338571, issued May 28, 1985 on the Supplemental Register; renewed.

⁵ Registration No. 1764183, issued February 3, 1992; renewed. The registration includes a claim of acquired distinctiveness under Section 2(f).

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The record consists of the pleadings; the file of the involved application; trial testimony, with related exhibits, taken by each party; one of opposer's registrations made of record through opposer's notice of reliance; and numerous third-party registrations introduced by way of applicant's notice of reliance. Both parties filed briefs. An oral hearing was held at which only opposer's counsel appeared.

Opposer has been engaged for many years in the manufacture and sale of audio products. Opposer's goods are sold in retail stores and through its website. The goods are advertised nationally through various media, including print and broadcast.

Applicant manufactures and sells various products for the marine industry, including waterproof audio products for boats, personal watercraft, and the like. Applicant's goods are sold in its retail shop and through its website, as well as in power sport dealers, including dealers that sell personal watercraft. The goods are advertised at personal watercraft rallies and in personal watercraft magazines, and through word of mouth. Due to the waterproof nature of applicant's goods, a professional installation is required.

Opposer has established its standing to oppose registration of the involved application. In particular, opposer has properly made its pleaded registrations of

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record and, further, has shown that it is not a mere intermeddler. Opposer's use and registrations of its marks establish that opposer has standing. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

In view of opposer's ownership of valid and subsisting registrations of its pleaded marks, there is no issue regarding opposer's priority. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Thus, the only issue to decide herein is likelihood of confusion.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence. The relevant *du Pont* factors in the proceeding now before us are discussed below.

Inasmuch as opposer introduced evidence bearing on the *du Pont* factor of fame, we first turn to consider this factor. Fame of the prior mark plays a dominant role in likelihood of confusion cases featuring a famous mark. *Bose*

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Corp. v. QSC Audio Products Inc., 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000); and *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). "Famous marks enjoy wide latitude of legal protection since they are more likely to be remembered and associated in the public mind than weaker marks, and are thus more attractive as targets for would-be copyists. Indeed, '[a] strong mark...casts a long shadow which competitors must avoid.'" (citations omitted) *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005).

As pointed out by opposer, the Federal Circuit already has determined that opposer's ACOUSTIC WAVE and WAVE marks are famous. The Court determined that "[w]hen the full record is considered, only one conclusion can be reached regarding the fame of the Bose product marks; they are famous and thus entitled to broad protection." *Bose Corp. v. QSC Audio Products, Inc.*, 63 USPQ2d at 1309.

In the present case, opposer has updated its evidence bearing on fame, thus presenting us with even more evidence

of fame than what the Federal Circuit considered in making its earlier determination.⁶

Opposer's ACOUSTIC WAVE mark has been used for approximately twenty-five years, with annual sales of 45,000 units generating around \$50 million in annual sales revenue. (Brief, p. 8). Promotional and advertising expenditures average \$10 million on an annual basis. (Brief, p. 8). Opposer has advertised its goods in national publications such as USA Today, Parade Magazine and New York Times Magazine, as well as through direct mailings and on opposer's website. Opposer has benefited from significant press coverage in major media outlets such as Wall Street Journal, Boston Herald and CNN.com.

Opposer's WAVE mark has been used for approximately sixteen years, with annual sales of 600,000 units, representing annual sales revenue in excess of \$250 million. (Brief, pp. 9-10). Opposer has spent around \$40 million annually on its promotional and advertising efforts. (Brief, p. 10). Opposer has promoted its WAVE brand goods through direct mail, catalogs, the Internet, and in publications such as New York Times Magazine and Parade

⁶ Opposer took the testimony of David Snelling, opposer's senior new product manager. Although portions of the deposition were designated as "confidential," opposer's sales and advertising figures were set forth in opposer's main brief; the brief was not designated as "confidential" in any respect. Thus, we consider opposer to have waived the confidentiality of certain facts that are cited in this opinion.

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Magazine. Opposer also has enjoyed press coverage of its WAVE brand products in national publications.

Accordingly, we find that opposer's ACOUSTIC WAVE and WAVE marks are famous for opposer's electronic products. This *du Pont* factor weighs heavily in opposer's favor.

