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GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Pyro-Spectaculars, Inc.*

Serial No. 75/405,999

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Before *Hohein, Wendel and Rogers*, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Pyro-Spectaculars, Inc. has filed an application to register the mark "SKY CONCERT" for "entertainment services, namely, production of events and shows featuring pyrotechnics synchronized with music."¹

¹ Ser. No. 75/405,999, filed on December 16, 1997, which alleges dates of first use anywhere and in commerce of 1975.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its services, so resembles the mark "CONCERT IN THE SKY," which is registered for "entertainment services in the nature of a musical fireworks show,"² as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not held.³ We affirm the refusal to register.

The determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods and/or services and the similarity of the marks.⁴

² Reg. No. 1,348,659, issued on July 9, 1985, which sets forth dates of first use anywhere and in commerce of July 4, 1976; affidavit §8 accepted. The word "CONCERT" is disclaimed.

³ Although applicant submitted a request for an oral hearing, it subsequently withdrew such request.

⁴ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and/or services] and differences in the marks."

Here, inasmuch as applicant's services are in essence identical and otherwise closely related to registrant's services⁵ since both involve the presentation of fireworks shows with synchronized music,⁶ the principal focus of our inquiry is on the similarities and dissimilarities in the marks at issue when considered in their entireties. Moreover, as pointed out in *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994), "[w]hen marks would appear on virtually identical goods or services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines."

Applicant, in this regard, asserts that "[t]he mere fact that both marks contain the words 'sky' and 'concert' does not in and of itself establish that there is a likelihood of confusion," given that the marks are not identical.⁷ The

⁵ Applicant, we note, does not argue to the contrary in its brief.

⁶ We judicially notice, as requested by the Examining Attorney in his brief, that Merriam-Webster's Collegiate Dictionary (10th ed.) at 953 defines "pyrotechnics" in relevant part as "a display of fireworks" and that Webster's II New Riverside Dictionary at 959 likewise lists such term as meaning "[a] fireworks display." It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁷ While applicant also contends that its rights in its mark are superior to registrant's rights in the cited mark because applicant's

Examining Attorney, on the other hand, maintains that when the marks "SKY CONCERT" and "CONCERT IN THE SKY" are considered in their entireties, confusion is likely because:

Both marks share the same overall meaning and commercial impression when used in connection with the [respective] services. The applicant's mark focuses consumers' attention on a musical performance, a CONCERT, occurring in conjunction with pyrotechnics in the SKY. The registrant's mark also centers consumers' attention on a musical performance, a CONCERT, occurring in harmony with fireworks IN THE SKY. Thus, consumers are likely to retain the same general commercial impression of the applicant's mark as they do the registered mark, namely that some type of musical performance occurs with fireworks in the sky. Consequently, the marks share the same overall commercial impression.

As a general proposition, where the primary difference between marks is the transposition of the elements which compose the marks and such transposition does not change the overall commercial impression engendered thereby, confusion has been found to be likely. See, e.g., In re Wine Society of America Inc., 12 USPQ2d 1139, 1142 (TTAB 1989) [mark "WINE SOCIETY OF AMERICA" and design for wine club membership services including

claimed dates of first use precede those stated in the cited registration, it is pointed out that Section 2(d) of the Trademark Act precludes registration of "a mark which so resembles a mark registered in the Patent and Trademark Office ... as to be likely ... to cause confusion" Thus, even if applicant actually is the prior user, such fact is irrelevant and immaterial to the question of the registrability of applicant's mark.

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the supplying of printed materials, selling of wines to members, conducting wine tasting sessions and recommending specific restaurants offering wines sold by the applicant held likely to be confused with mark "AMERICAN WINE SOCIETY 1967" and design for a newsletter, bulletin and journal of interest to members of the registrant]; In re Nationwide Industries Inc., 6 USPQ2d 1882, 1884 (TTAB 1988) [mark "RUST BUSTER" for rust-penetrating spray lubricant found likely to be confused with mark "BUST RUST" for penetrating oil]; and In re General Tire & Rubber Co., 213 USPQ 870, 871 (TTAB 1982) [mark "SPRINT STEEL RADIAL" for tires held likely to be confused with mark "RADIAL SPRINT" for tires]. We agree with the Examining Attorney that the same is true in this case. Applicant's mark "SKY CONCERT" differs from registrant's mark "CONCERT IN THE SKY" in the transposition of the terms "SKY" and "CONCERT" and in the addition of the words "IN THE." Such differences, however, fail to result in a distinctly different overall commercial impression; instead, the respective marks in essence share the same basic connotation and project an identical commercial impression. Their contemporaneous use in connection with essentially the same entertainment services, consisting of the presentation of fireworks displays or pyrotechnics shows choreographed to music, is therefore likely to cause confusion.

Applicant, notably without any supporting evidence, nonetheless further argues that "the marks have co-existed for approximately twenty-five (25) years in a relatively small market (pyrotechnics) without Applicant becoming aware of any instances of actual confusion." In particular, applicant insists that "the differences in the marks, the conditions of purchase, and the sophistication of the consumers has precluded actual confusion from occurring during this time." According to applicant:

The nature of Applicant's and Registrant's services requires them to be negotiated for well in advance of the event. In addition, the significant cost of the services generally requires a detailed contract due to issues of cost and insurance. Accordingly, Applicant submits that Applicant's and Registrant's services are generally purchased only after a careful negotiation and review has been completed. As such, customers and potential customers of Applicant's and Registrant's services will be well aware of the actual source of those services. This condition on the purchase of the services reduces a likelihood of confusion.

As the Examining Attorney correctly points out, the test under Section 2(d) of the statute is whether there is a likelihood of confusion. It is not necessary, therefore, to show actual confusion. See, e.g., Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990). Moreover, in the present case, there simply is no

affidavit or other supporting evidence as to the extent to which the respective marks, as claimed by applicant, have co-existed in the marketplace for musical fireworks shows. For the absence of any incidents of actual confusion to be probative that there is no real likelihood of confusion between the respective marks, evidence demonstrating appreciable and continuous use of such marks for a significant period of time in the same markets is necessary. Absent such proof, the mere assertion of a lack of any reported instances of actual confusion is not a meaningful factor in this appeal. See, e.g., *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

Lastly, as to applicant's contention that confusion is unlikely because the conditions of purchase of the respective services are such that, due to the expensive nature thereof and insurance considerations, buyers contract for the services only after a period of careful negotiation and review, suffice it to say that, even as to the relatively few customers who actually make arrangements for the presentation of musical fireworks shows or pyrotechnics events, the fact that those purchasers may indeed be knowledgeable or sophisticated in a particular field and exercise a degree of care in their purchasing decisions "does not necessarily preclude their mistaking one trademark for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. *Wincharger Corp. v.*

Rinco, Inc., 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also In re Decombe, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983). To the far larger group of consumers for such entertainment services, namely, the general public who enjoys the presentation of fireworks displays, including pyrotechnics shows which are synchronized to music, such persons would not be expected to exercise anything other than ordinary care in their selection of such events to attend.

We accordingly conclude that consumers and potential customers, who are familiar or acquainted with registrant's "CONCERT IN THE SKY" mark for its "entertainment services in the nature of a musical fireworks show," would be likely to believe, upon encountering applicant's substantially identical "SKY CONCERT" mark for its "entertainment services, namely, production of events and shows featuring pyrotechnics synchronized with music," that such identical and otherwise closely related services emanate from, or are sponsored by or associated with, the same source.

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