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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hop-On Wireless, Inc.

Serial No. 76579569

John L. Welsh of Welsh & Flaxman, LLC for Hop-On Wireless, Inc.

Alicia P. Collins, Trademark Examining Attorney, Law Office 115 (Tomas V. Vlcek, Managing Attorney).[1]

Before Quinn, Holtzman and Kuhlke, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Hop-On Wireless, Inc. has filed an application to register the mark CELL THONG for goods ultimately identified as "wearable carriers for portable electronic devices, namely, cellular phones, MP3 players, PDAs, handheld electronic video game units" in International Class 9.[2] In

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[1] The above application was originally examined by another examining attorney, but was subsequently reassigned to the attorney whose name is shown to prepare the appeal brief.

[2] Application Serial No. 76579569, filed March 5, 2004, alleging a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act. 15 U.S.C. §1051(b).

response to a request from the examining attorney, applicant disclaimed the word CELL.

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 on its identified goods, so resembles the registered mark PHONE THONG (in standard character form) for "wearable holders for portable electronic devices namely, cellular phones, MP3 players, portable electronic game consoles, personal digital assistants, cameras, global positioning systems and flashlights" in International Class 9,[3] as to be likely to cause confusion, mistake or deception.[4]

When the refusal was made final, applicant appealed. Briefs have been filed, but applicant did not request an oral hearing. We affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative

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[3] Registration No. 2939715, issued April 12, 2005, the word PHONE is disclaimed.

[4] The original examining attorney also refused registration under Section 2(d) of the Trademark Act in view of Registration No. 2752546 for the mark DIGITHONG for "cellular telephone accessories, namely hands-free accessories comprising straps, chains, pouches and belt loops, cellular telephone covers and cellular telephone face covers." In her brief, the newly assigned examining attorney withdrew the refusal based on that registration; therefore, our determination here only pertains to Registration No. 2939715.

facts in evidence that are relevant to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Co., 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 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).

We turn first to a consideration of the goods identified in the application and the cited registration. It is well settled that goods need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods themselves, but rather whether purchasers are likely to confuse the source of the goods. See Helene Curtis Industries Inc. v. Suave Shoe Corp., 13 USPQ2d 1618 (TTAB 1989). Further, we must consider the cited registrant's goods as they are described in the registration and we cannot read limitations into those goods. See Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and Octocom

Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). If the cited registration describes goods or services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods or services of the type described, that they move in all channels of trade normal for these goods, and that they are available to all classes of purchasers for the described goods. See In re Linkvest S.A., 24 USPQ2d 1716 (TTAB 1992).

Clearly, applicant's goods (wearable carriers for portable electronic devices, namely, cellular phones, MP3 players, PDAs, handheld electronic video game units) are essentially identical to registrant's goods (wearable holders for portable electronic devices namely, cellular phones, MP3 players, portable electronic game consoles, personal digital assistants, cameras, global positioning systems and flashlights) and applicant does not argue otherwise. Accordingly, for purposes of the likelihood of confusion analysis, applicant's goods must be considered legally identical to the goods in the cited registration, and must be deemed to be sold in the same channels of trade to the same classes of purchasers, including ordinary purchasers. In view thereof, the du Pont factors of the

similarity of the goods and the channels of trade favor a finding of likelihood of confusion as to the cited registration.

We turn now to the first du Pont factor, i.e., whether applicant's mark **CELL THONG** and registrant's mark PHONE THONG are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. It is well settled that marks must be considered in their entireties, not dissected or split into component parts and each part compared with other parts. This is so because it is the entire mark which is perceived by the purchasing public and, therefore, it is the entire mark that must be compared to any other mark. It is the impression created by the involved marks, each considered as a whole, that is important. See Kangol Ltd. V. KangaROOS U.S.A. Inc., 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992). Finally, "[w]hen marks would appear on virtually identical goods or services, the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), cert denied, 506 U.S. 1034 (1992).

The examining attorney requested that the Board take judicial notice of the following dictionary definitions:[5]

> CELL: cellular phone;
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> CELLULAR PHONE: a telephone that can be used anywhere you go because it operates with radio signals;
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> PHONE: (formal telephone) a device which uses either a system of wires, along which electrical signals are sent, or a system of radio signals to enable you to speak to someone in another place who has a similar device.

