

THIS DISPOSITION IS
NOT CITABLE AS PRECEDENT
OF THE TTAB

Mailed: January 8, 2003

Hearing:
November 12, 2002

Paper No. 17
BAC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Lufthansa Cargo AG

Serial No. 75/911,677

Vincent L. Ramik of Diller, Ramik & Wight for Lufthansa Cargo AG.

Vivian Micznik First, Trademark Examining Attorney, Law Office 104 (Sidney Moskowitz, Managing Attorney).

Before Walters, Chapman, and Rogers, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On February 7, 2000, Lufthansa Cargo AG (a company of the Federal Republic of Germany) filed an application to register the mark shown below

Care/td

on the Principal Register for services identified, as amended, as "transportation of cargo, passengers and/or goods by air, train and truck, and warehouse and cargo storage" in International Class 39. Applicant included in the application a statement that "the mark is lined for the colors blue and gray." The application is based on Sections 44(d) and (e) of the Trademark Act, 15 U.S.C. §§1126(d) and (e), through applicant's ownership of German Registration No. 399 50 148, currently to remain in force until August 31, 2009.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with its identified services, so resembles the mark CARES, which is registered for "land and air freight forwarding and shipping services" in International Class 39,¹ as to be likely to cause confusion, or to cause mistake, or to deceive.

When the refusal was made final, applicant appealed to this Board. Both applicant and the Examining Attorney have

¹ Registration No. 2,366,032, issued July 11, 2000 to Alliance Air Freight, Inc., with a claimed date of first use of August 1993.

briefed the issue before us², and an oral hearing was held on November 12, 2002.

As a preliminary matter, we will consider the Examining Attorney's objections in her brief to certain material submitted by applicant. First, applicant submitted five exhibits (third-party registrations and Internet material) for the first time with its brief on the case. The Examining Attorney properly objected to the evidence as untimely pursuant to Trademark Rule 2.142(d). The Examining Attorney's objection is sustained, and the Board did not consider these exhibits.

Second, the Examining Attorney also continued her objection to applicant's previously submitted list of third-party applications³ and registrations because applicant did not submit copies of said applications/registrations. In a May 4, 2001 Office action, the Examining Attorney explained to applicant that soft copies are required to make the third-party material

² During the prosecution of this application, both applicant [United Foods, Inc. v. United Airlines, Inc., 41 USPQ2d 1653 (TTAB 1995)] and the Examining Attorney [Life Corporation v. Carefree Trading Corp., 47 USPQ2d 1151 (TTAB 1998)] have cited as precedential cases which have been designated by the Board as non-precedential. The Board will disregard such citations. See General Mills Inc. v. Health Valley Foods, 24 USPQ2d 1270, footnote 9 (TTAB 1992).

³ Third-party applications are evidence of only the fact that each was filed on a particular date.

properly of record, and she cited the case of *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992). Applicant did not thereafter submit copies of the involved applications/registrations. This objection is also well taken and is sustained, and the Board did not consider this material.

Turning to the merits of the appeal, we affirm the refusal to register. In reaching this conclusion, we have followed the guidance of the Court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The services of applicant and the cited registrant are, in part, identical (the transportation of freight by land and air); and are otherwise closely related (the transportation of passengers by land and air, and storage services related to the transportation of freight by land and air). Applicant concedes these facts. (Brief, p. 3.) Obviously, identical services are offered through all the same channels of trade to the same or similar potential purchasers, in this case, the general public.

"When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

We turn next to consideration of the similarities or dissimilarities of the marks. Applicant contends that these marks are distinct in sight and are dissimilar in sound, connotation and commercial impression. There are obvious differences between the registered mark CARES, and applicant's composite mark, specifically, that applicant's mark begins with the word CARE in the singular not plural form, and it includes a slash line, the letters "td," and stylized lettering lined for color.

It is well settled that marks must be considered in their entirety as to the similarities and dissimilarities thereof. However, our primary reviewing court has held that in articulating reasons for reaching a conclusion on the question of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature or portion of a mark. That is, one feature of a mark may have more significance than another. See Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1845 (Fed. Cir.

2000); Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); and In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

In this case, both applicant's mark and registrant's mark share the root term CARE. It is the first and dominant part of applicant's mark, and registrant's mark is merely the plural form of that term. The first part of a mark is often the part impressed upon the mind of the purchaser, and the most likely to be remembered. And here applicant's mark is presented with the first word "CARE" in larger lettering, further emphasizing its dominance. See Presto Products, Inc. v. Nice-Pak Products, Inc., 9 USPQ2d 1895 (TTAB 1981). That applicant's mark includes "CARE" in singular rather than plural form is not significant in terms of the likelihood of confusion of purchasers. See In re Pix of America, Inc., 225 USPQ 691 (TTAB 1985). Likewise, we see little trademark significance in the slash line in applicant's mark.

Applicant's argument that its use of stylized lettering (lined for color) creates significant differences between the marks is not persuasive. As the Court stated in Squirtco v. Tomy Corporation, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) "the argument concerning a

different type style is not viable where one party asserts rights in no particular display." In the appeal now before the Board, registrant's mark is depicted in typed drawing form, and thus it is not limited to any special form. See also, Phillips Petroleum Company v. C.J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35 (CCPA 1970).

