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March 31, 2005
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Vudo, Inc.

Serial No. 76467337

Nguyen Hong Nhuan of Law Offices of Nguyen Hong Nhuan for Vudo, Inc.

Susan Leslie Dubois, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Hohein, Chapman and Holtzman, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Vudo, Inc. has filed an application to register on the Principal Register the mark "LILY'S BAKERY" and design, as shown below,



for goods identified as "cake."¹

¹ Ser. No. 76467337, filed on November 15, 2002, which is based on an allegation of a date of first use anywhere and in commerce of June 15, 2000. The word "Bakery" is disclaimed.

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 goods, so resembles the mark "LILY BAKERY" and design, as reproduced below,



which is registered for "cakes, sponge rusk, cup cakes, mini cakes, pastries, and crackers,"² as to be likely to cause confusion, or to cause mistake, or to deceive.

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

Our 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 or dissimilarity in the goods at issue and the similarity or

² Reg. No. 2,607,707, issued on August 13, 2002, which sets forth a date of first use anywhere and in commerce of March 30, 1994.

dissimilarity of the respective marks in their entireties.³

Here, inasmuch as applicant's "cake" and registrant's "cakes" and "mini cakes" are legally identical goods which therefore would be sold through the same channels of trade to the same classes of customers,⁴ the focus of our inquiry is accordingly on the similarity or dissimilarity of the respective marks.

³ 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 differences in the marks." 192 USPQ at 29.

⁴ It is noted that applicant argues in its brief that the respective goods are not similar because its product "includes French, Vietnamese, and Chinese styles" and that "[t]hese kinds of cakes are peculiar in the United States." The Examining Attorney, citing *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987) and *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973), nonetheless properly points out in her brief that "[l]ikelihood of confusion is determined on the basis of the goods ... as they are identified in the application and the registration." In view thereof, she further correctly observes that:

Since the identification of the [applicant's] goods is very broad, no limits on the type of cakes offered by applicant will be assumed. However, this argument would still be unpersuasive even if the applicant's identification [of goods] were to be limited to a particular type of cake. The respective goods would still be considered identical because no such limitation exists on the cakes offered by the registrant.

Moreover, it also should be noted that where the goods of an applicant and a registrant are broadly described as to their nature and type, it is presumed in each instance that in scope the application and registration respectively encompass not only all goods of the nature and type described therein, but that the identified goods are available through all channels of trade which would be normal for those goods and that they would be purchased by all potential buyers thereof. *See, e.g., In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). In addition, because it is well settled that a refusal under Section 2(d) is proper if there is a likelihood of confusion involving the goods listed in the application and any of the goods set forth in the cited registration, it is unnecessary to rule with respect to the other goods listed in the cited registration. *See, e.g., Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) and *Shunk Mfg. Co. v. Tarrant Mfg. Co.*, 318 F.2d 328, 137 USPQ 881, 883 (CCPA 1963).

Turning, therefore, to such issue, applicant argues in its brief that its mark consists of a "[d]esign of two fanciful lily flowers and the words 'LILY'S BAKERY.'" Such mark, applicant insists, "does not resemble" registrant's "LILY BAKERY" and design mark because, when considered in their entirety:

(1) The spelling[s] of the two marks are different, one with an "s" after the word Lily, and the other without; and (2) The drawing[s] of the two marks are also different. [The] [m]ark "Lily's Bakery" contains a design of two fanciful lily flowers while [the] mark "Lily Bakery" includes a design of a female cook or baker with a hat in an oval carrier.

