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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re York

Serial No. 76600403

Michael I. Kroll for Ronald V. York.

David H. Stine, Trademark Examining Attorney, Law Office  
114 (K. Margaret Le, Managing Attorney).

Before Bucher, Rogers and Zervas, Administrative Trademark  
Judges.

Opinion by Zervas, Administrative Trademark Judge:

Ronald V. York has appealed from the final refusal of  
the trademark examining attorney to register SUPER-CYCLONE  
(in standard character form) as a trademark for  
"environmental control apparatus, namely, solar venting  
fan"<sup>1</sup> in International Class 11.

<sup>1</sup> Application Serial No. 76600403, filed June 29, 2004, based on  
an assertion of an intent to use the mark in commerce under  
Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

The examining attorney has refused registration of applicant's mark pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the previously registered mark CYCLONE (in typed form) for "electric fans,"<sup>2</sup> in International Class 11, that, as used on applicant's identified goods, applicant's mark is likely to cause confusion or mistake or to deceive.

Applicant has appealed the final refusal of his application. Both applicant and the examining attorney have filed briefs.

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. 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, however, two key, although not exclusive, 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

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<sup>2</sup> Registration No. 2750576, issued August 12, 2003.

(CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We first consider the second and third *du Pont* factors regarding the similarities between applicant's and registrant's goods and the similarities between registrant's and applicant's trade channels and classes of purchasers of those goods. Registrant has broadly identified its goods as "electric fans," without any limitations. Applicant has identified his goods as "environmental control apparatus, namely, solar venting fan." The examining attorney contends that applicant's fans are electric, and applicant does not contest the examining attorney's contention regarding his fans. Accordingly, we find that applicant's goods are encompassed within registrant's "electric fans," applicant's fans being electric fans with a particular application or use.

Applicant has argued that his fans are "a highly specialized type of fan likely to have sophisticated purchasers." Brief at p. 6. We consider, however, registrant's identification of goods as encompassing all electric fans, including electric fans that are highly specialized and which have sophisticated purchasers. There are no limitations to the type of "electric fans" in registrant's identification of goods. The question of

likelihood of confusion must be determined based on an analysis of the mark as applied to the goods recited in applicant's application vis-à-vis the goods recited in registrant's registration. If there are no limitations in an identification of goods, we must presume that the "registration encompasses all goods of the nature and type described, [and] that the identified goods move in all channels of trade that would be normal for such goods." *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). See also *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."). The identification of goods in the cited registration encompasses even highly specialized electric fans, including solar electric venting fans. Thus, applicant's argument is not persuasive.

As for trade channels, because the registration does not include any trade channel limitations in the identification of goods, as stated above, we assume that

registrant's goods move in all channels of trade which may be deemed reasonable or customary for such goods, and that they are available to all potential customers. *Elbaum*, 211 USPQ at 240. Because applicant's goods are encompassed within the cited registration, we find that the trade channels for both applicant's and registrant's goods overlap.

In view of the foregoing, we resolve the *du Pont* factors regarding the similarities of the goods and the similarities of likely-to-continue trade channels in favor of finding a likelihood of confusion.

We turn next to the fourth *du Pont* factor, i.e., the conditions under which and buyers to whom sales are made, including whether sales are made on impulse or whether they are made by careful, sophisticated purchasers. As noted above, applicant maintains that the purchasers of his goods are "sophisticated." Applicant has not provided any explanation or evidence in support of his contention and there simply is no evidence in the record from which we can make a determination of whether such purchasers are "sophisticated." We add too that even if applicant's purchasers are "sophisticated," sophisticated purchasers are not necessarily knowledgeable in the field of trademarks or immune from source confusion. *See In re*

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*Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988).

Accordingly, we find that the fourth *du Pont* factor is neutral on the question of likelihood of confusion.

We now turn to the first *du Pont* factor, i.e., the similarities of the marks considered in their entireties. Our focus is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We do not consider whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Also, we are guided by the well-established principle that although the marks must be considered in their entireties, there is nothing improper, under appropriate circumstances, in giving more or less weight to a particular portion of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

The only difference between the marks is applicant's addition of "SUPER-" to registrant's CYCLONE mark. The presence of the hyphen in applicant's mark does not significantly affect the appearance or commercial impression of the mark. See *In re Champion International Corp.*, 196 USPQ 48, 49 (TTAB 1977) ("[N]o distinction, vague or otherwise, can be drawn between 'CHECK MATE' with or without a hyphen between the words so that for purposes herein they are identical"); *In re General Electric Co.*, 180 USPQ 542, 544 (TTAB 1973) ("Notwithstanding the hyphen in applicant's mark, it is fair to assume that applicant's insulating material would ordinarily be called for and referred to by the designation 'REX.'"). The hyphen does not affect the sound of applicant's mark because the hyphen would not be pronounced when calling for applicant's goods.

