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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Richard H. Wynn

Serial Nos. 75/011,915 and 75/011,916

Richard H. Wynn, pro se.

Jill C. Alt, Trademark Examining Attorney, Law Office 114 (Mary Frances Bruce, Managing Attorney).

Before Cissel, Hairston and Bottorff, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Richard H. Wynn has filed applications to register the marks 21ST CENTURY FOX[1] and TWENTY-FIRST CENTURY FOX[2] for:

> pre-recorded video-discs, pre-recorded video tapes and cassettes, pre-recorded video-magnetic tapes all featuring adult live-action entertainment; pre-recorded compact discs and pre-recorded audio magnetic tapes, audio cassette tapes, all featuring adult social intercourse entertainment, specifically adults discussing adult entertainment topics using graphic adult entertainment language;

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[1] Serial No. 75/011,915, filed on October 30, 1995, which alleges a bona fide intention to use the mark in commerce.
[2] Serial No. 75/011,916, filed on October 30, 1995, which alleges a bona fide intention to use the mark in commerce.

all products are not advertised, marketed or presented on the global computer network in class 9; and

adult entertainment services that include adult movies and the production and distribution of adult motion picture films, adult television programs and television commercials; all services are not advertised, marketed or presented on the global computer network in class 41.

Registration has been refused in both instances pursuant to Section 2(d) of the Trademark Act, on the ground that each mark, if used on the identified goods and services, would so resemble the following registered marks as to be likely to cause confusion or mistake or to deceive:

(a) TWENTIETH CENTURY FOX FILM CORPORATION and design as shown below

for “silent, sound, dialogue, and talking motion picture films”;[3]

(b) 20th CENTURY FOX and design as shown below

[3] Registration No. 336,090 issued June 23, 1936; renewed.

for “motion picture films”;[4]

(c) TWENTIETH CENTURY FOX for “motion picture films, phonograph records, audio magnetic tapes, video magnetic tapes (videocassettes) and videodiscs”;[5]

(d) 20th CENTURY FOX and design as shown below

for “cinematographic films, video tapes, prerecorded video cassettes and video discs” in class 9 and “production and distribution of motion picture films television programs, pre-recorded videocassettes” in class 41;[6]

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[4] Registration No. 1,011,919 issued May 27, 1975; renewed.
[5] Registration No. 1,237,164 issued May 10, 1983; Sections 8 & 15 affidavit filed.
[6] Registration No. 1,256,722 issued November 8, 1983; Sections 8 & 15 affidavit filed.

(e) 20th CENTURY FOX and design as shown below

for "cinematographic films, video tapes, pre-recorded videocassettes and video discs" in class 9 and "production and distribution of motion picture films, television programs, pre-recorded videocassettes and videodiscs" in class 41;[7]

(f) TWENTIETH CENTURY FOX for "production and distribution of motion picture films; phonograph records, audio magnetic tapes, television programs, video magnetic tapes (videocassettes) and video-discs";[8]

(g) TWENTIETH CENTURY FOX SELECTIONS for "pre-recorded video tapes, pre-recorded video cassettes, pre-recorded videodiscs featuring live action and animated entertainment[9]

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[7] Registration No. 1,465,225 issued November 17, 1987; Sections 8 & 15 affidavit filed.
[8] Registration No. 1,602,948 issued June 19, 1990; Sections 8 & 15 affidavit filed.
[9] Registration No. 1,956,371 issued February 13, 1996. The word SELECTIONS has been disclaimed apart from the mark as shown.

(h) 20th CENTURY FOX and design as shown below

for "motion picture films, pre-recorded video tapes, pre-recorded video cassettes, and pre-recorded videodiscs featuring entertainment";[10]

(i) 20th CENTURY FOX HOME ENTERTAINMENT and design as shown below

for "entertainment services in the nature of production and distribution of motion picture films; production of and distribution for others of television programs, pre-recorded video cassettes, pre-recorded video tapes, pre-recorded video discs, pre-recorded audio cassettes, pre-recorded audio tapes, pre-recorded

[10] Registration No. 1,928,423 issued October 17, 1995. The registration states: The trademark is a computer generated sequence showing the central element from several angles as though a camera is moving around the structure.

audio compact discs, and phonograph records";[11] and

(j) 20th CENTURY FOX and design as shown below

for "pre-recorded video cassettes, pre-recorded video tapes, pre-recorded videodiscs, pre-recorded audio cassettes, pre-recorded audio tapes, pre-recorded audio compact discs and phonograph records, all featuring entertainment, action, adventure, dramatic, comedic, children's and documentary themes and musical performances".[12]

Applicant has appealed, and because both cases involve essentially identical records and issues, we will render a single opinion resolving both appeals.

