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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	76597980
Applicant	PHILLIPS PRODUCTS COMPANY LLC
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Applicant:	Phillips Products Company, LLC
Trademark:	UV CITRUV
Serial No.:	76-597980
Law Office 105:	Barbara Rutland, Examining Attorney

APPLICANT'S APPEAL BRIEF

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I. INTRODUCTION

Pursuant to a Notice of Appeal filed August 2, 2005, applicant has appealed the trademark examiner's refusal to register applicant's mark UV CITRUV for vodka in class 33 on the grounds that it is likely to be confused with the mark UV and DESIGN in registration no. 1827015 for use on wine.

II. FACTS

By application filed June 18, 2004, applicant sought to register its mark on the principal register. In an office action dated January 10, 2005, the examining attorney refused registration under section 2(d) on the grounds that the applied-for mark was confusingly similar to the mark in registration no. 1827015

In refusing registration, the examiner held that: (1) the marks create the same overall impression; (2) the element UV is dominant in both marks; and (3) the respective goods are related.

Applicant submitted a response to the office action requesting that the examining attorney reconsider the refusal to register.

Applicant argued that: (1) in holding that the marks created a similar commercial impression, the examiner ignored the design elements of the registered mark; (2) in holding that UV was the dominant portion of the registered mark, the examiner improperly dissected the mark; and (3) in light of the dissimilarity of the respective marks, the respective goods are irrelevant.

On March 31, 2005, the examiner issued a final office action maintaining the section 2(d) refusal.

III. ARGUMENT

A. THE EXAMINING ATTORNEY ERRED IN DETERMINING THAT THE MARKS CREATE THE SAME OVERALL IMPRESSION.

The examiner held that, when comparing the applied-for mark and the registered mark, "the points of similarity are of greater importance than the points of difference." citing to *Esso Standard Oil Co. v Sun Oil Co.* 108 USPQ 16 (D.C.Cir.) *cert denied 109* USPQ 517(1956).

Applicant respectfully submits that, in reaching this determination, the examiner failed to give appropriate consideration to the commercial impression created by the design element of the registered mark. The design is visually complicated with the central figure of a fox's head framed within a hunting horn surrounded by grape clusters.

Moreover, the letters UV are incorporated within registrant's design and cannot be visually separated from it. By contrast, the applied-for mark has no design element.

The overall visual impression of registrant's composite mark is thus much different from the impression of applicant's word mark. *In re Products de Beaute* 224 USPQ 283 (TTAB 1984). The examiner erred in ignoring the design elements of the registered mark. "To ignore the role of the design elements and interpret only the word portions of the mark would fly in the face of the well known rule that in assessing the likelihood of confusion, marks should be considered in their entireties". *In re Loew's Theatre, Inc.* 218 USPQ 956 (TTAB 1983).

When viewed in its entirety, the registered mark creates a distinctly different impression from applicant's mark so as to avoid any likelihood of confusion.

B. THE EXAMINING ATTORNEY ERRED IN DETERMINING THAT UV IS THE DOMINANT PORTION OF THE REGISTERED MARK

The examiner has determined that the word UV is the dominant feature of both applicant's and registrant's mark. Applicant respectfully submits that this determination is in error.

As discussed above, the design elements of the registered mark are an integral part of the composite mark. To determine that the design elements were subordinate to the lettering was in error.

The Court of Appeals for the Federal Circuit has held that "the basic principle in determining confusion between marks is that the marks must be considered in their entireties...It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark". (citations omitted) *In re National Data Corp* 224 USPQ 749,750 (CAFC 1985).

By separating out the letters UV and diminishing the remainder of registrant's mark, the examiner inappropriately changed the mark. *In re Hearst Corp.* 25 USPQ 2d 1238 (CAFC 1992).

Had the examiner properly compared the entire composite mark in registration no. 1827015, to the applied-for mark, there is no likelihood of confusion.

C. THE DISSIMILIARITY OF THE MARKS IS DISPOSITIVE

The Board has previously held that a single *DuPont* factor may be dispositive on the issue of likelihood of confusion especially when that single factor is dissimilarity of the marks. *Kellogg Co. v Pack 'Em Enterprises, Inc.* 14 USPQ 2d 1545,1550 (TTAB 1990). Further, the Federal Circuit Court of Appeals has cited the Board's decision in holding that "substantial and undisputed differences" justifies a conclusion of no likelihood of confusion. *Champagne Louis Roederer S.A. v Delicato Vineyards* 47 USPQ 2d 1459,1461 (CAFC 1998). As discussed above, the design elements of the registered

mark creates a commercial impression which is clearly dissimilar from the applied-for mark. This dissimilarity simply outweighs all other *DuPont* factors. Therefore, the examining attorney's determination that the respective goods are related is irrelevant.

IV. CONCLUSION

Applicant respectfully submits that the examining attorney erred in dissecting the registered mark and in failing to accord sufficient weight to the design element.

Therefore, it is respectfully requested that the refusal by the examining attorney to register applicant's mark should be reversed and the applied-for mark be allowed to registration.

Dated: 9/1/05

Respectfully Submitted,
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