The examining attorney maintains that the addition of SUPER "essentially creates the commercial impression of an upgraded or higher feature version of the 'CYCLONE' brand." Brief at p. 2. We agree. "Super" is defined inter alia as, "[a]n article or a product of superior size, quality, or grade." *The American Heritage Dictionary of the English Language* (3d ed. 1992).<sup>3</sup> Those consumers familiar with

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<sup>3</sup> The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports*

registrant's CYCLONE brand electric fans will consider applicant's SUPER-CYCLONE mark as referring to registrant's CYCLONE brand electric fans of superior quality.<sup>4</sup>

The meanings of applicant's and registrant's marks are also similar. CYCLONE is defined in *The American Heritage Dictionary of the English Language, supra*, as inter alia a "violent rotating windstorm." In the context of fans, CYCLONE suggests a strong wind created by the fan. SUPER-CYCLONE simply suggests a superior grade or an even

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Co., Inc., 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>4</sup> Applicant takes issue with the examining attorney's argument that prospective purchasers are likely to assume that applicant's goods are upgraded, better-quality or higher-feature versions of registrant's goods because applicant's mark includes the term SUPER. At p. 2 of his reply brief, applicant states that "[i]t is not, at all clear, whether it can be said that 'solar venting fans' are inherently superior to ordinary 'electric fans' - or just different - such that purchasers would necessarily assume that Applicant's goods are a superior version of those of the owner of the cited registration." Consumers do not need to know whether in fact "solar venting fans" are inherently superior to "electric fans" to make the association that a SUPER-CYCLONE brand fan is of a superior quality to a CYCLONE brand fan. The argument is based on the meaning of SUPER and the shared term CYCLONE, not on a comparison of the goods.

Additionally, applicant argues that the addition of SUPER to a mark may "reasonably imply to purchasers a 'new and improved' version of the other entity's goods" if the mark is "truly fanciful or arbitrary," but would not do so if the mark is inherently weak, and "'CYCLONE' is, at best, a suggestive mark." Reply at p. 2. We are not aware of any per se rule regarding the addition of SUPER to a term that is suggestive or "inherently weak," and do not accept the assumption that CYCLONE in the context of applicant's and registrant's goods is "inherently weak" or suggestive. See discussion, *infra*.

stronger wind. The meanings of the marks hence are similar.

Further, as far as sound and appearance of the marks, while there are differences due to the addition of SUPER to CYCLONE, the differences are outweighed by the similarities created by the shared common term CYCLONE.

We conclude, therefore, that when we consider these marks in their entirety, any differences in appearance, pronunciation, meaning, and commercial impression are eclipsed by the similarities of the marks. The *du Pont* factor regarding the similarities of the marks thus weighs in favor of finding a likelihood of confusion.

Applicant has submitted with his response to the first Office action numerous third party registrations from the TESS database for the term CYCLONE for a variety of goods and services, and argues at p. 5 in his brief that "'CYCLONE' is used as a single-word, or composite, mark by many sellers in an almost endless line of business fields and, accordingly, it is submitted that the word 'CYCLONE,' as a trademark, is entitled to only the most narrow scope of protections, rather than being accorded the same scope of protection as would a fanciful or arbitrary trademark term." In his reply brief at p. 3, applicant clarifies his argument:

Applicant, however, has not introduced more than two dozen subsisting registrations for establishing "marketplace" usage, but, rather, to show the weakness, through commonality, of the term "CYCLONE" throughout industry.

In this regard, it cannot be said that the Examining Attorney has acknowledged the weakness of "CYCLONE," established by both widespread registration and meaning. Instead, the Examining Attorney has sought to infer that "CYCLONE" is as strong as any fanciful or arbitrary mark which may be adopted for an entity's goods, let alone for electric fans. While it is agreed that even a very weak mark is entitled to protection against substantially the same mark for substantially the same goods or services, that situation is not presented to the Board on this appeal.

To be clear, to the extent that applicant has argued in his brief that applicant's mark is weak due to third-party use of the mark, applicant's argument is not well taken. Third-party registrations do not demonstrate use of the marks which are the subjects thereof in the marketplace or that the consuming public is familiar with the use of those marks and has learned to distinguish between them based on the differences therein. See *Smith Brothers Manufacturing Co. v. Stone Manufacturing Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973). To the extent that applicant is arguing that CYCLONE is a weak term due to widespread registration, applicant's argument is not well taken. Third party registrations, by themselves, are thus entitled to little weight on the issue of likelihood of

confusion. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983). Additionally, as the examining attorney noted, the third party registrations cover goods and/or services which are unrelated to the goods in the registration.<sup>5</sup> Thus, even if we were to consider that CYCLONE is used "in an almost endless line of business fields," none of the third-party registrations recite goods and/or services similar to registrant's goods. Moreover, as our principal reviewing court pointed out in *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001), "[e]ven if some prior registrations had some characteristics similar to [applicant's] application, the ... allowance of such prior registrations does not bind the Board or this court."

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, we conclude that, when potential purchasers of applicant's "environmental control apparatus, namely, solar venting fan" and registrant's "electric fans" encounter the marks SUPER-CYCLONE and CYCLONE for these goods, they are likely to believe that

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<sup>5</sup> The registrations cover goods such as laboratory instruments (Registration No. 2113797); sausage and spices (Registration No. 2115362); whistles (Registration No. 2358508); and a chassis used in fire fighting vehicles (Registration No. 2360240).

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the sources of these goods are in some way related or associated. As a result, there is a likelihood of confusion.

**DECISION:** The refusal to register the mark under Section 2(d) of the Trademark Act in view of Registration No. 2750576 is affirmed.