With respect to the marks, we must compare opposer's WAVE and ACOUSTIC WAVE marks to applicant's mark FULL WAVE AUDIO in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, supra*. The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

With respect to applicant's mark, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression

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created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("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 consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable."). *See Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002).

The generic term "AUDIO" is disclaimed in applicant's mark. Thus, the dominant portion of applicant's mark comprises the first two words, "FULL WAVE," and is the portion of applicant's mark that is most likely to be remembered and used by consumers in calling for the goods. *See Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). Applicant's mark incorporates the entirety of opposer's WAVE mark, and a salient portion of opposer's ACOUSTIC WAVE mark. Although the marks have differences, the marks all share the common presence of the term "WAVE," rendering the marks similar in sound and appearance. *See Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1311 ("The presence of the root element WAVE, upon this court's review, introduces a strong

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similarity in all three marks [WAVE, ACOUSTIC WAVE and POWERWAVE]...The Board itself, other courts and this court have been confronted frequently with situations similar to this one, in which a competing mark shares a core portion of senior marks, and in which the competing mark was found too similar to the other mark to earn mark status for itself."). See also *Glamorene Products Corp. v. The Procter & Gamble Co.*, 538 F.2d 894, 190 USPQ 543 (CCPA 1976).

As to meaning, the record shows that the "WAVE" portion of opposer's marks refers to sound. Applicant's mark, on the other hand, was selected by applicant to convey the waterproof nature of applicant's products. Ted Bootes, applicant's vice president and research and development director, indicated that applicant's mark relates to a "full" ocean or water wave. We recognize that the term "FULL WAVE" in applicant's mark may be suggestive of the marine nature of the product, and thus result in the marks' having different connotations. We find, however, that any difference between the marks in meaning is outweighed by the similarities.

The marks, all sharing the presence of WAVE, also engender sufficiently similar overall commercial impressions that, if used in connection with similar products, confusion in the marketplace among ordinary consumers is likely to occur.

Applicant asserts that "[a]lthough WAVE and ACOUSTIC WAVE have admittedly become well known for particular types of integrated, one-piece music systems, the terms 'ACOUSTIC' and 'WAVE' are themselves fairly commonplace and descriptive in the extremely broad field of audio and sound related products." (Brief, p. 25). In this connection, applicant submitted forty-three third-party registrations of marks that include the word "WAVE" for goods identified in Class 9. Due to the third-party registrations, applicant contends that opposer's marks are "entitled to less deference in the likelihood of confusion analysis." (Brief, p. 24).

Generally, the existence of third-party registrations cannot justify the registration of another mark that is so similar to a previously registered mark as to create a likelihood of confusion, or to cause mistake, or to deceive. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973). Nevertheless, third-party registrations may be relevant to show that the mark or a portion of the mark is descriptive, suggestive, or so commonly used that the public will look to other elements of a mark to distinguish the source of the goods or services. *See, e.g., AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269-70 (CCPA 1973); and *Plus Products v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983). Properly used in this limited manner, third-party

registrations are similar to dictionaries showing how language is generally used. *See, e.g., Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 675, 223 USPQ 1281, 1285 (Fed. Cir. 1984); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917, 189 USPQ 693, 694-95 (CCPA 1976); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); and *United Foods Inc. v. J.R. Simplot Co.*, 4 USPQ2d 1172, 1174 (TTAB 1987).

Thus, although we have considered this evidence, it neither diminishes the fame of opposer's marks for audio products nor compels us to reach a different conclusion in our likelihood of confusion analysis.

Applicant also asserts that the parties' marks are further distinguished by applicant's consistent use of a design "depicting a pair of opposing full ocean waves" in close proximity to its FULL WAVE AUDIO mark. This fact is irrelevant inasmuch as the design feature is not part of the mark sought to be registered. Our comparison of the marks is confined to applicant's mark as shown in the drawing.