Applicant contends that the term "CARE" has several dictionary meanings, the most relevant being "painstaking or watchful attention" [Merriam Webster's Collegiate Dictionary (Tenth Edition)]; that both applicant and registrant, and in fact, all businesses, wish to create in the minds of the public that their businesses have a caring attitude; and that, therefore, the term CARE(S) is extremely weak.

We agree with applicant that the words CARE and CARES are likely to connote to prospective purchasers essentially the same idea in relation to transporting freight and/or passengers. That is, the connotation of the dominant root word in applicant's mark is very similar to that of registrant's mark, regardless of what that connotation may be. One likely connotation of these terms is the suggestion that the business is concerned about the freight or passengers it transports and the cargo or people will be delivered with care. Moreover, applicant has not submitted

evidence that the term "care(s)" is weak in the relevant field of providing freight and/or passenger shipping services, and our agreeing with applicant's argument regarding the similar connotation of the common term in the involved marks does not serve in lieu of presenting such evidence.

Even if the record included proper evidence of third-party registrations, they have little probative value. They are not evidence of use in the marketplace or public familiarity with the third-party marks. See *AMF Incorporated v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); and *In re Phillips-Van Heusen Corporation*, 228 USPQ 949, footnote 5 (TTAB 1986). Moreover, even weak marks remain entitled to protection against registration by a subsequent user of the same or similar mark for the same or related goods.⁴

Applicant also argues the following:

The "td" suffix was carefully chosen and has innumerable possible meanings or connotations, depending upon a purchaser's perceptions, knowledge, attitude and intelligence. The prefix formative "td" is, of course, an acronym intended to suggest superiority of performance of services by Applicant

⁴ We specifically note that the cited registered mark is on the Principal Register with no disclaimer and no claim of acquired distinctiveness under Section 2(f) of the Trademark Act; and it is, of course, entitled to the statutory presumptions under Section 7(b).

when perceived to mean--timely
delivery--. However, even absent any
perception as to a specific meaning of
"td" and even absent any meaning, "td"
necessarily adds a different perception
to the mark "Care/td" in its entirety
to the purchasing public which is
totally absent in the mark "CARES" per
se.

Applicant concludes therefrom that "the [overall]
marks present totally dissimilar meanings or connotations."
(Brief, p. 6.)

With regard to this argument, the Board notes that in
the Examining Attorney's first Office action, she asked
whether "td" has any significance in the relevant trade,
any geographical meaning, or any meaning in a foreign
language. Applicant's response to that Office inquiry was
that "the letters 'td' have no significance in the relevant
trade or any geographical significance or any meaning in a
foreign language." (Applicant's August 16, 2000 response,
p. 2.) Applicant's current argument regarding possible
perceived meaning(s) of "td" to purchasers without any
evidence thereof is not persuasive.

Under actual market conditions, consumers generally do
not have the luxury of making side-by-side comparisons.
The proper test in determining likelihood of confusion is
not a side-by-side comparison of the marks, but rather must
be based on the similarity of the general overall

commercial impressions engendered by the involved marks.

See *Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255 (TTAB 1980).

The differences in the marks (applicant's addition of a slash line, the letters "td," and the stylized lettering) do not serve to distinguish the marks here in issue. That is, purchasers are unlikely to remember the specific differences between the marks due to the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of the many trademarks encountered. Purchasers seeing the marks at separate times may not recall these differences between the marks. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd* (Fed. Cir., June 5, 1992); and *Edison Brothers Stores v. Brutting E.B. Sport-International*, 230 USPQ 530 (TTAB 1986).

Purchasers familiar with registrant's services sold under the registered mark CARES may, upon seeing applicant's mark CARE/td (stylized lettering) on the same or closely related services, assume that it is a revised version of registrant's mark CARES, and that the services originate from the same entity.

Applicant strongly urges that the case of *In re Hearst Corp.*, 982 F.2d 493, 25 USPQ2d 1238 (Fed. Cir. 1992), requires a different result in the case now before the Board. Specifically, applicant contends that the Examining Attorney erred and "when 'Care' is given fair weight along with 'Care' (singular), confusion of 'Care' with 'CARES' becomes less likely." (Brief, p. 9.) However, in the application now before the Board, applicant's mark does not consist of multiple words (as in the Hearst case where applicant's mark consisted of the words VARGA and GIRL), rather, here applicant's mark consists of one word "CARE," a slash line, and the letters "td," which applicant stated have no specific meaning. Thus, the letters would presumably not be understood by consumers as being an abbreviation for any particular word or words. Moreover, the Court explained in the Hearst case at 25 USPQ2d 1239 that "the weight given to the respective words is not entirely free of subjectivity... ." In any event, we disagree that the Hearst case requires a different result herein as we have given each element of applicant's mark appropriate weight and of course, we have ultimately considered the similarities/dissimilarities of the marks in their entirety.

We find that applicant's mark CARE/td (stylized lettering) and registrant's mark CARES, when considered in their entireties, although obviously not identical, are similar in sound, connotation and commercial impression. See *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999). The contemporaneous use of these marks, in connection with these identical services, would be likely to cause confusion as to the source or sponsorship of such services. See *Cunningham v. Laser Golf Corp.*, supra; and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

To the extent we have any doubt on the question of likelihood of confusion, it must be resolved against applicant as the newcomer, because the newcomer has the opportunity of avoiding confusion and is obligated to do so. See *TBC Corp. v. Holsa Inc.*, 126 F.3d 1470, 44 USPQ2d 1315 (Fed. Cir. 1997); and *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

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