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Paper No. 12
HRW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re K. Fisher Enterprises Ltd.

Serial No. 75/847,625

Ken Fisher for K. Fisher Enterprises Ltd.

Patricia A. Horrall, Trademark Examining Attorney, Law Office 106 (Mary Sparrow, Managing Attorney).

Before Walters, Wendel and Bottorff, Administrative Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

K. Fisher Enterprises Ltd. has filed an application to register the mark SUPER QUIZ for “books containing quiz games; and syndicated newspaper columns featuring quiz games” in Class 16.^{1[1]}

^{1[1]} Serial No. 75/847,625, filed November 8, 1999 under the provisions of Section 2(f), claiming a first use date and first use in commerce date of 1982. The application as filed also included Class 9 goods. The Examining Attorney withdrew the Section 2(d) refusal as to these goods and the Class 9 goods were subsequently divided out into the child application, Serial No. 75/980,893.

Registration has been finally refused under Section 2(d) of the Trademark Act on the ground of likelihood of confusion with the mark QUIZ, which is registered for “magazines containing games and puzzles.”^{2[2]} The refusal has been appealed and applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

We make our determination of likelihood of confusion on the basis of those of the *du Pont*^{3[3]} factors that are relevant in view of the evidence of record. Two key considerations in any analysis are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods or services with which the marks are being used. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999).

Looking first to the respective marks, we are guided by the well-established principle that although marks must be considered in their entireties, there is nothing improper, under appropriate circumstances, in giving more or less weight to a particular portion of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Here the dominant portion of applicant’s mark is the term QUIZ, which comprises the whole of registrant’s

^{2[2]} Registration No. 1,664,973, issued November 19, 1991 under the provisions of Section 44(e) based on Spanish Registration No. 562,421. Section 8 (6 yr.) affidavit filed and accepted; combined Section 8 (10 yr.) and Section 9 filed.

^{3[3]} *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

mark. The additional term SUPER is highly laudatory, with little source-indicating significance. While the term SUPER leads to slight differences in appearance and sound for the marks as a whole, the connotation is substantially the same, i.e., that of the word “quiz.” SUPER might well be interpreted to refer to an expanded or top of the line version of the QUIZ goods. The overall commercial impressions created by the two marks are very similar.

Although applicant has pointed to third-party marks registered in Class 16 which also contain the term QUIZ,^{4[4]} we note that all of these marks contain other terms, such as KIDS QUIZ or QUIZTRONICS, which serve to distinguish them from QUIZ. None is as similar in commercial impression as SUPER QUIZ is to QUIZ. Furthermore, while QUIZ is clearly not a strong mark when used in connection with goods such as registrant’s game and puzzle magazines, even a weak mark is entitled to protection against registration of a mark very similar to QUIZ for goods which would reasonably be assumed to emanate from registrant. See *In re Textron Inc.*, 180 USPQ341 (TTAB 1973); *OPTOmechanisms Inc. v. Optoelectronic, Inc.*, 175 USPQ 246 (TTAB 1972).

Applicant’s argument that registrant’s mark is generic when used with its product is in effect a collateral attack on the validity of the registration and as such cannot be entertained in this ex parte proceeding. See *In re Calgon Corp.*,

^{4[4]} Although applicant failed to submit copies of the third-party registrations, as is the proper means for introducing the same, the Examining Attorney has taken the registrations into consideration. Accordingly, we have done the same.

435 F.2d 596, 168 USPQ 278 (CCPA 1971). Applicant's only recourse would have been to institute a cancellation proceeding against the registration on this basis.

Turning to the goods involved, we note that as a general principle, the issue of likelihood of confusion must be determined on the basis of the goods as identified in the application and the cited registration. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). It is not necessary that the goods of registrant and applicant be similar or even competitive to support a holding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate, or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993) and the cases cited therein. If there are no restrictions in the application or registration(s) as to channels of trade, the parties' goods must be assumed to travel in all the normal channels of trade for goods of this nature. See *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992).

We find applicant's books containing quiz games and syndicated newspaper columns featuring quiz games to be closely related to registrant's magazines containing games and puzzles. Applicant's arguments that registrant's magazines are published only in Spanish and directed to the

Hispanic community are to no avail. There are no restrictions in the identification of the goods in either application or registration as to language or class of purchasers, and thus we must assume that the goods of both would travel in the same channels of trade and would be encountered by the same persons. The respective goods must be viewed simply as books and newspaper columns featuring quiz games and magazines containing games and puzzles. All are printed publications which might well emanate from the same source; "games" would encompass quiz games such as applicant's. We find it highly reasonable for purchasers familiar with registrant's QUIZ magazines containing games to assume that applicant's SUPER QUIZ books and newspaper columns are simply an expansion by registrant into other closely related forms of printed publications.

The other factor which applicant raises is the absence of any indication of actual confusion despite applicant's use of its mark since 1982. We can give little weight to this claim, however, under the present circumstances. In the first place, registrant has not had the opportunity to be heard from on this point. See *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984). Second, there is no evidence of record as to the extent to which either applicant or registrant has used its mark and thus the question arises whether there has been any real opportunity for confusion. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992). In any event, the issue is not actual confusion, but rather likelihood of confusion.

Accordingly, on the basis of the similarity of the commercial impressions created by applicant's mark SUPER QUIZ and registrant's mark QUIZ and the close relationship of the printed publications of applicant and registrant, we find that confusion is likely.

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