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Mailed: September 21, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Votivo, Ltd.

Serial No. 76636181

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Before Holtzman, Drost and Zervas, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Votivo, Ltd. (applicant) filed an application to register
the mark BLACKBERRY LEMONADE (in standard character format) on
the Principal Register, and as amended, under Section 2(f) of the
Trademark Act,¹ for "candles" in Class 4.²

¹ The application was amended to Section 2(f) in response to the
examining attorney's refusal to register the mark under Section 2(e)(1)
of the Act. Following this amendment, the refusal under Section
2(e)(1) was withdrawn.

² Serial No. 76636181, filed April 18, 2005, based upon an allegation
of first use and first use in commerce on December 29, 2004.

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the mark LEMONADE (in typed form) registered on the Principal Register for "candles" in Class 4 as to be likely to cause confusion.³

When the refusal was made final, applicant appealed. The appeal has been fully briefed.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The goods in this case are identical. They are both "candles." Because the goods are identical and there are no limitations in the application or registration, we must assume that the goods are sold through all the normal channels of trade, to all the usual purchasers for such goods. See Interstate

³ Registration No. 2633154, issued October 8, 2002.

Brands Corp. v. McKee Foods Corp., 53 USPQ2d 1910 (TTAB 2000); and In re Smith & Mehaffey, 31 USPQ2d 1531 (TTAB 1994).

Applicant argues that its candles are sold in quality boutiques and large national chains to purchasers of "high-end home products" whereas, according to applicant, registrant's goods are "unclear" and the trade channels for the goods are "unknown." (Brief, p. 10, 15-16; Reply Brief, p. 2.) This argument is unavailing.⁴ The authority is legion that the question of likelihood of confusion in a Board proceeding must be decided on the basis of the goods set forth in the application and registration, without limitations as to the actual nature of the goods, their channels of trade and/or classes of purchasers that are not reflected therein. See J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983).

⁴ Applicant's arguments here, and throughout its briefs, that registrant's mark may no longer be in use and/or that the mark is descriptive amount to impermissible collateral attacks on the validity of the registered mark and have not been considered. See Section 7(b) of the Trademark Act ("A certificate of registration of a mark upon the principal register ... shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods..."). See also In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In the absence of any specific restrictions in the application or registration, it must be presumed that both applicant's and registrant's candles would be of the same quality; that applicant's candles would reach all classes of customers, including registrant's customers; and that applicant's candles are sold through all normal channels of trade, including all the usual retail outlets for such goods.

Applicant's attempt to distinguish the goods on the basis of price, arguing that its "high-end" candles which sell for \$8-\$12 are more expensive than other candles in the marketplace, must also fail. We must presume that applicant's candles would be sold at all the usual price points for such goods. In this regard, we note that a Google search summary submitted by applicant⁵ indicates that candles can sell for as little as \$1.50-\$3.00. In any event, "high end" or not, candles are relatively inexpensive, frequently replaceable goods. It has often been stated that purchasers of such products are held to a lesser standard of purchasing care and, thus, are more likely to be confused as to the source of the goods. See *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ

⁵ Applicant has relied on this evidence for the purpose of showing the asserted weakness of registrant's mark. This will be discussed later in the opinion.

1281 (Fed. Cir. 1984); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Turning to a consideration of the marks, we note, at the outset, that when marks would appear on identical goods, the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines. *Century 21 Real Estate v. Century Life*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

We find that applicant's mark BLACKBERRY LEMONADE and registrant's mark LEMONADE when considered in their entireties, as applied to identical goods, are similar in sound, appearance, meaning and commercial impression.

