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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Lipner

Serial No. 76571009

Mary Catherine Merz of Merz & Associates, PC for Brian Lipner.

Inga Ervin, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Hairston, Bucher and Kuhlke, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Brian Lipner has filed an application to register the mark TRUE BLUE and design, which is reproduced below,



for goods ultimately identified as "air filters for domestic and commercial use, namely air conditioner and furnace air filters."¹

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 applicant's goods, so resembles the mark TRUE BLUE, which is registered for "air purifying units for use with air respirators,"² as to be likely to cause confusion, or mistake or to deceive.

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

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or

¹ Serial No. 76571009, filed January 20, 2004, which alleges dates of first use of August 6, 1997.

² Registration No. 2,550,127 issued March 19, 2002.

services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning first to a consideration of the marks, the examining attorney argues that they are highly similar because they share the identical words, TRUE BLUE.

Applicant, however, argues that the circular design in its mark serves to distinguish the marks. Also, applicant argues that marks consisting of or containing the words TRUE BLUE are weak marks which are therefore entitled to only a limited scope of protection.

With respect to the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Although the marks must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side

comparison, but rather whether the marks are sufficiently similar in terms of their commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result.

Applying these principles to the involved marks, we find that they are highly similar due to the shared words TRUE BLUE. We recognize that applicant's mark also includes a circular design. However, this design primarily serves as a "carrier" for the words TRUE BLUE. Purchasers are not likely to look at it as indicating the source of the goods. Rather, it is the words TRUE BLUE that are likely to be noted and remembered. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Nor is the type font of the words TRUE BLUE in applicant's mark sufficient to distinguish the marks. The type font in which the words are displayed is not unusual. Moreover, because registrant's mark is in standard character form, registrant is free to depict its mark in a similar typestyle. Under the circumstances, we find that applicant's mark TRUE BLUE and design and registrant's mark TRUE BLUE are substantially similar in sound, appearance, connotation and commercial impression.

Turning next to a consideration of the goods, the examining attorney contends that applicant's air conditioner and furnace air filters and registrant's air purifying units for use with air respirators are related because they perform the same function, namely, to clean the air; and that such goods would be sold in the same channels of trade to the same purchasers.

Applicant, on the other hand, argues that such goods not related because registrant's air purifying units are used with air respirators in industrial settings whereas applicant's air filters are used with air conditioners and furnaces in homes and businesses. Further, applicant argues that registrant's goods are purchased by sophisticated purchasers, namely, industrial companies, whereas applicant's goods are purchased by the general public and businesses.

It is well-settled that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d

1715 (TTAB 1991). Further, it is a general rule 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 the respective goods or services are related in some manner and/or that the conditions and activities surrounding the marketing of the goods or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that the goods or services originate from or are in some way associated with the same source. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

In this case, we find that the examining attorney has failed to establish that applicant's air conditioner and furnace air filters and registrant's air purifying units for use with air respirators are sufficiently related that confusion as to source would result when marketed even under very similar marks. Indeed, the examining attorney has submitted no evidence at all on this issue. It is true that applicant's goods and registrant's goods can both be broadly described as products that clean the air. However, to demonstrate that goods are related, it is not sufficient that a particular term may be found which may generally describe the goods. See General Electric Company v. Graham

Magnetics Corporation, 197 USPQ 690 (TTAB 1977); Harvey Hubbell Incorporated v. Tokyo Seimitsu Co., Ltd., 188 USPQ 517 (TTAB 1975); and In re Cotter, 179 USPQ 828 (TTAB 1973). The respective goods, as identified, have very different applications. Applicant's goods are air filters for use in air conditioners and furnaces. Registrant's goods are air purifying units for use with air respirators. We judicially notice³ that the word "respirator" is defined in The American Heritage Dictionary of the English Language (4th ed. 2000) as:

1. A device that supplies oxygen or a mixture of oxygen or carbon monoxide for breathing, used especially in artificial respiration. Also called *inhalator*.
2. A screenlike device worn over the mouth or nose or both to protect the respiratory tract.

Thus, it would appear that applicant's air purifying units attach to an air respirator which is worn over a person's mouth and/or nose. A unit which is attached to a device worn by a person, albeit to clean the air, is plainly different from an air filter used in an air conditioner or furnace.

³ The Board may take judicial notice of dictionary definitions. See *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd* 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

It appears to us that, because of the nature of the goods, they would be offered to different classes of purchasers through different channels of trade. As such, it is unlikely that there would be any opportunity for confusion to occur. In addition, because air respirators are protective devices, purchasers of applicant's air purifying units for use with these devices would be expected to exercise a higher than usual degree of care in making such purchases. This factor supports our finding that confusion is unlikely.

Although we have found for applicant, we want to make it clear that our decision is not based on applicant's argument that registrant's mark is a weak mark and only entitled to a limited scope of protection. In support of this argument, applicant submitted a list of TRUE BLUE marks with their registration or application numbers. Normally, a mere list of third-party registrations and applications would be insufficient to make them properly of record. However, because the examining attorney not only failed to object to this evidence, but also has discussed it in her brief, we have treated the evidence as being of record. Nevertheless, this evidence is of limited probative value for the reason that the list fails to indicate the particular goods in connection with which the

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marks are registered or sought to be registered. In short, as pointed out by the examining attorney, this evidence does not prove that registrant's mark is weak.

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