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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Clear Blue LLC

Serial No. 76282838

Jeffrey P. Thennisch of Dobrusin & Thennisch PC for Clear Blue LLC.

Kelley L. Wells, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Walters, Holtzman, and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On July 11, 2001, Clear Blue, LLC (applicant) applied to register the mark CLEAR!BLUE (in typed form) on the Principal Register for services ultimately identified as "communication services provided to others; namely, delivering and transmitting live event content and streamed sound and audio-visual recordings via live presentations,

remote video conferencing, webcasting, and the Internet for strategic events" in Class 38.[1]

The examining attorney[2] has refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of two registrations for the mark CLEAR BLUE, one in typed form,[3] and the other with the design shown below.[4]

While the image as reproduced above is not as clear as the Office's electronic records, we note that the registration does contain the following statement: "The mark consists of blue sky with white clouds within a circle, and the superimposed words 'Clear Blue.' The stippling shown in the drawing is a feature of the mark and not intended to indicate color."

The services in both registrations are identical: "advertising agency services" in International Class 35.

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[1] Serial No. 76282838. The application claims a date of first use and first use in commerce of August 2, 2000.
[2] The current examining attorney was not the original examining attorney in this case.
[3] Registration No. 2,629,966, issued October 8, 2002.
[4] Registration No. 2,629,967, issued October 8, 2002.

The examining attorney argues that the "literal portion of the applicant's mark CLEAR!BLUE is identical in sound, meaning, and appearance. The only difference between the marks is the exclamation point between the words CLEAR and BLUE in the applicant's mark." Brief at 3. Regarding the services, the examining attorney determined (Brief at 5 and 6) that:

> {A]ll of the information provided in the applicant's specimens shows that the applicant's identified services are a small part of an overall marketing service. All of the services provided by the applicant, including the service identified in the application, are all advertising/marketing services. One purpose of the applicant's services is to advertise, market or promote its clients' goods and services….
>
> The applicant's event and communication services are related to traditional advertising services. They may be an additional or new way of promoting or advertising clients' products but it is clear from the evidence of record and from the applicant's specimens that the purpose of the applicant's events and communications is to promote or advertise the client's product.

Specifically, the examining attorney points out (Brief at 6) that applicant's specimen "shows that the applicant refers to some of its work product as infomercials. The applicant refers to the 'Mercedes Benz reveal'[5] as a live infomercial. This is clearly a type of advertising."

[5] "Reveal" is apparently used as a term of art to describe the "revealing" or "introduction" of a product to the public.

In response, applicant argues that registrant's marks "cannot be regarded as particularly strong marks entitled to broad protection." Brief at 7. In addition, applicant argues that "'advertising agency services' are NOT identical to the Applicant's amended recitation of services clause." Brief at 8. "Applicant's services are directed to providing solutions for such matters as how thousands of individuals across the country can technically view a live speech or discussion in real time, such as a business meeting, earnings/sales reports, etc." Reply Br. at 3.

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin our discussion by considering the similarities and dissimilarities of the marks in the application and registrations. We agree with the examining attorney that the literal portions of the marks are the identical words, CLEAR BLUE. The marks would be pronounced identically and they would have the same meaning and commercial impression. Regarding the two typed drawing marks, they would appear very similar but for the exclamation point separating the words in applicant's mark. While we consider this point, we cannot see that it substantially differentiates the appearance of the marks. Slight differences in the stylization of identical marks are unlikely to result in confusion becoming unlikely. CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) "([M]inor design features do not necessarily obviate likelihood of confusion arising from consideration of the marks in their entireties. Moreover, in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed").

Regarding registrant's design mark with the words CLEAR BLUE, we note that the registration describes the mark as consisting of "blue sky with white clouds within a circle, and the superimposed words 'Clear Blue.'" Thus,

the design in this registration emphasizes the "Clear Blue" wording of the mark and it would not serve to distinguish the marks. See Wella Corp. v. California Concept Corp., 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design likely to be confused with CONCEPT for hair care products).

More significant than the exclamation point in applicant's mark and the blue sky design in one of registrant's marks is the fact that the words in the application and registration are identical. "Without a doubt the word portion of the two marks are identical, have the same connotation, and give the same commercial impression. The identity of the words, connotation, and commercial impression weighs heavily against the applicant." In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993).