We agree with the Examining Attorney, however, that contemporaneous use of applicant's "LILY'S BAKERY" and design mark and registrant's "LILY BAKERY" and design mark in connection with, respectively, applicant's "cake" and registrant's "cakes" and "mini cakes" would be likely to cause confusion as to the source or sponsorship of such goods. As the Examining Attorney correctly notes in her brief, "the relevant inquiry regarding likelihood of confusion is not whether the marks can be distinguished from one another" on the basis of a side-by-side comparison. Such a comparison of the respective marks is simply not the proper test to be used in determining the issue of likelihood of confusion inasmuch as it is not the ordinary way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks at issue which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The

proper emphasis is accordingly on the recollection of the average purchaser, who normally retains a general rather than a specific impression of marks. See, e.g., Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); Envirotech Corp. v. Solaron Corp., 211 USPQ 724, 733 (TTAB 1981); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

Here, as the Examining Attorney observes in her brief, "[t]he only textual difference between these two marks is the use of the apostrophe 's' in the applicant's mark, which is used ... to denote possession." We concur with the Examining Attorney that "consumers will not take the time to analyze the slight differences in meaning created by the inclusion of the apostrophe 's'" in applicant's mark and that the presence or absence of an "apostrophe 's' within the mark[s] as a whole does not alter the commercial impression of the mark[s] in any appreciable manner, and the slight difference[s] in sound and appearance are insignificant." Consequently, as the Examining Attorney further notes, the inclusion or omission in the marks at issue of "an apostrophe 's'" is a difference which "cannot obviate the likelihood of confusion." See, e.g., Scott Paper Co. v. Scott's Liquid Gold, Inc., 195 USPQ 707, 719 (D. Del. 1977) [when used in connection with household cleaners, mark "SCOTT'S LIQUID GOLD" is likely to cause confusion with mark "SCOTT"]; and Mr. Rooter Corp. v. Morris, 188 USPQ 392, 395 (E. D. La. 1975) [when used in connection with sewer and drain cleaning services, mark "MR. ROOTER'S" is likely to cause confusion with mark "MR. ROOTER"].

As to the differences created by the design features of the respective marks, the Examining Attorney contends in her brief that:

The applicant's mark includes scripted typeface and fanciful scrollwork, while the registered mark shows a picture of a little girl. While it is true that the different designs serve to alter the commercial impressions, it is not a significant enough difference to overcome the nearly identical textual portions of the marks. When a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods [*In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).]

In view thereof, the Examining Attorney maintains that, while "taking into consideration the different designs" in the respective marks, it is "the common use of the arbitrary term 'LILY' [which] creates the overriding commercial impression" and, thus, the differences in the designs fail to "obviate the similarity between the marks."

It is clear that the term "LILY" may mean both a kind of flower as well as signify a female name. Therefore, as used in connection with "cakes" and "mini cakes," the phrase "LILY BAKERY" in registrant's mark engenders the commercial impression of a bakery named on behalf of a girl or woman named "Lily," given the accompanying design of a girl or woman in a baker's hat. However, applicant's mark is likewise susceptible to conveying essentially the same or a substantially similar overall commercial impression since, as used in connection with "cake," the possessive phrase "LILY'S BAKERY" connotes a bakery named for a girl or woman named "Lily," given that the design in

applicant's mark is not necessarily readily recognizable. Instead, as argued by the Examining Attorney, consumers seeing applicant's mark could view the design therein as constituting "just scrollwork around the text, with no flowers." Moreover, inasmuch as people rather than plants bake cakes, even if the design in applicant's mark were to be recognized or regarded, as applicant asserts, as that of two lilies, the word portion of its mark, namely, the possessive phrase "LILY'S BAKERY," would still be taken as connoting, like registrant's mark, a bakery named after a girl or woman named "Lily," with the flowered design being mere decoration derived from the double entendre inherent in the word "LILY."

Consequently, when considered in their entirety, it is apparent that the literal portions of the respective marks are substantially similar, if not virtually identical, in sound, appearance and connotation, and that the differences in the design elements of such marks are insufficient to distinguish them. Overall, applicant's mark and registrant's mark convey a substantially similar commercial impression, particularly since the word "LILY" appears to be a wholly arbitrary term when used as an indication of source in connection with any kind of cake.

We accordingly conclude that consumers, who are familiar or acquainted with registrant's "LILY BAKERY" and design mark for, inter alia, "cakes" and "mini cakes," would be likely to believe, upon encountering applicant's substantially similar "LILY'S BAKERY" and design mark for "cake," that such legally

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identical goods emanate from, or are sponsored by or associated with, the same source.

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