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PRECEDENT OF THE T.T.A.B.**

Mailed: December 8, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Savage Tales Entertainment, LLC

Serial No. 77816357

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Before Quinn, Zervas, and Wolfson, Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

On August 31, 2009, Savage Tales Entertainment, LLC filed an application to register the mark PETER CANNON THUNDERBOLT for "comic books; comic magazines; graphic novels; posters; trading cards."¹ The examining attorney refused registration of applicant's mark under the provisions of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles

¹ Filed August 31, 2009; first use and first use in commerce claimed at least as early as August 1966.

the previously registered mark THUNDERBOLTS for "publications, namely, comic books and comic magazines and printed stories in illustrated form featured in books and magazines; posters," that confusion, mistake, or deception among purchasers is likely.²

When the refusal was made final, applicant appealed. Briefs, including applicant's reply brief, have been filed. Applicant's request (filed April 11, 2011) for an extension of time to file its appeal brief is granted.

We affirm.

I. Applicable Law

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Rests. Inc.*, 105

² Registration No. 2192684, issued September 29, 1998. The examining attorney initially refused registration under Sections 1, 2 and 45, 15 U.S.C. §§ 1051, 1052, and 1127, on the ground that the applied-for mark was used only as the title of a single creative work and as such, failed to function as a trademark. The examining attorney withdrew the refusal on this basis prior to appeal.

Serial No. 77816357

F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Discussion

A. The similarity or dissimilarity and nature of the goods as described in the application and cited registration.

We begin by considering the second *du Pont* factor, the similarity or dissimilarity of the goods as identified in the application and cited registration. "Likelihood of confusion may be found based on any item that comes within the identification of goods in the involved application and registration." *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008). Here, applicant seeks registration for "comic books; comic magazines; graphic novels; posters; trading cards." The registered mark covers "publications, namely, comic books and comic magazines and printed stories in illustrated form featured in books and magazines; posters." Registrant's "publications, namely, comic books

Serial No. 77816357

and comic magazines; posters" are legally identical to applicant's "comic books, comic magazines and posters." The remainder of the goods, "graphic novels" and "trading cards" in applicant's mark, and "printed stories in illustrated form featured in books and magazines" in the cited registration, are all broadly categorized as printed matter. The overlap of the goods weighs heavily in favor of a finding of likelihood of confusion.

B. The similarity or dissimilarity of established, likely-to-continue trade channels; classes of consumers.

As the parties' goods are legally identical, and as there are no trade channel restrictions or limitations in either applicant's identification of goods or registrant's identification of goods, we must presume that both parties' goods are or could be marketed in all normal trade channels for such goods, that these trade channels are the same or at least overlap, and that the goods will be encountered by the same classes of potential purchasers. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); and *In re Smith & Mehaffey*, 31 USPQ2d 1531 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers.").

Applicant argues that "many comic book stores group titles first by publisher and then alphabetically (and even possibly located in different sections of a comic book store depending on its size and layout)."³ Nothing in the record suggests, however, that a potential customer would be unlikely to browse the entire comic book store when seeking to buy a comic book. The demarcation of various comic books within a comic book store, either alphabetically or by publisher, appears unlikely to isolate buyers of one title from those of another in the same manner. Moreover, applicant's identification of goods allows for comic books that could be sold in other locations such as retail stores where they would not be grouped by titles or by publisher and then alphabetically; they could simply be included in a book section of the store. The third *du Pont* factor weighs in favor of a finding of likelihood of confusion.

C. The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing.

Applicant argues that "comic book collectors are knowledgeable purchasers of specialty products, and thus they make careful purchasing decisions."⁴ The record is

³ January 10, 2010, *Request for Reconsideration*, unnumbered p. 6.