Applicant also refers to several registrations for the words CLEAR BLUE, and it argues that the term has a suggestive or descriptive connotation that entitles it to a more narrow scope of protection.[6] When we consider the

[6] Actually, applicant attached an electronic printout of a list of 31 applications and registrations along with printouts of eight of the items on the list. We note that 24 items on this list are simply indicated to be pending or abandoned applications which are not evidence of anything other than the application was filed. Olin Corp. v. Hydrotreat, Inc., 210 USPQ 62, 65 n.5 (TTAB 1981) ("Introduction of the record of a pending application is

copies of the four registrations of record, one is for "in vitro diagnostic reagents for the detection of pregnancy;"[7] two are owned by the same party for motion picture film productions[8] and financing motion pictures for others;[9] and the fourth is for a wide variety of consumer items and services, e.g., toys, computer and video games, tableware, and retail stores.[10]

While third-party registrations may be used to demonstrate that a portion of a mark is suggestive or descriptive, they cannot be used to justify the registration of another confusingly similar mark. In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987). Therefore, the few registrations that applicant has made of record hardly support applicant's claim the words "Clear Blue" are entitled to a narrow scope of protection. Nor, we add, are the facts that "clear blue" is not an arbitrary term and that it has been used by some on the Internet sufficient to diminish its scope of protection. There is no argument that the term CLEAR BLUE is a unique or coined

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competent to prove only the filing thereof"). Of the remaining eight registrations, three do not use the words CLEAR BLUE in the mark. Therefore, the number of relevant registrations is hardly overwhelming.

[7] Registration No. 1,492,770.

[8] Registration No. 2,311,262.

[9] Registration No. 2,376,724.

[10] Registration No. 2,329,366.

term. Therefore, while “Clear Blue” is not a weak mark, it is also not entitled to an unusually broad scope of protection.

Next, we look at whether the services are related, which is the major point of contention between applicant and the examining attorney. It “has often been said that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services.” In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991). See also Time Warner Entertainment Co. v. Jones, 65 USPQ2d 1650, 1661 (TTAB 2002). Therefore, the test is not whether registrant’s services are broad enough to include applicant’s communication services but whether purchasers would encounter both services and assume that there is some relationship between them.

Here, registrant's services are advertising agency services and applicant's services involve "delivering and transmitting live event content and streamed sound and audio-visual recordings via live presentations, remote video conferencing, webcasting, and the Internet for strategic events." Applicant has submitted specimens and literature that provide extensive information about applicant's services.

The first page of applicant's specimen reads as follows:

> EVENTKNOWLEDGE
> True creativity is smart creativity… that is why Clear!Blue combines the communication power of the Internet with state-of-the-art database management strategies to offer EventKnowledge: a targeted solution to help you build stronger, one-to-one relationships with your target audience.
>
> Can you really have one-to-one relationships with an audience of thousands or more?
>
> You can…
> By addressing each one of them individually…
> By suppling [sic] exactly the information they want exactly when they ask for it…
> And by not wasting their time with confusing, misdirected or unwanted messages.
>
> Clear!Blue can help build and manage those communications tools for you while extracting and interpreting the valuable information you need to speak intelligently to your audience. Meanwhile, you're free to focus on the other important tasks within your marketing strategy, campaign or event.

The specimen on page 2 then asks the question: "What does EventKnowledge look like? To which the answer is: "You! We'll match all EventKnowldege communications to *your* brand, using colors, layouts, fonts and logos that match your company or campaign look." Also, applicant's "e-mail platform is linked directly to our marketing database platform, drawing out customized information to speak more directly to each individual."

Applicant's overall services are demonstrated in its slides entitled "Our Successes." These examples include:

SEMA Las Vegas, NV October 30, 2000
Custom Pt Cruisers on display and reveal of Setzer Cruiser
The last party at the Rat Pack Bungalow … before it was demolished forever
Unforgettable atmosphere and live music by Bryan Setzer
Chrysler stole the show … without a show sponsorship or an all-new product

Los Angeles Auto Show January 4, 2001
Dodge Powerbox Reveal
Simple, creative, effective
Perfect, white reflective stage
A photo studio reveal resulting in breathtaking images for the press

Detroit North American International Auto Show January 2001
Jeep Liberty Reveal
Ken Kersey narration about the roads less traveled
A drive down a steep, 30-foot mountain in Cobo Hall
Shook the bag with a production vehicle reveal on concept car day – and got noticed

After reviewing applicant's literature, it is clear that at least some of applicant's strategic events include the unveiling of new products and the promotion of products already on the market. Applicant's services involve the designing or staging of these "strategic events." However, applicant is not seeking registration for marketing services. Instead, applicant's seeks registration for only delivering and transmitting live event content and streamed sound and audio-visual recordings via live presentations, remote video conferencing, webcasting, and the Internet for strategic events.

While there is evidence that advertising agency services and marketing services are overlapping services and that the same entities provide both services, there is no evidence that applicant's communication services are provided by advertising agencies. It is also not apparent that advertising agencies would provide these types of communication services. For example, as part of advertising a client's product, an advertising agency may hire a musical band or a caterer, but this would not establish that entertainment services or food services are related to advertising agency services. Here, to the extent that communication services are likely to be viewed as technical services not directly associated with

advertising agency services, we are not persuaded that a purchaser of advertising agency services would assume that the source of applicant's communication services are related or associated.

Furthermore, purchasers of advertising agency services and communication services involving transmitting and delivering strategic events are not ordinary or impulse purchasers. The fact that the purchasers would be professional purchasers exercising more than ordinary care in purchasing these services supports a conclusion that confusion is not likely.

Decision: The examining attorney's refusal to register applicant's mark under Section 2(d) of the Trademark Act is reversed.