Applicant has taken registrant's entire mark LEMONADE and merely added the admittedly descriptive word BLACKBERRY to it.⁶ Notwithstanding the addition of this term, the word LEMONADE remains aurally and visually a significant component of applicant's mark. Applicant argues that the word BLACKBERRY is the dominant feature of its mark and that "a consumer will be more likely to identify Applicant's candles with 'BLACKBERRY'

⁶ Applicant's characterization of its mark as a "fanciful pairing" of the two words is inaccurate. Applicant's mark is not fanciful; to the contrary, the entire mark is descriptive and applicant admitted this by seeking registration under Section 2(f). See *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) ("Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of inherent distinctiveness as an established fact.") (Emphasis in original.)

rather than 'LEMONADE.'" (Brief, p. 14.) In our view, however, neither word in the mark is more dominant than the other. The presence of BLACKBERRY does not change the commercial impression created by LEMONADE, alone, in any significant way. Nor does that term impart any new or different meaning to LEMONADE. The mark is likely to be perceived simply as indicating that the candle has a combination of two different scents, BLACKBERRY and LEMONADE. Regardless of which, if any, part of applicant's mark is dominant, the point is that LEMONADE is still a distinct and separately recognizable element of applicant's mark. See, e.g., *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (PACKARD TECHNOLOGIES and HEWLITT PACKARD convey similar commercial impressions since PACKARD, the dominant element of PACKARD TECHNOLOGIES, is identical to the "prominent" portion of HEWLITT PACKARD); and *In re Riddle*, 225 USPQ 630 (TTAB 1985) (RICHARD PETTY'S ACCU TUNE for automotive service centers confusingly similar to ACCUTUNE for automotive testing equipment; rejecting applicant's argument that because RICHARD PETTY dominates the mark, it would be sufficient to avoid confusion.)

Applicant argues, citing a number of cases and pointing to a Google search summary allegedly showing use of "lemonade" for candles, that registrant's mark LEMONADE is weak and entitled to only a narrow scope of protection. Applicant's argument and

evidence are unpersuasive. Many of the websites listed in the summary are either duplicative, irrelevant, or so abbreviated that the context of use of LEMONADE is unclear. Several of the remaining listings are for retail websites selling candles where "Lemonade" appears to be used as a trademark for the candles. However, because there is no information regarding the source of the candles or whether the candles come from the same or different sources, these listings do not support applicant's contention. The summary, at best, shows only a few instances of use of "Lemonade" by other companies in connection with candles - "Del's Lemonade" candle (onlyinrhodeisland.com); "SWCC Lemonade Candles" (heathers-store.com); and "Yankee Candles Cherry Lemonade" candles (just-candles.net). The listing also includes three or four uses by consumers to refer to a scent or color of the candle. This evidence is far from sufficient to show common and widespread use of "Lemonade" by third parties or to reflect any commonly understood meaning of the term by consumers in general. Furthermore, without evidence as to the extent of the third-party uses or the extent of public exposure to the sites, the probative value of this evidence is minimal. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). In addition, the examining attorney points out that there are no third-party registrations of any marks containing the term LEMONADE in the field.

Even if registrant's mark were "weak" it would not automatically mean that these marks are not similar. None of the cases cited by applicant compels a finding in this case that if the shared term is weak the likelihood of confusion is removed by the addition of other descriptive terms.⁷ See, e.g., *The Frostie Company v. Sun-Glo Packers, Inc.*, 315 F.2d 932, 137 USPQ 341, 342 (CCPA 1963) ("While we have, in certain cases, e.g., *The Murray Corporation of America v. Red Spot Paint and Varnish Co.*, 47 CCPA 1152, 280 F.2d 158, 126 USPQ 390 [1960]... treated the suggestiveness of a mark as a factor to be considered in determining the question of likelihood of confusion, each case must be determined on its own particular facts and circumstances.").

While the mark LEMONADE may be suggestive of registrant's goods, and therefore not entitled to the broadest scope of protection, the mark is at least entitled to protection from registration of a similar mark for identical goods. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ

⁷ Applicant relies, in particular, on *Jack Proust & Co., Inc. v. John Gross & Co.*, 460 F.2d 1076, 174 USPQ 149 (CCPA 1972). However, that case is not on point. The Court found that CHERRY JUBILEE and CHERRY JULEP, both for wine, were not confusingly similar, not only because CHERRY indicated the flavor of the wine, but also because "the second words" in the marks were "distinctly different." In the present case, LEMONADE is registrant's entire mark. The mark has no second word or any other matter to distinguish it. Furthermore, the mark in this case is not "lemon," it is LEMONADE, and LEMONADE is not a flavor it is a drink. The term in registrant's mark suggests a scent or the color of the candle.