Insofar as the goods are concerned, it is well established that the goods of the parties need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and/or that the

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conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

The question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods identified in opposer's pleaded registration(s). *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). Thus, we must compare opposer's "radios, clock radios, compact stereo systems, and portable compact disc players"; "music systems consisting of a loudspeaker system and amplifier and at least one of a radio tuner, compact disc player and digital music player; compact disc changer; digital music playing docking station"; "loudspeaker systems"; and "loudspeaker systems and music systems consisting of a loudspeaker system and amplifier and at

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least one of a radio tuner, compact disc player and audio tape cassette player" to applicant's "marine waterproof audio amplifier, and waterproof stereo speakers."

We construe the term "marine" in applicant's identification of goods to apply to both of its amplifiers and stereo speakers. Opposer's goods are not identified as being "marine" or "waterproof" in nature but, given that there are no restrictions in opposer's identifications, we must assume that they may nevertheless be used on boats (even if they are not waterproof or otherwise specifically designed for marine use). Further, Mr. Snelling states that opposer's WAVE and ACOUSTIC WAVE brand products each have internal amplifiers and speakers for transmitting sounds. (dep., pp. 11 and 42). Even though the goods may be specifically different, they are nevertheless highly similar audio products. *See Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1310 (opposer's WAVE and ACOUSTIC WAVE products and applicant's "amplifiers and power amplifiers," as shown from the text of the registrations alone, amplify via an amplifier).

Mr. Snelling testified that opposer sells, among its variety of products, a loudspeaker model (Bose 131) that is specifically designed for use on boats, and that these speakers undergo environmental testing for conditions that may be encountered on boats. (dep., pp. 58 and 61). In

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view of the variety of audio products offered under by opposer, a consumer may believe that applicant's FULL WAVE AUDIO marine waterproof audio products are an enhanced line of WAVE or ACOUSTIC WAVE products emanating from opposer. See *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1310 ("the consumer has to be aware that Bose offers many acoustic products").

In the absence of any express limitations in the identifications of goods in the involved application and registrations, the Board assumes that the trade channels for the goods are those normal for such goods, and that the classes of purchasers include all purchasers for such goods. See, e.g., *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992). In the present case, given the absence of any express limitations, we assume that the goods travel in similar trade channels for audio products, including for marine use. Applicant took the testimony of Douglas James Richardson, who has many years of experience in the electronics field, including amplifier repair and installation of sound and stereo systems. Mr. Richardson testified that "[w]e even carried [applicant's goods] at the music store I worked in, and at the time we were selling used Bose products." (dep., p. 22).

There also is an overlap in the classes of purchasers of the parties' goods, namely owners of boats and other watercraft. In this connection, Mr. Richardson would appear to be a typical customer of both types of goods involved herein. Mr. Richardson testified that he installed applicant's goods in his kayak, and that he also owns one of opposer's WAVE brand products. (dep., pp. 7 and 16-17).

The similarities in the parties' goods, trade channels and classes of purchasers are *du Pont* factors that weigh in favor of a finding of likelihood of confusion.

Applicant asserts that there has been no actual confusion between the parties' marks despite their contemporaneous use since 2007. Applicant's argument based thereon is entitled to little value. The record is devoid of probative evidence relating to the extent of use of applicant's mark and, thus, the existence of 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). In any event, as often stated, proof of actual confusion is not necessary to establish likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983). Accordingly, the *du Pont* factor of the length of time during

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and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

We conclude that consumers familiar with opposer's audio products sold under the famous marks WAVE and ACOUSTIC WAVE would be likely to believe, upon encountering applicant's mark FULL WAVE AUDIO for marine waterproof audio amplifier, and waterproof stereo speakers, that the goods originate from or are associated with or sponsored by the same entity. Consumers are likely to perceive that the product sold under the mark FULL WAVE AUDIO is a WAVE (or ACOUSTIC WAVE) brand audio product of opposer that can withstand water.

Lastly, to the extent that there may be any doubt on our finding of likelihood of confusion, we resolve that doubt, as we must, in favor of opposer as the prior user and registrant of a strong mark. *See Giant Food, Inc. v. Nation's Foodservice, Inc.*, 218 USPQ at 395. This is especially the case where, as in the present proceeding, the prior user's mark is one which is famous. *See Kenner Parker Toys Inc. v. Rose Art Industries Inc.*, 22 USPQ2d at 1456.

Decision: The opposition is sustained, and registration to applicant is refused.