⁴ *Applicant's Brief*, unnumbered p. 4.

devoid of any evidence to establish this fact. The examining attorney has submitted an Internet printout from the website MyComicshop.com showing that prices of applicant and registrant's comic books range from \$1.25 to \$4.00, which is relatively inexpensive.⁵ It has often been stated that purchasers of relatively inexpensive products are held to a lesser standard of purchasing care and are more likely to be confused as to the source of the goods. See *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567, 223 USPQ 1289, 1290 (Fed. Cir. 1984). Purchasers of comic books and magazines include ordinary consumers who would be subject to impulse purchase. This *du Pont* factor weighs in favor of a finding of likelihood of confusion.

D. Similarity or dissimilarity of the marks in their entireties

In a likelihood of confusion analysis, we compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. Where, as here, the applicant's goods are legally identical to the registrant's goods, the degree of

⁵ Exhibit to Final Office Action of July 8, 2010.

Serial No. 77816357

similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992); see also, *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Dixie Restaurants, Inc.*, 41 USPQ2d at 1534.

In terms of the meanings and commercial impressions of the marks, the marks engender similar, complementary meanings. Registrant's mark, THUNDERBOLTS, is the name for a group of "Marvel supervillians turned heroes."⁶ The phrase "Peter Cannon" in applicant's mark would be considered as the name of a character, and in fact is the "real name" of the character portrayed in applicant's comic book stories, and "Thunderbolt" is his "code-name."⁷ Following this construct leads to the likely (mis)perception that PETER CANNON THUNDERBOLT identifies one of the several "supervillians turned heroes" in the THUNDERBOLTS group. In light thereof, the overall similarities of the marks create marks with similar meanings.

⁶ Applicant's Request for Reconsideration, Ex. 4.

⁷ Applicant's Response to Office Action, unnumbered p. 3.

Applicant argues that PETER CANNON is the dominant portion of its mark. However, PETER CANNON would be perceived by purchasers as a name, while the term THUNDERBOLT in applicant's mark is an arbitrary or fanciful term with respect to the goods. Thus, PETER CANNON is not the dominant term. Moreover, we must consider applicant's mark in its entirety. *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985) ("the ultimate conclusion rests on consideration of the marks in their entireties.") Because both parties' marks share the common term THUNDERBOLT or THUNDERBOLTS,⁸ the marks are somewhat similar in appearance and pronunciation.

The similarities between the marks outweigh their differences, and this first *du Pont* factor weighs in favor of opposer.⁹

⁸ The fact that registrant's mark is pluralized while applicant's is singular is immaterial in terms of appearance and pronunciation of the marks. See *Chicago Bears Football Club, Inc. v. 12th Man/Tennessee LLC*, 83 USPQ2d 1073, 1077 (TTAB 2007); and *Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (there is no material difference, in a trademark sense, between singular and plural forms of a word).

⁹ In considering the similarities and dissimilarities of the marks, we do not consider differences in packaging, the alleged distinguishable content or themes of the parties' comic books, or that the names and logos of the publishers are allegedly displayed on the covers of the works together with the marks at issue herein. The issue of likelihood of confusion must be determined by comparing applicant's mark as it appears in the application and the cited mark as it appears in the registration. The product packaging is not part of the marks in the application or the cited registration, and applicant and registrant are free to change their respective product packages, content, or use of

E. The number and nature of similar marks in use on similar goods.

Applicant has submitted Internet printouts from MarvelDirectory.com¹⁰ (Exhibit 1); Wikipedia.org¹¹ (Exhibit 2); www.milehighcomics.com¹² (Exhibit 3); and www.internationalhero.co.uk,¹³ (Exhibit 4); all purportedly show that there are "numerous comic book character names and series titles that contain or comprise 'Thunderbolts'."¹⁴ Exhibit 1 contains information on the storyline of the THUNDERBOLTS comic books, as well as information about two other characters, one named THUNDERBOLT and the other THUNDERBOLT ROSS, neither of whom appear to have any relation to the THUNDERBOLT series, but both of which appear to be owned by Marvel Comics. Exhibit 2 is a copy of an article from Wikipedia that discusses the evolution of the PETER CANNON THUNDERBOLT character. Exhibit 3 is the result of a "search of the titles sold by Mile High Comics listing the first 50 titles containing

other marks on the goods, at any time. Thus, for purposes of determining likelihood of confusion, any differences in product packaging are irrelevant. See *Kimberly-Clark Corp. v. H. Douglas Enterprises*, 774 F.2d 1144, 227 USPQ 541 (Fed. Cir. 1985); and *The Quaker Oats Company v. Acme Feed Mills, Inc*, 192 USPQ 653 (TTAB 1976).