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108, 109 (CCPA 1974) (likelihood of confusion is to be avoided as much between weak marks as between strong marks).

Applicant's argument that consumers will associate its candles with applicant's company name, "Votivo" which, according to applicant appears on the packaging for the candles, is not relevant to the analysis, and applicant's reliance on *Heartsprings, Inc. v. HeartSpring, Inc.* 143 F.3d 550, 46 USPQ2d 1481 (10th Cir. 1998), an infringement case, to support its contention is misplaced. It is well established that, in proceedings before the Board, as distinguished from infringement proceedings before the court, the question of likelihood of confusion must be decided on the basis of the mark "exactly as shown in the application" regardless of how the mark is actually used. *Jim Beam Brands Co. v. Beamish & Crawford, Ltd.*, 937 F.2d 729, 19 USPQ2d 1352, 1356 (2d Cir. 1991). See also *Kimberly-Clark Corp. v. H. Douglas Enterprises*, 774 F.2d 1144, 227 USPQ 541 (Fed. Cir. 1985). The name "Votivo" is not part of the applied-for mark, and applicant's arguments with respect to the asserted use and goodwill of that term in connection with the goods are entitled to no probative weight.

Applicant states that it is the owner of Registration No. 2841930 for the mark, BLACKBERRY BASIL (on the Supplemental Register) for "candles and tapers" and Registration No. 3214165 (also on the Supplemental Register) for BLACKBERRY LEMONADE for

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"scented soap and incense." Applicant argues that the existence of these marks "reinforces the applicant as the source of products in the home fragrance business" and that purchasers "would be just as likely to draw a connection between the Mark and its prior registration." (Brief, pp. 9, 15.)

These registrations do not justify registration of the mark in the current application. To begin with, registrations on the Supplemental Register are not entitled to any of the statutory presumptions of Section 7(b) of the Trademark Act. See *In re The Clorox Company*, 578 F.2d 305, 198 USPQ 337 (CCPA 1978). Furthermore, Registration No. 2841930 does not even include the conflicting word LEMONADE, and Registration No. 3214165 is for different goods. Applicant is now seeking to register BLACKBERRY LEMONADE for goods that are identical to those in the cited registration. Neither of applicant's registrations have any bearing on the question of whether the marks as applied to the identical goods in this case would be likely to cause confusion. Our determination of likelihood of confusion must be based on the facts and record before us. See *In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court").

We also point out that any asserted recognition by consumers of applicant's mark or the term BLACKBERRY alone does not diminish the likelihood of confusion in this case. The question is whether purchasers will believe that the goods offered under the respective marks come from the same source, not whether purchasers can identify the source for the goods. The additional descriptive term BLACKBERRY would do nothing to prevent consumers from mistakenly assuming that BLACKBERRY LEMONADE candles come from or are associated with the same source as the LEMONADE candles. See, e.g., *In re Riddle*, supra at 632 (RICHARD PETTY'S ACCU TUNE for automotive service centers confusingly similar to ACCUTUNE for automotive testing equipment; noting that while the name "Richard Petty" might well be a famous one in the field, that fact does not diminish the likelihood of confusion because those who encounter both marks "would likely believe that Richard Petty endorsed or was in some way associated with both the goods and the services, in that both marks contain the designation 'ACCUTUNE.'").

Finally, applicant's arguments concerning the absence of actual confusion are unpersuasive, particularly since applicant's mark has been in use for a relatively short period of time and we have no information regarding the nature or extent of registrant's use or whether a meaningful opportunity for actual confusion has existed. See *Gillette Canada Inc. v. Ranir Corp.*,

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23 USPQ2d 1768 (TTAB 1992). Thus, contrary to applicant's contention, the absence of evidence of actual confusion under these circumstances is not a factor that weighs in applicant's favor.

In view of the foregoing, we find that a likelihood of confusion exists between applicant's BLACKBERRY LEMONADE mark and registrant's LEMONADE mark for identical goods.

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