Cambridge Dictionary of American English (2006) available online at dictionary.cambridge.org.

The examining attorney argues that THONG is the dominant term in each of the marks in view of the descriptive nature of the terms CELL and PHONE in relation to the goods in issue. In addition, she argues that the terms PHONE and CELL "have similar meanings and connotations...as a cell is a type of phone" and thus the addition of the term CELL to applicant's mark "does not alter the commercial impression of the mark so as to eliminate confusion in the marketplace with the registered mark PHONE THONG." Br. p. 5. Finally, she argues that it

[5] The entries are from an on-line version of a dictionary that is available in print form; thus, the Board may take judicial notice of these entries. In re CyberFinancial.Net Inc., 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). See also University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

is not "clear that the existence of two registered marks and one pending mark containing the term THONG for related goods renders the term THONG weak in relation to those goods" and in any event weak marks "are entitled to protection against registration by a subsequent user of the same or similar mark for the same or closely related goods or services." Br. p. 5.

In traversing the refusal, applicant argues that the word THONG is not the dominant feature of any of the marks and the distinguishing feature of each mark is the first term CELL and PHONE respectively. Br. p. 3. Applicant continues stating that the marks are different in sound and appearance. Applicant further argues that "[s]ince both PHONE THONG and DIGITHONG are registered and marketed on the same goods, the public must distinguish or has been forced to distinguish the marks by the difference between CELL, PHONE and DIGI...[and t]he fact that both PHONE THONG and DIGITHONG are registered for identical goods is clear evidence that the term THONG is weak and does not function as the dominant portion of either mark." Br. p. 3. Finally, applicant contends that "all three marks have been used in commerce for the last two years and have coexisted with out one known occurrence of confusion." Br. p. 4.

Applicant's attempt to characterize the word THONG as weak based on the coexistence of the cited registration PHONE THONG and the other third-party registration for DIGITHONG, is not persuasive. While third-party registrations may be relevant to show that a mark is descriptive, suggestive, or has a commonly understood meaning that the public will look to other elements to distinguish the source of the goods or services, see, e.g., AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 1406, 177 USPQ 268, 269-70 (CCPA 1973), one third-party registration containing the term THONG is simply not sufficient to establish that THONG has a commonly understood meaning such that the public will look to other elements to distinguish the source of the goods. Moreover, third-party registrations, by themselves, are entitled to little weight on the question of likelihood of confusion because they are not evidence of use in the marketplace. We further note that each case must stand on its own merits. Cf. In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001); and In re Scholastic Testing Service, Inc., 196 USPQ 517 (TTAB 1977).

We find that applicant's mark is highly similar to the mark in the cited registration. The marks **CELL THONG** and PHONE THONG both consist of two-word phrases that have the

same connotation in each mark. CELL and PHONE both mean phones in this context and the remaining term, THONG, is identical. Although the words CELL and PHONE are different, the marks in their entireties have some similarities in appearance and pronunciation in terms of their overall formation. Therefore, we do not believe that this difference in the two words creates marks with an overall different commercial impression, in particular in view of the similar connotation. Thus, the factor of the similarity of the marks also favors a finding of likelihood of confusion.

Further, we do not accord significant weight to applicant's contention, unsupported by any evidence, that there have been no instances of actual confusion despite contemporaneous use of the respective marks. The Federal Circuit has addressed the question of the weight to be given to an assertion of no actual confusion by an applicant in an ex parte proceeding:

> With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See In re Bissett-Berman Corp., 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual

> confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an ex parte context.

Majestic Distilling, 65 USPQ2d at 1205.

Accordingly, while examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not as compelling in support of a finding of no likelihood of confusion. Thus, we cannot conclude from the lack of instances of actual confusion that confusion is not likely to occur.

In conclusion, we find that because the marks are similar, the goods are legally identical, and the channels of trade are the same, confusion is likely between applicant's mark and the cited registration. Finally, to the extent that any of the points argued by applicant may cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

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