¹⁰ *Applicant's Request for Reconsideration*, Ex. 1.

¹¹ *Applicant's Request for Reconsideration*, Ex. 2.

¹² *Applicant's Request for Reconsideration*, Ex. 3.

¹³ *Applicant's Request for Reconsideration*, Ex. 4.

¹⁴ *Applicant's Request for Reconsideration*, unnumbered p. 6.

Serial No. 77816357

[Thunderbolts]."¹⁵ A review of this exhibit is virtually impossible because the listings are indecipherable. It appears that there are 19 listings, but the word "Thunderbolts" can be deciphered in only some of them. At the top of the exhibit is printed: "Your search for 'thunderbolt' found 47 matching titles," and a book entitled "Essential Official Handbook of the Marvel Universe-Update 89 Vol. 1 TPB" is advertised next to this explanatory note. We cannot tell whether the listings refer to only comic books issued by Marvel Comics or whether they identify third-party publishers.

Exhibit 4, printouts from a United Kingdom website, appears to be an encyclopedia of characters appearing in comic books, with information about their super-powers, adventures, personalities and the like. Four of them have names that include "Thunderbolt:" Thunderbolt the Avenger, Thunderbolt, Thunder Boulton, and Thunderbolt Jaxon. This latter super-hero appeared in Australia and the U.K. but apparently not in the United States; the character named "Thunderbolt" only had a single appearance according to the webpage; and it is unclear whether the remaining two are British superheroes (Thunder Boulton's alias is apparently a

¹⁵ *Applicant's Request for Reconsideration*, unnumbered p. 6.

Serial No. 77816357

British government agent), or whether they are characters appearing in comic books in circulation in the United States.

Applicant's evidence fails to persuade us that potential customers have been conditioned to distinguish among various uses of the term THUNDERBOLT with respect to comic book character names, or that registrant's THUNDERBOLTS mark is diluted. This *du Pont* factor is neutral.

F. The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

Applicant claims use of the PETER CANNON THUNDERBOLT mark since 1966, and notes that its mark has co-existed with registrant's mark without any instances of actual confusion since that mark was first used in 1997. Yet the literature submitted by applicant, specifically Exhibit 2 attached to its request for reconsideration, shows that the PETER CANNON THUNDERBOLT mark was discontinued sometime after 1966, reintroduced in 1985, and then discontinued again at some point until its next appearance in 1992, at which time it was in use only through 1993.¹⁶ It is unclear from the record when the mark was again put into use, and whether there were any subsequent breaks in the period of

¹⁶ *Applicant's Request for Reconsideration*, Ex. 2.

Serial No. 77816357

continuous use. Accordingly, we cannot say with certainty how long the parties' marks have, in fact, co-existed. In any event, applicant's assertion of no actual confusion between the marks is entitled to little weight. *In re Majestic Distilling Co.*, 65 USPQ2d at 1205 ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value"). See *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). This *du Pont* factor is considered neutral.

G. Balancing the factors

The marks are similar in connotations and commercial impressions, as well as in sound and appearance. The goods are legally identical, the trade channels and classes of consumers are presumed to be the same, and the purchasers are subject to impulse purchase. There is insignificant use of similar marks in the marketplace, and the evidence of the length of time during which the parties' marks may have co-existed without actual confusion is inconclusive. Applicant's mark is likely to cause confusion with registrant's mark.

Serial No. 77816357

Decision: The refusal under Section 2(d) of the Act is affirmed.