Our determination under Section 2(d) of the Act is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the

[11] Registration No. 2,092,752 issued September 2, 1997. The words HOME ENTERTAINMENT have been disclaimed apart from the mark as shown.
[12] Registration No. 2,138,211 issued February 24, 1998.

likelihood of confusion issue. In re E. I. duPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the relatedness of the goods and services and the similarities between the marks.

We turn first to a consideration of the goods and services. It is applicant's position that the adult-oriented entertainment products and services which he intends to offer are in no way similar to the "mainstream" entertainment products and services in the cited registration. Applicant contends that his adult-oriented pre-recorded video discs, tapes and cassettes, compact discs, etc., will be sold in different channels of trade than are the products in the cited registrations. Further, applicant argues that registrant, which offers entertainment goods and services tailored to children, would never be involved in the adult-oriented entertainment business.

As correctly noted by the Examining Attorney, the issue of likelihood of confusion in a proceeding such as this must be determined on the basis of the goods and services specified in the involved application vis-à-vis the goods and services set forth in the cited registrations, without limitations or restrictions not

reflected therein. See In re Elbaum, 211 USPQ 639, 640 (TTAB 1981). We recognize that the identifications of goods and services in the involved applications has been restricted such that applicant's entertainment goods and services are limited to those which are adult-oriented in nature. However, the identifications of goods and services in the cited registrations have no limitations as to type, channels of trade or classes of purchasers. Thus, we must presume that the entertainment goods and services listed in the cited registrations include the adult-oriented type which applicant intends to offer. Notwithstanding applicant's arguments concerning the actual goods and services offered by registrant, for purposes of our likelihood of confusion determination, the goods and services of applicant and registrant are identical.[13]

We turn then to a comparison of applicant's marks 21ST CENTURY FOX and TWENTY-FIRST CENTURY FOX and the various cited marks consisting of 20th CENTURY FOX or TWENTIETH CENTURY FOX.

[13] We should add that even if registrant's entertainment goods and services were specifically limited to exclude those which are adult-oriented, there would nonetheless be overlap among purchasers. For example, adults who purchase registrant's "mainstream" pre-recorded video tapes could also purchase applicant's pre-recorded video tapes featuring adult social intercourse entertainment.

There is no dispute that the cited marks consist of and are dominated by the wording 20th (or TWENTIETH) CENTURY FOX and that such wording is highly similar to applicant's marks 21ST and TWENTY-FIRST CENTURY FOX in appearance and sound. It is applicant's position, however, that his marks 21ST and TWENTY-FIRST CENTURY FOX, when used in connection with its goods and services, would differ significantly in meaning from 20th and TWENTIETH CENTURY FOX in the cited registrations, such that confusion would be unlikely. In particular, applicant argues that the cited marks connote the twentieth century itself and the surname "Fox," whereas applicant's marks connote a contemporary ("21ST or TWENTY-FIRST CENTURY") beautiful and sexually attractive woman ("FOX").

When the goods and services are identical or closely related, it has been held that: "Concerning the question of the similarity of the marks, it is well established that similarity in any one of the elements of sound, appearance, or meaning is sufficient to indicate likelihood of confusion." General Foods Corp. v. Wisconsin Bottling, Inc., 190 USPQ 43, 45 (TTAB 1976). See also In re Mack, 197 USPQ 755 (TTAB 1977) ["It is also well settled that similarity in any one of the elements of sound, appearance or meaning is sufficient to indicate likelihood of

confusion.”]. Even assuming that applicant’s marks and the marks in the cited registrations have different connotations, the marks are so similar in appearance and sound that, if used in connection with identical goods and services, confusion would be likely.

Decision: The refusal to register is affirmed.

R. F. Cissel

P. T. Hairston

C. M. Bottorff
Administrative Trademark Judges
Trademark Trial and Appeal Board

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